No. 22-5383

---

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

---

October 2021 Term

**LYNN GIOVANNI** - PETITIONER

(Your Name)

Vs.

**STATE OF NEW JERSEY** - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

---

(NAME OF THE COURT THAT LAST RULED ON THE MERITS OF YOUR CASE)

**NEW JERSEY SUPREME COURT**

PETITION FOR WRIT OF CERTIORARI

Lynn Giovanni, Pro Se, $511483D
(Your Name)

Edna Mahan Correctional Facility, 30 County RT. 513
(Address)

Clinton City, N.J., 08809
(City, State, Zip Code)

(908) 735-7111
(Phone Number)

## QUESTION(S) PRESENTED

QUESTION ONE:

DOES THE ACTION/INACTION OF DEFENSE COUNSEL, IN FAILING TO UTILIZE OR UNDER-UTILIZING THE FAVORABLE PSYCHATRIC REPORTS COMPILED FOR THE DEFENSE IN ASSERTING AN INSANITY/DIMINISHED CAPACITY DEFENSE AT TRIAL, AND/OR AS MITIGATING FACTOR(S) DURING SENTENCING, CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL AND A VIOLATION OF THIS COURT'S HOLDING IN *STRICKLAND V. WASHINGTON,* 466 U.S. 668, 104 S.Ct. 2052 (1984) TO JUSTIFY WITHDRAWAL OF HER GUILTY PLEA OR A REDUCTION NI HER SENTENCE?

## LIST OF PARTIES

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

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

(1) Union County Prosecutor's Office, 32 Rahway Avenue, Elizabeth, N.J., 07202

(2) Office of the Attorney General, State of New Jersey, 25 West Market St., P.O. Box 112, Hughes Justice Complex, Trenton, N.J., 08625

(3) Supreme Court of New Jersey, P.O. Box 970, Hughes Justice Complex, 25 West Market Street, Trenton, N.J., 08625

## TABLE OF CONTENTS



## INDEX TO APPENDICES

## TABE OF AUTHORITIES CITED

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[ ] is unpublished.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[ ] is unpublished

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

The opinion of the highest state court to review the merits appears at Appendix B,C to the petition and is:

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[X ] 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 certiorari was granted to and including _____ (date) on _____ (date) in Application Number _____.

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

The date on which the highest state court decided my case was November 12, 2019.

A copy of that decision appears at Appendix B and C.

[ ] 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 Number. _____ _____.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) United States Constitution Amendment Six (Assistant of Counsel)

(2) United States Constitution Amendment Fourteen (Due Process)

## STATEMENT OF THE CASE

This case involves the tragic death of a child named Nicole Giovanni, the daughter of the petitioner. On February 6, 2005, petitioner was alleged to have killed her 14-year old daughter with a hammer. Immediately after the homicide, petitioner drove her own car into a guardrail; in an attempt to kill herself. According to a police report, petitioner was heard to have stated "I killed my daughter this morning...I hit her over the head with a hammer." Once police report indicated that petitioner had swallowed "eight bottles of pills" in a suicide attempt. Petitioner was noted to have slurred speech, appeared disoriented and the smell of alcohol was in the vehicle. There is some dispute as to whether petitioner was ever given *Miranda* warnings by police at the scene of the accident.

Petitioner was arrested and taken to Overlook Hospital in Summit, N.J. on February 6, 2005. She was diagnosed by the medical personnel as suffering from major depressive disorder, and that her behavior was influenced by delusions or hallucinations. After being treated, petitioner was taken to Roselle Park Police Headquarters for questioning. She was arrested and charged with the crimes of murder under NJSA 2C:11-3a(1),(2); Possession of a Weapon for Unlawful Purpose under NJSA 2C:39-4d; and Unlawful Possession of a Weapon under NJSA 2C:39-5d. She was later indicted on Union County Indictment 05-09-01032. After giving a statement to police, she was next transferred to Ann Klein Forensic Center in Trenton for an evaluation and treatment. Law enforcement tried to interview her at that location and did administer *Miranda* warnings this time. Petitioner admitted having killed her daughter by striking her in the head with a hammer. She stated that "I realize I'm going to be put in jail for murder and I hope they put me in the gas chamber...all I did today was to try and put my

daughter and me out of misery:" he death of Nicole Giovanni apparently was the culmination of a downward spiral in which the petitioner lost her job, her home, her ability to relate to family members due to a major depressive episode. Petitioner evidently believed that both she and her daughter would find relief in Heaven after the deaths. Petitioner was diagnosed as suffering from severe depression, with suicide attempt. Petitioner was found to be "somewhat paranoid," yet logical with impaired insight and impaired judgment. Her general level of functioning was found to be highly impaired. She later expressed the feeling to Ann Klein staff that the medications she was receiving were not working and expressed feelings of hopelessness.

Peter Liguori of the Union County Public Defender was assigned to represent petitioner. Liguori first visited petitioner when she was still confined at Ann Klein Forensic Center. He observed that her mental state at the time was extremely poor and that she had little understanding of or interest in the criminal charges against her. However, during her stay at Ann Klein, petitioner's medications were adjusted and she began to improve. Petitioner upset, remorseful and understand the nature and potential consequences of her actions.

Defense counsel retained two psychiatric experts to examine petitioner. Dr. Alan Goldstein reported that petitioner had no recall of having been taken to Overlook Hospital nor the Roselle Park Police Headquarters on the day of her arrest. She did recall hitting her daughter with the hammer and that she felt "totally crazed and panicked. She then took an overdose of pills and lay down in bed and awakened a short time later and getting into her car. Her intent was to kill herself. Dr. Goldstein opined that petitioner was in the midst of a psychotic episode at the time of the homicide; Bipolar II disorder, severe depression with psychotic features.

Dr. Kenneth Weiss also examined petitioner for the defense. . Dr. Weiss concluded that

at the time of the homicide, petitioner was laboring under a defect of reason, and suffered from severe depressive episode, with psychotic features, and that she did not know what she was doing was wrong. Dr. Weiss believed that the depression was so severe that petitioner had lost the ability to distinguish right from wrong.

The state retained Dr. Abad to conduct several psychiatric examinations of petitioner; these sessions were taped. . Dr. Weiss sat in on these examinations and reported afterward to defense counsel that the session had not "gone well." The exact meaning of this is not explained. However, the interviews with Dr. Abad created a change in the attitude of defense counsel. Mr. Liguori assumed that Dr. Weiss meant that Dr. Abad disagreed with the defense experts' diagnosis. Within a few days after Dr. Abad concluded his examinations, Mr. Liguori received word that petitioner wanted to see him. He then visited her at the Union County Jail, According to Mr. Liguori's impression, petitioner was upset and believed that Dr. Abad's interview had gone badly. Liguori testified at the state court post-conviction relief evidentiary hearing that petitioner told Liguori that "she couldn't take it anymore," that the situation was taking a toll on herself and her family and that she wanted to resolve the matter by pleading guilty.

Liguori testified at a state court post-conviction relief evidentiary hearing that he believed that an insanity defense was not in petitioner's interests and told her so. Mr. Liguori told petitioner that in his experience, even if an insanity defense was successful at trial, the defendant is committed to a secure psychiatric hospital for a length of time comparable to that served in prison after a conviction. Mr. Liguroi believed that petitioner's bets chance lay with a diminished capacity defense which could result in a conviction for aggravated or even reckless manslaughter rather than murder. Liguori believed the key to this defense was to obtain an order

from the court to suppress petitioner's statement to the police based upon her severely debilitated mental state at the time of the statement. Mr. Liguori believed that if the statement was suppressed, he had a good change to negotiate a plea calling for a much shorter prison sentence.

Mr. Liguori testified that he had not told petitioner that if she were found not guilty by reason of insanity and were committed, periodic hearings under *State v. Krol*, 68 N.J. 236 (1975), would be required to ascertain whether petitioner remained a danger to herself and/or others and that she would remain confined if found to remain a danger. Mr. Liguori failed to inform his client about this because of his belief that, regardless of periodic court reviews, a person found not guilty by reason of insanity remains committed for practically the same length of time that defendant would have served in prison after conviction at trial.

According to Liguori, petitioner very upset when she was informed that she would need t submit to a psychiatric examination by the prosecutor. He testified that he at first tried to persuade petitioner not to plead guilty at this stage of the case because the state's first plea offer was so punitive that it was little improvement on the sentence she might received from the court if convicted at trial. However, petitioner insisted she wanted to plea guilty.

Petitioner, however, insisted that it was defense counsel Liguori, not herself, who was disheartened after the evaluation by Dr. Abad, and urged her to consider a guilty plea.

After that jail meeting, Mr. Liguori contacted the prosecutor and arranged to enter the guilty plea. Petitioner would plead guilty to the crime of aggravated manslaughter and be sentenced to a term of 30 years (the maximum available for that particular crime), subject to the 85% parole ineligibility stipulation required by New Jersey's No Early Release Act (NERA), NJSA 2C:43-7.2. Petitioner provided a factual basis and answered questions about her mental

state. She did not state that she was not insane at the time of the homicide, and did not state that her capacity to act knowingly or purposely was not diminished. The court, in its plea colloquy, did not explain to petitioner that by entering a plea of guilty, she was waiving the right to assert a diminished capacity or insanity defense and the right to require the State to prove that she had acted with the *mens rea* required as an element of the crime. Petitioner's guilty plea was accepted by the court on October 3, 2006 and she was sentenced on December 1, 2006.

Petitioner did not take any direct appeal from her conviction/sentence. She did, however, file a post-conviction relief petition in state court in 2009. Petitioner argued that she had received constitutionally ineffective assistance of counsel because her assigned attorney's erroneous and misleading advice regarding the viability of the insanity/diminished capacity defense and the lack of any advice about the requirement for periodic *Krol* hearings. She sought to withdraw her guilty plea entered in 2006 and to proceed to trial. Alternatively, she sought a reduction in her sentence based upon counsel's failure to aggressively argue the mental health issue as an important mitigating factor. The matter eventually resulted in an evidentiary hearing on April 20, 2011. The PCR judge denied the application for post-conviction relief. The judge found that there was no expert evidence adduced during the PCR proceedings to support her claim that her debilitated mental health status was responsible for her decision to plead guilty. Importantly, the subject of whether or not the trial court was required to engage in a plea colloquy with the defendant about whether she must be made aware that she was waiving an insanity defense, something the New Jersey Supreme Court required to be done in *State v. Handy*, 215 N.J. 334 (2013), would be retroactively applicable to petitioner's PCR decision. [1]

[1] The intermediate state appellate court addressed this subject in the case of *State v. O'Donnell*, 435 N.J. Super. 351 (A.D. 2014), where it ordered a full evidentiary hearing on the defendant's claim that the defendant had presented a colorable claim of innocence based upon diminished capacity and insanity to justify setting aside her guilty plea. Both the *Handy* and *O'Donnell* cases were decided after petitioner's conviction became final.

The PCR judge denied the petition in its entirety.

On appeal, the Superior Court, Appellate Division, affirmed the decision to deny the PCR application, but remanded for reconsideration on the application to withdraw the guilty plea. *State v. Giovanni,* App. Docket A-1877-11 (A.D. 2014). After remand, the Union County Superior Court conducted hearings on June 2, 2015 and October 14, 2015. On March 18, 2016, that court entered a written decision and order denying the motion to withdraw the guilty plea. On appeal from that order, the Superior Court, Appellate Division affirmed the PCR court's denial of the motion to withdraw the guilty plea. *State v. Giovanni*, 2019 N.J. Super. Unpub. LEXIS 1088 (A.D. 2019) On the date of November 18, 2019, the New Jersey Supreme Court denied certification to review the matter. *State v. Giovanni,* 240 N.J. 152 (2019).

Petitioner next turned to the United States Supreme Court, filing a *pro se* petition for certiorari on or about February 18, 2020 (when the COVID-19 crisis was taking hold in America). The documents were returned to petitioner by the Clerk of the Court because:

1. There was no affidavit of indigency included;
2. The petition failed to comply with Rule 14 (improper formatting of petition)
3. The appendix was deficient in that there was no copy of the lower court opinion;
4. No affidavit or proof of service.

Petitioner then embarked on a long, frustrating attempt to obtain competent legal assistance from the prison paralegals. On February 25, 2020, she tried writing to the paralegal in the maximum/medium section of the prison (petitioner is confined in the full minimum custody section) and asking for assistance; the prison education director (who supervises the activities of paralegals) evidently refused to deliver the request. Petitioner tried contacting the

Supreme Court Clerk to request some assistance but this avenue was a dead end. It was not until June 2022, when a new education director was assigned and agreed to transport petitioner's documents to the maximum/medium section of EMCFW, that petitioner was able to obtain the assistance she had sought for more than a year.

Based upon the submissions and documents available, it appears that the Supreme Court Clerk never filed petitioner's petition for certiorari in 2020. Petitioner now requests this Court to grant certiorari and review the matter.

## REASONS FOR GRANTING THE WRIT

This Court has long recognized that a defendant is entitled under the Sixth Amendment of the U.S. Constitution to the effective assistance of counsel at all critical stages of a criminal prosecution. See *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006 (1972)(guilty plea stage); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984)(setting the standard for analyzing claims); *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366 (1985)(extending *Strickland* test to claims of ineffective assistance during process of entry of guilty plea); *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574 (1986)(suppression of evidence); *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473 (2010)(advising defendant of deportation consequences of guilty plea); *Missouri v. Frye,* 566 U.S. 134, 132 S.Ct. 1399 (2012)(failure to communicate plea offer).

The *Strickland* standard requires that : (1) counsel's performance was so deficient that he/she was not functioning as the 'counsel' guaranteed by the Sixth Amendment.; and (2) the defendant was actually prejudiced by counsel's deficient performance.

In the case at bar, petitioner complains that defense counsel made errors in two different ways. First, counsel failed to strongly urge her to not consider pleading guilty at the early stage of the proceedings which turned out to be the case, certainly not before the outcome of a contemplated *Miranda* hearing. Based upon the debilitated mental state of petitioner at the time she spoke with police, counsel believed that there was a change the trial court might rule that her statements to police should be suppressed because she was unable to understand her rights and make an intelligent decision whether to waive her right to remain silent. However, this line of strategy proved to be moot once petitioner pleaded guilty.[2]

---

[2] It should be pointed out that counsel might have tried to negotiate a conditional guilty plea in which petitioner reserved the right to pursue the *Miranda* hearing to suppress her statement and, if denied, appeal the denial of the suppression motion and, if successful, retract her guilty plea and proceed to trial. There is no evidence in the record that this possibility was discussed between defense counsel and the State or counsel and petitioner.

The evidence before the State court indicated that there was a disagreement as to whether the petitioner herself or defense counsel grew cold feet at the prospect of waiting for the trial date to arrive. Defense counsel testified that it was petitioner who insisted upon resolving the case immediately after the evaluation interview with Dr. Abad; petitioner insisted it was counsel who expressed concern about proceeding with the psychiatric defense, and gave petitioner the impression that counsel believed it was necessary to resolve the case quickly. The state post-conviction relief court evidently found that counsel's version of events was the more credible of the two.

It is the responsibility of counsel to advise the defendant about the options available and then allow the defendant to choose the course of action. Counsel claimed that petitioner insisted upon pleading guilty and that he tried to recommend that she wait. However, counsel himself conceded that petitioner suffered from severe mental illness which, while it was improving, still lingered. There is no indication in the record that counsel took this into account and conferenced with either the trial judge or the prosecutor about whether a hearing should be held on whether petitioner was even mentally competent to proceed with entry of a guilty plea. See, e.g. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788 (1960)(per curiam)(granting habeas relief because of insufficiency of the record to support the District Court's finding that the accused was mentally competent to stand trial); *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975)(defendant's due process right to a fair trial was violated by the trial court's failure to suspend the trial pending a psychiatric examination to determine the defendant's competence to stand trial). At the very least, counsel should have insisted upon a competency hearing to ascertain whether petitioner was competent to enter a guilty plea.

The State argued that a reading of the transcripts of the guilty plea and sentencing

hearings indicated that petitioner gave answers which indicated she understood what was happening, entered the plea of her own free will, and later was making a *post hoc* excessive sentence argument and complaining that she should receive a sentence reduction.[3]

The failure of defense counsel to argue for a lesser sentence than thirty years during the sentencing proceeding is another example. In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000), this Court reversed the lower court and held that the accused's right to effective assistance of counsel held violated at his Virginia sentencing hearing in which he received a death sentence. The evidence offered by Williams' trial counsel at the sentencing hearing consisted of the testimony of Williams' mother, two neighbors (one of whom had not even been interviewed by counsel prior to being asked to testify), and a taped excerpt from a statement by a psychiatrist. The three witnesses briefly described Williams as a "nice boy" and not a violent person. The recorded psychiatrist's testimony did little more than relate Williams' statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.

In his cross-examination of the prosecution witnesses, Williams' counsel repeatedly emphasized the fact that Williams had initiated the contact with the police that enabled them to solve the murder and to identify him as the perpetrator of the recent assaults, as well as the car thefts. In closing argument, Williams' counsel characterized Williams' confessional statements as "dumb," but asked the jury to give weight to the fact that he had turned himself in, not on one crime but on four that the police otherwise would not have solved. The weight of defense

---

[3] The pleadings in state court also indicated that petitioner was complaining at some point about a plea offer that would call for a 20year sentence of incarceration. Petitioner seemed to fault defense counsel for not communicating this offer to her. However, the evidence seems to indicate that there was never a plea offer extended for a 20-year sentence, only a 30-year sentence.

counsel's closing, however, was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life.

This was held to constitute ineffective assistance by the U.S. Supreme Court. This Court held that the state courts had unreasonably applied the *Strickland* standard to counsel's performance. In so doing, the Supreme Court explicitly applied the standards of *Strickland* to counsel's performance during sentencing hearings.

*Glover v. United States*, 531 U.S. 198, 121 S.Ct. 696 (1998) represents another example. This Court considered a case where the presentence investigation report prepared by the probation office recommended that the convictions for labor racketeering, money laundering, and tax evasion be grouped together under United States Sentencing Commission, Guidelines Manual 3D1.2 (Nov. 1994), which allows the grouping of counts involving substantially the same harm. The Government, insisting that the money laundering counts could not be grouped with the other counts, objected to that recommendation, and the District Court held a hearing on the matter. The money laundering counts, it ruled, should not be grouped with Glover's other offenses. Defense counsel made no argument against the government's position. The defendant later filed a petition under 28 U.S.C. Section 2255, arguing that the failure of his counsel to press the grouping issue, was ineffective assistance. The performance of counsel, he contended, fell below a reasonable standard both at sentencing, when his attorneys did not with any clarity or force contest the Government's argument, and on appeal, when they did not present the issue in their briefs or call the Wilson decision to the panel's attention following the oral argument. He further argued that absent the ineffective assistance, his offense level would have been two levels lower, yielding a Guidelines sentencing range of 63 to 78 months. Under this theory, the 84-

month sentence he received was an unlawful increase of anywhere between 6 and 21 months. 531 U.S. at 201-202.

The District Court denied Glover's motion, determining that under Seventh Circuit precedent an increase of 6 to 21 months in a defendant's sentence was not significant enough to amount to prejudice for purposes of *Strickland v Washington*. As a result, the District Court did not decide the issue whether the performance of Glover's counsel fell below a reasonable standard of competence. On appeal, the Court of Appeals affirmed. This Court, however, reversed. It held that the Seventh Circuit's precedent that an increase of 6 to 21 months in a defendant's sentence was not significant enough to amount to prejudice for purposes of *Strickland v Washington* was erroneous. The Seventh Circuit erred in engrafting onto the prejudice branch of the Strickland test the requirement that any increase in sentence must meet a standard of significance misapplied the prejudice prong of the *Strickland* test. More importantly, the decision in *Glover* indicates that this Court will not hesitate to find ineffective assistance of counsel where defense counsel falls below an objective standard of reasonableness based upon counsel's failure to make an effective argument for a lesser sentence.

It seems clear that this Court has held that the performance of counsel during sentencing hearings is subject to the *Strickland v. Washington* test. That test should be applied here. The state court's finding that petitioner's defense counsel's performance was not constitutionally deficient. There was a mountain of psychiatric evidence to support a strong argument by counsel that petitioner should be sentenced to far less than the thirty years reached in the plea agreement. The State court's application of *Strickland* was unreasonable and this Court should grant certiorari and assign counsel to represent petitioner.

## POINT TWO

THIS COURT SHOULD ACCEPT THIS PETITION AS WITHIN TIME BECAUSE THE REASON FOR THE DELAY WAS ATRIBUTABLE TO STATE ACTION, NOT TO PETITIONER .

This petition for certiorari is admittedly filed long after the 90-day window specified in Supreme Court Rule 13(1).[4] It is also past the extension prerogative specified in Rule 13(5).[5] However, there is precedent for this Court to consider granting the writ even though both time deadlines have long elapsed.

There are several exceptions to the timeliness rule. First, there is equitable tolling. This doctrine applies when the principles of equity would make rigid application of the statute of limitations unfair. This Court discussed the subject of equitable tolling in the habeas corpus context in *Holland v. Florida*, 560 US 631, 177 L.Ed.2d 130 (2010). This Court recognized that a habeas petitioner is entitled to equitable tolling if he/she can show (1) that he/she has been pursuing his/her rights diligently, and (2) that some extraordinary circumstance stood in his/her way and prevented timely filing. 177 L.Ed.2d at 145. The diligence required for equitable tolling purposes in a habeas case is reasonable diligence, not maximum feasible diligence *Id* at 148.

Here, petitioner actually filed a petitioner for certiorari with the Supreme Court on or about February 18, 2020. This is exactly when the COVID-19 crisis was taking hold in Americ). The documents were returned to petitioner by the Clerk of the Court because:

1. There was no affidavit of indigency included;
2. The petition failed to comply with Rule 14 (improper formatting of petition)

[4] Rule 13(1) requires that a petition be filed within 90 days after entry of the judgment.
[5] Rule 13(5) permits any Supreme Court Justice to extend the time by a period of 60 days for good cause.

3. The appendix was deficient in that there was no copy of the lower court opinion;
4. No affidavit or proof of service.

Petitioner then embarked on a long, frustrating attempt to obtain competent legal assistance from the prison paralegals. On February 25, 2020, she tried writing to the paralegal in the maximum/medium section of the prison (petitioner is confined in the full minimum custody section) and asking for assistance; the prison education director (who supervises the activities of paralegals) evidently refused to deliver the request. Petitioner tried contacting the Supreme Court Clerk to request some assistance but this avenue was a dead end. It was not until June 2022, when a new education director was assigned and agreed to transport petitioner's documents to the maximum/medium section of EMCFW, that petitioner was able to obtain the assistance she had sought for more than a year.

Based upon the submissions and documents available, it appears that the Supreme Court Clerk never filed petitioner's petition for certiorari in 2020. Rather than make accommodation for a pro se petitioner, something which this Court's precedents see to require[6]

This Court has waived the time parameters of Supreme Court Rule 13 previously. In *Schacht v. United States*, 398 U.S. 58, 90 S. Ct. 1555 (1970), this Court waived the time limits of the predecessor rule of Rule 13 when the affidavits showed that the petitioner acted in good faith and that the delay was brought about by circumstances largely beyond his control. In

[6] See *Haines v. Kerner*, 404 US 519, 92 SCT 594 (1972)(United States Supreme Court holds allegations of a pro se complaint to less stringent standards than formal pleadings drafted by lawyers); *Houston v. Lack*, 487 US 266, 108 SCT 2379 (1988)(Pro se prisoner's notice of appeal held filed, for purposes of time limit under Rule 4(a)(1) of Federal Rules of Appellate Procedure, at moment of delivery to prison authorities for mailing to court);

*Durham v. United States*, 401 U.S. 481, 91 S. Ct. 858 (1971), overruled in part, *Dove v. United States*, 423 U.S. 325, 96 S. Ct. 579 (1976), waiver of the rule was proper where (1) subsequent to Court of Appeals affirmance of defendants conviction, he filed a timely petition for rehearing, (2) upon his inquiry to Court of Appeals, he was informed that he would be notified as to disposition of his petition as soon as court acted, (3) when several months had passed without any word, he wrote to Court of Appeals and was informed that his petition for rehearing had been denied about 6 months earlier, and (4) his petition for certiorari was docketed in Supreme Court within 3 weeks after he received notice that his petition for rehearing had been denied. In *Heflin v. United States*, 358 U.S. 415, 79 S. Ct. 451 (1959), this Court held that Although petition for writ of certiorari in criminal case in Court of Appeals was not filed within prescribed time, Supreme Court would dispense with requirements of predecessor to Rule 13 where relief under Rule 35 of Federal Rules of Criminal Procedure allowing court to correct illegal sentence at any time was still available and dispensing of predecessor to Rule 13 would avoid wasteful circuitry. There is ample precedent for this Court to waive the application of Rule 13.

A second grounds for filing beyond the one-year limit may occur when "the date on which an impediment to filing an application created by state action in violation of the Constitution or laws of the United States was removed, if the applicant was prevented from filing by such state action." See 28 U.S.C. Sec. 2244(d)(1)(B). In this particular case, petitioner was denied the access to the paralegals who could assist her in preparing a proper petition for certiorari in 2020 because of the prison education director who refused to permit her to send her legal documents to the maximum/medium section of the EMCFW, which is where the competent paralegals were housed. The NJDOC essentially blocked petitioner from filing the petition for

certiorari within the 90 day time limit of the rule and then NJDOC is a state entity. By way of analogy, petitioner's failure to file her petition for certiorari was due to state action and, under habeas corpus rules, should be reason to excuse her late filing.

Similarly, this Court should waive strict application of Supreme Court Rule 13. Petitioner should be permitted to proceed as within time in this petition for certiorari.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted:

Lynn Giovanni

Date: July 5, 2022