No. 20-8265

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN LICAUSI — PETITIONER

vs.

NEW YORK STATE —— RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
COUNTY COURT OF THE STATE OF NEW YORK, COUNTY OF SUFFOLK

JOHN LICAUSI DIN# 10A5172
Petitioner *Pro Se*
Eastern Correctional Facility
P.O. Box 338
Napanoch, New York 12458

Submitted on May 22, 2021

QUESTIONS PRESENTED

I. Whether a hearing in a collateral proceeding was required to determine trial Judge's "neutrality" when newly discovered evidence was presented on a motion as to Trial Judge's bias and conflict of interest based on a personal conflict with Petitioner forty years prior and in presiding over a prior coerced plea in 2001?

II. Whether a subsequent civil verdict that establishes the third party culpability of a police officer in a pursuit of Petitioner that lead to the death of a motorist based on altered evidence that was relied upon in the prior criminal trial of Petitioner undermines the previous criminal conviction under the due process clause of the Fourteenth amendment and the right to present a complete defense under the Sixth amendment of the United States Constitution, such that

a. the lower state court erred when it denied a hearing in a collateral proceeding based on its erroneous holding that the altered evidence was not newly discovered, especially when that new evidence is viewed in conjunction with other evidence that had been destroyed prior to trial and suppressed at trail; and/or

b. the civil findings impeach the prior criminal conviction *per se* because the parties and factual issues are exactly the same.

LIST OF PARTIES

All Parties appear in the caption of the case on the cover page

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May 22, 2021

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[XX] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[X] reported at Suffolk County Court; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. Leave denied by NY Appellate Court, 2nd Dept.on 3/3/21

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[X] For cases from **state courts:**

The date on which the highest state court decided my case was Nov. 24, 2020.
A copy of that decision appears at Appendix A.
Leave denied by NY Appellate Court, 2nd Dept. on 3/3/21.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF CASE

This matter emanates from a judgment of the County Court, Suffolk County (Hudson, J.) rendered on October 12, 2010 convicting Petitioner after jury trial of Aggravated Vehicular Homicide, Manslaughter in the Second Degree, operating a motor vehicle while impaired of drugs, unlawful fleeing an officer, reckless driving, three counts of failing to stop at stop sign, failing to stay in lane, two counts of failing to stop at a stop light and one count of speeding and sentencing him as a discretionary persistent felony offender to a term of 25 years to life for aggravated vehicular homicide, manslaughter in the second and unlawful fleeing an officer,1 1/3 to 4 years for driving while impaired and various traffic offenses.

The Appellate Division of the State of New York, Second Department modified the sentence to a term of 18 years to life and otherwise affirmed the convictions. *People v Licausi*, 122 AD3d 771 (2d Dept 2014). The New York Court of Appeals denied leave to appeal to that court. *People v Licausi*, 25 NY3d 1166 (2015). Habeas corpus relief was subsequently denied. *Licausi v Griffin*, 460 F.Supp3d 242 (EDNY 2020), *app. dismissed* 2020 WL 7488607 (2d Cir 2020). The instant collateral proceeding was denied by Supreme Court, Suffolk County on November 24, 2020(cite) by Hon. Richard Ambro, and leave was denied by the Appellate Division, Second Department on March 3, 2021.

REASONS FOR GRANTING THE WRIT

I. Whether a Hearing in a Collateral Proceeding Was Required To Determine Trial Judge's "Neutrality" When Newly Discovered Evidence Was Presented on a Motion As to Trial Judge's Bias and Conflict of Interest Based on a Personal Conflict With Petitioner Forty Years Prior and in Presiding Over a Prior Coerced Plea in 2001?

FACTS

Petitioner has raised a claim with regard to Judge Hudson's (trial judge's) conflict of interest and bias. Petitioner only recently obtained a letter and affidavit from his defense counsel (Affirmation of Michael Ahern, Esq. dated July 10, 2017, annexed as Exhibit A-2 in CPL 440 motion dated November 14, 2019) as to what went on off-the-record and behind closed doors when a conflict became apparent that Judge Hudson would have to recuse himself because he presided over a prior 2001 case where he coerced a plea. Petitioner realized much later when reading the trial transcript that Judge Hudson and Petitioner went to and graduated the same high school (Sachem High School Class of 1977) and had engaged in fisticuffs over a certain girl, Rose, nearly 40 years prior.

The matter started off as argument on a written motion made by Petitioner's counsel seeking to set aside his convictions from two prior cases Judge Hudson presided over where he unconstitutionally coerced pleas from him, thereby creating a conflict of interest in the current case. The Judge, the prosecutor and Petitioner's attorney then went into a sidebar conference, but before it occurred the Judge had

the Petitioner removed from the courtroom. When Petitioner was brought back, the Judge told him that his attorney would tell him what had occurred. Petitioner's attorney failed and refused to tell him what happened and it took him nearly ten years to get the proof from counsel that, in fact, the Judge has acknowledged that he had to recuse himself.

This is "newly discovered evidence" as it is not record-based because there is no transcript of what went on and Petitioner's efforts to find out only reached fruition when his attorney came clean and provided the information after a decade of attempts to obtain this information by continuous correspondence with counsel. It is clear from these documents that Judge Hudson stated he, in fact, would have to "recuse himself [at sentencing]." Exhibit A-2 to CPL 440.10 motion dated November 14, 2019. This issue had to be adjudicated in the collateral proceeding to explore the Judge's bias and the conflict with Petitioner dating back to high school, which Judge Hudson admitted both on and off the record. It was clearly covered up by defense counsel, and the prosecutor, as well as Judge Hudson himself for failing to disclose this conflict at trial after the 'secret sidebar' where Petitioner was deceptively removed, denying him presence in the courtroom when this conflict was aired out, the details of which he did not learn until ten years later.

ARGUMENT

It is significant that the collateral proceedings court failed to rule on this issue and ignored it in its totality. The constitutional standard, as elucidated by this Court, is not "whether in fact [the judge] was influenced", but rather "whether sitting on the case then before [the court] 'would offer a possible temptation to the average...judge to...lead him not to hold the balance nice, clear and true." *Aetna Life Ins co v. Lavioe*, 475 US 813,823-824 (1986(quoting *Ward v Monroeville*, 409 US 57,60 (1972)(quoting *Tumey v Ohio*, 273 US 510,532 (1927)). "The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely to be neutral, or whether there is an unconstitutional "potential for bias." *Caperton v A.T. Massey Coal, Inc.*, 556 US 868,881 (2009). Applying this standard, it is eminently clear that Petitioner was constitutionally entitled to a hearing on the trial judge's bias and conflict of interest based on the newly discovered evidence from counsel that had been an off the record matter that counsel withheld from Petitioner for a decade. A judge embroiled in a bitter controversy with a litigant before him/her is unlikely to "maintain that calm detachment necessary for fair adjudication." *Mayberry v Pennsylvania,*400 US 455,465 (1971). Indeed, a judge's prior relationship with a defendant acquired from a prior proceeding is of critical import.

Caperton, 556 US at 881 (referencing *In Re Murchison*, 349 US 133 (1955)). As such, the Judge coercing a prior plea meets that threshold.

Finally, Judge Hudson's bias is eminently clear by his *sua sponte* invocation of the discretionary persistent felon statute, when it had never been brought at *any time* prior on the record or otherwise by the prosecutor. Throughout the proceedings, Judge Hudson had indicated that Petitioner faced a sentence of a minimum of 4 ½ - 9 and a maximum of 12 ½ - 25 after the verdict, instead of the 25 years to life that he imposed. Judge Hudson's hostility was evident from his unwarranted characterization of Petitioner as a "sociopath incapable of genuine human emotions" at sentencing. The conflict of interest is clearly demonstrated by the trial judge's bringing up the enhanced sentence, biased rulings and vindictive sentence imposed, especially his efforts to avert police negligence/recklessness as an issue by barring testimonial (Inspector Hatton) and documentary evidence (Internal Affairs Report) proving that the pursuing officer violated departmental pursuit polices and training. This denied Petitioner a fair and impartial trial, and tainted the entire trial. The discretionary enhanced sentence resulted after Petitioner discussed at sentencing the issues that deprived Petitioner of a fair trial, at which time Judge Hudson angrily retaliated by stating, "Is this your way of taking responsibility?" immediately suggested to the Assistant District Attorney "Do you wish to seek an enhanced sentence", despite the fact that the Pre-

Sentencing Report recommended at sentence of 12 and one half to 25 years. This occurred after Petitioner tearfully expressed his sincere remorse and responsibility for his actions. However, now the newly discovered evidence proves Petitioner was asserting the truth that there were no aggravating factors justifying or supporting the top charge. This reveals the mitigating factors denied for the jury's consideration that should have been considered in the charges and/or fair sentence. As such, the trial judge's conflict of interest and/or bias operated on the judge's decision-making and his exercise of discretion during the trial and at sentencing.[1] Accordingly, as a matter of due process, the collateral proceedings court should have granted a hearing regarding the trial judge's conflict of interest.

This Court should grant certiorari to determine whether *Caperton* and the conflict of interest line of cases should be extended to a case where the Judge and the defendant before him were rivals over a girl in high school and whether a judge could "maintain that calm detachment necessary for fair adjudication" in that circumstance or is "likely to be neutral, or whether there is an unconstitutional

[1] Judge Hudson was later censured for showing favoritism in a criminal case of an attorney and was thereafter moved from the Criminal Term to the Civil Term. The District Attorney, Thomas Spota who was later convicted of corruption charges in federal court, sat in the courtroom throughout the trial basking in the glow of press coverage and conferring repeatedly with his ADAs on strategy and fine points in the case. He had his hands on every piece of evidence in this case. He had a part in the destruction of the GPS Hard Drive. He had a hand in signaling to the Judge what he wanted done at various points on crucial pieces of evidence, including the Internal Affairs report. The Internal Affairs report is noteworthy because it was given in discovery and no objection was ever made to the impending testimony of Inspector Hatton and introduction of the document in the case until Spota signaled the Judge on the morning the witness was not allowed to testify.

"potential for bias." Although the instant case involves presiding over a prior coerced plea, as well as an "old-fashioned" high school grudge and does not involve social media, one can easily forecast a situation where a judge on a platform such as Facebook, Instagram, etc., evinces a personal animus to a particular person or issue that a person is closely identified with that person and then presides over a case involving that person. The constitutional lines have to be drawn sooner rather than later and the instant case provides an opportunity to test those parameters.

II. Whether a subsequent civil verdict that establishes the third party culpability of a police officer in a pursuit of Petitioner that lead to the death of a motorist based on altered evidence that was relied upon in the prior criminal trial of Petitioner undermines the previous criminal conviction under the due process clause of the Fourteenth amendment and the right to present a complete defense under the Sixth amendment of the United States Constitution, such that

> a. the lower state court erred when it denied a hearing in a collateral proceeding based on its erroneous holding that the altered evidence was not newly discovered, especially when that new evidence is viewed in conjunction with other evidence that had been destroyed prior to trial and suppressed at trail; and/or
>
> b. the civil findings impeach the prior criminal conviction *per se* because the parties and factual issues are exactly the same.

FACTS

This case arises out of a police pursuit of Petitioner that led to an unfortunate accident where a third party driver lost his life. See, *People v Licausi*, 122 AD3d 771; *Licausi v Griffin*, 460 F.Supp3d 242. After the earlier criminal appeal, the

decedent-driver's estate brought a civil action, for which the County's motion for summary judgment was denied and thereafter affirmed by the Appellate Division., *Foster v Suffolk County Police Department*, 137 AD3d 855,856 (2d Dept 2016). That case later went to trial and the jury found the County liable for the "reckless disregard for the safety of others and a substantial factor in bringing about the death of Scott Foster" See Exhibit A (Special Verdict from the civil case finding judgment against Suffolk County and the Suffolk County Police Department for $2.005,262.10) in CPL 440.10 motion dated November 14, 2019. Based on the actions of the pursuing officer, which verdict is currently on appeal, Petitioner testified at that civil trial, where plaintiff's attorney discovered new evidence that was not available for the criminal case. It is that new evidence, (an altered surveillance video, Exhibit B2 to CPL 440.10 motion), that is at the core of the claim herein when considered with previously destroyed evidence prior to the criminal trial (the pursuing officer's GPS hard drive, see Exhibit B-1 to CPL 440.10 motion), and the court suppressed important and relevant evidence during the criminal trial, and third party police culpability now proven that denied defendant a fair trial (testimony of Inspector Hatton, the author of the Internal Affairs report showing violation of Departmental policy). *Foster v Suffolk County Police Dept, supra*, 137 AD3d at 855,856.

The subsequent civil trial has cast substantial doubt on the verdict in this case. New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been produced at the trial, the verdict and sentence would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after discovery of such alleged new evidence. Although, there is a difference between a civil and criminal case, the same facts and issues resounded in both cases here. The civil case, both in its ultimate jury verdict and in the Court's denial of summary judgment prior to that has raised serious questions about the guilty verdict in the criminal case. The civil case also relied upon evidence that was not produced in the criminal case and calls into question the People's (and the State's) complicity in altering, destroying and suppressing evidence in the case, also tainting the verdict.

The civil case showed that a certain videotape (the "Lowell Mechanical" Video, Exhibit LL at civil trial, annexed as Exhibit B-2 to CPL 440.10 motion dated November 14, 2019) was altered wherein two seconds were removed to make it seem that Petitioner's car was traveling faster ("a flash") and that Officer Bogliole's car was further away from Petitioner than he actually was and "borderline tailgating" as stated by Petitioner's attorney, Michael Ahern. The

importance of this is that in the unaltered version of the video shows the Officer was only 25 feet behind petitioner when the video was still framed with both vehicles, such that Petitioner could not stop without causing harm to himself and others, contradicting the officer's previous testimony that he was between 300 feet and 1000 feet behind Petitioner's vehicle prior to the accident which occurred in close proximately to the accident scene. Petitioner was pumping his brakes to get the reckless officer to "back off" while attempting to stop on a rainy day while approaching the intersection, driving defensively at that point. We do not know who altered the video, but it was shown at and relied upon in the civil case, and it had to be either the Suffolk County Police Department or of the District Attorney's Office. Nor was this tampered video ever investigated during the initial investigation, or by Petitioner's court-appointed Private Investigator or defense attorney which shows ineffectiveness of counsel.

ARGUMENT

The altered video is "newly discovered evidence" and also falls squarely within the ambit of New York's collateral proceedings statute, CPL 440.10(1)(b), a fraud perpetrated on the Court by the People or by *someone acting on behalf of the prosecution.* Further, when you join the altered video that was discovered at the civil trial, (the newly discovered evidence), along with the fact that Officer Bogliole's GPS Tracking Hard drive from Sector Car # 620 was destroyed by the

People or the Police for "security reasons" prior to defense counsel's subpoena for it[2], we have the makings of a pattern of fraud and obstruction of justice, conduct proven by the preponderance of the evidence in the related civil case.

Regarding the newly discovered evidence, the Honorable Arthur G. Pitts, Suffolk County Supreme Court Civil term, who presided in the civil case, instructed that "P.O. Bogliole's act must have been done with conscious indifference to the outcome." Trial Transcript of May 19, 2017, *Foster v Suffolk County & County Police Department of Suffolk* at p.989). Judge Pitts also explained in his instructions that "[...] an act or omission is regarded as a cause of death of Scott Foster, if it had such an effect in producing the death, that reasonable people would regard it as a cause of death." *Id* at 987. Then, he further explicated "[B]ut to be substantial, it cannot be slight or trivial." *Id.* The new evidence substantiated that the officer "intentionally and recklessly operated his patrol vehicle as an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, with indifference to the outcome." "P.O. Bogliole's act must have been done with conscious indifference to the outcome." *Id.*

[2] It should also be noted that civil plaintiff's counsel filed a timely Notice of Claim against the County, in accordance with New York State law with a copy to the Suffolk County Police Department headquarters, and requested that the GPS hard drive be preserved. Nevertheless, it was destroyed.

These facts were covered-up at trial in order to protect the police and County from future liability for negligence based on the fact the officer bore some responsibility in causing the tragic accident. The destruction of the GPS Hard drive as a security matter was ludicrous because it would have shown where the Officer was during the ill-advised, unauthorized and strictly prohibited pursuit. It would have clearly and objectively shown that Officer Bogliole perjured himself at trial because he drove a different route and falsified police reports and all associated paperwork. *See People v Hargrove*, 162 AD3d 25 (2d Dept 2018)(newly discovered evidence of prior police misconduct requires a hearing on 440.10 motion). As such, the downloaded AVL maps purportedly downloaded from the Hard Drive could not be substantiated or verified because while the encrypted Hard Drive could not be manipulated, the maps after a download could be manipulated. As such, there was no guarantee of trustworthiness. The destruction of the Hard Drive was clearly in bad faith and in hindsight was a violation of the *Brady* Rule and Due Process violation. This denied Petitioner a fair trial and tainted the verdict especially when considered in conjunction with the newly discovered (altered) evidence and the evidence wrongly excluded by the trial court. See Exhibit B, Memo responding to subpoena for GPS Tracking Hard Drive from CPL 440.10 motion dated November 14, 2019.

Further, in conjunction with the newly discovered (altered) evidence and the evidence destroyed prior to trial, the trial court's ruling excluded the testimony of Executive Officer Christopher Hatton, who was Petitioner's witness proving that Officer Bogliole violated the pursuit rules and other departmental regulations in his reckless pursuit of Petitioner, also undermines the criminal verdict. Hatton authored the Internal Affairs report that substantiated "Improper Police Action." See Exhibit C, Internal Affairs Report, from CPL 440.10 motion dated November 14, 2019. The trial court in the criminal case ruled out Hatton's testimony and denied admissibility of the Internal Affairs Report. The Appellate Division affirmed his ruling by holding:

> "County Court providently exercised its discretion in precluding the defendant from presenting the testimony of a Suffolk County Internal Affairs inspector who reviewed an investigation of the arresting officer's conduct during the pursuit of the defendant, which testimony was offered to show that the officer had a motive to fabricate his testimony. While extrinsic proof tending to establish a motive to fabricate is never collateral and may not be excluded on that ground, a trial court may, as here, in the exercise of discretion, properly exclude such proof where it is **too remote or speculative**." *People v Licausi*, 122 AD3d 771,772-773 (2d Dept 2014)(citations omitted)(emphasis added).

The holding that the matter was "remote or speculative" is ridiculous in light of the fact that the report directly shows that Officer Bogliole was reckless when he intentionally disregarded police procedures and protocols, which are never remote or speculative in the case of police pursuit. The report was admitted at the civil

trial and that jury accordingly made the correct choice. Officer Bogliole was the prime moving force in the sequence of events that led to the unfortunate death of Mr. Foster. Albeit that Petitioner was a contributory cause, Officer Bogliole was the catalyst. Even though Petitioner may have committed an offense, Officer Bogliole's conduct mitigated Petitioner's culpability, such that at the very least Petitioner would have been convicted of a lesser offense or acquitted *in toto*. The criminal trial court protected Officer Bogliole from proper, critical and expository cross-examination from an independent source from within his own department and the jury never learned that the Bogliole violated the pursuit rules in effect at that time. The court took Hatton's testimony outside the jury's presence and excluded his testimony at the last minute near the end of the trial, leaving Petitioner no one to testify to the violation of pursuit rules, as well as the Officer's reckless conduct. The result was Petitioner's Due Process Rights were violated, and that Petitioner could not present a "Complete Defense" under the Sixth Amendment to the United States Constitution, which is an issue that can never be collateral. See *Scrimo v Lee*, 935 F.3d 103 (2d Cir 2019).

Juxtapose the above arguments with the collateral proceedings court's finding at p.4 of its Decision/Order dated November 24, 2020 that states:

> "[M]issing from defendant's sworn allegations concerning points 1-a through e is a more detailed description of the proffered evidence to establish its admissibility, its expected evidentiary impact, whether the proffered evidence is merely cumulative to trial evidence and whether such

> evidence is relevant for purposes beyond impeachment, sufficient to satisfy most or all of the first, fourth, fifth and sixth criteria described..."

This part of the decision was clearly addressed in the motion by Petitioner's sworn affidavit and further clarified in his sworn affidavit in Reply as a "fraud on the court," which clearly merited relief for Petitioner or, at the very least, a hearing on the merits. The collateral proceedings court erred in a constitutionally significant manner when it failed to grant a hearing on these issues.

Officer Bogliole's conduct and culpability falls squarely within New York's "third party culpability doctrine." *People v Negron*, 26 NY3d 262 (2015); see *People v DiPippo*, 27 NY3d 127 (2016). Petitioner could not have presented a complete defense without it, especially given the destroyed GPS drive, the altered video and the wrongful exclusion of the Hatton testimony and the Internal Affairs Report. Therefore, the nexus between his defense and Officer Bogliole's conduct is aptly described and referred to in a later case in *Estate of Gambino-Vasile v Town of Warwick*, 62 Misc3d 646, 663 (Orange Co. Sup. Ct. 2018), where in referring to the civil case that was directly related to the Petitioner's criminal conviction the court states, "[I]n *Foster* [the civil case involving Bogliole and the County], on the other hand there was a palpable casual link between the police [Bogliole] alleged recklessness and the collision: evidence that officer Bogliole pursued Mr. Licausi through a steady red light gave rise to an issue of fact "whether officer Bogliole pursued Licausi in manner that prevented him from stopping for fear of a collision

with officer Bogliole's police vehicle," thereby proximately causing Licausi's collision with a third vehicle. See *Foster v Suffolk County Police Dept, supra*, 137 AD3d at 855,856, 26 NYS3d 781."

This was further exacerbated at the criminal trial by the fact that the trial court would not let defense counsel attack the recklessness of Officer Bogliole through cross-examination, repeatedly stating in the presence of the jury that the Officer was not on trial and the fact that the Officer's GPS drive was intentionally destroyed by the County almost immediately after the accident. This flies in the face of defendant's right to establish "third party culpability" and encompasses even defense counsel's failure to go further and investigate independent evidence of third party culpability. People v Negron, 26 NY3d 262 (2015); *see* People v DiPippo, 27 NY3d 127 (2016).

a. Violation of Right to Present Complete Defense.

The trial court's and Appellate Division's limited view of the use of the Internal Affairs Report is also a violation of the right to a "complete defense" because it did not only go to credibility of the Officer, it more importantly was also "affirmative proof" to support a defense theory that went directly to the question of guilt. *Scrimo*, 935 F.3d at 116. Indeed, the civil case, prior to the trial went before to the Appellate Division on an appeal by the County from an order denying its motion for summary judgment, wherein that court held, "there were triable issues

of fact as to what occurred just moments before the accident and as to whether Officer Bogliole pursued Licausi in a manner that prevented him from stopping for fear of a collision with Officer Bogliole's police vehicle." *Foster v Suffolk County Police Department*, 137 AD3d 855,856 (2d Dept 2016). That was exactly the defense Petitioner was not allowed to completely or adequately pursue at trial. See *People v Garrett*, 23 NY3d 878,884-886 (20114)[affirming 106 AD3d 929,930 (2d Dept 2013)](civil allegations constitute important impeachment material that may lead to additional exculpatory evidence and further impeachment material).

So, if the civil side has looked at Bogliole's reckless conduct as "substantial" or material to the cause of the accident, then how can that fact be remote or speculative in the criminal matter looking at the very same exact issue from the viewpoint of Petitioner's criminal liability? Further, how can Petitioner have had a "complete defense" by having that ruled out? It is obvious that the prior improper ruling excluding the Internal Affairs Report, which substantiated "Improper Police Action," was demonstrated in the civil case to be absolutely critical to analyzing the accident, such that the People's case falls like a house of cards when the altered evidence is considered in conjunction with the destroyed evidence in light of the erroneous evidentiary and testimonial exclusion of Hatton and the Internal Affairs Report by the court.

Petitioner was denied his right to present a complete defense by the combination of the altered (newly discovered) evidence, the destroyed GPS hard drive, and the court's wrongful exclusion of the testimony of Inspector Hatton. The "Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v Kentucky*, 476 US 683,690 (1986)(quoting *California v Trombetta*, 467 US 479,885 (1984). It is the *opportunity* that matters in this analysis, *Id.*, such that "misleading, or even deliberately fabricated testimony" would impinge upon this right, *Taylor v Illinois*, 484 US 400,411-412 (1988), especially when it pertains to the opportunity to cross-examine, which if significantly diminuated, calls into question the "integrity of the fact-finding process", *Chambers v Mississippi*, 410 US 284,295 (1973), or the fundamental right of "an accused right to present witnesses in his own defense. *Id* at 302; *Washington v Texas*, 388 US 14 (1967).

In *Holmes v South Carolina,* 547 US 319,330-331 (2006), this Court held that the exclusion of a defense of third-party guilt denied the defendant of a fair trial because of a state evidentiary rule requiring the court weigh the strength of the case against the defendant before allowing evidence of third-party guilt. An extension of *Crane*, *Taylor*, *Chambers* and *Washington* holdings, especially in light of the *Holmes* holding, would seem to fit the instant case and require the grant of an evidentiary hearing on the newly-discovered "altered" evidence weighed in

conjunction with previously destroyed evidence and the exclusion of pertinent evidence by Inspector Hatton. All three of these pieces of evidence support the third-party liability of Officer Bogliole, with the altered evidence discovered in the civil trial being the entrée to the new collateral proceeding, where all three can be considered in determining whether Petitioner was provided with the opportunity to present a complete defense under the due process clause of the Fourteenth amendment, *Napue v Illinois*, 360 US 264,269 (1959)(knowing use of false evidence violates due process); *Alcorta v Texas*, 355 US 28,31-32 (1957)(due process violated where prosecutor artfully asked questions to obscure the truth); *Lisenba v California*, 314 US 219 ,237 (1941)(fraud, collusion, trickery, suborning perjury violate due process); *Mooney v Holohan*, 294 US 103,113 (1935)(contrived conviction by deception of court and jury by knowing presentation of perjured testimony violate due process) or the compulsory process clause of the Sixth Amendment or both.

This Court should grant certiorari to determine whether *Crane*, *Holmes* and the complete defense line of cases should be extended to collateral proceedings where a fraud on the court, based on altered evidence discovered in a subsequent civil trial, mandates a hearing for purposes of due process and the right to compulsory process under the Sixth Amendment.

b. The Civil Findings Impeach the Prior Criminal Conviction *Per Se* Because the Parties and Factual Issues are Exactly the Same.

Although this Court has never dealt with the issue of whether a subsequent civil verdict may impeach a prior related criminal conviction, there is ample authority for this as a matter of due process. By "impeachment", Petitioner means that the criminal verdict is undermined by the civil verdict such that there is a loss of confidence in the criminal conviction for due process purposes.

There is old and ancient precedent supporting this assertion;, *United States v McGee*, 117 F.Supp. 27,33-35 (D.Wyo. 1953); *State v Faulk*, 30 La.Ann. 831 (1878); *Commonwealth v Harkins*, 128 Mass. 79, 82-83 (1880); *People v Kenyon*, 52 NW 1033,1034 (Mich. 1892); *People v Parker,* 189 NE 352,361,364 (Ill. 1934); and contrarily there is authority rejecting this, as well. *United States v Satuloff Bros*, 79 F.2d 846 (D.C.Cir. 1935); *State v Johnson*, 536 P.2d 295 (Ida. 1975); *Commonwealth v Stine*, 193 A. 344 (Pa. Super. 1937); *People v Lichtenstein*, 135 P. 692,699 (Cal. 1913).

In the contrary cases, the fact that the State was not a party to the civil proceedings or that the issues varied seems somewhat dispositive. See, e.g., *Commonwealth v Stine*, 193 A. 344. However, in the present case, the County prosecuted Petitioner on behalf of the State and, then, the County was a defendant in the civil action along with the Petitioner. Further, the facts, documents and witnesses are exactly the same in the civil and criminal cases, with the exception of proof of the altered evidence and inclusion of the suppressed evidence in the civil

trial. As such, the rationale for the application of a res judicata or collateral estoppel effect does exist here. cf. *Heath v Alabama*, 474 US 82 (1985)(state not barred from prosecuting defendant for offense that has already been prosecuted by another state). Certainly, however, we need not go as far as full-on res judicata and collateral estoppel, rather the Court could simply hold that such evidence from the civil verdict must be admissible in the criminal proceeding and, at the very least, Petitioner should be entitled to a hearing to determine whether the 'effect" of the civil verdict and its supportive evidence, as newly-discovered evidence, in evaluating whether the criminal conviction has so undermined that due process was violated, especially in a case where the altered evidence can be viewed in conjunction with previously destroyed evidence and other excluded evidence. *Napue, 360 US at* 269; *Alcorta,* 355 US at 31-32; *Lisenba,* 314 US at 237; *Mooney,* 294 US at 113.

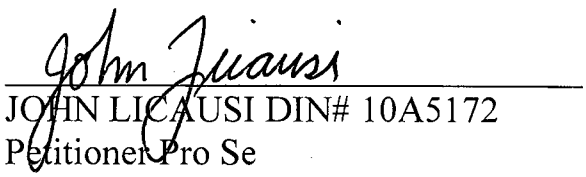
This Court should grant certiorari to determine whether the *Napue, Alcorta, Lisenba,* and *Mooney* due process line of cases should be extended to collateral proceedings where a fraud on the court, based on altered evidence discovered in a subsequent civil trial, casts doubt on the efficacy of the criminal verdict such that due process is violated. There are criminal cases where subsequent civil proceedings have developed evidence that call into question the prior criminal conviction, even in a plea context. See e.g. *People v Tiger*, 32 NY3d 91

(2018)(conviction of caregiver to child, who pleaded guilty to injuring infant by bathing it in water that was "too hot", called in question by evidence developed in subsequent civil proceeding defended by caregiver's agency's liability insurance company showing the injury was likely attributable to a rare skin condition and not based on any bathing of infant). The issue of subsequently developed or discovered evidence from civil suits affecting prior related criminal convictions is a nascent issue that may become more common before long.

CONCLUSION

For all of the above reasons and arguments herein, Petitioner respectfully requests that this honorable Court should grant his petition for a Writ of Certiorari in the public interest because the issue of judicial conflict of interest is an important matter at all levels of courts in the United States, whether federal, state or local, and further elucidation of the clear boundaries would be helpful and timely; and because the use of altered evidence discovered in a subsequent related civil proceeding impacts on due process in a fair trial and in the right to present a complete defense and draws the boundaries on police/prosecutorial misconduct in the presentation of evidence, another timely and important matter for the Court to consider in these times where such conduct has run rampant and been called into question, as the truth matters.

Respectfully submitted,



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Dated: May 22, 2021