SUPREME COURT OF THE UNITED STATES

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DEMETRIO LIFRIERI,

Petitioner,

-against-

JAMES STINSON,

Respondent.

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APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Sonia Sotomayor, Associate Justice of the Supreme Court:

1. The incarcerated petitioner, a pauper and not fluent in the law, hereby respectfully makes this application for an extension of time within which to file a petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled proceeding. The judgment of that Court was rendered on May 25, 2022, and a copy of that opinion and judgment is attached hereto and made a part the proceedings.

2. The time for which to file a petition for certiorari will, unless extended, expire on August 25, 2022. The applicant requests that the time be extended for 90 days, from August 25, 2022, to and included November 25, 2022.

3. The judgment of the United States Court of Appeals for the Second Circuit affirmed the Decision and Order of the United States District Court of the Eastern District of New York denying petitioner's Rule 60(b) Motion, saying that, "in light of the grounds alleged in support of the Rule 60(b) Motion, ju

reason would find it debatable whether the underlying habeas petition states a valid claim of the denial of a constitutional right."

4. As a preliminary matter, petitioner would like to stress that the main reason for the delay, and for requesting an extension of time is due mainly to the recent health crisis that has totally thrown into havoc mostly every aspect of the programming in the prison system for the past couple of years, to the point that mostly every program has been curtailed, and especially hit hard were the facility law libraries throughout the state prison system.

5. It is only in the recent months that the facility is slowly beginning to re-instate some of the programs, however it is still difficult just to get back on the list of the law library, much less to be able to obtain adequate assistance from law clerks who regularly get transferred to other jails.

6. The primary issue to be raised before this Court is an issue that has totally escaped the petitioner throughout the years of his incarceration, and it was only recently that came to the forefront after a District Court Judge had assigned counsel to represent the petitioner at the March 20, 2018 hearing, where an egregious Fourth Amendment violation was extensively discussed at length for the first time in the District Court.

7. At a pretrial suppression hearing, defendant argued that the search and seizure of the automobile still registered to his name and which was involved in the crime had been unlawfully searched without a warrant, yet the evidence used against him.

The evidence showed that soon after defendant's arrest, an anonymous caller phoned the police hot-line and gave them the location of an automobile that resembled that of the defendant, was parked at a specified location. Acting on that tip, a number of police vehicles converged at that location. Believing that it was the vehicle they had been looking for, without first obtaining a search warrant, they entered the private lot where the defendant was paying rent to secure a parking spot at that location.

8. Again, without a warrant or notifying a judge, they approached the auto and broke into the trunk with a screwdriver, where they observed two sealed, dark garbage bags; without hesitation or any regard for the law, they cut open the bags and noticed the mummified skeletal remains of (2) two individuals. The Coroner was called and removed the bodies to the Medical Examiner's Office, believing they were the bodies of the (2) two females they had been looking for a couple of years.

9. At an ensuing Suppression Hearing, the trial judge ruled that the search was unlawful, and the defendant had standing to challenge the search of the auto because he had been paying rent at said location. Yet, the Court refused to suppress the evidence, claiming that defendant had made several statements to the investigating detectives, that he no longer had possession of the auto and that it was stolen.

Following the prodding by the District Attorney, the Court agreed to repeat decision of the pre-trial Suppression Hearing.

Beginning on page 1125, line 7 of the transcripts:

> THE COURT: "I felt that the search was an unlawful search in that the officers did not obtain a search warrant. There were no exigent circumstances which would justify or authorize them to enter the car without a search warrant.
>
> There are provisions in the law for search warrants being obtained over the telephone. That could have been done even while they are waiting for Emergency Services to come to the lot in order to pull the car away from the fence so that they could open the trunk. It wasn't done. And it's a flagrant violation. And there is no basis that I can see to justify it.
>
> I also rule that the defendant had standing to move to suppress based on the evidence in the case. I, however, denied the defendant's motion to suppress on the ground that he told the police concerning the fact that the car was stolen constitures a waiver. By making these statements, he waived his expectation of privacy.
>
> And by that the car was stolen, he impliedly gave permission to search for and seize the car as evidence of the theft and to examine it, etcetera, for evidence of the crime that was committed with respect of the car.
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> This does not and of itself mean that that the People can rely on the statement because in addition to that, defense counsel claimed that there was a failure by the people to provide 710.30 notice relative to items that they would seek to introduce at the trial, namely and specifically, this statement by the defendant to the police that the car was stolen.
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> The question then became what effect does this have on this hearing. And then I ruled that 710.30 relates to trial... The question of whether the defendant had requested an attorney or done something to indicate

that he didn't wish to be questioned concerning the incident is then an important consideration because it would require the suppression of that statement. And then the People would be unable to use it with respect to the hearing concerning the suppression.

On the issue of whether the defendant requested an attorney or whether the police acted improperly is an issue at the hearing that has to be established by the defendant. I ruled that the defendant failed to clearly establish that he had retained an attorney for the purposes of representation at any criminal proceeding."

In the end, the trial court ruled that it wasn't clear whether the attorney had been retained specifically to represent the defendant on the murder charges, or he had only been retained to represent him only in the divorce proceedings.

THE COURT: "All right. That completes the decisions on all aspects of the motion, as far as I am aware.

To recapitulate, the motion to dismiss the indictment because the car was missing was denied. The issue of whether to impose any sanctions is held in abeyance pending developments at the trial.

The motion to suppress the items seized in the defendant's apartment is granted. And the motion to suppress the bodies is denied.

As far as I can see, that takes care of in its entirety the motion. The motion is in all respect decided... Does the District Attorney move this case for trial?"

THE PROSECUTOR: "Your Honor, we are ready We are ready to go forward, yes."

And so, after the Court refused to suppress the unlawfully obtained evidence from the search of the auto, the Court called for the first juror to be sworn-in, signaling start of the trial.

The defendant was, of course convicted and on August 24, 1993, he was sentenced to (2) two consecutive terms of 25 years to life in state prison where he remains to this day.

10. Following a round of unsuccessful direct appeals represented by counsel, his conviction was affirmed by the New York Court of Appeals in late 1996, and appellant began a series of collateral proceedings that pretty much continued over the span of 25 years.

11. In 2003, petitioner's writ of habeas corpus finally came-up for review in the Eastern District of New York; however, a Senior District Court Judge refused to appoint counsel, and to let him call witnesses, including his appellate counsel, who was ready to take the stand and explain some of the issues she had discussed in the appellate brief.

12. Petitioner tried to do his best over the telephone, while his young daughter was present in the courtroom. She was only asked a few questions with regards to the failure of the Italian Consulate personnel representing the petitioner whom he had included to his list of witnesses.

13. The issue that would recently stand out was a vague mention of the loss of evidence in the form of an automobile that the police had asserted on being used to conceal the evidence used at trial against him.

14. In his written decision, the Senior District Court Judge Jack B. Weinstein, only mentioned briefly that the court was precluded from discussing anything with regards to the unlawful evidence pursuant to the Supreme Court case in Stone v. Powell, 428 U.S. 465 (19776).

15. It was only recently that the issue came-up for discussion, when petitioner filed a Rule 60(b) motion in the District Court in front of the Hon. Judge Weinstein. After appointing counsel for the petitioner, Judge Weinstein set a hearing date for March 20, 2018, at which time petitioner's counsel agreed to argue only one issue, the Fourth Amendment violation that occurred after defendant's arrest of September 16, 1991, and which was discussed at the pre-trial suppression of hearing of April 1993, which neither the State nor the Federal Courts had ever addressed.

16. After the opening arguments of the issue by the petitioner's counsel, the Court asked the Prosecutor to proceed with his side of the argument, and so, on page 11, line 2, the Prosecution begins:

> "Judge, under Stone versus Powell, so long as the defendant got a full and fair opportunity to raise his Fourth Amendment suppression issue, the federal court cannot review the claim. And in this case the Court gave the defendant a full and fair opportunity...
>
> Petitioner claims that the hearing court improperly denied a defense motion to suppress the recovered bodies of the victims. Under Stone versus Powell a federal habeas court is barred..."
>
> THE COURT: "Well, he was never provided the opportunity if he is given an attorney who is not going to raise it."
>
> THE PROSECUTOR: "Well, Your Honor, I will just read from page 16 of your decision in which you said... "
>
> (continued on page 12, line 3)

THE PROSECUTOR: "Petitioner claims that the trial court was biased against defense counsel and conspired to secure petitioner's conviction. The claim is without weight. There is no evidence..."

THE COURT: "Well, the claim, itself, has never been argued effectively. You agree to that?"

THE PROSECUTOR: "No, Your Honor. I think that the claim was effectively argued in the trial court and the trial court denied the claim and that it is without merit."

(cont. on top of page 13)

THE COURT: "Well, what authority, the authority, the authority to enter, break into the car and break into the bags was based on the fact that he had what, abandoned the car, in effect, by claiming it was stolen?"

THE PROSECUTOR: "Correct. And so he did claim at trial these claims and the trial court denied the claims, and whether or not the trial court got it right or got it wrong is beyond the review of this court under Stone versus Powell."

DEFENSE COUNSEL: "Judge, if I might just say one thing. The problem, the flaw in the argument counsel just raised --"

THE COURT: "But your position is there is no place in the record where the issue of breaking into the car and into the bags was really argued?"

DEFENSE COUNSEL: "Well, I'm saying, Judge, that's true. And what he misstated a moment ago was that there was an abandonment. The problem is if Judge Kreindler had said there was an abandonment, then there would be a waiver. But he realized that you really don't have an abandonment where a man is paying to store the car at a certain location, has the garbage bags in a locked trunk, and he ruled no abandonment, but waiver. It's interesting."

THE COURT: "It is a strange case."

(cont. from page 14, line 7)

THE COURT: "You want to further argue?"

THE PROSECUTOR: "Your Honor, I will just reiterate that under Stone versus Powell that it doesn't really matter whether the state court got it right or got it wrong, as long as it gave the defendant a full and fair opportunity to raise the claim. And the Appellate Division considered this claim as well and although it didn't directly address it, it did say that defendant's remaining contentions are either unpreserved or without merit. And under current federal law that -- that means that the federal court has to give deference to the state court's decision."

THE COURT: "I never decide that the police had the right to open, did I?"

THE PROSECUTOR: "No, Your Honor. You ruled that under Stone versus Powell you are precluded from considering it."

THE COURT: "And my opinion went up, I certified, right?"

(cont. from page 15, line 2.)

THE COURT: "And then you moved under Rule 60."

DEFENSE COUNSEL: "He did. I wasn't on the case at that time."

THE COURT: "Yes. And I ruled against you on Rule 60 on the ground that I had properly handled it in the habeas phase, and that went up."

DEFENSE COUNSEL: "It's been up and down a lot of times before I came into the picture. It's unfortunate, Judge. It's just a bad ruling and it was never really focused on, and I can see why it wasn't focused on.

(cont. from page 16, line 10)

THE COURT: "Do you want to say anything further?"

THE PROSECUTOR: "I'll rest on the People's prior papers that they submitted in oppos..."

THE COURT: "It has always puzzled me if I should certify a Rule 60 motion. I certify it, but I do not know what that means. Right?"

DEFENSE COUNSEL: "Judge --"

THE COURT: "It is just an indication, I think, you better look at this case. Well, whatever I say they are going to affirm it, I think, but -- "

DEFENSE COUNSEL: "Judge, if you write an opinion saying that there was no waiver and if you find that that you are barred from doing anything about it, at least I have got something to show the Second Circuit. And I sincerely believe it is a bad decision by the trial judge and I sincerely believe he didn't get a full and fair opportunity."

THE COURT: "Okay. I'm not going to clear the court in this case, there is no point. It's strictly a legal argument. I do not think he has anything to add."

DEFENSE COUNSEL: "No, Judge. He -- "

THE COURT: "Do you want to clear the court and discuss it with him?"

DEFENSE COUNSEL: "I think -- "

THE COURT: "I will do it."

DEFENSE COUNSEL: "I think if we don't, Judge -- "

THE COURT: "It's a problem."

DEFENSE COUNSEL: " -- it will be a problem."

THE COURT: "Clear the court, please. The court is being cleared... "

(Courtroom cleared. Recess taken.)

(In open court.)

THE COURT: "You have had an opportunity to discuss privately, to the extent that you could, this matter?"

DEEFENSE COUNSEL: "Yes, Judge. I will note for the record, though, that Mr. Lifrieri indicated that although speaking as loud as I am right now, he said he heard every other word.

THE COURT: "I see."

DEFENSE COUNSEL: "And he didn't hear what you said. I indicated to him that he would get the transcript and he agreed to abide by what I've said."

THE COURT: "In this case it would have been entirely inappropriate to interfere with what is going to probably be a life sentence in state court to bring him to this court. His counsel made an argument that I do not think could have been improved by the moving party or his presence."

THE COURT: "Decision is reserved."

17. As defense counsel agreed during the 2018 District Court hearing, it is understandable that no judge wants to suppress two bodies and let a guilty defendant go free, and the petitioner can see that point as well. However, defense counsel also stressed, that with regards to evidence of a crime, that threatens a defendant with being incarcerated for life, that evidence needs to have been lawfully obtained, and as he also said, "bodies cannot be treated differently than a pile of garbage."

18. It is evident from the transcripts of the suppression hearing, that the trial judge went to great lengths trying to justify the introduction of that unlawful evidence into the record, so as to obtain defendant's murder conviction. Granted, it should have been up to defendant's counsel to take an immediate appeal even before the start of the trial, however none of that was done, other than just registering an objection.

19. Moreover, appellate counsel totally failed to properly argue the Fourth Amendment issue in her appeal to the Appellate Division, but just in passing while arguing the loss of the automobile, and as the District Attorney admitted during the 2018 District Court hearing, the Appellate Division never addressed the issue directly, while the New York Court of Appeals would only state that appellant's appeal was denied.

20. It was only after the 2018 hearing, that the petitioner fully understood the gravity of the trial court's decision in refusing to suppress the unlawfully obtained evidence, and he returned on his own to the Second Department to argue the ineffective assistance of appellate counsel through a writ of error coram nobis, which was promptly denied.

21. As stated earlier, petitioner has been in and out of court for the entire time of his incarceration, which spans over the better part of three decades, and never once the appellate courts had the gumption to really examine appellant's case thoroughly, but only in passing, as if petitioner did not identify as a real person, and causing him to wonder whether his foreign nationality, or the fact that his last name ends in a vowel is enough reason to keep him at arms length.

22. Petitioner can also understand the full meaning and restrictions of the 1976 Supreme Court case in Stone v. Powell, 428 U.S. 465, S.Ct. 3037, which restricts the Federal Courts' limited powers to review a Fourth Amendment issue, once a defendant obtained a "full and fair opportunity in the State Court."

23. The question however remains, "what is the remedy in a case like defendant's where the trial court refused to exclude the unlawfully obtained evidence after a suppression hearing, and no state appellate court has ever reviewed the issue of the unlawful evidence introduced at defendant's trial."

24. The Prosecutor admitted under questioning of the District Court Judge clearly and sussinctly On page 14, line 7 in part:

"... and although it didn't directly address it, it did say that appellant's remaining contentions are either unpreserved or without merit. And under current federal law that --that means that the federal court has to give deference to the state court's decision."

25. The case in Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, arose out of two cases from two different courts of appeals one 507 F.2d 93, denied by the Ninth Circuit, and the other out of the Eight Circuit, 513 F.2d 1280, which affirmed the District Court's decision granting relief in 388 F.Supp. 385.

26. After granting certiorari, the U.S. Supreme Court, Justice Powell held that:

"Where the state had provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner could not be granted habeas corpus relief", on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial... "

27. The question then remains, what relief is a defendant entitled to when the state court failed to grant any relief after

the trial court's failure to suppress the unlawfully obtained evidence as a result of an illegal search and seizure? Moreover, the trial court ruled, albeit without any real evidence, that appellant had 'waived' any expectation of privacy after he had told the investigating detectives that the car was stolen, even though the court had already ruled that the search of the car was a 'flagrant' violation to enter a lot where defendant was paying rent for the parking spot, and that defendant had standing to challenge the search.

28. In addition, the District Court itself agreed at the 2018 hearing, that appellant had not received a "full and fair opportunity" because neither the Appellate Division, nor the New York Court of Appeals had ruled on the Fourth Amendment issue, and therefore, petitioner's rights were clearly violated. Yet, the District Court Judge made clear on the record that he wasn't sure whether he could certify the issue brought for the Court's review through a Rule 60(b) motion, saying:

"It always puzzled me if I should certify a Rule 60(b) motion. I certify, but I do not know what that means. Right?"

29. Even after this uncertainty expressed by the District Court Judge, the Second Circuit Court of Appeals refused to act and grant petitioner a Certificate of Appealability (COA), so that perhaps that court could have finally decided whether petitioner Fourth Amendment violation was a viable issue for the Circuit Court to clarify if petitioner was allowed to raise the denial of his writ of habeas corpus by way of a Rule 60(b) motion?

In his dissent, the Honorable Justice Brennan, with whom the honorable Justice Marshall concurs, dissenting:

"The Court today holds, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. To be sure my Brethren are hostile to the continued vitality to the exclusionary rule as part and parcel of the Fourth Amendment' prohibition of unreasonable searches and sezures, as today's decision in United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, confirms. But these cases..."

"...do not involve any question of the right of a defendant to have evidence excluded from use against him at his criminal trial when the evidence was seized in contravention of rights ostensibly secured by the Fourth and Fourteenth Amendments Rather they involve the question of the 'availability' of a Federal forum for vindicating those federally guaranteed rights. Today's holding portends substantial evisceration of federal habeas corpus jurisdiction, and I dissent."

Unfortunately, Justice Brennan says:

"The Court's opinion does not specify the particular basis on which it denies federal habeas jurisdiction over claims of Fourth Amendment violations brought by state prisoners. The Court insists that its holding is based on the Constitution... but in light of the explicit language of 28 U.S.C. s 2254... "

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a

writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

30. After the District Court hearing of 2018, when petitioner noted the strong argument his assigned counsel made with regards to the failure of appellate attorney in the State Courts, he went back to the Appellate Division to argue the inffectivness of appellate counsel for not making a proper argument of the Fourth Amendment issue on direct appeal, and the subsequent CPL 440.10 motion she had filed in appellant's behalf in the State Courts, he strongly believes he has exhausted the issue in those courts. Thus, the third leg required prior to instituting his latest argument on the Fourth Amendment issue in the District Court was satisfied.

31. Subsequent to the District Court's denial of his Rule 60(b) motion, and the Judge's refusal to issue a COA, petitioner submitted a COA request in the Second Circuit Court of Appeals, which the Court promptly rejected as being out of time, even though the petitioner submitted enough proof to justify the delay as a result of Covid-19 restrictions.

32. The District Court denied petitioner's Rule 60(b) motion challenging the habeas corpus decision, and the Second Circuit Court of Appeals denied his request for a Certificate of Appealability (COA), saying that:

"Upon due consideration ...appellant failed to show that, (1) jurists of reason would find it debatable ... and (2) ...the underlying habeas petition, in light of the grounds alleged to support the [Rule] 60(b) motion, states a valid claim of the denial of a constitutional right."

33. Respectfully, petitioner argues that the unlawfully obtained evidence was introduced at his trial in order to obtain defendant's conviction. The trial court agreed that the search and seizure of the automobile legally parked in a private lot was illegal, and that it was a "flagrant violation", and that appellant had "standing to challenge the search." Yet, the trial court refused to suppress the evidence under some other false pretense, and both the Appellate Division and the New York Court of Appeals failed to rule on it, mainly because appellate counsel was ineffective in failing to properly bring-up and argue the issue on appeal, thus he was denied the "full and fair opportunity" in the State Courts.

34. Moreover, the District Court denied review of his Fourth Amendment issue, saying that the case in Stone v. Powell, 428 U.S. 465 (196), prevented the District Court from reviewing the issue in habeas proceedings in Federal Court; therefore, appellant is relegated to serve an unlawful sentence in derogation of his Fourth and Fourteenth Amendments to the United states Constitution.

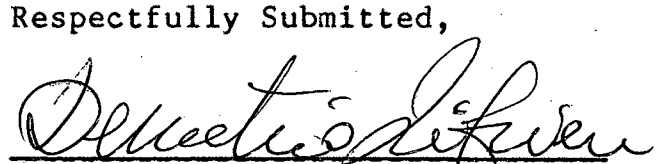
CONCLUSION

Petitioner is respectfully asking this Honorable Court, whether the trial court violated his rights by refusing to suppress the evidence obtained in violation of the Fourth Amendment to the Constitution? And whether the State Appellate Courts compounded the Fourth Amendment violation by overlooking appellant's most important issue in his prosecution, the use of unlawfully obtained evidence by the police at his murder prosecution, and the Federal Courts justifying it by saying that he had received a "full and fair resolution" in the State Courts.

Petitioner prays that the Honorable Court will grant him a 90 day extension, to November 25, to properly prosecute his request for review through a Writ of Certiorari in the Supreme Court. Petitioner remains grateful for the Court's consideration.

Dated: August 5, 2022
Stormville, NY 12582

Respectfully Submitted,



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