22-6227

No. 22-_____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

PETER CORINES

Appellant/Petitioner, pro se

v.

SUPREME COURT OFTHE STATE OF NEW YORK

APPELLATE DIVISION, SECOND DEPARTMENT

Respondent

On Petition for a Writ of Certiorari

PETITION

Peter J. Corines

Petitioner, *pro se*

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Eastchester, New York 10709

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I. Questions Presented

1. Was Petitioner denied due process and equal protection of the law in violation of Constitutional Amendments V and XIV when the State used known false and material testimony to obtain an Indictment?
2. Was Petitioner denied due process and equal protection of the law in violation of Constitutional Amendments V and XIV when the State knowingly used an Indictment obtained with false testimony to secure a conviction by plea?
3. Was Petitioner denied effective assistance of counsel in violation of Constitutional Amendments VI and XIV when his Attorneys withheld knowledge of false grand jury testimony?

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1. Pattern Jury Instructions: Grand Larceny
2. Pattern Jury Instructions: Identity Theft

IV. PETITION FOR WRIT of CERTIORARI

Peter J. Corines, petitioner *pro se* respectfully petitions this court for a Writ of Certiorari to review the judgment of the N.Y.S Supreme Court, Appellate Division, Second Department affirming his conviction rendered in Supreme Court, County of Westchester, New York April 13, 2022 for Grand Larceny, Attempted Grand Larceny and Identity Theft. The New York State Court of Appeals by Order dated July 11, 2022, denied leave to appeal.

V. OPINIONS BELOW (see Page 4, infra)

A1 Decision and Order affirming Judgment of Conviction was rendered by New York State Supreme Court, Appellate Division, Second Department on April 13, 2022; **Docket No. 2019-03642**

A2 The New York State Court of Appeals Order dated July 11, 2022 denying leave to appeal

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VI. Basis for Jurisdiction

1. **28 U.S.C. sec. 1257**: A state court of last resort has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

2. Petition is timely as enlargement of the time for submission was extended by Associate Justice Sotomayor until December 9, 2022 **A3**

3. There are no other Parties.

VII. Constitutional Provisions Involved

(Emphasis on relevant text)

Amendment V:

> **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 offense 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 VI:

> **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 XIV, Section 1 Due Process of Law

> **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.

OPINIONS BELOW

A1. Decision and Order affirming Judgment of Conviction was rendered by New York State Supreme Court, Appellate Division, Second Department, April 13, 2022; **Docket No. 2019-03642**

A2. The New York State Court of Appeals Order dated July 11, 2022 denying leave to appeal

A3. Letter from Clerk of the Court extending time to file to December 8, 2022

Decision and Order 2019-03642, Supreme Court of the State of New York, Appellate Division, Second Judicial Department April 13, 2022

VIII. Statement of the Case:

This case involves use by the State of New York of false, material grand jury testimony that was known to the prosecution, to obtain an indictment against petitioner for Grand Larceny, Attempted Grand Larceny and Identity Theft. The Indictment so obtained was used to obtain conviction by plea of guilty. Petitioner was denied due process of law in violation of the Fifth and Fourteenth Amendments by the knowing use of perjured testimony and by the suppression of favorable and exculpatory evidence.

Throughout the appeal proceedings, petitioner repeatedly presented the false grand jury testimony and the related issues of prosecutorial misconduct and ineffective assistance of counsel. **A10, A11** The prosecution never controverted any of these issues but argued that they were, inter alia: **A12, SA2**

1) **Unsubstantiated**
2) **Not part of the record or "dehors" the record**
3) **Not raised in omnibus motion (although the Court stated that it did review the grand jury minutes "in camera")**[1]
4) **Not included in the Record and the Court should not expand the record to include any portion of the grand jury minutes.**
5) **Precluded from consideration by defendant's plea**

[1] This specious argument was raised in response to petitioner's Motion for Release of Grand Jury Minutes, which was denied by the Court.

6) **Barred from review by the waiver of his right to appeal**

And that:

7) **Although reviewed, grand jury minutes were "Never specifically reviewed to adjudicate a perjured testimony claim". See SA2**

In affirming petitioner's conviction, the Appellate Division, Second Department focused on the plea proceedings and gave little consideration to the arguments raised with respect to the false grand jury testimony, holding:

A1, at page 2

> **"Here, the record as a whole and the circumstances surrounding the entry of the plea reveal that the defendant's plea was knowingly, voluntarily and intelligently made...the defendant understood the charges and made an intelligent decision to enter a plea of guilty...**
>
> **..."Finally, as regards the plea, by entering his plea of guilty, the defendant forfeited the contention raised in his pro se supplemental brief that the indictment was defective on the ground that allegedly perjured testimony impaired the integrity of the grand jury proceeding (see People v Monroe 174 AD3d (649)...**
>
> **By waving his right to appeal, the defendant gave up his right to challenge the adequacy of his attorney's representation ... thus constitutes a mixed claim of ineffective assistance....a CPL 440.10 proceeding is the appropriate forum...and we decline to review the claim on this direct appeal."**

Background

The complainant in this case, Bernice Judd Porter ("Porter") was a ninety-eight year old childless widow. She is now 102 years old. Porter was known to

petitioner for over 40 years having been the wife of petitioner's personal attorney. On April 17, 2014 Porter executed a broad power of attorney (henceforth "POA") appointing petitioner as her agent and giving him broad powers[2] **A4**

At that time she was 93years old and her estate was valued in excess of ten million dollars ($10,000,000.00), with assets that included stock, bonds, numerous bank accounts, money market funds and a safe deposit box. Her assets were located in numerous local banks and in money market funds, some of which were not in New York State, but accessible on line.

On November 14, 2017 Porter became ill and was hospitalized[3]. Petitioner then proceeded to attempt to consolidate her accounts into a joint POA account which he opened at Chase Bank in the name of Porter and himself. Using the POA executed by Porter, Petitioner was able to withdraw funds from several banks and deposit checks which were payable to Porter and/or himself into the joint account.

All of the transactions occurred between November 14, 2018 and November 22, 2018. Petitioner soon discovered that almost all of the checks were stopped and the deposits reversed and that the Chase Bank POA account had been closed[4].

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[2] Porter also executed a living will, health care proxy naming petitioner as her agent, and provided him with keys to her apartment and mail box.

[3] Prior to this hospitalization, Porter had sustained a head injury and cervical fracture ("Hangman's fracture" of vertebral body C-2) from which she had "recovered".

[4] Apparently, the Westchester DA office had been informed of the alleged crime and aided in blocking transactions performed by petitioner.

Without informing petitioner, Porter revoked petitioner's POA on November 20, 2017. (**A5**) and executed a new POA naming a cousin, Charles Margolis[5], ("Margolis"), as agent. Margolis retained as attorney for Porter's estate, his son-in -law, Steven Seiden, Esq. Margolis and his attorneys failed to serve petitioner with the notice of revocation. [6]

On November 30, 2017 Margolis with his new POA was accompanied by his attorneys[7] and filed a false statement with the Yonkers Police stating that petitioner was removing moneys from Porter's accounts "without any authorization". They did not reveal to the police that petitioner had been authorized for several years to be her agent by POA[8]. **A6**

On April 23, 2018, the Yonkers, N. Y. police executed a search warrant and Felony Complaint, the affidavit of which contained the false statement:

> **"...Corines, fraudulently acting as a valid agent on a power of attorney repeatedly tried to transfer money to himself without permission, authority or consent"**

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[5] Margolis also testified at the Grand Jury. See A8, p.44

[6] Although executed on November 20, 2017, petitioner was in fact never personally served with the notice of revocation as required by NY General Obligations Law 5-1511. His attorney, received notice by e-mail on December 4, 2017.

[7] A second attorney, Peter Cooke was also present and was later disbarred from practice for unrelated reasons, by the Disciplinary Committee of the NY Appellate Division, Second Department.

[8] The existence of the POA was not mentioned either in the Felony Complaint or in the indictment handed down by the Westchester County Grand Jury. A7, A9

Petitioner was arrested after a three- hour interrogation[9] and subsequently arraigned on the Yonkers Felony Complaint, to which his attorney entered a plea of "not guilty" A7. The matter was then transferred to New York Supreme Court, County of White Plains[10].

Porter's False Grand Jury Testimony A8

On or about June 15, 2018 Porter, the alleged "victim" in this matter testified at the Grand Jury in Westchester Supreme Court. Her testimony was replete with false statements. Although she did acknowledge that she had executed petitioner's POA on April 17, 2014 and that she had reviewed the document prior to testifying, she proceeded to deny *seventeen times* that she had authorized any of the financial or related transactions performed by petitioner. The complete litany of false responses is herewith appended. **A8** She stated that she had "forgotten":

A8, Page 7, lines 14-20

Q Did Peter Corines have a Power of Attorney for you?

A Yes, I had forgotten about that and I thought that was only effective if one were not able to handle ones own affairs and I thought at that point that I was able to handle my own affairs.

Page 9, lines 4-20

Q I'm going to hand you what's previously marked as Grand Jury Exhibit 1 for identification. I ask that you look at it?

---

[9] **Yonkers detective Pollick interviewed petitioner for three hours in the absence of his attorney.**

[10] **At that time Petitioner was perplexed because he believed that he had acted legally as authorized by POA and believed he was being guided by competent defense counsel.**

A **Yes.**

Q **Do you recognize it?**

A **Yes, I do.**

Q **What is it?**

A **It's my signature.**

Q **What is the document?**

A **The document is – it's a power of attorney.**

Q **Did you have an opportunity to review this power of attorney prior to coming into the Grand Jury chambers today, before you came here?**

A **Yes, I did.**

Porter then testified: page 7 Lines 21-24

Q **Did you during this event or after this event revoke the power of attorney that you had given to Peter Corines?**

A **Yes, I did.**

The prosecution essentially led the grand jury to infer that the POA was not in effect at the times the alleged crimes were committed. Hence, without referring to the effective dates, Porter was queried:

Transcript, Page 10:

Q: .....do you recognize that document?

A: Yes, I do

Q: And what is it?

A: It's a revoking of the power of attorney

Porter was not asked when the POA was revoked until sometime later in the proceeding when she was asked by a grand juror. She then responded evasively:

A8, **page 43, line11:**

> **BY A JUROR: When was the power of attorney revoked?**
>
> **MS. ROWE-SMITH: When was your power of attorney to Peter Corines revoked?**
>
> **THE WITNESS: Where?**
>
> **MS. ROWE-SMITH: When did you evoke (sic) the power of attorney that you had given to Peter Corines?**
>
> **THE WITNESS: I guess as soon as I realized that he was taking advantage of this period, this brief period, a matter of hours I think that caused me to be taken to the hospital[11].**

The prosecutor failed to advise the grand jurors of the date of the revocation of the POA leaving it open to speculation. According to the record, the prosecutors also failed to explain that although the revocation was executed by Porter on November 20, 2017, the POA was in effect during the time from its execution (April 17, 2014) until the date of revocation. By this uncorrected testimony, the grand jurors were misled into believing that the November 20, 2017 revocation voided the entire POA and that petitioner was not authorized as her agent even during the time period beginning April 17, 2014.

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[11] Porter was hospitalized from November 17, 2017 until November 20, 2017 and then transferred to a Nursing Home where she remained for 30 days.

The potential for confusion is obvious and there is no evidence on this transcript that the jurors were made cognizant of the inclusive dates of petitioner's authority pursuant to the POA. The jurors were therefore led to believe that the POA was not in effect during the time period November 17 through 20, 2017; that petitioner was not authorized; and that there was cause to believe that he performed illegal transactions[12]. Whether or not the matter was later clarified cannot be discerned from this record, and is unlikely. But it is clear that the manner in which the question was posed and responded to by their main witness left open that possibility. The Grand Jury was deceived.

Petitioner was therefore prejudiced by the repeated false statements of this witness who knew, or should have known the truth- that her statements were belied by her sworn POA. The false statements were not corrected by the prosecutor.

Porter was not asked and did not provide any detail of the dates of execution of the POA or its revocation.[13] ADA Smith did not query Porter as to the date of revocation of the POA. There was in fact no mention of that date until later in the proceeding.

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[12] The issue of whether petitioner was served with the revocation was not discussed; nor was the date when he was made aware of its existence divulged to the jurors.

[13] Petitioner was never served with the Notice of Revocation and actually became aware of it through his attorney who was notified by e-mail on December 4, 2017.

The balance of Porter's testimony is replete with false statements. Beyond her opening statements confirming the validity of the POA, she shockingly thereafter repeatedly denied that she gave consent, permission or authorization for any of the transactions performed by petitioner. Although she knew, or should have known that petitioner was legally authorized to execute all of transactions including banking, mail, phone calls, she in fact made simple, yes or no answers to the prosecutor's leading questions. On seventeen occasions, she falsely testified that the transactions were not authorized. **A8, pages 17-22**

Subsequently Porter was asked and also falsely denied authorizing petitioner to change her mailing address, make phone calls on her behalf or take money out of her accounts, to which she repeatedly responded:

"No, I did not." A8, page 28

Fair dealing on the part of the prosecutors would have required that the New York General Obligations law and its relation to the facts would have been explained to the jurors, as all of the banking transactions were authorized by law pursuant to the POA. Therefore essentially all of Porter's responses to the questions subsequently posed to her were false, to wit: **ibid,**

"....did you give Peter Corines permission, consent or authorization to (perform these transactions)...

And to which Porter responded multiple times: **id**

"No, I did not".

Following this (false) testimony, the ADA and Porter were confronted by "a juror" who apparently was a physician and apparently perturbed by her testimony. He persistently challenged her credibility, memory and cognition and was rebuffed by the prosecution seven times. **A8, pages 28-40**

The false material testimony was not revealed to the grand jurors, the Court or defense counsel, and was subject to secrecy. The failure of the prosecution to tell the grand jurors that the answers given to the prosecutor's leading questions were in fact false was prejudicial to petitioner. The spectacle of this 98 year old "victim" must have had a chilling effect upon the jurors and influenced their vote to indict. The false testimony was believed by the grand jurors and led to a false, "empty" indictment.[14] **CPL 210.35 (5)**

Defense counsel, Peter Tilem ("Tilem") had received a copy of transcript of Porter's testimony in preparation for the court ordered "conditional examination", scheduled for October 3, 2018. He failed to discuss the grand jury testimony with petitioner. Surprisingly, he did not tell petitioner of the perjured testimony and

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[14] The juror(s) questioning her memory and credibility were prevented from pursuing the issue even though persisting, and were rebuffed seven times. See A8 at pages 35 through 42

never raised the issue to the Court. Similarly, it did not appear in any of his court filings. Indeed, he failed to even mention it during the plea proceedings. As an experienced defense attorney, he knew or should have known the significance of the false testimony. Nevertheless, he failed to apprise his client of its existence and, more importantly of its significance.[15]The perjured testimony was therefore never raised in defense of the indicted crimes.

Westchester Supreme Court Proceedings

Before he was aware of the grand jury testimony, defense counsel submitted an omnibus motion arguing inter alia: that the POA was a defense to the allegations; that the grand jury minutes should be released; and that the indictment should be modified or dismissed. In its decision September 21, 2018 the Court deleted Count One of the Indictment and agreed to review the grand jury minutes "in camera".[16] **SA2**

The Court, (Minihan, j) ultimately decided:

> **"...the court has conducted ...an *in camera* inspection of the stenographic transcript of the grand jury minutes. Upon such review, the court finds no basis upon which to grant defendant's application to dismiss or reduce the indictment." SA2**

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[15] **Petitioner received a copy of the grand jury transcript by email from a newly- hired junior associate of the Tilem law firm. She did not contact petitioner or offer any comment. A8, e-mail message**

[16] **Count One of the Indictment alleged a scheme with intent to defraud "more than one person". A9**

The prosecution then moved by Order to Show Cause for a "Conditional Examination" of the alleged "victim". The motion was not opposed by defense counsel and was scheduled for October 3, 2018.

In anticipation of this examination, Defense counsel received a copy of the court reporter transcript of Porter's grand jury testimony. The transcript was sent to petitioner on September 21, 2018. **A8, (E-mail)** Neither Defense Counsel nor any of his associates discussed or reviewed the transcript with petitioner[17].

On the scheduled date for conditional examination, Porter had appeared in court. For unclear reasons, the prosecution argued that the examination should be postponed despite the fact that defense counsel was prepared to go forward and cross examination by the defense would have to be adjourned.[18]

The proceedings were perplexing to petitioner because the conditional exam was ordered over concern about Porter's age, yet the ADA was anxious to postpone this conditional exam despite the alleged difficulties involved in: obtaining her "preferred" videographer; scheduling with the Court; and arranging

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[17] Throughout the entire proceedings in this matter, petitioner's attorneys acknowledged receipt of the grand jury testimony but never implied there were irregularities in the testimony. The transcript that was received by Tilem was included in the large carton of discovery materials that passed from Tilem to assigned Attorney Kennedy and then was passed on to the second retained Attorney, Chartier.

[18] The ADA had considerable difficulty in arranging this conditional examination. There were numerous difficulties in obtaining her preferred videographer, arranging transportation for Porter and coordinating date for this proceeding with defense counsel and the court. In the face of these difficulties, the prosecution surprisingly argued that they could not proceed because their direct examination "could not be completed in one day". This was apparently intentional, as they anticipated appearing in front of Judge Warhit the next day.

transportation for the 98 year old complainant. Porter's "cousin" Margolis appeared in court with Porter.[19]

On the next day, October 4, 2018, petitioner and defense counsel appeared in Westchester County Court "TAP"[20]. The Court was familiar with this case as ADA Smith and defense counsel had previously appeared there for SCI conference prior to indictment. However, on this day the Court had an unusually long conference in chambers with the ADA and defense counsel, which petitioner was not permitted to attend. After forty minutes Defense counsel appeared and told petitioner that the Court offered a sentence of one year in Westchester County Jail.

The Court gave defendant-petitioner only one day to decide. **SA3**

Plea Proceedings

Plea proceedings took place on the next day, October 4, 2018 and continued on October 16, 2018.Throughout these proceedings, petitioner repeatedly raised the POA as a defense to the charges of Grand Larceny and Identity Theft, but was repeatedly silenced by the Court.[21] **SA3** At the conclusion of the proceeding, petitioner insisted that defense counsel move to withdraw his plea. Defense

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[19] Charles Margolis, a purported cousin of Porter, was appointed Power of Attorney a few days after Porter executed the revocation of petitioner's POA. They were represented by Steven Seiden, Esq., Margolis's son-in–law.

[20] "Trial Assignment Part"

[21] Defense counsel, Tilem had, surprisingly, advised him not to mention the POA during his appearances. SA3, SA4

counsel then moved to be relieved, and was relieved by the Court on October 23, 2018.

Petitioner then retained new counsel, Jeffrey Chartier, Esq. who moved to withdraw the plea[22]. **SA3** Although the POA was included in his Motion to Withdraw Plea, Chartier shockingly failed to inform the Court of the false grand jury testimony. Nevertheless, his motion was denied and sentencing followed. At sentencing, petitioner again asserted his innocence based upon the valid POA. Petitioner, was prematurely remanded to Westchester County Jail on December 12, 2018 and ultimately sentenced to one year imprisonment on March 28, 2019.

Notice of Appeal was filed on April 1, 2019.

The Appeal Proceedings

While incarcerated, petitioner became aware of the perjured grand jury testimony and that it was material and obviously prejudicial. Petitioner cannot to this day understand why it was never brought to his attention by his attorneys.

On or about June 1, 2019, while incarcerated, petitioner submitted a Motion to Dismiss Indictment and Application for Bail, both of which were denied by the Court. **SA1**

[22] **Kevin Kennedy, Esq., a recently retired, former ADA was assigned as defense counsel in the interim after Tilem moved to be relieved by the Court.**

Petitioner was thereafter granted *in forma pauperis* and assigned counsel. The assigned appellate counsel *adamantly refused* to include in her brief the arguments included herein. Assigned appellate counsel prepared and submitted a brief which argued inter alia: that the petitioner's motion to withdraw his plea should have been granted, and that his waiver of appeal was invalid[23]. Petitioner moved, as she also suggested, for substitution of counsel. The motion was denied by the Court, but petitioner was granted leave to submit a *pro se* supplemental brief.

After the Decision and Order Affirming Conviction (**A1**) was issued, Petitioner submitted Application for Leave to New York Court of Appeals. **(A11)** The application was denied July 11, 2022. **A2**

Conclusions

As further discussed in Reasons for Granting the Writ, infra, the Grand Jury Transcript of Porter's testimony is *primae facie* evidence of false and material testimony. The known false testimony was used to obtain a tainted indictment which was then used to procure petitioner's conviction by plea. The conduct of the prosecution was contrary to federal law and multiple holdings of this Court. The

[23] Despite pleading from defendant-petitioner, assigned counsel refused to consent to his demand that she include the arguments of perjured grand jury testimony and the related arguments included in the instant Petition to this Court for Writ of Certiorari.

tainted grand jury proceedings and prosecutorial misconduct render the indictment subject to dismissal pursuant to CPL 190.65, Article 210.20, and section 210.35(5).

IX. Reasons for Granting the Writ

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IX. REASONS FOR GRANTING THE WRIT

I. The State of New York used known false, material testimony to obtain a "tainted indictment" in violation of petitioner's right to due process

"The State's pursuit is justice, not a victim."

Giles v Maryland, 386 US 66 (1967)

The use by the State of false, material testimony to obtain an indictment violates petitioner's right to due process under Amendments V and XIV. This was an unjust conviction, contrary to both New York, and well-established Federal law in conflict with numerous holdings of this Court.

The lower court errors are plain and are repugnant to the U.S. Constitution. The Writ of Certiorari should therefore be granted because the constitutional due process rights of petitioner were violated.

Petitioner, never having been so apprised by his attorneys, first realized that the grand jury testimony was perjured when he was incarcerated in the Westchester County Jail.[1]. The arguments were first presented as an Emergency Application to the Presiding Justice of the Appellate Division, Second Department. Petitioner therein sought Dismissal of Indictment and Granting of Bail. **SA1** The application was opposed by the People and denied by the Court.

[1] **Petitioner was remanded to Westchester County Jail on December 12, 2018. He was sentenced to one year incarceration on March 28, 2019**

The arguments were again presented in his *pro se* Supplemental Brief, as well as in his Application for Leave to the New York Court of Appeals[2]. **A10, A11**

To wit, Petitioner argued:

"As held by the US Supreme Court in Napue v. Illinois, 360 U.S. 264 (1959); cited in Giles v. Maryland, 386 U.S. 66(1967):

A conviction obtained by the use of false evidence, know to be false by representatives of the State, falls under the Fourteenth Amendment, *Mooney v. Holohan,* 294 U. S. 103; *Pyle v. Kansas,* 317 U. S. 213; *Curran v. Delaware,* 259 F.2d 707. *See New York ex rel. Whitman v. Wilson,* 318 U. S. 688, and *White v. Ragen,* 324 U. S. 760. *Compare Jones v. Kentucky,* 97 F.2d 335, 338, *with In re Sawyer's Petition,* 229 F.2d 805, 809. *Cf. Mesarosh v. United States,* 352 U. S. 1. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Alcorta v. Texas,* 355 U. S. 28; *United States ex rel. Thompson v. Dye,* 221 F.2d 763; *United States ex rel. Almeida v. Baldi,* 195 F.2d 815; *United States ex rel. Montgomery v. Ragen,* 86 F. Supp. 382. *See generally* annotation, 2 L. Ed. 2d 1575"

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People v. Savvides,* 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:

"It is of no consequence that the falsehood bore upon the witness' credibility, rather than directly upon defendant's guilt. A lie is a lie, no matter

Page 360 U. S. 270

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[2] Petitioner's assigned appellate counsel, despite urging, refused to include petitioner's arguments in the Appellate Brief.

what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

A lie is a lie

The egregious failure of Prosecution to correct Porter's false testimony was a violation of its duty to avoid a needless prosecution as well as a violation of basic ethics and responsibilities. The grand jury cannot protect against malicious prosecution if it is not given information which is material to its determination. The prosecution has a duty of good faith with respect to the court, the grand jury and the defendant. **US v Basurto 497 F.2d 781, 785-86 (9th Cir. 1974).** Therein it was clearly stated:

> **"Permitting a defendant to stand trial on an indictment which the government knows is based on perjured testimony cannot comport with the "fastidious regard for the honor of the administration of justice."**

The New York courts have in this case rejected the clear command of this Court, subjecting an innocent person to incarceration[3]. Despite the obvious possibility that petitioner was prejudiced by the corruption of the Grand Jury proceedings, the intermediate court failed to even reference his rights under the

[3] **At best, it appears that there is a conflict, confusion or uncertainty between the New York State Courts and the Federal Courts which should be resolved by this Court.**

New York and U.S. Constitutions, or Supreme Court Law. The obviously perjured testimony was the basis for an unjust conviction and incarceration.

Petitioner prays that this Court will grant certiorari in this matter and upon review order that the indictment in this case be dismissed and judgment reversed. It is likely that other defendants have been, or will be prejudiced by such "Napue violations". This court should therefore take action to prevent future abuse by prosecutors as it is mandated by Title 28, U.S.C. sect: **1257(a):**

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

There appears to be a conflict between the New York State law and Federal law. The conflict is implicit and should be resolved because it is applicable to all courts below, as the decisions in Giles v. Maryland, id and Napue v. Illinois, id., were of national importance. This conflict will affect other citizens who are not a party to this case, and petitioner believes that the benefit of granting the Writ and hearing this matter outweighs the risk of not so doing.

The principle was well stated in Niemotko v. Maryland 340 US 268, 27(1951):

"...the false testimony used by the state had an effect on the outcome of the trial. Accordingly the judgment below must be reversed".

Certiorari should therefore be granted to correct the conflicting positions of the New York State Courts and this Court, that by pleading guilty, defendant-petitioner waived his right to challenge the indictment or that a guilty plea somehow negates constitutional violations. A guilty plea does not extinguish a constitutional challenge to indictment. People v. Pelchat, 62 N.Y. 2d 97, 104-5, 108-109 (1984); Menna v. New York, 423 US 61 (1975); US v Basurto, id

The People repeatedly and incorrectly argued in their answering papers:

"...rather than showing an infirmity to his conviction, defendant has only confirmed what was apparent from his sworn plea allocution, that he knowingly, intelligently and voluntarily pleaded guilty...defendant's...claims are largely not reviewable. As discussed more fully in the Supplemental Brief for Respondent, defendant's claims are unpreserved for appellate review, forfeited by his guilty plea, barred from review by the waiver of his right to appeal, or based upon matters dehors the record...To be certain, none of defendant's varied claims is deserved of further review". A12

The Appellate Division confirmed conviction without regard to the multitude of New York cases holding a contrary opinion. People v. Pelchat, id; People v Cameron, 71 AD3d 533 (2010); People v Huston, 88 NY2d, 400 (1996); People v Hansen, 95 N.Y. 2d 227 (2000) It also neglected the same Federal case law, i.e. U. S. v. Basurto, id, which holds that a defendant must not be forced "to stand trial on an indictment which the government knows is based partially on perjured testimony" and that:

" Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel — and, if the perjury may be material, also the grand jury — in order that appropriate action may be taken. See Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); Hysler v. Florida, 315 U.S. 411, 62 S.Ct. 688, 86 L.Ed. 392 (1942); Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942)."

In Napue, id, the court held that the prosecutor's use of known false testimony at trial requires a reversal of the petitioner's conviction. The same result must obtain when the government allows a defendant to stand trial on an indictment which it knows to be based *even in part*, upon perjured testimony.

Therefore, contrary to the Decision and Order in this case, claims of a constitutional nature can be raised on appeal of a plea; petitioner may raise the issue of dismissal of indictment after a plea; and notwithstanding a guilty plea, defendant may not forfeit a claim of a constitutional defect implicating the integrity of the process" People v. Hansen 95 N.Y. 2d 227, 231 Claims implicating the "constitutional function of the grand jury to indict" or "the prosecutors' duty of fair dealing" survive a guilty plea. People v Pelchat, id

This Court should grant the Writ of Certiorari in this matter to re-affirm the holding in the numerous cases above cited and thereby confirm that the State may not use false material testimony whether known or unknown to be false, to obtain a

conviction. Petitioner believes that the benefits of hearing this case outweigh risk of not so doing.

II. Writ of Certiorari Should Be Granted to Discourage Future Prosecutorial Abuses in violation of Constitutional Amendments V, XIV.

A. Prosecutorial Misconduct Permeated This Proceeding.

Society's interest in justice is great especially when a citizen faces loss of liberties. The Grand Jury performs the essential function of investigating criminal activity to determine whether sufficient evidence exists to accuse a citizen of a crime. People v Lancaster 69 N.Y. 2d 20, 26 cert. denied 480 US 922; People v. Calbud, Inc., ibid Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. Brady v Maryland, 373 U.S. 83, 87

> **"The prosecutors are charged with the duty not only to secure indictment but also to see that justice is done". People v Lancaster, id, People v Pelchat, ibid**

The state prosecutors abused their discretion in this case and knowingly violated their responsibility and duty of "fair dealing". In this case, the lack of completely impartial judgment and discretion was evaded. People v DiFalco 44 NY 2d, 482, 487(1978)

The recorded grand jury testimony of Porter is *primae facie* evidence of perjury as it contained numerous false and material[4] statements and was intended to deceive those who were burdened with the obligation to find the truth, i.e. the grand jurors. Porter's obvious contradictions make it clear that the prosecutors knew or should have known that she presented false testimony. They took advantage of her willingness to lie for their own personal reasons. Their desire to obtain a conviction at any cost in this case is despicable and appears to have been an intentional violation of the ABA code of Professional Responsibility.

The ability of the grand jury to uncover the facts accurately was thwarted by permitting false testimony to go uncorrected. As a result, the integrity of the Grand Jury proceedings was substantially undermined. (see People v Caracciola, 78 N.Y. 2d , 1021 (1991), citing People v Batashure, People v Calbud, Inc., People v. Valles, and CPL 210.35(5), wherein misleading and incomplete legal instructions impaired the integrity of the grand jury and mandated dismissal of the indictment).

As held in People v Huston, 88 NY2d, 400, where irregularities in presenting the case to the Grand Jury rise to the level of impairing those proceedings and creating the risk of prejudice, "the indictment cannot be permitted

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[4] Giglio v U.S., 405 U.S. 150, 153 articulated the standard of materiality for a prosecutors use of false testimony i.e. any reasonable likelihood that it affected the judgment of the jury, quoting Brady v Maryland 373 U.S. 83, 87(1962)

to stand even though it is supported by legally sufficient evidence". Indictments are presumed to be valid and should be based upon competent evidence People v Bergerson 17 N.Y. 2d 398, 402 Perjured testimony *cannot* be considered competent evidence and is grounds for dismissal of the indictment. US v Basurto, id It is also unlikely in this case that legally sufficient evidence otherwise existed, for then, the perjured testimony would likely not have been sought by the prosecution.

The conviction in this case should be reversed and the indictment dismissed because the evidence, i.e. the main witness testimony was perjured and known to be so by the prosecution when it permitted the court to accept defendant's plea to the indictment. Under New York Law, dismissal of indictment under CPL 210.35(5) was appropriate in this case where prosecutorial wrongdoing and possible fraudulent conduct, bias and errors may have prejudiced the ultimate decision reached by the Grand Jury.

Porter's statements were material and not corrected, nor were the Court or grand jurors told of their falsity. Defense counsel was not notified until several months later, but defendant and the Court were never notified. Petitioner was therefore denied due process under Amendments V and XIV because the material that was withheld was capable of clearing him of guilt; i.e. "tending to clear the accused of guilt or of substantially affecting the punishment to be imposed in

addition to being such as could reasonably be considered admissible and useful to the defense". Alcorta v. Texas 355 U.S. 28 (1957), Napue, ibid, Mooney v Holohan , 294 U.S., 103 The many decisions of this Court confirm that petitioner in this case, was denied due process.

Certiorari should be granted so that this Court may consider reiterating the principle that: "a state may not knowingly use false evidence including false testimony to obtain tainted conviction, implicit I any concept of ordered liberty..." Giles v. Maryland, at 74

B. The State of New York Failed In Its Responsibility to Adequately Oversee Its Prosecutors

The Court should take judicial notice of the New York law that would have created the (Nation's first) State Commission on Prosecutorial Conduct signed into law on August 18, 2018 by then Governor Andrew Cuomo:

> **Center for the Advancement of Public Integrity, *The New York State Commission on Prosecutorial Conduct*, (2018).**
> **Available at: https://scholarship.law.columbia.edu/public_integrity/25**
>
> **Supporters claim that the law is an invaluable tool in the fight against unethical prosecutorial conduct, while opponents such as the District Attorneys Association of the State of New York ("DAASNY") claim that the law violates both the New York State and U.S. Constitution. On October 17, 2018, DAASNY was joined by David Soares, president of DAASNY representing all district attorneys, and Robert J. Masters, an assistant district attorney in Queens County representing all assistant district attorneys in the state of New York, in filing a legal challenge to the law. The complaint, filed in the Albany County Supreme Court, seeks declaratory as well as injunctive relief.**

The bill was signed into law by Governor Cuomo and Chief Judge, DiFiore[5].

> **Chief Judge Janet DiFiore today announced the appointments of Hon. Michael J. Obus, Hon. Randall T. Eng and Professor Michael A. Simons, Dean of St. John's University School of Law, to the New York State Commission on Prosecutorial Conduct. Recent state legislation created the Commission as an independent entity dedicated to investigating prosecutorial conduct in New York State, serving to strengthen oversight of New York's prosecutors and holding them to the highest ethical standards in the exercise of their duties. The New York State Commission on Prosecutorial Conduct will receive, initiate, investigate and hear complaints related to qualifications, conduct, fitness to perform and performance of official duties of any prosecutor in New York State. In carrying out its responsibilities, the Commission may conduct hearings, administer oaths, subpoena and examine witnesses, and require the production of records or other evidence deemed relevant to the investigation. The Commission will produce a factual record, along with recommendations, that will be transmitted to the relevant Appellate Division attorney grievance committee in charge of overseeing the prosecutor charged with misconduct. The attorney grievance committee may then accept or reject the recommended sanction or impose a different sanction. Additionally, the Commission is authorized to make a recommendation to the Governor that a prosecutor be removed from office for cause–including misconduct as evidenced by departure from obligations under appropriate statute, case law and/or New York Rules of Professional Conduct–and must report annually to the Governor, Legislature and Chief Judge with respect to proceedings in which there has been a final determination.** New York State Contact: Unified Court System, press release:

Subsequently, the law was challenged by representatives of the N.Y. prosecutors and declared unconstitutional:

> **In a 63-page decision, Justice David A. Weinstein of Albany held Tuesday that statute was "inconsistent with the provisions of the New York State Constitution."**
>
> **Critics of the commission had voiced concerns that its broad investigatory power could interfere with the decision making of prosecutors—who are independently elected—and put a chill on their investigative work.**

[5] **Chief Justice, Janet DiFiore recently resigned from the New York Court of Appeals**

"The court eloquently explained what we and our clients have been arguing for over a year: the Commission on Prosecutorial Conduct and its enabling statute are unconstitutional," attorney Jim Walden, a member of the legal team representing the District Attorneys Association of the State of New York said. Prosecutors statewide "will be able to do their jobs without the constant threat of unconstitutional oversight," he added. The Wall Street Journal, January 28, 2020

Certainly, "two wrongs do not making a right" and unconstitutional oversight to correct unconstitutional indictment may not be proper. Nevertheless, this court may consider reinforcing the proposition that prosecutorial misconduct should not be tolerated[6]. Petitioner believes that granting the Writ in this matter would go a long way towards prevention of further abuses.

C. The Indictment should be dismissed

Pursuant to ***NY CPL 210.35 (5)*** A grand jury proceeding is defective within the meaning of paragraph(c) of subdivision one of section 210.20 when:

5. The proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result.

Petitioner argued to the courts below that the Indictment should be dismissed and that the Grand Jury minutes should be made public. **A10, A11** The New York courts have consistently held that the statute: CPL 210.35 (5), provides for

[6] **The current crises in law enforcement, police funding and "criminal justice reform" including eliminating bail and other such "reforms" reinforce the need to police the prosecutorial profession.**

dismissal upon the *mere possibility* of prejudice, and defects in Grand Jury proceedings (as opposed to claims of insufficiency of evidence to support the indictment), may be raised even after a plea of guilty. People v Wilkins, 68 N.Y. 2d 269, 277 (1986)

The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. The constitutional issues of due process and equal protection have been ignored:

> **The New York State Constitution guarantees that "no person shall be held to answer for a capital or otherwise infamous crime...unless on indictment of a grand jury." (NY Cont. art 1, sect 6); CPL art 190 By acting as a buffer between the state and its citizens, the Grand Jury serves to shield individuals from excesses of prosecution and protects one from unfounded prosecutions. People v Calbud, Inc 49 NY 2d 389, 394, 396, People v Pelchat, 62 N.Y. 2d 97, 108**

Due process imposes upon the prosecutor a "duty of fair dealing to the accused and candor to the courts," thus requiring the prosecutor "not only to seek convictions but also to see that justice is done" Pelchat,id; Huston, id This duty extends to the prosecutors' instructions to the grand jury and the submission of evidence (Lancaster) The prosecutor also cannot provide "an inaccurate and misleading answer to the grand jury's legitimate inquiry" (People v Hill NY 3d 772, 773), nor can the prosecutor accept an indictment that he or she knows to be

based on false, misleading or legally insufficient evidence (Pelchat, id at 107)..People v Thompson, 985 NYS2d 428, 434

In affirming petitioner's conviction The Appellate Division held: **A1**

> **" ..... as regards the plea, by entering his plea of guilty, the defendant forfeited the contention raised in his pro se supplemental brief that the indictment was defective on the ground that allegedly perjured testimony impaired the integrity of the grand jury proceeding (*see People v Monroe*, 174 A.D.3d 649)."**

This is contrary to New York Court of Appeals decisions in People v. Pelchat, id; People v Savvides; People v Cameron, where it has been repeatedly held that the issue of CPL 210.35 (5) may be raised on appeal of a plea. People v Huston, 88 NY2d, 400

The "exceptional remedy" of dismissal of indictment is warranted when defects in the indictment, and the integrity thereof, created a possibility of prejudice to the defendant. People vs Difalco; People v Sayavong, 83 N.Y.2d 702 (N.Y. 1994); People v. Wilkins, id

The requirement of due process, or lack thereof, in depriving a defendant of liberty by the deliberate deception of the court and in this case the grand jury, appears to have been a contrivance to procure conviction and imprisonment of appellant. It is as inconsistent with the rudimentary demands of justice as would be

the obtaining of a like result by intimidation[7]. Mooney v Holohan , ibid, citing Hebert v. Louisiana 272 U.S. 312, 316, 317

The state prosecutors' failure to respond directly to Petitioner's allegations is also notable. Although repeatedly raised by defendant/petitioner, the allegations of perjured grand jury testimony were *never denied, argued or disputed.* Indeed, The State did not raise any direct defense or denial to petitioner's allegations of perjury and prosecutorial misconduct, raising only technical arguments and justifications. **See supra, Statement of the Case at page 5; A12**

Similarly the prosecution opposed petitioner's motions for Bail Pending Appeal and Release of Grand Jury Minutes which were submitted while he was incarcerated. **SA1** The people responded:

> **1. There is no compelling or particularized need.**
>
> **2. The trial court upheld the integrity of the proceedings**
>
> **3. Disclosure is not required because defendant pled guilty.**

See Pyle v. Kansas, **317 US 213, 216 in reversing the Supreme Court of Kansas**

> **Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the**

[7] **Petitioner also alleged that he was coerced and intimidated to plead guilty.**

Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney* v. *Holohan*, 294 U.S. 103. They are supported by the exhibits referred to above, and nowhere are they refuted or denied. The record of petitioner's conviction, while regular on its face, manifestly does not controvert the charges that perjured evidence was used, and that favorable evidence was suppressed with the knowledge of the Kansas authorities. No determination of the verity of these allegations appears to have been made. The case is therefore remanded for further proceedings. *Cochran* v. *Kansas, supra; Smith* v. *O'Grady*, 312 U.S. 329; cf. *Waley* v. *Johnston*, 316 U.S. 101, 104. In view of petitioner's inexpert draftsmanship, we of course do not foreclose any procedure designed to achieve more particularity in petitioner's allegations and assertions.317 U.S. 213 (1942).

All persons, young or old, black or white, liberal or conservative, democratic or republican, citizen or alien should be held to the unequivocal high standard of truthful testimony under oath. There should be no excuse. The obvious false statements at the Grand Jury are consistent with the crime of perjury. The lack of compunction to lie and the apparent lack of fear of prosecution for that crime should not be tolerated by this Court and the Court should send a clear and loud message that such conduct cannot not be tolerated.

"The true administration of Justice is the firmest pillar of good government" (George Washington)[8]

The untainted administration of justice is certainly one of the most cherished aspects of our institutions. ...fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so

[8] **This inscription appears on the New York County Courthouse, 60 Centre Street, NYC**

manifest that only irrational or perverse claims of its disregard can be asserted. Communist Party v. Control Board, 351 U.S. 115, 124-125 (1956), citing McNabb v. US 318 U.S. 332

Permitting a defendant to stand trial on an indictment which the government knows is based upon perjured testimony cannot comport with this "fastidious regard for the honor of the administration of justice... Because of the prosecuting attorney did not take appropriate action to cure the indictment upon discovery of the perjured grand jury testimony, we reverse appellant' convictions". Basurto, id

III. Petitioner was denied Effective Assistance of Counsel guaranteed by the Sixth Amendment.

The Writ should be granted because petitioner was prejudiced by ineffective assistance of counsel. Except for attorney failure to raise the constitutional issues raised herein, he would not have pleaded guilty and been unjustly convicted and incarcerated.

Petitioner was shocked when while incarcerated he discovered the fact of Porter's perjury and the prosecutors' knowledge of it. The denial of Petitioner's right to Effective Assistance of Counsel is evident from the record and should have

been decided by the New York Courts. A warning from this Court will go a long way in discouraging less than effective practice of criminal defense.

Throughout these proceedings petitioner's first counsel was deficient in his representation of petitioner in failing to acknowledge Porter's perjured grand jury testimony and in neglecting to apprise his client of its existence. Nowhere in the proceedings prior to plea did defense counsel argue that it was a defense to the indictment. In fact, it never appeared in the record. When Petitioner insisted that he move to withdraw the plea, counsel moved to be relieved as counsel by the Court.

Despite the fact that both retained counsels had access to the files which contained Porter's grand jury testimony, and despite the fact that they did communicate with each other, neither raised the issue of Porter's false testimony to the Court. Neither attorney attempted to proclaim to the Court *even possibility of prejudice*. And even if they were unsure whether prejudice could have possibly occurred, they had an obligation to raise the issue to the Court.[9]

Petitioner's second retained counsel also failed to raise the issue in his Motion to Withdraw Plea. Both defense counsels had access to the files which

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[9] **Similarly, Kevin Kennedy, Esq., a recent retiree of the Office of the DA of Westchester County who was appointed by the Court after relieving Tilem, also failed to raise the issue either to the Court, ADA or to petitioner.**

contained Porter's grand jury transcript but remained silent as to any of her false statements.

Petitioner believes that it is evident from the record that petitioner was prejudiced by ineffective assistance of counsel.

IV. Conclusions

I. Petitioner's constitutional rights pursuant to Amendments V and XIV were violated by the knowing use of perjured testimony to obtain an indictment.

II. The State prosecutors continued to deny petitioner due process when they used the tainted indictment to obtain a conviction by plea.

III. Petitioner was denied effective assistance of counsel pursuant to Amendments V and XIV when his attorneys withheld knowledge of the perjured testimony and permitted his conviction by plea.

IV. This case is of significance to many citizens of this country and the Writ of Certiorari to review this case should be granted:

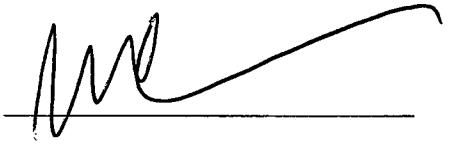
A. to eliminate any conflict between Federal Court and State Court

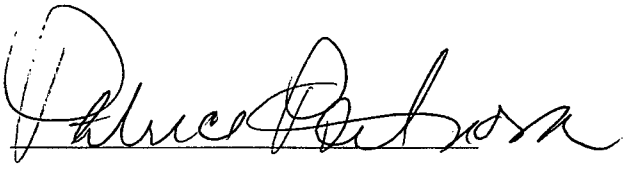
B. to correct any State court confusion or uncertainty

C. to reverse this unjust conviction

D. to prevent future prosecutorial abuses

Respectfully submitted: Dated: November 29, 2022





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Commission Expires May 14, 2023

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The Supreme Court of the State of New York

Appellate Division, Second Department

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