19-7184

No. 19-104

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

STANLEY BREWER,

Petitioner,

vs.

ROBERT F. CUNNINGHAM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Stanley Brewer, 07-A-4537
Fishkill Correctional Facility
271 Matteawan Road
Beacon, New York 12508

QUESTION(S) PRESENTED

(1) Did the United States Court of Appeals Second Circuit misapplied the ruling in *Miller-El v. Cockrell,* in denial of petitioner's claims? Using conclusory terms and by merely stating, *"Petitioner did not show a substantial showing of a Constitutional Right.* "Where the rule announced by United States Supreme Court in *Miller-El v. Cockrell* is, *"petitioner satisfied this standard by demonstrating that jurists of reason could conclude the issues presented are adequate to deserves encouragement to proceed further." Slack v. McDaniel.*

(2) Did the United States Court of Appeals Second Circuit Misapplied the standard in relation to petitioner's Prosecutorial Misconduct claim? Where the petitioner's *Traverse has been unopposed, there by conceded to the facts therein.* Where the prosecutor knew or should have known that its witnesses gave false and misleading testimony from the grand jury, pre-trial and trial. *Fernandez v. Capra,* 916 F. 3d 215, 230-31, (2019). *Shih Wei Su v. Filion,* 335 F.3d 119, 126 (2003); and failed to correct it when it appeared, *Dubose v. Lefevre,* 619 F.2d 973, 978, (2d Cir. 1980), and violated the petitioner's Constitutional Right under the 14th Amendment. Did the United States Court of Appeals Second Circuit Misapplied the standard in *Miller-El v. Cockrell* in denial of petitioner's COA in-relation to his Judicial Misconduct claim? Where the District Court failed to address the

judicial misconduct (Bias) claim, *Liteky V. United States,* 510 U.S. 540, 555, 114S.Ct. 1147 (1994), *Withrow V. Larkins,* 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, (1975),in the Petition/Appellant Traverse and reply motion the trial the judge was actually bias and prejudiced the petitioner in his decision this act threw the scales of justice (due process of law) out of balance and imbued the petitioner with substantial prejudice. *Williams v. Pennsylvania,* 136 S.Ct. 1899, 1905 (2016).

(3) The district court adopted the pre-trial judge's decision order of the probable cause hearing, where the pre-trial judge misstated the facts of the record, and rendering the district court fact finding process unreasonable; a violation of the petitioner's 14th Amendment. *Wiggins v. Smith*, 123 S.Ct. 2538-39 (2003); *Harris v. Kuhlman,* 345 F.3d 350-351 (2nd Cir. 2003); *Taylor v. Maddox,* 366 F.3d 992 (9th Cir. 2004), which a *jurists of reason could find debatable, announced in Slack v McDaniel's jurists of reason standard* raised in petitioner's COA?

(5) Did the United States District Court and the United States Court of Appeals Second Circuit Misapplied the standard in denial of petitioner's ineffective assistance claim *Strickland v Washington* 466 U.S. 688, 687-88, (1984). *Rompilla v. Beard*, 124 S.Ct. 2456, 2467,(2005), and the conflict of interests <u>announced</u> in the ruling in U.S. *v. Perez,* 325 F.3d 115 (2nd Cir. 2003).

LIST OF PARTIES

All parties appear in the caption of the case on the cover

Brewer v. Cunningham

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

STATUE AND RULES:

28 USCA §2254 (d) (2) (e) (1)

28 USCA §2253 (c)

Writ of Coram Nobis

CPL 330.30 (3)

CPL 440.10 (2) (c)

OTHER:

6th Amendment

14th Amendment

OPINION BELOW

For cases from federal courts:

The opinion of the United States court of Appeals Decision is at Appendix-G.

The opinion of the United States district court appears at United States District Court S.D. New York 2018 WL 6697991.

For cases from state courts:

The opinion of the highest state court to review the merits reported at Court of Appeals of New York September 17, 2010 15 N.Y. 3d 856.

The opinion of the Appellate Court of New York appears at 73 A.D. 3d 1199 May 25 2010.

JURISDICTION

For cases from Federal Courts:

The date on which the United States Court of Appeals decided my case was on 9/12/2019 MANDATE ISSUED received on 9/17 2019.

No petition for rehearing in the United State Court of Appeals.

An extension of time to file the petition for a Writ of Certiorari was granted to and including_____, on_____. In application number_____.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

For cases from State Court:

(1) The date on which the highest state court decided my direct appeal was 9/7/2010.

(2) On January 28, 2010, petitioner filed a *Writ of Error Coram Nobis. On 2/22/11,* the trial court denied the Writ of Error Coram Nobis on 1/9/12.

(3) The Writ was appeal to the appellate court that was denied on 5/18/12.

(4) Motion to Re-argue to the Appellate Court was timely submitted and was denied on 9/21/12,_Raising Prosecutorial, and Judicial Misconduct, as well as Ineffective Assistant of Counsel.

(5) Petitioner timely filed is Habeas Petition on 4/26/13, On 2/8/18 MJ Davison issued an R&R, On 2/28/18, petitioner timely filed objection, On 12/20/18, 12/20/18 the District Court denied the petition.

(6) On 1/9/19 petitioner timely filed his COA, On 8/8/19 U.S. Court of Appeals denied COA.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

(1) The United States District Court Southern district denied petitioner's petition. The United States Court Appeals Second Circuit denied petitioner COA, against the rule announced by the United States Supreme Court ruling in *Slack v. McDaniel* 529 U.S. 473, at 484, (2000); 28 USCA §2253 (c) and the 14th Amendment.

(2) The Constitutional Claims raised by petitioner was prosecutorial misconduct, where the prosecutor knew or should have known that its witnesses gave false and misleading testimony. From the Grand Jury, pretrial and trial, and did not correct it when it appeared, violated the petitioner's right under the 14th Amendment.

(3) The Constitutional Claim raised by petitioner was judicial misconduct. Where the district court misstated the facts of the record rendering its fact process unreasonable, 28 USC § 2254 (d) (2) when petitioner has shown by the clear and convincing evidence 28 USC § 2254 (e) (1).

(4) The Constitutional Claim raised by petitioner was a violation of his 6th Amendment to effective assistance of counsel. Trial counsel failed to impeach the prosecution witnesses on cross-examination concerning the investigative stop, *Kimmelman v. Morrison*, 477 U.S. 365, 373, (1986). Based on the prosecution witnesses' purged testimony

stemming from the grand jury, pre-trial and trial, violated the two prongs in *Strickland v Washington* 466 U.S. 668, 687-88, (1984). And conflict of interest, based on co-counsel for co-defendant who had a conflict of interest. When the petitioners have a joint trial and counsels ran afoul of each other, this creates a conflict.

STATEMENT OF THE CASE

(1) The United States Court of Appeals did not address the petitioner's Constitutional Claims from the District Court's Judgment, which was unreasonable in light of the evidence presented in the state court. When petitioner's has shown by clear and convincing evidence that the arrest and search was unconstitutional. The United States Court Appeals denying the petitioner's petition for COA without an evidentiary hearing.

REASONS FOR GRANTING THE PETITION

(1) The petitioner's Constitutional Rights has been violated and offended by the District Court and Second Circuit Court of Appeals. Based on the petitioner's inherent right to the Constitution of the United States, 6th and 14th Amendment. Based on prosecutorial misconduct, judicial misconduct and ineffective assistance of counsel. The petitioner has shown that the case at hand is riddled with Federal Constitutional violations, which cannot be denied by procedural bars and procedural grounds.

ACTUAL BACKGROUND

(1) On January 19, 2005,2 p.m. on North Broadway in the City of White Plains N.Y., the petitioner and Cruz were stopped by WPPD officer who associated them with a "wanted flier" he had seen. The petitioners were stopped, questioned, arrested and searched. Then transported and held while search warrants for a car and 2 apartments were obtained and executed. Petitioner Brewer was eventually Mirandized after refusing to speak to detective after 10 p.m. that night.

(2) Petitioner was arraigned on 21 counts of Burglary on January 20th, 2006, and waived the grand jury. The prosecutor went to the Grand Jury with 72 burglaries, a True Bill and the instant indictment was filed on 31 March. Westchester Ind. No. 06-222 indicted 24 counts of burglary second degree and two counts of criminal possession of stolen property in the fifth degree. These counts reflected a number of daytime "lock pick burglaries" that had occurred between December 14, 2005 to January 19, 2006. The "lock pick" burglaries had all taken place in similar settings with a similar *modus operandi* throughout the cities of Yonkers, New Rochelle and White Plains New York.

(3) On or around March 28, 2006, petitioner Eric Cruz then co-defendant Brewers presented a new article to his Legal Aid attorney about the arrest of one Jorge Guzman. Guzman and Santiago had been

arrested for similar "lock pick" burglaries in and around the same time for which petitioner and his co-defendant Cruz stood accused. Petitioners were arraigned and plead not guilty on 11 April 2006. Petitioner sought to suppress evidence obtained at or about the time of his arrest. By decision issued by New York State Supreme Court Judge Robert DeBella ("Judge DeBella"), denied the motion dated July 25, 2006.

(4) The petitioner through counsel moved for omnibus motions relief whereby the Court ordered pre-trial hearing to be held. The hearing consisted of a combined Mapp/Wade/Dunaway and Huntley hearings. The hearings commenced before the Court of Lester B. Adler on November 6, 2006 and concluded on November 8th, 2006 with the petitioner[s] hearings being denied.

(5) The Court rendered its so-called fact finding conclusion of law denying motion to suppress on November 13, 2006. A jury trial was commence on November 13, 2006, and concluded on November 29, 2006 with guilty verdict against each petitioner of the offences submitted to the jury. The matter was adjourned to January 22, 2007 for further proceedings.

(6) In December of 2006, the petitioner Cruz made a motion and affidavit pursuant to CPL 330.30/440.10, with the claims of Prosecutorial Misconduct, Brandy violation and Ineffective Assistance

of Counsel, due to an actual conflict of interest. Petitioner Brewer joined Cruz in the CPL 330.30/440.10 motion.

(7) Brewer's trial counsel Ms. Frohlinger, adopted the motion with a return date of January 22, 2007. Those motions contained evidence of conflict of interest suffered by the appellants/petitioners through the Legal Aid Society's simultaneously represented Guzman. On the return date of the motion, the Legal Aid attorney Zoppo, for petitioner Cruz, applied to be relieved upon a conflict of interest. The matter was adjourned until January 25, 2007.

(8) On May 17 2007, petitioner Cruz newly assigned attorney (Ms. Janet Gandofo), submitted to the court a motion in support of the Earlier C.P.L 330.30/440.10 motions which incorporated more documentary submissions and was returnable on May 31, 2007. With the claim that the petitioner Cruz was denied his Constitutional right to the effective assistance of counsel of an actual conflict of interest.

(9) The Court rendered its decision and order on July 19, 2007, denying the petitioners motion, stating the CPL 333.30 motion aspects of the motion was outside the record, and the CPL 440.10 motion aspects of the motion was premature. Subsequently, both petitioners were sentenced on August 2, 2007, Stanley Brewer was sentenced to 15 years with 5 years post release supervision Petitioner Cruz was sentenced to 20 to life.

(10) A timely notice of appeal was filed by petitioner's counsel Ms. Frohlinger on August 22, 2007. On December 10, 2007 the court issued a Decision and Order allowing appellate Brewer to proceed in forma pauperis and assigning Ms. Jeanne E. Mettler, Esq. to proceed with an appeal. Ms. Metteler's Relieve Application was based upon a potential of conflict of interest, due to her previous employment and current participation with the Legal Aid Society. Decision and Order granted, on October 15, 2008.

(11) The second assigned counsel Mr. David, was re-assigned by petitioner's motion to relieve him of his assignment, which was granted, whereby Charles O. Letterman was assigned on March 24, 2009. The direct appeal was prosecuted on November 2, 2009.

(12) This issue was raised on direct appeal by assigned counsel Charles O. Lederman, in which the trial court and the New York Appellate Court affirmed the conviction on March 25, 2010; *People v. Brewer,* 73 A.D.3d 1199 (2d Dept. 2010). The petitioner's ineffective assistance of counsel claim of (Conflict of Interest), was denied as matter Dehors the Record, and was further exhausted in petitioner's Application to the New York Court of Appeals. On September 17, 2010, the Court of Appeals (Rad, J.) issued a certificate denying petitioner permission for leave to appeal; *People v. Brewer,* 15 N.Y. 3d 849 (2010).

(13) On January 28, 2010, petitioner filed a *Writ of Error Coram Nobis. On 2/22/11,* the trial court denied the Writ of Error Coram Nobis without conducting a Hearing and rubber stamping the Writ as a 440.10, on 1/9/12. The Writ was appeal to the appellate court that was denied on 5/18/12. Motion to Re-argue to the Appellate Court was timely submitted and was denied on 9/21/12, Raising Prosecutorial, and Judicial Misconduct, as well as Ineffective Assistant of Counsel. Petitioner timely filed is Habeas Petition on 4/26/13, On 2/8/18 MJ Davison issued an R&R, On 2/28/18, petitioner timely filed objection, On 12/20/18, 12/20/18 the District Court denied the petition. On 1/9/19 petitioner timely filed his COA, On 8/8/19 U.S. Court of Appeals denied COA.

ARGUMENT-1

THE DISTRICT COURT MISAPPREHENDED AND MISSTATED THE FACTS OF THE RECORD RENDERING ITS FACT FINDING PROCESS UNREASONABLE DENYING PETITIONER'S PROSECUTORIAL MISCONDUCT CLAIM IN WHICH A JURISTS OF REASON WOULD FIND DIFFERENT OTHERWISE

(14) The petitioner's traverse has not been contested and was totally disregarded by the district court. The district court violated the procedural guide-lines in regards to habeas corpus proceedings, 28 USCA § 2254 (d) (2) (e) (1). The petitioner filed his petition, the district court issued an order to show cause, the respondent filed its

affirmation in opposition to the petitioner's petition, and the petitioner filed his traverse in return, there was no rebuttal to the *Traverse.*

(15) The district court adopted the report and recommendation of the magistrate judge who adopted the pre-trial decision order of the state court. This adoption was unreasonable because the pre-trial court decision was a violation of the petitioner's 14th Amendment; when the pre-trial judge misstated the facts of the record clearly manufacturing instances to draw up his conclusion. "**First provision of the unreasonable determination clause applies most readily to a situation where the petitioner challenges the State Court finding based entirely on the record,**" *Wiggins v Smith*, 123 S.Ct. 2538-39 (2003); *Harris v. Kuhlman,* 345 F.3d 330-351 (2nd Cir. 2003); *Taylor v. Maddox,* 366 F.3d 992, 1001, (9th Cir. 2004). The petitioner requested a Certificate of Appealability Appendix-A, based on the Prosecutorial Misconduct Claim 28 USC 2253(c) (1).

(16) The district court erred denying petitioner's prosecutorial misconduct claim that was objectively unreasonable, Title 28 USCA 2254 (d) (2). And debatable among jurists of reason, *Slack v. Daniel,* 529 U.S. 473, 484 (2000). The district court at 6. stated, "**Petitioner did not allege prosecutorial misconduct on direct appeal.**" The district

court misapprehended the facts of the record, *Harris v. Kuhlman,* 345 F.3d 330-351 (2nd Cir. 2003).

(17) Petitioner raised prosecutorial misconduct in his post-conviction motion, Writ of Coram Nobis[1]. Issues that appeared on the record and off the record, making it a *Mix Claim.* The State Court denied the prosecutorial misconduct claim citing CPL 440.30 (1), Appellant Court Affirmed, in violation of the rule announced in *Smart v. Scully,* 787 F.2d 816 (1986)[2]. The Prosecutorial Misconduct Claim was also raised in *Petitioner's Leave Application pages 3, 4, 13-14, to the New York Appellate Court,* Appendix-B, at 13-14. In addition, the Prosecutorial Misconduct issue was exhausted in defendant/petitioner's *Motion to Reargue to New York Appellate Court, Pages 3-4.* The petitioner raised that he was denied his Due Process under the 14 Amendment by the State of New York Pre-trial Judge's decision. District Court failed to view petitioner's Petition/Addendum and Traverse. Appendix-C Petition, (Addendum) page 3 and Appendix-B Traverse pages 13-24.

(18) Petitioner exhausted his State Court remedies and the petition for habeas corpus was timely. *Daye v. Attorney General,* 696 F.2d 186, 194 (2d Cir. 1982). The District Court decision at 6 stating,

"The Petitioner did not allege any facts to support a motion to extend the time limit...of cause and prejudice to overcome the procedural bar."

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[1] Petitioner's post-conviction motion Writ of Coram Nobis to the Trial Court

There was no procedural bar, because the *Writ* is not controlled by CPL 440.10 or 440.30 and the issue was fully exhausted.[2] The record holds that the prosecution knew or should have known that its witnesses gave false and misleading testimony. *Fernandez v. Capra,* 916 F. 3d 215, 230-31, (2019), *Shih Wei Su v. Filion,* 335 F.3d 119, 126 (2003); and failed to correct it when it appeared, *Dubose v. Lefevre,* 619 F.2d 973, 978, (2d Cir. 1980).

(19) The District Attorney"s star witness, arresting officer Meidriech, was asked at the grand jury proceeding **Gr. 36-39**, to read every item on the return of the inventory list from the search of the resident at 2458 Nostrand Ave. It should be noted, that the return or inventory list is "barren" of property in the name of "Stanley Brewer." **Appendix-D.** Now, this officer of the law, officer Meidriech, perjured himself at trial, **Tr. 164-165**. Concerning the inventory list he testified at the grand jury. Where he was asked by the A.D.A, John O' Rourke,

> Q. Did you recover any paper work from inside that location relevant to Stanley Brewer?
> A. Yes, I did.

(20) The A.D.A. John O' Rourke knew that the officer of the law testimony was false and did not correct it which was a violation of the petitioner's Due Process under the 14th Amendment. A prosecutor is

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[2] Petitioner's Leave Application to the Appellate Court at

under duty to correct the false testimony given by prosecution witness. *Napue v. People of Illinois,* 360 U.S. 264, 269, (1959), states,

"First, it is established that a conviction obtained through use of false evidence, known to be such by representation of the State, must fall under the 14th Amendment."

(21) Detective Connolly from the White Plains Police Department testified at trial that he conducted the search of the BMW that was towed to White Plains Police Headquarters. Tr. 80-81. Det. Connolly also stated, while he was conducting the search of the BMW, he found a **"composite book"** all relevant to Stanley Brewer. Tr. 88-89. This explains the absence of the paperwork, in the name of Stanley Brewer from Officer Meidriech"s inventory list he read to the grand jury. Because it was found in the BMW, not at the resident of 2458 Nostrand Ave. *U.S. v. Agurs,* 427 US 97, 103-104, (1976), states,

"The prosecution knew or should have known of the perjury...must" be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"

(22) Detective Deering, First Grade Detective, from the Yonkers Police Dept. committed perjury at the grand jury. Det. Deering testified that during the search of the resident of 2458 Nostrand Ave., he found paperwork in the name of "Stanley Brewer." Gr. 59-60.

Det. Caiati, from the White Plains Police Department stated at trial, concerning the search at 2458 Nostrand Ave, **"I was the only one who**

actually conducted the search. We had Sergeant Hardy who was videotaping, officer Meidriech who was recording everything that I recovered." Tr. 701-702.

(23) On cross by Atty. Zoppo, who asked Det. Caiati, "You mean recording, writing it down? Det. Caitai responded "He's writing it down I was the recovery person" Hear it is clear that Officer Meidriech wrote everything down in which became the returned *inventory list* he read to the grand jury Gr. 36-39; that Det. Caiati recovered from the search at 2458 Nostrand Ave. There was no video coverage of the search in *"Real Time"* and the paper work in question is not *"Depicted"* in the video. Det. Deering did not conduct the search, and did not find any paperwork in the name of "Stanley Brewer" because it was taken from the BMW. Tr. 88-89. The District Attorney"s. "star witness", arresting officer Meidriech was asked by A.D.A., John O'Rourke at the grand jury proceeding, "In the course of that investigation, did you have an opportunity to view security footage from 30 Windsor Terrace?" The law enforcement officer answer to this question was "Yes" Gr. 40.

(24) The question was asked by the grand jury, "The two people you stopped, you had a chance to see the surveillance video from 30 Windsor Terrace?" Officer Meidriech responded to the grand jury's question, answering "YES" Gr. 40. This false testimony was very convincing to the grand jury because Meidriech is an Officer of the Law,

who sworn under Oath to tell the truth. Officer Meidriech is stating he has firsthand knowledge witnessing the petitioners committing a crime of burglary at 30 Windsor Terrace Apt. 2-h. In this case, the video surveillance did not provide coverage to the entrance to the victim's apartment. No one seen or saw anyone enter the victim's apartment. The victim Michael Kane Trial Testimony Tr. 276.

(25) Now, in part a true bill of indictment was returned on the testimony of officer Meidriech, who took the Oath before the People of Westchester County New York to tell the truth. On cross by petitioner's attorney Ms. Frohlinger, at the pre-trial hearing, Office Meidriech was asked, **"Now, in addition to the surveillance tape, the still of the surveillance tape, had you actually seen the surveillance tape, the motion picture surveillance tape?"** Officer Meidriech replied was "No, I **did not." Ptr. 301.**

(26) Detective Deering testified at the grand jury, during the course of the search on January 19, 2006, he found paperwork in the name of Stanley Brewer. Officer Deering testified he didn't know who Stanley Brewer was. Gr. 60. Detective Connolly stated the same thing at trial, during the search of the BMW on January 19, 2006. "Which originally at the time ***we didn't know who Stanley Brewer was" Tr. 88-89.***

(27) Det. Deering testified at pre-trial, when he interviewed the defendants on *January 20th, 8 o'clock p.m. 2006,* is when he learned that "Stanley Brewer" and Sedrick Watson, the petitioner's alias, was the same person, **Ptr. 128**. Now, Det. Deering committed perjury at trial concerning the same question of the identity of "Stanley Brewer." While on direct, he was asked did he knew who Stanley Brewer was during the search at 2458 Nostrand Ave., on *January 19, 2 o' clock p.m. 2006.* Det. Deering replied "Yes", **Tr. 638.**

(28) Again, the petitioner has been prejudiced by the prosecution witnesses (Det. Deering) when his testimony was not Corrected by the prosecutor. This a clear violation of the petitioner's due process under the 14th, Amendment. *Napue v. People of Illinois,* 360 U.S. 264, 269, (1959). The grand jury, **Gr. 73-74**, where the proceeding was also impaired by the testimony of another one of Westchester County's District Attorney's witnesses, a Ms. Peggy Gill. When asked by the A.D.A. John O' Rourke, **"What did you see about the apartment?"** Her response to this question was,

"Em, just all the drawers emptied out, everything strewn about. You know just everything, drawers emptied out, jewelry taken, and *money* taken from one particular drawer in the apartment."

(29) The second question presented to Ms. Gill by A.D.A. John O' Rourke **"How did you know it had been taken?"** Her reply to this questioned was **"Because I put the money there for him, because there**

cash in the house at all times" This reply brought another question by the A.D.A. John O' Rourke, **"About how much is that?"** Ms. Gill's answer was, **"about seven hundred dollars"** Now, the credibility of this witness testimony comes into play in her following answer to the questioned asked: **"What did you notice?** Her response to the question was,

"In that drawer with the money there was a glove in there and I said, that is unusual. He doesn't own a pair of glove like this so I left the glove in the drawer and called the police and told them what I saw"

(30) The legal credibility here is the witness is first testifying that there was, "No Money" in the drawer where the so-called glove was found. Yet, later on in her testimony she is testifying **"In that drawer with the *money* was a glove" Gr. 73-74.** Now, where is the legal line drawn to show which of the statement of events is true? The District Attorney's witness credibility is really in question, when she contradicts her "Grand Jury Testimony" at the trial stage of this case. At trial Ms. Gill was asked by A.D.A. John O' Rourke, concerning the so-called glove, **"Did you made arrangements with Detectives from the city of Yonkers to enter the apartment for that purpose?"** Ms. Gill's response was, **"Right we called the neighbors and the neighbors went into and got the glove out of the drawer and brought it to detectives." Tr. 1084.** This neighbor never testified at the grand Jury, Pre-trial or Trial.

(31) This makes Ms. Gill's testimony to the grand jury false, the question presented was, **"You provided those two items to Detective Tilson of the Yonkers Police Department?"** She replied, **"Yes."**, **Gr. 74, lines 15-17.** First it's NO MONEY, then ONE GLOVE WITH THE MONEY, then TWO GLOVES, then TWO ITEMS. Detective Tilson of Yonkers Police Department stated that Officer Wagner from the CIU unit secured the glove into custody and vouchering it **Tr. 740-741.** The testimony of the prosecution's witnesses is riddled with perjury, *Napue v. Illinois Supra*, and the chain of custody has been broken.

(32) Police Officer Gordon testified at trial that the arrest of the Petitioner was based on a burglary at 10 Lake Street, on January 19, 2006, When Police Officer was asked:

Q. Did there come a point in time when you went into Lake Street.

A. Yes Sir.

Q. Were you directed there by any supervisor?

A. Yes, I was directed by Sergeant Fisher to canvass the area.

Q. That would be Sergeant Eric Fisher correct?

A. Yes.

Q. As part of that direction, did you find yourself searching the 10 Lake Street Building?

A. Yes, I did.

Q. Did you find any apartments on the second floor that you saw something unusual with?

A. Yes, I did. I found an apartment 2-A on the second floor that was keys broken off in the locks.

pg. 348 at 6-9.

Officer Gordon was further asked:

Q. And were efforts made to notify the homeowner, Badia Colocho, about that?

A. Yes. Pg. 348, at 10-12.

Pg. 349 at 5-6, Officer Gordon was asked:

Q. Do you know what time that happened or what time she arrived home?

A. The exact time, no, but approximately 3:00, 3:30, and 4:00.

Q. When you gain entry, did it appear that anybody had been in that apartment from what you could see?

A. Yes.

Q. What types of things did you notice?

A. Yes. We entered the apartment. We noticed that the apartment disheveled, ransacked, stuff was all over the place. Gordon Tr. 347-349.

(33) Ms. Colocho's trial testimony wholly refutes Police Officer Gordon's trial testimony, when Ms. Colocho was asked:

Q. Now, subsequent to the police coming into your apartment you had gone in previously when they came to your apartment to meet you? They went in first? You didn't go in first.

A . They went in first I had to wait 20 minutes.

Q. And when they came out they told you that the apartment had been burglarized?

A. Correct.

Page 416, line 19, to page 417, line 2,

* * * * *

Q. But first they told you the apartment had been burglarized?

A. I can't really remember. What I remember is that I came home, and they opened the door, they went in, and they told me to wait 20 minutes. And after that they said apparently someone break into your apartment, and now you can come in, take a look, but don't touch anything. And after that they said apparently someone break into your apartment, and now you can come in, take a look, but don't touch anything.

(34) The United States District Court ignored that the prosecution should have known that its witnesses Officer Gordon was giving misleading testimony concerning the burglary of 10 Lake Street. In violation of the petitioner's 14th Amendment, that reasonable jurists would have found debatable, *Slack v. McDaniel supra.* The record bares the fraudulent lies from Officer Gordon concerning Ms. Colocho's apartment. Police Officer Petrosino testified that he was with Officer

Gordon when commissioned by their superior to canvas the 10 Lake Street Building. He stated while searching for burglaries that afternoon, the results were negative. Police Officer Petrosino testified when asked: **Tr. Page 300, lines 19-25.**

Q. Were you by yourself again or with

A. Officer *Gordon* and Officer Carra. **Tr. page 299, line 25 - page 300, line 2.**

Q. Did you wait there for the homeowner?

A. Yes.

A. She did.

Q. And did you do anything next after that?

A. No. When she arrived, she actually told us that it wasn't burglarized; that she had left it like that. (Ms. Colocho). *Emphasis mine.*

(35) Supplementary Incident report of Officer Petrosino and Police Officer Carra, used in petitioner's post-conviction motion that appeared of the record, collaborates officer Petrosino's testimony that appeared on the record. Who both stated they also accompanied Police Officer Gordon to canvass the 10 Lake Street Building, and the results were negative. Someone has lied to the court **(Gordon)** which was a violation of petitioner's Due Process under the 14th Amendment. Appendix-B, Traverse at 23.

ARGUMENT-2

THE DISTRICT COURT MISSTATED THE FACTS OF THE RECORD IGNORING THE EVIDENCE PRESENTED IN PETITIONER'S TRIAL AND DIRECT APPEAL, PETITIONER'S POST-CONVICTION MOTION AND FEDERAL HABEAS PETITION RENDERING THE DISTRICT COURT FACT FINDING PROCESS UNREADABLE IN WHICH A JURISTS OF REASON WOULD FIND DIFFERENT OTHERWISE

(36) The district court failed to address the judicial misconduct (Bias) claim in the Petition/Appellant Traverse. This issue was completely disregarded by the District Court. The Petitioner demonstrated that reasonable jurists could find the District Court's assessment of the Constitutional Claim debatable, *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). The District Court judgment follows:

"When Officer Perry, who had responded to Officer Meidriech response for assistance, arrived at the scene and requested that defendant produced identification, a watch fell out of the defendant Brewer's rear pocket. Officer Perry testified that he found this odd based upon the fact that defendant Brewer was wearing a watch on wrist."

(37) The District Court misstated the facts of the record which violated petitioner's due process. The Petitioner requested a Certificate of Appealability based on the Judicial Misconduct Claim which should had been granted. Officer Perry's pre-trial testimony **Htr. 72, lines 6 through line 4 of 73**, where he was asked:

Q. Did you see Police Officer Josef Meidriech when you arrived at that location?

A. Yes sir, I did.

Q. Where was he and what was he doing?

A. He was standing, there, and he was standing in front of two individuals and—

Q. Where was he standing, more specifically?

A. He was standing on the sidewalk, like facing—I was coming up North Broadway. He was standing on North Broadway on the sidewalk and he was facing my direction.

Q. And did there come a point in time when you assisted him?

A. Yes sir, I did.

Q. What did you do to assist him?

A. I stepped out of the vehicle. He was with two subjects. Stepped out of the vehicle. I heard him say to one of the subjects, he asked him for identification. Do you want me to get specific or-

Q. Yeah. When he asked that, who was that he asked for identification, if you recalled

A. He asked Sedrick Watson, which is Stanley Brewer, and Edward Cruz.

(38) Officer Meidriech who stated that he retrieved the petitioner's identification, when asked:

Q. Officer, when you did the warrant check after getting the I.D.'s from both Cruz and Brewer, did you get a response that either of them were wanted individuals?

A. They were not wanted ***at that time.*** **Pre-trial Testimony Pg. 303 line.**

(39) Officer Meichriech's Supplemental Incident Report (S.I.R) fully corroborates his pre-trial testimony. That he, Meidriech, received the subject's identification *before any other officer's* or units arrived at the scene.

"I then asked each subject for their identification and one male black produced a Georgia Driver's License and was identified as Erick Dean Cruz, DOB 5-8-67, of 100 Leslie Oak Dr. # 1101, Lithonia, GA 30058. The other male black produced a New York State Interim License as Serdrick J. Watson, DOB: 12-9-69, of 84 Academy Street, Liberty, New York 12754. I conducted a local and NCIC warrant check of the subject. At this time Sgt Dominquez and Sgt Fisher as well as other White Plains Patrol and plain clothes units arrived on the scene to assist with the stop." Appendix-E.

(40) Officer Perry never requested the petitioner's I.D. and the petitioner did not consent to a search at the time of the investigative stop. The record holds that Det. Donnelly stated at pre-trial that the petitioner was handcuffed at the time petitioner was search, Donnelly Htr. 67, Tr. 53. Concerning the involuntary search of the petitioner, this Court must consider the factors announced in *New York v. Quarles 467 U.S. 649,665*, (1984).

A. The officer was not concerned with their safety or the public safety, because the so-called stop was based on a level one, of Officer Meidriech common-law right to inquiry.

B. The fact that the Petitioner was confronted and surrounded by eight Law Enforcement Personnel, handcuffed, searched, and separated from his acquaintance and not able to leave, he was arrested.

C. Based on the predetermination of Det. Donnelly, during the investigative stop, by stating: **"That's correct, We were not going to let them leave." Htr. at 67,** Petitioner was in police custody.

(41) The question from Officer Perry "Can I search you" after petitioner was handcuffed, **Htr. 53,** was an improper inquiry, *Florida Royer v.* 460 U.S. 491, 507-08, (1983). This is what Judge Adler and the (District Court) has found to be factual, and what Officer Perry never testified to. Officer Perry stated he was in front of the squad car, Officer Perry stated it was Officer Josef Meidriech who requested petitioner's identification. **Htr. 72, lines 6 through line 4 of 73, Htr 303.**

Ms. Colocho stated to the police that nothing was missing from her apartment, which was found in the same position that she had left it, disheveled and with an unmade bed, Tr. 299-300. **(See pg. 26 of Certiorari).**

(42) A reading of Police Officers Perry, Gordon and Meidriech testimonies would show that the district court completely prejudiced the petitioner by misinterpreting the relevant facts of record in its judgment, which was an unreasonable determination in light of the evidence presented in the State Court. Title 28 U.S.C. § 2254 (d) (2). *Officer Perry* was also asked at the pre-trial suppression hearing, **Pg. 78, lines 2-14:**

Q. Did you personally find any apartments that had been burglarized

A. I didn't. No I didn't.

Police Officer Gordon was asked at the pre-trial hearing, page 99 line 24 o page 100, lines 4-7.

Q. And do you know if the property taken off Mr. Cruz or Mr. Watson had been reported stolen.

A. No, I didn't.

Officer Meidriech was asked the same question concerning the investigated stop, **Htr. 301 line 25 to page 302 lines 2-13**, when asked:

Q. And do you know if there was a burglary at -- on Lake Street reported before you actually stopped these two individuals?

A. That day?

Q. Yes.

A. Specifically where?

Q. Do you know if there was a burglary reported on 10 or 15 Lake Street prior to your stopping these individuals?

A. No.

Q. You don't know or there wasn't?

A. I don't know if there was a burglary committed at the time when I stopped them.

(43) Trial Judge Adler and the District Court wrongly found that the "Common law right to inquiry which ripened into probable cause to arrest them once the jewelry, currency and cameras were recovered from the defendant."[3]

"However, instead of terminating the seizure when their suspicion ... proved unfounded, the Agents continued to detain the defendant while they 'embarked upon [an] expedition for evidence in hope that something might turn up" Brown v. Illinois, 422 U.S. 590, 605, 95 S.Ct

[3] Pre-Trial Decision And Order of Judge Adler's Page 15-16

2254, 2262, (1975) ... This continued detention was nothing more than an unlawful fishing expedition. The fact that it happened to successful does not, of course, make it lawful." See *U.S. v. Babwah,* 972 F.2d 30 (1992).

(44) The search has by-passed the pat down procedure announced in *Terry v. Ohio,* 398 U.S. 1, 12, (1968). There was no reports that the petitioners was armed and dangerous or that the items in petitioner's pockets felt and resembled a gun. The so-called "at-the-scene investigation" exceeded the 90 minutes announced in *United States v. Place* 492 US 696, 709-710, (1983). Appx.-F Reply Motion at 3. The petitioner was held for investigative detention for more than 8 hours, 480 minutes, from 2:00 o'clock pm to 10:00 o'clock pm January 19th, 2006. Until Detective Hembury read petitioner his Miranda Rights in violation of the rule announced in *United States v. Place*, Supra. Appendix-B Traverse at 11. The District Court has turned a blind eye to the violation of the petitioner's due process under 14 Amendment that is debatable among jurists of reason, *Slack v. McDaniel*, 529 US 474, 484 (2000).

(45) Detective Donnelly, Detective Gordon, Office Perry and Officer Meichriech was neither aware nor investigating any specific crime which had occurred immediately before for which the petitioners could have been considered suspects. The Police had no inarticulated knowledge that a crime had been committed or that the petitioner was the perpetrator of such crime. Simply, there was no suspicion of a crime

anywhere in the Lake Street area, based on Officer Perry, Gordon and Officer Meichriech's pre-trial testimony. *People v. Diaz* NYS2d 768 (1987), *People v. Robinson*, 100 AD2d 945, *People v. Ross* 67 AD2d 955 (1979).Case above rest on Terry v Ohio and Brown v. Illinois.

(46) The petitioner has established by clear and convincing evidence 28 USC 2254 (e) (1) that the hearing judge and the District Court has engaged in misconduct sufficient to warrant redress. By typically demonstrating that the judge displayed *"such a degree of favoritism or antagonism that made the judgment unfair and impossible." Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147 (1994), see *Withrow v. Larkins,* 421 U.S. 35, 47, 95 S.Ct. 1456, 1464 (1975).

ARGUMENT-3
THE DISTRICT COURT IGNORED & MISAPPLIED THE GOVERNING STANDARD TO PETITIONER'S CONFLICT OF INTEREST AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WHERE COUNSEL FAILED TO IMPEACH THE PROSECUTION WITNESSES THAT A JURISTS OF REASON WOULD FIND DIFFERENTLY OTHERWISE

(47) A reasonable jurists could find that the petitioner/Appellant was denied an effective assistance of counsel. *Strickland v. Washington* 466 U.S. 668 (1984). Trial counsel for the defendant failed to investigate the so-called investigated stop of the petitioner, violated the rule announced in *Kimmelman v. Morrison,* 477 U.S. 365, (1986), *Rompilla v. Beard*, 124 S.Ct. 2456, 2467, (2004.

[4] Petitioner's Post-Conviction Motion (Writ of Coram Nobis), pages 1-9

(48) Attorney Zoppo who is from the Legal Aid Society of Westchester County represented the petitioner's co-defendant, Eric Cruz, and Attorney Ms. Frohlinger, represented the petitioner. The testimony by the prosecution witness Detective Deering testified that the picklock burglary stopped upon the defendants' arrest, Tr. 664. The prosecution in the case knew Detective Deering testimony was false and did not correct it. *Mooney v. Holohan, Wei Su v. Filion* supra. The fact is that the prosecution office had two open files of suspects, Santiago and Jorge Guzman, both arrested and charged with lockpick burglary, after the petitioners were arrested. Attorney Zoppo who represented Guzman, as early as of March 2006, never objected to Detective Deering's false testimony. Appendix-B Traverse at 24-25.

(49) The prosecution office and the Legal Aid Society went through the trial burden with the conflict of interest. Attorney Zoppo never disclosed to the petitioner's attorney, Ms. Frohlinger that would allow her to pursue a defense that the defendant/petitioner is not responsible for all the "Pick-Lock Burglaries." Which could have been concluded by just one of the juror. When two defendants have a joint trial and one of the attorneys has a conflict of interest, this has a pill-over effect on the other petitioner.

(50) The attorneys ran afoul of each other, *People v. Gomberg,* 38 N.Y.2d 307, 312, (1975). Causing a "conflict of interest Appx.-B

Traverse at 25-26. Zoppo applied to be relieved of counsel, which was granted based on conflict of interest after the petitioner was found guilty. This argument was presented by the petitioner's second assigned attorney Ms. Jeanne E. Mettler in her application to be relieved of counsel also granted, based on conflict of interest. Because She is a member of the Board of the Legal Aid Society. Appx-B Traverse at 25. The state court failed to conduct a hearing on the matter. *Glasser v. United States,* 315 U.S. 60, 71-72, (1942), *U.S. v. Perez*, 325 F.3d 115 (2nd Cir. 2003), and a violation of the defendant's right under 4th, 6th, and 14 Amendment.

(51) The State court never conducted a *Curcio Hearing*, *U.S. v. Curcio,* 680 F. 2d 881, (1982), *Cuyler v. Sullivan,* 446 U.S. 335, 349-50, (1980). However, this was raised on direct appeal by assigned counsel Charles O. Lederman, and exhausted in the petitioner's application to appeal to the court of appeals. See Leave Application of Stanley Brewer to the New York Court of Appeals prepared by Charles O' Lederman.[5]

"The due process/ineffectiveness issue was dismissed by the trial court for it's being outside of the trial record under CPL § 330.30 (1). That court ignored the allowance of such matters under CPL § 330.30 (3). In construing such pro se motion liberally, and in consideration of the fact that counsel was in fact relieved of the assignment, the trial court should have at least had a hearing in order to develop the record. In turn, the intermediate appellate court has parroted proscription against review of matters "dehors the record." Appellant posits here

[5] Leave Application of Stanley Brewer to the Court of Appeals prepared by Charles O'Lederman.

that since the issue was disposed of by the trial court well before judgment was entered, the issue is in fact part of the record that must necessarily be considered on appeal. If the defendant is prevented from asserting a claim of conflict at each level of our process based upon such limited views of what constitutes the record, then the constitution protection itself would become illusory."

(52) Attorney of record Ms. Frohlinger, failed to impeach Officer Meidriech's grand jury testimony Gr. 36-39, during his false testimony at trial, Tr. 164-165. Concerning his testimony of the inventory list he read to the trial jury. Counsel of record failed to impeach Ms. Peggy Gill at trial, Tr. 1084, concerning her grand jury testimony, Gr. 73-74, on whether or not there was glove with the money, or no money, or she herself gave the glove to Detective, or "Right we called the neighbors and the neighbors went into and got the glove out of the drawer and brought it to detectives." Tr. 1084.

CONCLUSION: The petition for a writ of certiorari should be granted because of the Substantial Federal Violation of Petitioner's Rights.

Respectfully submitted,

Stanley Brown

Dated 12/30/19