

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM - PART K-7 QUEENS COUNTY
125-01 QUEENS BOULEVARD, KEW GARDENS, NEW YORK 11415

P R E S E N T:

HON. ROBERT CHARLES KOHM, J.S.C.

THE PEOPLE OF THE STATE OF NEW YORK:	:	INDICT. NO QN12062/95
ex rel.	:	
LUIS FERNANDEZ -MORALES	:	
a/k/a JOHN CARDONA; FILIPE BARNAGAS;	:	
ERNESTO FUENTES	:	
	:	
-against-	:	MOTION TO VACATE
	:	JUDGMENT
JOSE BARRON, JR.	:	
STATE OF NEW YORK	:	
Petitioner.	:	
-----	:	

The following papers numbered
1 to 7 submitted in this motion.

By: LUIS FERNANDEZ-MORALES
FOR THE MOTION

HON. RICHARD A BROWN, D.A.
EMIL BRICKER, A.D.A
OPPOSED

Application for Writ , Application to Proceed in Forma Pauperis and Memo of Law	<u>1-3</u>
Verified Answer, Verification and Argument	<u>4-6</u>
Reply	<u>7</u>

____ Upon the foregoing papers, petitioner’s application is denied in part and granted in part.
See accompanying memorandum.

Date: August 4, 2006

ROBERT CHARLES KOHM, J.S.C.

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-7

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THE PEOPLE OF THE STATE OF NEW YORK	:
ex rel.	:
LUIS FERNANDEZ -MORALES	:
a/k/a JOHN CARDONA; FILIPE BARNAGAS;	:
ERNESTO FUENTES _____	: BY: ROBERT CHARLES KOHM, J
-against-	:
_____	: DATE: AUGUST 4, 2006
JOSE BARRON, JR.	:
STATE OF NEW YORK	: IND. NO.: QN14236/89
Petitioner.	: QN10600/90
_____	: QN2344/91

Almost seven and one-half years after the end of petitioner’s sentence, Luis Fernandez-Morales, pro se, submitted an application for poor persons relief and a petition for a writ of *habeas corpus*. Mr. Morales has the dubious distinction of having been indicted on a drug charge in three consecutive years under three different aliases. On June 6, 1991, before the Hon. Nicholas L. Pitaro, petitioner pled guilty to the crimes of: Criminal Sale of a Controlled Substance in the Third Degree under Indictment No. 14236/89 in the name John Cardona; Criminal Possession of a Controlled Substance in the Fifth Degree under Indictment No. 10600/90 in the name Filipe Barnagas; and Criminal Sale of a Controlled Substance in the Third Degree under Indictment No. 2344/91 in the name Ernesto Fuentes. On June 25, 1991, petitioner was sentenced to three terms of two and one-half to seven and one-half years to be served concurrently.

During the time petitioner was incarcerated by the State of New York, he did not move to appeal his conviction nor move to vacate the judgment and sentence. Petitioner comes now, by

way of a petition for a writ of *habeas corpus* to appear before this Court for a hearing on his complaint and for an order setting aside his convictions on the ground that his plea to each indicted crime was unintelligent, involuntary, and unknowing. Petitioner argues that the life sentence he is currently serving in a federal facility was enhanced because of his convictions in New York State. The fact that his sentence was enhanced, he further argues, is the legal basis upon which he is entitled to the relief he seeks. The People oppose petitioner's application on the grounds that petitioner is not in the custody of the State Of New York; petitioner's claims are not, as a matter of law, cognizable grounds for a petition for a writ of *habeas corpus*; and even if petitioner's claims were remediable by this Court, he would not be entitled to immediate release.

Sections 7002(a) and 7003(a) of the CPLR address the instant matter and read, in relevant part, as follows:

Section 7002(a) "A person illegally imprisoned or otherwise restrained in his liberty **within the state**, ... , may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." (Emphasis added).

Section 7003(a) "If it appears from the petition or the documents annexed thereto that the person is not illegally detained or that a court or judge of the United States has exclusive jurisdiction to order him released, the petition shall be denied."

Upholding the denial of a writ of *habeas corpus* in post-judgment cases, appellate courts have held that issues that could have been raised on direct appeal from a criminal conviction or

in the context of a CPL Article 440 motion are inappropriate for an application for a writ of *habeas corpus* and that such an application is properly denied. See People ex rel. Terrence Curry, v. Roy Girdich, 290 Ad2d 912; People ex rel. Brown v Commissioner of N.Y. State Dept. Oc Correctiona Srvs., 252 AD2d 602; and People ex rel Rodriques v Kuhlmann, 239 AD2d 72.

In addition, it has been held that even where a petitioner's claims are meritorious; *habeas corpus* would not lie because the remedy is a new trial and not a directive to release the petitioner from custody. See People ex rel Curry v Batista, 236 AD2d 724; People ex rel. Kaplan v Commissioner of Correction, 60 NY2d 648; People ex rel. Taylor v Commissioner of Correction, 100 AD2d 52' and People ex rel. Douglas v Vincent, 50 NY2d 901. Based upon the foregoing, petitioner's petition must fail as he cannot use habeas corpus as a substitute for a post-judgment motion or an appeal and would not be entitled to immediate release from the federal facility in which he is incarcerated even if the claim that his convictions were unconstitutional were true. Finally, petitioner is not incarcerated in the State of New York but in a Florida federal facility and only a court or judge of the United States has jurisdiction to order him released.

Accordingly, this Court declines to issue the writ of *habeas corpus*. However, since petitioner's application for poor persons status is granted the filing fee is waived pursuant to CPLR 1101(d).

Order entered accordingly.

The Clerk of the Court shall distribute a copy of this memorandum and accompanying order to the petitioner at his place of incarceration and to the District Attorney.

Date: Kew Gardens, New York
August 4, 2000

ROBERT CHARLES KOHM,
SUPREME COURT JUSTICE