

Supreme Court, U.S.  
FILED

JUL 01 2022

OFFICE OF THE CLERK

22-5362  
No.

IN THE

**Agustin Garcia-PETITIONER  
(Your Name)**

VS.

State of New Jersey, et. al., - RESPONDENT(S)

ON PETITION FOR CERTIORARI TO

**SUPERIOR COURT OF NEW JERSEY/ APPELLATE DIVISION**  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

**PETITION FOR WRIT OF CERTIORARI**

AGUSTIN GARCIA  
(Your Name)

E.J.S.P., Lock Bag R,  
(Address)

Rahway, New Jersey 07065  
(City, State, Sip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1. WHETHER THE STATE COURT'S OCT. 13, 2021 ORDER (App. P-2) DEPRIVED PETITIONER OF THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO FAIR TRIAL, E.G., "MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE [476 U.S. 690 (1986)] DEFENSE", I.E., DISMISSING ASSIGNED APPELLATE COUNSEL'S ARGUMENT [App. V-5]: "BECAUSE OF TECHNOLOGICAL ADVANCES, MR. GARCIA REQUIRES A COPY OF THE ENTIRE VIDEOTAPE PLAYED AT HIS TRIAL IN SUPPORT OF HIS DEFENSE. THE VIDEOTAPE DEPICTED HIS STRUGGLE [App. X-3(a):97;103; 124-133; Z-3(a):147-146; 162-167; Z-3(b):234-237] COULD ENHANCE THE QUALITY OF THE TAPE PROVING THAT THE GUN WENT OFF PURSUANT TO THE ATTACK [App. V-5]"?

2. WHETHER THE STATE COURT'S OCTOBER 13, 2021 ORDER (App. P-2) DEPRIVED PETITIONER OF HIS RIGHT TO PRESENT A COMPLETE DEFENSE BY FAILING TO ASSESS MERIT OF FIRST PCR, AND THE PRO-SE SUPPLEMENTARY POINT II DISCOVERY REQUEST (App. T-1; May 4, 2007 Trans. 56:15 to 57-9)?

3. WHETHER THE STATE COURT'S OCTOBER 13, 2021 ORDER (App. P-2) DEPRIVED PETITIONER OF HIS RIGHT TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE 6TH AMEND. U.S. CONSTITUTION?

4. WHETHER THE APPELLATE DIVISION'S OCT. 13, 2021 ORDER (App. P-2) DEPRIVED PETITIONER OF THE ASSISTANCE OF COUNSEL, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, BY AFFIRMING THE LOWER COURT'S AUGUST 25, 2016, MARCH 3, 2017, AND MARCH 28, 2017, WHICH WERE ALL ISSUED WITHOUT ANY PARTICIPATION OF ASSIGNED COUNSEL [App. T-2; Jan. 25, 2019 Trans. 62-1 to 63-3; App. S,T,U)?

5. WHETHER THE APPELLATE DIVISION'S OCT. 13, 2021 ORDER (App. P-2) DEPRIVED PETITIONER OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT OF U.S. CONSTITUTION, AFFIRMING THE LOWER COURT'S AUGUST 25, 2016, MARCH 3, 2017 AND MARCH 28, 2017, AND JANUARY 25, 2019 ORDERS (App. O:1-3; P-1,) BY ISSUING RULINGS WERE AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED?

6. WHETHER APPELLATE DIVISION'S OCT. 13, 2021 ORDER (App. P-2) DEPRIVED PETITIONER OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT OF U.S. CONSTITUTION, BY FAILING TO REVERSE IT'S OWN JURISDICTIONALLY DEFECTIVE RULING PURSUANT TO N.J.C.R. 2:2-3?

7. WHETHER THE PETITIONER'S POST-CONVICTION RELIEF PROCESS FAILED TO ACCORD PETITIONER DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW THAT ALSO AMOUNTED TO A FUNDAMENTAL MISCARRIAGE OF JUSTICE?

LIST OF PARTIES

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

All parties do not appear in the caption of the case on the cover page. A list of all parties to proceeding in the court whose judgment is the subject of this petition is as follows:

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APPENDIX "App. X:1", refers to New Jersey Public Defender's May 28, 2021 transmittal of Petitioner's Feb. 25, 2021 pro-se supplementary appellate brief with appendix;

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

OPINION 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 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 reported;  
or  
[ ] is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merist appears at Appendix [P-2] to the petition and is

[ ] reported at \_\_\_\_\_; or  
[ ] has been designated for publication but is not reported;  
or  
 [x] is unpublished.

The opinion of the Superior Court of New Jersey / Appellate court appears at Appendix [P-2] to the petition and is

[ ] reported at \_\_\_\_\_; or  
[ ] has been designated for publication but is not reported;  
or  
 [x] is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States 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 appear as appendix

An extension of time to file the petition for 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).

For cases from state courts;

The date on which the highest state court decided my case was December 13, 2021. A copy of that decision appears at Appendix (App. P-2).

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)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**AMENDMENT 1**

**Religious and political freedom.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**AMENDMENT 5**

**Criminal actions-Provisions concerning-Due process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT 6**

**Rights of the accused.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**AMENDMENT 14**

**Section 1. [Citizens of the United States.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner first post-conviction relief petition, where New Jersey State's scheme provides first opportunity to raise ineffective assistance of counsel, was denied on May 4, 2007. Four days later, on May 8, 2007 Petitioner filed Motion (May 4, 2007 Trans. 43:18-21; App. X-3(b): 209-217; Z-3(a):72-286), supplementing first post-conviction relief record pursuant to N.J.C.R. 1:7-4(b), "made not later than 20 days after service of final [May 4 2007 order [App. C-1]]", and/or for "New Trial based on Newly Discovered Evidence 'may be made at any time' [N.J.C.R. 3:20-2]", i.e., International Media Service's April 4, 2007 forensic expert analysis and report (App. X-3(a):95-109). As evidenced by accompanying appendix (App. X-3(b):209-217), this motion was received twice by Superior Court of New Jersey/Law Division, Bergen County Prosecutor and New Jersey Public Defender: first on May 24, 2007 (App. 209-213); and second, on August 7, 2007 (App. X-3(b):214-217).

Neither, the May 8, 2007 nor August 7, 2007 packages appear on court's log. (Da: 323-324), evidencing lower court's failure to file this motion. This court's inaction or abuse which flagrantly violated N.J.C.R. 3:22-7, thereby, subjecting Petitioner to "fundamental [State v. Laurick, 498 U.S. 927

(1990)] miscarriage of justice".<sup>Fn. 1</sup> This Superior Court/Law Division's failure deprived Petitioner of his right to first PCR, because the critical timely and properly filed motion supplementing first PCR record never made it into the record until June 1, 2016, when matter was referred by court to New Jersey Public Defender, who assigned Assistant Deputy Public Defender who filed sworn certification with Superior Court of New Jersey attesting under oath:

"As the Court may be aware, in 2017 the Office of the Public Defender reviewed Mr. Garcia's requests and pro-se motions concerning certain video evidence utilized at his trial and agreed that said motions have merit [App. X-3(a):150-152]".

Thereafter, assigned counsel reported to PCR court:

(1) "The Public Defender ... was so compelled by Mr. Garcia's presentation not only of -- his case, but also the law that Our Office has decide to take [It!]... [App. T-2; Jan. 25, 2019 Trans. 5:1-5]";

(2) "[I]t is our position that the [first] PCR attorney [we appointed] was ineffective[!]" ... [App. T-2; Jan. 25, 2019 Trans. 16:23-24]"

<sup>Fn. 1</sup> Carter v. Gills, 2004 U.S. Dist. LEXIS 22301: "A federal court may review a procedurally defaulted claim where Petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims would result in a Fundamental Miscarriage of Justice. "Cause" sufficient to excuse procedural default require a showing that some objective factor, outside the Petitiioner's control prevented compliance with [New Jersey] procedural rules. "Actual Prejudice" occurs when an error had cause the actual and substantial disadvantage of Petitioner's Fundamental Injustice has been defined to encompass instances in which newly discovered evidence make it more likely than not tha ta reasonable juror would find a Petitioner not guilty."

Disregarding extraordinary circumstance resulting from Superior Court of New Jersey/ Law Division's failure to comply with N.J.C.R. 3:22-7, and the procedural bar exemption resulting in light of Carter v. Gills, 2004 U.S. Dist. LEXIS 22301, supra at Fn. 1, p. 2, and also in light of N.J.C.R. 3:22-4[5]:

"As to application of the procedural bar of the rule to claim of ineffective assistance of counsel, ordinarily exempt under subsection (c) ... cautioning as well against disposition on procedural grounds for foreclosing federal habeas corpus review in accord with Harris v. Reed, 489 U.S. 255 (1989)"; "Exception to foreclosure: (1) if the ground for relief [Martinez v. Ryan, 2012 U.S. LEXIS; 23 Fla. L. Weekly Fed. S 175: where the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise the ineffective assistance claim, the collateral proceeding is the equivalent of a prisoner's direct appeal as to that claim (...)" Halbet v. Michigan, 545 U.S. 605, 617, 125 S.Ct. 2582, 162 L.2d 552] could not have been raised on direct appeal; (2) the enforcement of the bar would result in Fundamental Injustice; (3) the denial of relief would be contrary to the Constitution of the United States or the State of New Jersey."

Worse yet, Superior Court of New Jersey/ Law Division reached another low point in its abuse pattern, i.e., issuing orders dated Aug. 25, 2016, March 2017, and March 28, 2007 (App. O:1-3), without any participation by already assigned counsel (App. T-2; Jan. 25, 2019 Trans. 62-1 to 63-3; App. S-1; S-2; S-3(a)), clearly another flagrant Fundamental Miscarriage of Justice, supra at Fn. 1, p. 2.

Finally, on January 25, 2019, Superior Court of New Jersey assessed merit of what should have been assigned counsel, Emile Lisboa's Oct. 15, 2018 interlocutory discovery motion and related

argument [App. X-3(a):146-161], still neglecting to rule on merit of Petitioner's May 8, 2007 Motion (App. T-1; May 4, 2007 Trans. 43:18-21; App. X-3(b):209-217; Z-3(a):72-286), supplementing first post-conviction relief record pursuant to N.J.C.R. 1:7-4(b), thereby, depriving him of due process and assignment of counsel guaranteed by First, Sixth and Fourteenth Amendments of U.S. Constitution, warranting Certiorari to correct resulting fundamental miscarriage of justice.

REASON FOR GRANTING THE PETITION

For sake of brevity, in support of instant Petitioner for Certiorari, Petitioner will rely on following: ((1) Brief with appendix filed by assigned counsel, Monique Moyse, before Superior Court of New Jersey/ Appellate Division's Dec. 14, 2020 Brief with appendix (App. V:1-2); (2) assigned counsel, Monique Moyse's Nov. 9, 2021 Letter in lieu of Formal Petition for Certification Supreme Court of New Jersey (App. W:1-4); (3) Petitioner's Feb. 25, 2021 pro-se supplementary brief with appendix filed before Superior Court of New Jersey (App. X:1-35; X:1-351); (4) Petitioner's March 13, 2021 Reply brief (App. Y:19); and, (5) Petitioner's Feb. 16, 2022 supplementary brief with appendix filed before Supreme Court of New Jersey (App. Z-2:1-20; Z-3:1-293), repeated and reasserted herein at length).

Additionally, Petitioner humbly submits the following:

First, Superior Court of New Jersey/ Appellate Division's Oct. 13, 2021 Order (App. P-2:1-6) deprived Petitioner of his right to complete defense (476 U.S. 690), i.e., affirming lower court's Jan. 25, 2919 order (App. P-1), after this court arbitrarily failed to assess merit of first PCR Pro-se supplementary Point II Discovery request (App. T-1; May 4, 2007 Trans. 56:15 to 57-9), acknowledged as received by Judge: "The Court received the volumes from your client [App. T-1; May 4, 2007 Trans. 2:22-23)]". But immediately, arbitrarily refusing ruling, i.e., answering to Garcia:

"I did file a motion for discovery specifically requesting

that a copy of the original videotape that was described by the Detective Domboski [App. X-3(a):121-122]' --- Judge: "I don't have the papers on that ... I will deny that motion" [App. T-1; May 4, 2007 Trans. 56-15 to 57-19]".

Thereafter, capriciously neglecting to assess merit of discovery request Point II of Petitioner's May 8, 2007 Motion (App. Z-3: 73; 174-182; 72-286), supplementing first PCR record, timely and properly filed pursuant to N.J.C.R. 1:7-4(b) [App. Z-3:82]. Thereby, rendering original wedding videotape unavailable and unsupported by the record Superior court of New Jersey/ Appellate Division's Oct. 13, 2021 finding: "\*\*\*The entire videotape was available to defendant and his counsel before trial and was also available during defendant's direct appeal and his first PCR petition [N.J. Super.'s Dock. # A-3575-18; Op. p. 5 (App. Div. (Oct. 13, 2021); App. P-2:5]".\*\*\*

Here, it should be noted, that Petitioner's May 8, 2007 Motion (App. Z-3: 73; 174-182; 72-286) filing was deliberately delayed by Superior Court of New Jersey/ Law Division, in flagrant violation of "N.J.C.R. 3:22-7: "Criminal Division Manager shall make entry of the filing ... and shall promptly notify ... presiding Judge", thereby, preventing assessment of ineffective assistance of trial and first PCR counsels issue, e.g., failure to seek forensic testing of wedding videotape, State's evidence-in-chief; <sup>Fn. 1</sup> "within the context of

<sup>Fn. 1</sup> State v. Garcia, No. A-3939-01T2 (App. Div. May 11, 2004), cert. den. 181 N.J. 545; 573-574; 589 (2004)): "Whether or not defendant was assaulted prior to the shooting and the immediacy of the shooting were key issues in this case where jury had the lesser offenses of manslaughter to consider. (...) the video

evidentiary hearing to support such judicial findings. State of New Jersey v. Askia Nash, 2013 N.J. LEXIS 79 (Jan. 22, 2013)"; even disregarding assigned counsel, Assistant Deputy Public Defender, Emile Lisboa's new technology argument [App. T-2; Jan. 35, 2019 Trans. 37-24 to 38-25]", instead, giving deference to ruling in civil OPRA proceeding, despite issuing judge's remark: "This is not a criminal proceeding where there are constitutional [rights]", flagrant fundamental miscarriage [498 U.S. 927] of justice, warranting granting of Certiorari;

Second, Superior Court of New Jersey/ Appellate Division's Oct. 13, 2021 Order (App. P-2:1-6) deprived Petitioner of his right to due process of law and the assistance of counsel, guaranteed by the First, Sixth and Fourteenth Amend. U.S. Const.,

tape constituted objective proof of the timing and sequence of what occurred [Emphasis added.]"

i.e., affirming lower court's Aug. 25, 2016, March. 3, 2017, and March 28, 2017 (App. 0:1-3), all arbitrarily entered without any participation by already assigned counsel (App. T-2; Jan. 25, 2019 Trans. 62-1 to 63-3; App. S-1; S-2; S-3(a)), denying Petitioner's May 8, 2007 Motion (App. Z-3:72-286), supplementing the first PCR (App. T-1; May 4, 2007 Trans. 43:18-21; App. Z-3:82) record, filed pursuant to N.J.C.R. 1:7-4(b) [App. Z-3:82], whereby, Point I raised: "The initial collateral proceeding raising ineffective assistance [466 U.S. 668] of counsel [which] is equivalent [545 U.S. 617] to direct [545 U.S. 617] appeal", even disregarding lower court's deliberate failure to comply with N.J.C.R. 3:22-7, supra at above page 2, which again, prevented "assessment within the context of evidentiary hearing" of ineffective assistance of counsel, i.e., failure to seek forensic testing of wedding videotape, State's evidence-in-chief, flagrant fundamental miscarriage [498 U.S. 927] of justice,<sup>Fn. 2</sup> warranting granting of Certiorari;

Third, on October 13, 2021, Superior Court of New Jersey/

Fn. 2 Carter v. Gills, 2004 U.S. Dist. LEXIS 22301: "A federal court may review a procedurally defaulted claim where Petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims would result in a Fundamental Miscarriage of Justice. "Cause" sufficient to excuse procedural default require a showing that some objective factor, outside the Petitioner's control prevented compliance with [New Jersey] procedural rules. "Actual Prejudice" occurs when an error had cause the actual and substantial disadvantage of Petitioner's Fundamental Injustice has been defined to encompass instances in which newly discovered evidence make it more likely than not that a reasonable juror would find a Petitioner not guilty."

Appellate Division summarized issue presented by Petitioner as follows: "His current [assigned appellate] counsel submitted a brief making one argument 'The trial court erred in denying Mr. Garcia's motion to compel production of discovery [App. P-2:4-5]" ... 'Defendant submitted his own brief [App. X:1-3] in which he argued':

A. [The] January 25, [2019] adverse order [App. P-2:6] flagrantly violate[d] appellant['s] constitutional rights to due process of law, because it is capricious, unreasonable and unsupported by sufficient competent evidence in the record [court's deliberate failure to comply with N.J.C.R. 3:22-7, i.e., timely filing and assessing merit of Petitioner's May 8, 2007 Motion supplementing First PCR Record [App. X:3(b):209-217; Z-3:1-184-351], [thereby, depriving Petitioner of his right to due process of law, guaranteed by Sixth and Fourteenth Amendment of US. Constitution], warranting reversal and remand in best interest of justice;

B. [The judge [] entered orders dated August 25, 2016, March 3, 2017, and March 28, 2017, [issued] without any participation by already assigned counsel [App. T-2; Jan. 25, 2019 Trans. 62-1 to 63-3; App. S-1; S-2; S-3(a)], thereby, subjecting appellant to "[F]undamental [498 U.S. 927 (1990)] miscalriage of justice", violating his right to counsel guaranteed by the Sixth and Fourteenth Amendments [to the] U.S. Constitution.

[N.J. Super.'s Dock. # A-3575-18; Op. pp. 4-5 (App. Div. (Oct. 13, 2021); App. P-2:4-5]"

Following Superior Court of New Jersey/ Appellate Division's finding:

We agree with the motion judge that reproducing the video could not support any new argument that would not be procedurally barred and that any issue concerning the video could not constitute newly discovered evidence ... While New Jersey courts have the inherent power to order discovery when justice requires it, See, State v. Marshall, 148 N.J. 89, 270, (1997), defendant's motion did not support an invocation of that extraordinary remedy. Affirmed [N.J. Super.'s Dock. # A-3575-18; Op. pp. 4-5 (App. Div. (Oct. 13, 2021); App. P-2:4-5]"

This Superior Court of New Jersey/ Appellate Division's Oct. 13, 2021 ruling is clearly unreasonable, capricious, arbitrary and unsupported by sufficient credible evidence in the record, particularly, noting that court's finding: "the video could not support any new argument that would not be procedurally barred", must be viewed in light of lower court's deliberate failure to comply with N.J.C.R. 3:22-7, supra at above page 2, i.e., timely filing and ruling on merit of Petitioner's May 8, 2007 Motion, supplementing first post-conviction relief record pursuant to N.J.C.R. 1:7-4(b) (App. T-1; May 4, 2007 Trans. 43:18-21; App. X-3(b):209-217; Z-3(a):72-286), "made not later than 20 days after service of final [May 4 2007 order [App. C-1]]", and/or for "New Trial based on Newly Discovered Evidence 'may be made at any time' [N.J.C.R. 3:20-2]", i.e., International Media Service's April 4, 2007 forensic expert analysis and report (App. X-3:94-108), As evidenced by accompanying appendix, this motion was received twice by Superior Court of New Jersey/ Law Division, Bergen County Prosecutor and New Jersey Public Defender: first on May 24, 2007 (App. X-3(b):209-213); and second, on August 7, 2007 (App. X-3(b):214-217).

Neither, the May 8, 2007 nor August 7, 2007 packages appear on court's Aug. 16, 2014 log. (App. X-3(b):271-272), evidencing Superior Court of New Jersey/ Law Division's failure to file this motion as of April 16, 2014. This court's inaction or abuse, i.e., deliberate failure to comply with N.J.C.R. 3:22-7, prevented assessment within context of evidentiary hearing of counsels's ineffectiveness, e.g., failure to seek forensic testing wedding videotape, State's evidence-in-chief, thereby, subjecting Petitioner to "fundamental State v. Laurick, 498 U.S. 927 (1990); Black Law Dictionary at 697] miscarriage of justice", thereby, triggering the procedural bar exemption resulting in light of Carter v. Gills, 2004 U.S. Dist. LEXIS 22301, supra at Fn. 1, and also in light of N.J.C.R. 3:22-4[5]:

"As to application of the procedural bar of the rule to claim of ineffective assistance of counsel, ordinarily exempt under subsection (c) ... cautioning as well against disposition on procedural grounds for foreclosing federal habeas corpus review in accord with Harris v. Reed, 489 U.S. 255 (1989)"; "Exception to foreclosure: (1) if the ground for relief [Martinez v. Ryan, 2012 U.S. LEXIS; 23 Fla. L. Weekly Fed. S 175: "where the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise the ineffective assistance claim, the collateral proceeding is the equivalent of a prisoner's direct appeal as to that claim (...)" Halbet v. Michigan, 545 U.S. 605, 617, 125 S.Ct. 2582, 162 L.2d 552] could not have been raised on direct appeal; (2) the enforcement of the bar would result in Fundamental Injustice; (3) the denial of relief would be contrary to the Constitution of the United States or the State of New Jersey."

Consequently, having objectively demonstrated Superior Court of New Jersey/ Law Division's failure to comply with

N.J.C.R. 3:22-7, i.e., timely filing Petitioner's May 8, 2007 Motion (App. T-1; May 4, 2007 Trans. 43:18-21; App. X-3(b): 209-217; Z-3(a):72-286), supplementing first PCR record pursuant to N.J.C.R. 1:7-4(b), through which per New Jersey scheme he was able to raise ineffective assistance of counsel for the first time, causing instant matter to fall within reach of following holdings:

'where counsels [Michael Paul, Phillip Lago, Emile Lisboa, and Jillian Elko] in the initial-review collateral proceedings [for claims of ineffective assistance at trial, direct appeal and first PCR], where that claim should have been raised were [egregiously] ineffective [App. T-2; Jan. 25, 2019 Trans. 5:15; 16:23-24; App. P-24-5] under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984)." See, Halbet v. Michigan, id. at 545 U.S. 605, 617; Trevino v. Thaler, id. at 133 S.Ct. 1911, 185 L.Ed.2d 1044 (5/28/13); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984): "a procedural default will not bar a federal habeas corpus from hearing substantial claim of ineffective assistance of counsel (IATC) [because], in the State initial review collateral proceedings... [assigned counsels were constitutionally ineffective [App. T-2; Jan. 25, 2019 Trans. 16:23-24]", Martinez v. Ryan, 2012 U.S. LEXIS; 23 Fla. L. Weekly Fed. S 175: "where [in New Jersey] the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise the ineffective assistance claim, the collateral proceeding is the equivalent of a prisoner's direct appeal as to that claim (...)" Halbet v. Michigan, 545 U.S. 605, 617, 125 S.Ct. 2582, 162 L.2d 552.

Here, it should be noted, that it was not until June 1, 2016, when Superior Court of New Jersey/ Law Division referred Petitioner's May 8, 2007 (App. T-1; May 4, 2007 Trans. 43:18-21; App. X-3(b): 209-217; Z-3(a):72-286), supplementing first PCR Record pursuant to N.J.C.R. 1:7-4(b), to New Jersey Public

Defender for assignment of counsel (App. S-1), Emile Lisboa, who filed sworn certification before Law Division attesting under oath:

"As the Court may be aware, in 2017 the Office of the Public Defender reviewed Mr. Garcia's requests and pro-se motions concerning certain video evidence utilized at his trial and agreed that said motions have merit [App. S-3(b):1-3]."

Thereafter, assigned counsel reported to PCR court:

(1) "The Public Defender was so compelled by Mr. Garcia's presentation, but also the law that Our Office has decide to take [It]" [I]t is our position that the [first] PCR attorney [we appointed] was ineffective [e.g., "render[ing] aid and support to the State's opposition" contrary to Rue, 175 N.J. at 19, <sup>Fn. 3</sup> when he indicated to the Court: "[the video] wasn't tainted at all ... It is nothing in there relative to disparity of the language that was transcribed between the actual transcript of the tape and what my client's expert's is [App. X-3(a): 101-109; 110-111; 123-133] is [App. T-1; May 4, 2007 Trans. 4:2-3; 20-23]; App. T-2; Jan. 25, 2019 Trans. 5:15; 16:23-24"].

(2) "... [I]t is our position that the [first] PCR attorney was ineffective[!]" ... [App. T-2; Jan. 25, 2019 Trans. 16:23-24]";

(3) "If you take a look at what the previous expert had translated out, the substantial -- the substantial dialogue, substantial screening, there's a thud [detected by Forensic Expert at camera clock number: "[00:18.19 or 66 seconds before first shot firing] [Sound of a thud or dull sound of a heavy object striking a solid surface [App. X-3(a):103=16], there is a thud before the shot, okay, which if presented to the jury would have corroborated other evidence in the case -- [App. T-2; Jan. 25, 2019 Trans. 26-21 to 27-1]";

<sup>Fn. 3</sup> N.J.C.R. 3:22-6[2]; State v. Rue, 175 N.J. 1, 16-17 (2002): "Disapproving of the contrary suggestion of State v. Clark, 260 N.J. Super. 559, 562-564 (App. Div. 1992), made plain that counsel is not at liberty to concede lack of merit but rather is obliged to state defendant's argument without expression of counsel's own opinion of their worthlessness, leaving the ultimate determination to the judge.

(4) "[N]otwithstanding the translation issue, but what the jury was presented is essentially Mr. Garcia walking and firing a shot, that basically the whole case, okay ... Now, if you take a look at what the previous expert had translated out [App. X-3(a):101-108; 124-133], the substantial dialog, substantial screening, there's a "[00:18.19 or 66 seconds before first shot firing] [Sound of a thud or dull sound of a heavy object striking a solid surface [App. X-3(a):103-16], before the shot, okay, which if presented to a jury would have corroborated other evidence in the case --- [App. T-2; Jan. 25, 2019 Trans. 26-17 to 27-1; 64:6-9];

(5) "[M]y position is that pursuant to my obligation to deliver effective assistance ... and in my effort to investigate whether or not there is bona fide motion for a new trial based upon new evidence ... I can't do my job ... So. 'I'm being ... rendered [ineffective by you!]'; [App. T-2; Jan. 25, 2019 Trans. 36-23 to 37-7]";

(6) "You know, and -- again, if my position always with the -- the prosecutor's office has been ... if they have nothing to hide then turn it over and it -- it's right there-- [App. T-2; Jan. 25, 2019 Trans. 35:11-15]";

(7) "[P]owers that be in my office who assigned me this task after reviewing much of this, is that it does appear to have been a struggle prior to the shots going off. The -- the understanding may be that if that can be enhanced, okay, that if some of the background noise can be taken out, some of the voices can be enhanced, it may well just corroborate, okay, the defense originally at the trial which is that Mr. Garcia [was] hit first before this whole thing went down, okay. So, again, this was back in the day, 2007 technology, we're now in 2019, judge, we can do so much more with enhancements ... you know, digitized. So, again, judge, this may be completely, you know, non-fruitful once we get it. It could be completely exculpatory and gray material in the -- in the same vein, but I can't do anything. I can't do anything with it at all if I don't have a copy of -- the video -- which again, I don't think it too onerous to the Pros -- how much could it cost to -- to burn me a copy [App. T-2; Jan. 35, 2019 Trans. 37-24 to 38-25]";

(8) "When you have a video which then has [detected by Forensic Expert at camera clock number: "[00:18.19 or 66 seconds before first shot firing] [Sound of a thud

or dull sound of a heavy object striking a solid surface [App. X-3(a):103-16], and "[Sound consistent with] Fn. 4 [is heard at time of entry [App. struggle] X-3(a):95;97], which is not presented to the jury [App. T-2; Jan. 25, 2019 Trans. 40:24-25]".

(9) "[T]his was discovered after trial. This enhancement with this transcript [App. X-3(a):101-109], by a certified interpreter [[App. X-3(a):108; T-2; Jan. 25, 2019 Trans. 29-23 to 30-2]".

Alternatively, Petitioner humbly argued, that contrary to New Jersey Appellate Division's finding, the retesting of original wedding videotape would have uncovered the existence of a second video tape never mentioned in court or concealed by prosecutor, which was detected through Team Audio Inc.'s Oct. 21, 2020 preliminary forensic draft:

a) "11:00 interesting shot of other cameraman appears, who is him? Where is this video?"; (b) "13:58 1st shot fired of the five shots fired, together ... with dialog of Augustin professing his love "My love ... I love you, Lilly [App. X-3(a):130;133; U-1109] ..."

This res gestae deletion from transcript handed by prosecutor to the Jury (App. X-3(a):110-111), of material and relevant exculpatory evidence remained hidden from the Jury due to defense counsel's failure to seek forensic testing of

Fn. 4 In an interview published in The Record Newspaper, a juror related the following: "The jury searched the video tape for signs of self-defense, replaying it several times, at least once in slow motion, said the juror who was interviewed. Using a watch and counting 'one Mississippi, two Mississippi,' they timed the interval between Garcia's knock at the door and the first shot: 'four second' she said. 'There just wasn't enough time for him to be attacked and respond' said the juror, 'we tried to hear and didn't hear (any) of that [App. X-3(a):112]'"

wedding videotape, despite their own statement arguing to the Court as to why the videotape should not be admitted, Appellant's Counsel, Oliver, stated:

(1) (Y)our Honor, the tape to a certain extent is prejudicial, also because it only captures the minute where -- or the seconds in which the Appellant approaches the decedent. It doesn't catch and it doesn't give you the affect of what happened at the door. It doesn't give you the affect of the altercations that occurred prior to that... (App. T-0(b); Mar. 22, 2001 Trans. 9:17-23) (Emphasis added);

(2) "As a matter of fact in the tape itself, for us to hear that statement, Mr. Jerejian and I when we review it, we had to play the tape over 50 times. (Emphasis added) --- so, in other words, to the ear, without -- just as without -- just as with the shooting, you can't see it in the normal sequence, you have to watch it in slow motion." (Emphasis added) (App. T-0(a); Mar. 1, 2001 Trans. 13:1-4; 14:10-13)

Judge stated, concerning his viewing of tampered wedding video tape copy introduced into evidence by prosecutor:

(1) "My other concern with the sound is with these cuts, it makes continuity-- that's one of the other factors I have. I'm not sure with checking this with the video on, that each one flows into the others (...)" [Emphasis added] (App. T-0(a); Mar. 1, 2001 Trans. 15:20-24); (2) "if I were to resolve [video timing] I would agree with [defendant] It's more than four seconds long on the videotape." (Emphasis added) (App. T-1; May 4, 2007 Trans. 49:16-17)

Surprisingly, defense counsel failed to seek critically needed forensic testing. Strickland v. Washington, 104 S.Ct. 2052, 2066 (1984): "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." After trial, petitioner's

family hired the service of International Media Service to perform forensic testing of wedding video tape. This analysis revealed that wedding video tape had in fact been tampered, deleting over one minute of video between Petitioner's knock at door and the first shot: first, deleting evidence of the struggle detected by forensic expert: ("sounds consistent with a struggle is heard at the time of entry. 26 seconds prior to the shooting a struggle is heard on the videotape upon entry of the house by defendant [App. X-3(a):95]."; and, second, altering and concealing critical exculpatory res gestae (App. X-3(a):124-133), among other...

Based on foregoing, Petitioner humbly submits, that contrary to Superior Court of New Jersey/ Appellate Division's Oct. 13, 2021 finding: "video could not support any new argument that would not be procedurally barred", Because Petitioner's May 8, 2007 Motion, supplementing first PCR record, pursuant to pursuant to N.J.C.R. 1:7-4(b), instant matter, was part and parcel of the first PCR, the correct assessment should have been in the light of State v. Nash, 212 N.J. 518, 535 (Jan. 13, 2013):

"[E]vidence clearly capable of altering the outcome of a verdict that could have been discovered by reasonable diligence at the time of trial would almost certainly point to ineffective assistance of counsel ... '[We] would not require a person who is probably innocent to languish in prison because the exculpatory evidence was discoverable and overlooked by a less than reasonable diligent attorney.  
See, Strickland v. Washington, 466 U.S. 668 (1984) (stating

that grant of new trial because of ineffective assistance of counsel depends on whether result would have been different but for counsel's deficiency.

Consequently, Petitioner humbly beg this Honorable Court to grant him Certiorari to correct resulting fundamental miscarriage of justice.

Petitioner relies upon the Briefs submitted to the Superior Court of New Jersey/ Appellate Division, specifically identified on above first paragraph, for further explication of the issues involved, and respectfully requests permission to file a supplemental brief should this petition for Certiorary be granted.

Petitioner, Agustin Garcia, humbly beg the court to relax the Rule and not hold him to the same stringent standard as that of a practicing attorney with regards to the construction of these pleadings, citing Haines V. Kerner, 44 U.S. 519.; Estelle V. Gamble, 429 U.S. 97, 106 (1976); Neitzke V. Williams, 490 U.S. 319, 330 n.9 (1989); Roman V. Jeffes, 904 F. 2d 192, 197 (3rd Circ. 1990).

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Executed on 6/30/22

[date]

  
Agustin Garcia/ SBI # 822642-B/ 428336  
East Jersey State Prison  
Lock Bag R, Rahway, N.J. 07065

CERTIFICATE OF PRO SE COUNSEL

Agustin Garcia, pro se, hereby certifies that the statements of fact in the accompanying Petition and Certiorari are true to his knowledge and that statements made on information and belief are true to the best of his knowledge and belief.

Respectfully submitted,

  
Agustin Garcia/ SBI # 822642-B/ 428336  
East Jersey State Prison  
Lock Bag R, Rahway, N.J. 07065

Date: 6/30/22