24-5619

ORIGINAL

In the
SUPREME COURT OF THE UNITED STATES

FRANCISCO TINEO-SANTOS (Din# 13-A-0532),

Petitioner,

Vs.

PAUL PICCOLO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FRANCISCO TINEO-SANTOS (Din# 13-A-0532)
Petitioner, Pro Se.
Eastern NY Correctional Facility
30 Institution Road, PO Box. 338
Napanoch, New York 12458-0338

Question Presented

I. Whether The **DENIAL** of a *Pro Se* Application for a **Certificate of Appealability** ("COA") with the United States Court of Appeals, Circuit Courts, In Relation to Civil (**Habeas Corpus**) Proceedings, Constitutes as a **DENIAL**, on its Merits, of an Appeal of the Civil Claims Relief, for the Purpose of Removing the United States District Court's **Exclusive Jurisdiction** Over Subsequently, **Timely and Comprehensively**, Filed Rules **60(a)**; **60(b)(1)**; **60(b)(3)**; **60(b)(6)**, and; **60(d)**, Federal Rules of Civil Procedure For The United States District Courts ("Fed.R.Civ.P."), *Pro Se* Motion(s) Attacking the **Integrity** of the Civil (Habeas Corpus) Proceedings In Seek To **Cure Defects** Appearing That Amounts to a **Miscarriage of Justice**?

II. Whether the United States Court of Appeals For the Second Circuit ("2nd Cir.") Abused Its Discretion In First Sidestepping, **Without Jurisdiction to Review the Merits of the Appeals**, To Take Full Consideration of the Merits of the Appeals In Justifying the **DENIAL** of the *Pro Se* COA Application?

III. Whether The United States District Court For the Southern District of New York ("S.D.N.Y.") Abused Its Discretion In Refusing To Review, On Its Merits, The **Timely and Comprehensively** Filed Rule **60(a)**; **60(b)(1)**; **60(b)(3)**; **60(b)(6)**, and; **60(d)**, Fed.R.Civ.P., -- Attacking the **Integrity** of the Original ***Writ of Habeas Corpus*** Proceeding In Seek of **Curing Appearing Defects** that Amounts to a **Miscarriage of Justice**, Violating the Fourteenth Amendment – On the Basis of "**Lack of Jurisdiction**" Due to the a Previously Issued DENIAL, By The 2nd Cir., of the ***Pro Se*** COA Application to Appeal, On Its Merits, the Original Writ of Habeas Corpus Claims Relief Denial?

Parties To The Proceeding And List of Directly

Related Proceedings

The Petitioner in this case is Francisco Tineo-Santos (Din# 13-A-0532). The Respondent is Paul Piccolo.

Related Proceedings

2nd Cir.

1. Francisco Tineo-Santos V. Paul Piccolo, 2nd Cir. Appeal Case Docket No.:23-7901. The judgment and opinion appears at **Appendix A1-A3** to the Petition and it has been designated for publication but is not yet reported, entered on May 03, 2024.

2. Francisco Tineo-Santos V. Paul Piccolo, 2nd Cir. Appeal Case Docket No.:22-2736. The judgment and opinion appears at **Appendix E1-E7** to the Petition and is reported at **2023 WL 7284607**, entered on June 29, 2023.

S.D.N.Y.

3. Francisco Tineo-Santos V. Paul Piccolo, S.D.N.Y. *Writ of Habeas Corpus* (Civil) Proceeding Case Docket No.:19-CV-05038-MKV-JLC. The judgment and opinion appear at **Appendix B1-B5** to the Petition and is reported at **2023 WL 8525113**, entered on November 07, 2023.

4. Francisco Tineo-Santos V. Paul Piccolo, S.D.N.Y. *Writ of Habeas Corpus* (Civil) Proceeding Case Docket No.:19-CV-05038-MKV-JLC, and is reported at **2022 WL 4238420**, entered on September 14, 2022.

New York State Courts;

5. The People of New York State V. Francisco Tineo-Santos, New York State Court of Appeals Case Docket No.: 6235-6236; In re: Bronx County Indictment No.: 1920-2009, reported at 31 N.Y.3d 1088, 103 N.E.3d 1257(Table), 79 N.Y.S.3d 110, entered on May 31, 2018.

6. The People of New York State V. Francisco Tineo-Santos, New York State Supreme Court, Appellate Division-First Department Case Docket No.: 6235-6236; In re: Bronx County Indictment No.: 1920-2009, reported at 160 A.D.3d 465, 74 N.Y.S.3d 316, 2018 N.Y.Slip Op. 02425, entered on April 10, 2018.

7. The People of New York State V. Francisco Tineo-Santos, New York State Supreme Court, Bronx County Indictment No.: 1920-2009, judgment and Sentencing, upon a Jury Trial, entered on January 18, 2013.

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Petition For Writ of Certiorari

Petitioner, Francisco Tineo-Santos ("Petitioner"), respectfully Petition for a ***Writ of Certiorari*** to review the judgment and order of the United States Court of Appeals for the Second Circuit ("2nd Cir."), DENYING a *Pro Se* Certificate of Appealability ("COA"), after **First Sidestepping, Without Jurisdiction to decide the merits of the Appeal,** to fully consider the Claims on its merits in justifying the **DENIAL** of the COA, and; To Provide a Clarification of the interpretation as to the **Exclusive Jurisdiction** of the District Courts over Post-judgment Rule **60(a); 60(b)(1); 60(b)(3); 60(b)(6)**, and; **60(d)**, Fed.R.Civ.P., *Pro Se* motions seeking to attack the **Integrity** of the Civil(Habeas Corpus) Proceeding to Cure Appearing Defects, Inter alia; Fraud on the Courts, that amounts to a **Grave Miscarriage of Justice,** in violation of the Fourteenth Amendment.

Opinion Below

The Judgment & Opinion of the United States Court of Appeals for the Second Circuit ("2nd Cir.") (**App. A1-A3**), entered on **May 03, 2024**, is not officially reported. The Judgment & Order of the United States District Court for the Southern District of New York ("S.D.N.Y.") (**App. B1-B5**), entered on **November 07, 2023**, is reported at **2023 WL 8525113**.

Jurisdiction

The Judgment & Order of the 2nd Cir. (**App. A1-A3**) was entered on **May 03, 2024**. Jurisdiction of this Court is invoked under **28 U.S.C. § 1254(1)** and **Rule 13**, of the Rules of the Supreme Court of the United States ("U.S.Supr.Ct.R.").

Constitution & Statutory Provisions Involved

The Pertinent Provisions of the Constitution of the United States of America are the **Fifth Amendment** thereto and **§ 1 & 5** of the **Fourteenth Amendment** thereto. Their texts provides, in relevant part that; "No person shall be****deprived of life, liberty, or property, without due process of law"(*See* **U.S.C.A. Const. Amend. V.**); "***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 law[, and;] The congress shall have the power to enforce, by appropriate legislation, the provision of this article." *See* **U.S.C.A. Const. Amend. XIV § 1 & 5.**

The Pertinent provision of the Rule **60(a)**, Fed.R.Civ.P., provides, in part that; "The[District] Court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a **Judgment**, **Order**, or **Other part of the record**. The[District] Court may do so ON MOTION OR ON ITS OWN, with or without notice." *See* **Rule 60(a), Fed.R.Civ.P.**

The Pertinent provision of the Rule **60(b)**, Fed.R.Civ.P., provides, in part that; "**On motion and Just Term**, the[District] Court may relieve a party of its legal representation from a **Final Judgment, Order, or Proceeding** for the following reasons: (1)Mistake, Inadvertence, Surprise, or Excusable Neglect;[...] (3)**Fraud (Whether previously called intrinsic or extrinsic), Misrepresentation, misconduct by an opposing party;**[....] (6)Any other reason that justifies relief." *See* **Rule 60(b), Fed.R.Civ.P.**

The pertinent provisions of the Rule **60(d)**, Fed.R.Civ.P., provides, in parts that: "This Rule Does Not Limit a[District] Court's power to: (1)Entertain an Independent proceeding:[...] (3)Set Aside a Judgment For Fraud on the Court." *See* **Rule 60(d), Fed.R.Civ.P.**

Statement of the Case

This Case involves a judgment procured by **Fraud on the Court, Misrepresentation of Material Facts & Evidence, Omission of Material Facts & Evidence**, and **Grave Miscarriage of Justice** committed by the Bronx County District Attorney's Office, in violation of the U.S. Constitution. Following affirmance of his **Intentional Second Degree Murder**, New York State Penal Law ("PL") Section ("§") **125.25(1)**, conviction on direct Appeal, **160 A.D.3d 465 (April 10 2018)**; denial of leave to appeal to the New York State Court of Appeals, **31 N.Y.3d 1088 (May 31, 2018)**; denial of Federal *Writ of Habeas Corpus*, **2022 WL 4238420**

(September 14, 2022), and; denial of *Pro Se* COA, 2023 WL 7284607, Petitioner Francisco Tineo-Santos moved, *Pro Se,* to **REOPEN** his Original Federal Habeas Corpus Proceeding under Rule 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P. The S.D.N.Y. Court denied the *Pro Se* Rule 60 motion, 2023 WL 8525113 (App. B1-B5) (November 07, 2023). Petitioner sought *Pro Se* COA with the 2nd Cir. Court. The 2nd Cir. Court, not reported, denied the *Pro Se* COA application (App. A1-A2) (May 03, 2024).

The S.D.N.Y. Court denied the *Pro Se* Rule 60 motion by **erroneously classifying** the 2nd Cir. Court's previously issued denial of the *Pro Se* COA application (App. E1-E7) (June 29, 2023) as a Denial decision issued on the merits of the Appeal, of the original habeas corpus Claims relief, in stating that the 2nd Cir. Court resolved "Petitioner's appeal of the Court's **September 14[, 2022]** Order"(App. B2) denying the federal habeas corpus claim relief, and concluding that "Petitioner's motion for relief pursuant to Rule 60[(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P.] and to["Simply"] **REOPEN** this case is **DENIED** because the[District] Court **DOES NOT** have jurisdiction to grant the requested relief ", further barring Petitioner from "filing future papers[, inter alia; Rule 60 motions] in this closed [federal habeas corpus] action without leave of the[District] Court"(App. B4).

The 2nd Cir. Court improperly **DENIED** Petitioner's *Pro Se* COA application by first sidestepping, without jurisdiction, the COA application, well established threshold, "process by[, erroneously,] first[and essentially] deciding the merits of the appeal, and then justifying its denial of[the *Pro Se*] COA[application] based on its adjudication of the actual merits", holding that "Upon due consideration, it is hereby **ORDERED** that the[*Pro Se*] motion [seeking COA] is **DENIED** and the[*Pro Se*] appeal is DISMISSED because[the *Pro Se*] Appellant[/Petitioner] has failed to show that (1)jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b)[*Pro Se*] motion, and (2)jurists of reason would find it debatable whether the underlying[federal] habeas petition, in light of the grounds alleged to support the

[Rule] 60(b)[*Pro Se*] motion, states a valid claim of the denial of a constitutional right." (**App. A2**). In other words, the 2nd Cir. Court have in essence decided an appeal, on its merits, without first securing proper jurisdiction and misapplied its ruling in ***Kellogg V. Strack***, 269 F. 3d 100, 104 (2nd Cir. 2001)-(per curiam), relating to the **timeliness** for filing a Rule 60 motion, irrelevant to the instant case, in justifying the denial of Petitioner's *Pro Se* COA application (**App. A1-A3**).

The 2nd Cir. Court's ruling throws the laws and process governing both the COA applications and the District Court's **Exclusive Jurisdiction** to review timely and comprehensively filed Rule **60(a)**; **60(b)(1)**; **60(b)(3)**; **60(b)(6)**, and; **60(d)**, Fed.R.Civ.P., motions into complete confusion. Only last year, the 2nd Cir. denied Petitioner's *Pro Se* COA application seeking to appeal the September 14, 2022 S.D.N.Y. Court's Order (denying the original federal ***Writ of Habeas Corpus*** Claims relief on its merit and closing the habeas proceeding), holding that "Upon due consideration, it is hereby **ORDERED** that the[*Pro Se*] motion are **DENIED** and the[*Pro Se*] appeal is **DISMISSED** because Appellant[/Petitioner] has not 'made a substantial showing of the denial of a constitutional right'", **erroneously applying** both the **28 U.S.C. § 2253(c)**, and the case of Miller-El V. Cockrell, 537 U.S. 322, 327 (2003), in justifying its denial of the *Pro Se* COA application. Now, both the 2nd Cir. Court and Several District Courts have also relied, as in this instant case, on the custom practice of (1)first sidestepping the well-established COA application threshold to review the case on its merits, without first securing proper jurisdictions, of the claims when deciding COA applications and; (2)refusing to review the subsequently, **Timely & Comprehensively,** filed Rule 60 motions, on the basis of "Lack of jurisdiction after the DENIAL of a COA application have been issued.

The 2nd Cir. Court, itself, has recognized that the inquiry for the process of COA applications **IS NOT** "**coextensive with a merits analysis**", that at the stage of a COA application process the only question is whether applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are

adequate to deserve encouragement to proceed further." The COA application process threshold, as it has been constantly and consistently emphasized by the United States Supreme Court ("this Court"), "should be decided without 'full consideration of the factual or legal bases adduced in support to the claims." As well, recognizing that its jurisdiction is to "review a district court's decision granting or denying a Rule 60(b) motion for abuse of discretion if it bases 'its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."

Furthermore, prior to this instant case, the 2nd Cir. Court have consistently, with the rulings and holding of this Court, held that **"A motion to reopen a habeas proceeding under Rule 60(b) is permissible where it 'relates to the integrity of the federal habeas proceeding, not the integrity of the state criminal trial"**, where the remedies, if granted, is "simply to the reopening of the federal habeas proceeding."

This Court have long established that a "Rule 60 of the Federal Rules of Civil Procedures [for the United States District Courts] contests the Integrity of the proceeding that resulted in the district court's judgment." Clarifying that when a Rule 60 motion challenges the "nonmerits aspect of the first federal habeas proceeding", like, inter alia; the denial of the habeas Petition and closing of the proceeding on the ground that were procured by **Fraud on the Court** by the opposing party, **"that sort of claim is not the equivalent of a habeas claim. It does not assert a federal basis for relief from the state-court judgment; rather, it seeks to cure a 'defect' on the federal habeas proceeding itself"**, that if not cured, results to a grave Miscarriage of Justice on its own, violating the Fourteenth Amendment. This Court have also, long established, that a judgments and/or orders and/or convictions "obtained through use of false evidence", **Fraud on the Court, Misrepresentation &/or Omission of the material facts & evidence**, known or should have been known to be such by "representation of the states, must fall under the **Fourteenth Amendment.**" The same result when the 'state' or the Courts,

after being provided with notice, "allow it to go uncorrected when it appears". *See* Napue V. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

This square conflict among the United States Court of Appeals, the Circuit Courts' and the United States District Courts' ruling means that, until this Court resolves the issues being presented in this instant case, (1)the Circuit Courts reviewing COA applications will continue to first sidestepping, without first securing proper jurisdiction, the COA application **threshold** inquiry to first take "full consideration" of the merits of the appeals in justifying the Denial of the COA, if not, cannot be sure what criteria to apply in deciding whether to grant COA for Civil (**Habeas Corpus**) proceedings, and; (2)the District Courts reviewing Rule 60 motions cannot be sure what criteria to apply in deciding whether the District Courts continues to have **Exclusive Jurisdiction** to review subsequently, **Timely & Comprehensively**, filed Rule 60 motions after a Denial of a COA application seeking to appeal the merits of the original Civil (**Habeas Corpus**) proceeding have been issued. Under the 2nd Cir. Court's holding in the instant *Pro Se* case, mass Civil and Habeas Corpus proceedings cases cannot be cure of defects appearing and identified on the "**Integrity**" of the proceedings under Rules 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P., after the U.S Court of Appeals, and/or Appellate Courts, have denied a COA application, even when denied without jurisdiction, but must go through years of grinding litigation in pursue of **Appeals & Writ of Certiorari** process, undermining the Rule 60 motion's sole purpose of curing this defects without having to flood the Appellate Courts and this Court with claims of issues that can be adequately cure by the district courts, whose in the best position in knowing all the material facts & evidence of the cases.

It is critically important for the Courts and Litigants to know whether the 2nd Cir. Court's and the S.D.N.Y. Court's decision are right or wrong. Among the most important benefits of Rule 60 motion is the curing, correcting, of defects found in the "**Integrity**" of the ***Writ of Habeas Corpus***, and **all Type of Civil** proceedings that have been identified, resulting in a grave Miscarriage of Justice. The confusion created by (a)the 2nd Cir. Court regarding a key element of the threshold

inquiry for the COA application process, and; (b)the S.D.N.Y. Court regarding the key element of the **Exclusive Jurisdiction** of the District Courts over Rule 60 motion (attacking the "**Integrity**" of the Civil, Habeas Corpus, original proceedings) that are subsequently, **Timely & Comprehensively**, file after the denial of a COA application (seeking permission to appeal the habeas corpus claim relief on its merits) by the Court of Appeals, Appellate Courts, means that parties will have neither. Instead, the only sure consequences of a identified, appearing, defects on the "**Integrity**" of the Civil (**Habeas Corpus**) original proceedings, as in the instant case, will be uncorrected, **Uncured**, resulting in a grave **Miscarriage of Justice** violating the **Fourteenth Amendment**, among other, rights.

If the 2nd Cir. and the S.D.N.Y. Courts are wrong but their rulings remain unreviewed, the decisions will unjustifiably encourage parties to procure Judgments, Orders, Decisions and Convictions through **Fraud on the Courts, Misrepresentation &/or Omission of the Material Facts &/or Evidence** by all means necessary, **Unethical & Malicious** means, so long the Judgments, Orders, Decisions and/or Convictions are issued and secured, completely undermining the meaning of a **Fair Trial** and **Justice**. If the 2nd Cir. and the S.D.N.Y. Courts are right and their approach ultimately prevails nationwide, parties that chooses to seek **Curing** appearing defects within the "**Integrity**" of Civil, Habeas Corpus, proceedings in reliance on the decisions of other Circuit Courts, eventually will see those COA applications and Rule 60 motions overturned. This Court **Should** grant review to clarify the governing standards and prevent the enormous waste of both **Judicial** and **Private** resources that is the inevitable real-world result of these conflicting rulings, specifically the grave Miscarriage of Justice, in violation of the **Fourteenth Amendment** of the United States Constitution.

Moreover, the issue arises here in a case of paramount importance. Allowing the 2nd Cir. Court's, and the S.D.N.Y. Court's decisions to stand unreviewed will trigger the filing of tens of thousands of claims against parties in the Federal and State Courts seeking reversal of Judgments, Orders, and Decisions relating to COA applications and Rule 60 motions for Lack of Jurisdiction. The

Courts, Litigants, and the Public will again be condemned to a Jurisdictional Litigation quagmire.

This Court should decide (i)whether the S.D.N.Y. Court abused its discretion in refusing to review on its merits, on the basis of "**Lack of Jurisdiction**", the subsequently, **Timely & Comprehensively**, Filed **July 12, 2023** Rules 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P., *Pro Se* Motion (attacking the "**Integrity**" of the original ***Writ of Habeas Corpus*** proceeding to cure appearing defects that amounts to a grave **Miscarriage of Justice**) after the 2nd Cir. Court issued an Order, entered on **June 29, 2023** (**App. E1-E7**), denying the *Pro Se* COA application (seeking to appeal the merits of the original ***Habeas Corpus*** claims relief), and; (ii)whether the 2nd Cir. Court abused its discretion in denying the *Pro Se* COA application (seeking to appeal the S.D.N.Y. Court's Refusal to review the subsequently, **Timely and Comprehensively**, filed **July 12, 2023** Rules **60(a)**; **60(b)(1)**; **60(b)(3)**; **60(b)(6)**, and; **60(d)**, Fed.R.Civ.P., *Pro Se* motion attacking the "**Integrity**" of the ***Habeas Corpus*** proceeding) by first sidestepping, **Without Jurisdiction**, to take in "full consideration" the merits of the claims, the factual & legal bases adduced in support of the claims, in justifying the denial of the *Pro Se* COA application.

A. Background

On the late night of **May 09, 2009**, Petitioner was involved in a one(1) car crashed incident, along with two(2) additional individuals being inside the crashed car.

1. NYPD 911 Callers Report

At 00:54:46 (**12:54:46am**) hours on the early morning of May 10, 2009 the First 911 caller eyewitness[#1] reported that a "**CAB DRIVER--WAS--SHOT**" at the location of West 177th Street with the Cross Street of Davidson Avenue ("the corner of 177th Street"). At 00:55:27 (**12:55:27am**) hours another 911 caller eyewitness[#2] reported that the "**DRIVER—WAS BEING--SHOT**". At 00:58:14 (**12:58:14am**) hours another 911 caller eyewitness[#3] reported that "**THE CAB**

DRIVER IS [S]HOT AT LOC[ATION]---INSIDE THE SCHOOLYARD----POSS CRASHED INTO THE SCHOOL---." At 00:59:01 (12:59:01am) hours another 911 caller eyewitness[#4] reported that "THERE IS A FIREARM... N THE BAC...INSIDE THE FR[O]NT SEAT...DR[I]V[E]R POSS DOA....N THERE IS A PASS[E]NG[E]R INSIDE THE VEH[ICLE]". At 00:59:38 (12:59:38am) hours another 911 caller eyewitness[#5] reported that "SOMEONE--IN SCHOOLYARD----- CAB CRASHIN[G] TO SCHOOL". At 01:00:09 (01:00:09am) hours another 911 caller eyewitness[#6] reported that "M[A]L[E] SHOT AT LOC[ATION]...[REDACTED]... M[A]L[E] AT LOC[ATION] POSS DEAD IN CAR... AIDED M[A]L[E] IS TAXI DRIVER.." At 01:01:10 (01:01:10am) hours another 911 caller eyewitness[#7] reported that "DR[I]V[E]R STILL IN VEH[ICLE]--- UNK[NOWN] DESC[RIPTION] OF PERP---STS POSS FIREARM IN FRONT SEAT OF CAB". AT 01:01:15 (01:01:15am) hours another 911 caller eyewitness[#8] reported that "M[A]L[E] SHOT IN BL[AC]K TAXI... PERP RAN.. UNK[NOWN] DIR[ECTION] OF FLIGHT.... NO DESC[RI]P[TION].." *See* S.D.N.Y. Court Civil Sheet Docket No.:19-CV-05038-MKV-JLC Document ("S.D.N.Y.Dkt.") #79, at Ex. #2, at Ex. B. (Over Seven(7) separate 911 caller eyewitnesses reported their witnessing statement to the 911 hotline prior to the first Responding NYPD officer arrival at the crashed car scene, yet, none of this 911 caller reports were made by the People's called two(2) witnesses Mr. Duverge & Mr. Arango reporting what they allegedly witnessed or saw.)

2. Procured Written & Video Coerced-Compliant False Self-Incriminating Confessions

On May 10, 2009 at 1:47am Petitioner was received at St. Barnabas Hospital's Emergency room area via Ambulance transportation "Accompanied by [NYPD] Police [Officer] Ortiz[,] badge# 19607[, of the] 46 P[re]c[inc]t". For the time of 1:47am through 10:00am Petitioner was kept in the preparation area for Major Surgery of his suffered broken right leg femur resulting from the crashed car incident. For the time of 10:00am through 2:01pm Petitioner underwent Major

Surgery of his right leg broken femur and treatments of other suffered injuries, inter alia; head and hands injuries resulting from the crashed car incident, and kept in the operation room under the constant supervision and custody of the NYPD. For the time of **2:02pm** through **7:00pm** Petitioner was kept in an **Intensive Care Unit** ("ICU") room recuperating from the major surgery he had just underwent. Precisely at **7:00pm** Petitioner was transported and received by his **assigned nursed** at a Regular hospital **"Stable Status"** room from the **"ICU Status" room** for further recuperation process, while being kept under the full supervision and custody of the NYPD, deprived of a free will, hand-cuffed to the bed rail and unable to contact nor communicate with his family and love ones. *See* **Trial Evidence labeled as "Defendant A"**(Petitioner's Medical Record created and maintained by the St. Barnabas Hospital).

On **May 10, 2009** at 16:15 (**5:15pm**) hours the NYPD Detectives Mr. Brennan and Mr. Ader procured the Coerced-Compliant False Self-Incriminating, **Written Statement,** confession from the Petitioner through false promises, inter alia; to not criminally prosecute the Petitioner in exchanged for providing the Coerced-Compliant False Self-incriminating Statement, while Petitioner was being kept under **ICU** status room by the hospital just hours after he had just underwent major surgery, dosed with strong narcotic pain medications, while being kept under the "Incommunicado" status deprived of a free will and kept hand-cuffed to the bedrail by the NYPD for over **Sixteen(16) Consecutive** hours. On the following date, **May 11, 2009** at **3:35pm** a **Bronx County** Assistant District Attorney, Mr. Dimaggio, alongside the presences of **both, the same,** NYPD detectives Mr. Brennan and Mr. Ader, procured the subsequently made Coerced-Compliant False Self-Incriminating, **Video Statement,** confession from the Petitioner while Petitioner have been kept under the same duress coerced-compliant atmospheres, under the same made **False Promises** by the NYPD Detectives Mr. Brennan & Mr. Ader, while being kept deprived of a free will handcuffed to the bedrail under the full supervision and custody of the NYPD, and under the same **"Incommunicado"** status unable to contact nor communicate with his family and love ones for over **Forty(40)**

Consecutive hours, by the same NYPD Detectives Mr. Brennan and Mr. Ader, at the St. Barnabas Hospital.

B. Trial Proceedings

1. People's Called Witness Debra Kramer

The People called Ms. Debra Kramer ("Ms. Kramer"), the St. Barnabas Hospital designated Vice President of Quality & Clinical Services, as part of their Chief Case Evidence. Ms. Kramer testified that she did not know any specifics nor had any personal knowledge relating to the Instant Case, deeming her testimony an "Overview Testimony" presented by the People to procure the wrongful conviction against Petitioner. Also, testified that one(1) of the responsibilities of the hospital designated Risk Management Department was to evaluate requests made for contacting patients admitted to the hospital, including request being made by NYPD Law Enforcements and Staffs from the District Attorney's Office, to determine whether a patient is sufficient "Stable" for such interview and contact. *See* S.D.N.Y.Dkt. #14-3, at Page ("Pg.") #150-#167. As well, testified that if a NYPD Detective(s) wants to interview a hospital patient, the Detective(s) are require to first secure clearance from the hospital designated Risk Department prior to being allow to interview, contact or communicate with the hospital patients. *See* S.D.N.Y.Dkt. #14-3, at Pg. #167, Line ("L.") #1. Further testifying that if a patient is being kept in the ICU room area, it is the hospital's policy, that clearance Shall Not Be Approved Nor Authorized for the Law Enforcements nor staffs from the District Attorney's Office to interview, contact nor communicate with said patient being kept in the ICU status room. *See* S.D.N.Y.Dkt. #14-3, at Pg. #153, L. #5. On various occasion, throughout her testimony, Ms. Kramer testified that she Did Not had any neither personal knowledge nor specifics relating to the circumstances of this case. *See* S.D.N.Y.Dkt. #14-3, at Pg. #154, L. #4-#5; Also at Pg. #165, L. #11-#13.

2. People's Called Witnesses Renee Duverge & Gregory Arango

The People called Mr. Renee Duverge ("Mr. Duverge") and Mr. Gregory Arango ("Mr. Arango") as their Case Chief Witnesses. The People have had clearly stated on the record that **No Written Materials Were Created, Filed Nor Maintained By Neither The Bronx County District Attorney's Office Nor The NYPD Concerning This Two(2) Specifically Called Witnesses as Eye witnessing to The Car Crashed Incident.** *See* **S.D.N.Y.Dkt. #14-2, at Pg. #222, L. #1-#16.** Mr. Duverge & Mr. Arango testified that they were **both** drinking **BEERS** and playing domino's from the time they came out of work at **4:00pm**, on **May 09, 2009**, through **12:00am**, on **May 10, 2009** outside a bodega (Grocery Store) nearby Davidson Avenue. *See* **S.D.N.Y.Dkt. #14-2, at Pg. #243-#244.** Mr. Duverge testified witnessing Mr. Arango leaving work and went to the bodega straight from work at **4:00pm** alongside, together with, Mr. Duverge on **May 09, 2009.** *See* **S.D.N.Y.Dkt. #14-2, at Pg. #243, L. #12-#25.** Mr. Duverge testified witnessing Mr. Arango drink a total of **Seven(7) Beers** throughout the night of **May 09, 2009** prior to standing at the corner of 177th street and allegedly witnessing the incident. *See* **S.D.N.Y.Dkt. #14-2, at Pg. #244, L. #11-#24.**

Mr. Duverge & Mr. Arango both testified that they were both standing next to each other on the corner of 177th Street when they both heard gun shots followed by a "Taxi" pass by them at a **High Velocity Speed**, making them both grab onto the wall of the building behind them, plowing through a fence and into the school wall, all while they both were against the wall. *See* **S.D.N.Y.Dkt. #14-2, at Pg. #210, L. #7-#10.** Mr. Duverge testified that Mr. Arango and himself were the only individuals present when they ran to the crashed car and while "talking" to the Petitioner. *See* **S.D.N.Y.Dkt. #14-2, at Pg. #246, L. #19-#22, and; Pg. #250, L. #12-#22.** Mr. Duverge testified that the distance between the corner of 177th Street -- Where they both stood "watching the 'Taxi' pass by at a **High Velocity Speed**" -- and the schoolyard wall – where the car crashed into – was **approximately of the "Size of the Court Room".** *See* **S.D.N.Y.Dkt. #14-2, at Pg. #252, L. #1-#8.** Mr. Duverge testified that the **First** responding teams to arrive at the crashed car scene were the NYPD Police Officers, in a NYPD Marked Official Car, with their

Service Guns out in their Hands ready to be discharged. *See* **S.D.N.Y.Dkt. #14-2, at Pg. #239, L. #6-#17**. Neither one(1) of this two(2) called, by the people (representative of the State), witnesses contacted the **911 hotline** to report the incident and/or what they have had witnessed on the late night of **May 09, 2009** going into the early morning of **May 10, 2009**. The investigating NYPD Officers/Detectives **Did Not** created nor maintained any records, neither in their investigation notes nor official records, reflecting the identities, statements nor any information relating to this two(2) "witnesses", Mr. Duverge & Mr. Arango, ever being in the crashed car scene, nor witnesses of the incident, nor having any type of information in relation to the incident.

3. People's Called Witness NYPD Officer Daniel Cross

The People called NYPD Officer Daniel Cross ("Mr. Cross"), who was the **First** responding NYPD officer at the crashed car scene on **May 10, 2009**. Mr. Cross testified at trial that on **May 10, 2009**, while being on duty, he responded to the location of West 177th Street to a schoolyard in respond to a **Radio Transmittal** of a " 911 call or an assault in progress, and also came over at the same time as a 53, which is a car accident with a pin, which means someone is either pinned inside or outside of the vehicle." *See* **S.D.N.Y.Dkt. #14-3, at Pg. #169, L. #4-#13**. Also testified that the "Black standard Lincoln town car[...] had went through a fence that is around the schoolyard at 177th Street in Davidson. It went through the fence, Cross approximately a Football Field or So of Distance and Crashed into The Wall." *See* **S.D.N.Y.Dkt. #14-3, at Pg. #172, L. #11-#18**; Also **S.D.N.Y.Dkt. #79, at Ex. #2, at Ex. A** (a Copy of the NYPD official created & maintained Diagram reflecting the actual distance between the corner of 177th Street and the schoolyard wall that the car crashed into).

Mr. Cross testified, as the First responding Officer to the crashed car scene, that he arrived at the crashed car scene and approached the crashed car, to find approximately three(3) to four(4) individuals standing by the crashed car, with his service weapon in his holster. Mr. Cross testified that upon arriving at the

crashed car scene -- with his Supervising Lieutenant, a **Mr. Donovan** – he saw the "rear passenger door had been open". *See* **S.D.N.Y.Dkt. #14-3, at Pg. #188, L. #9-#20**; also **Pg. #173, L. #1.** Also testified that he **Recovered the Firearm (Gun) from the Body of Mr. Pita** by removing his assigned NYPD service "Firearm" from his holsters, as he was trained at the academy, placing it on his "waistband", and subsequently putting on gloves, grabbing the firearm -- from Mr. Pita's body -- from the "Butt of the gun to conserve any, you know, evidence from the gun, pulled the slide to the back, for the most part that makes the gun safe so that no rounds are in the chamber", and placed this same recovered firearm -- the **"Murder Weapon"** -- in his holster to keep it safe. *See* **S.D.N.Y.Dkt. #14-3, at Pg. #174-#175.** *See* **S.D.N.Y.Dkt. #14-3, at Pg. # #174-#175.** Mr. Cross testified that he **Recovered** the gun from **Mr. Pita's** Left Armpit, **Specifically Tucked Between the Left Armpit & the Ribcage**. See **S.D.N.Y.Dkt. #14-3, at Pg. #183, L. #6-#21.** Also testified that upon removing Petitioner from the crashed car, he conducted a **Pat-Frisk** of the Petitioner resulting in **No Weapons, Nor Contraband,** being discovered nor recovered from Petitioner's Personal Possession. *See* **S.D.N.Y.Dkt. #14-3, at Pg. #193, L. #5-#21.**

4. Peoples' Called Witness NYPD Detective Jonathan Fox

The People Called NYPD Detective Jonathan Fox ("Mr. Fox") as their ballistic expert. Mr. Fox testified that his duties and responsibilities working at the firearm unit consisted of testing and identifying firearms, ammunition, **Microscopically Examine all the Ballistic Evidence, Cartridge Casing, Bullets Fragments and Live Cartridges**. *See* **S.D.N.Y.Dkt. #-14-3, at Pg. #228, L. #3-#13.** Also testified that he performed **Two(2)** separate type of test on the gun recovered from **Mr. Pita's** body, same gun introduced at Trial as the "**Murder Weapon**" by the People, consisting of a (1)firearm examination to see if the gun is operable with the ammunition received, and; a (2)Microscopy risk examination with the gun to compare the cartridge casings recovered from the crime scene for this case. *See* **S.D.N.Y.Dkt. #14-3, at Pg. #230-#231.** As well, stated that both the gun and the ammunition received were operable at the conclusion of the first test, conducted by

him. *See* S.D.N.Y.Dkt. #14-3, at Pg. #231, L. #7-#11. Further, stating that only Two(2) Live Ammunitions were received along with the firearm by his unit for testing in relation to this specific case. *See* S.D.N.Y.Dkt. #14-#3, at Pg. #231, L. #12-#15. Furthermore, stated that an additional test was actually conducted on May 15, 2009 by another NYPD Detective, a retired Detective named Tejada, prior to the test conducted by Mr. Fox, of this same recovered gun and live ammunitions. *See* S.D.N.Y.Dkt. #14-3, at Pg. #231, L. #16-#25.

Mr. Fox testified that he received a total of Three(3) Cartridges from a .9 Millimeter Lugar and Two(2) .9 Millimeter Caliber Class Bulls with a Six(6) Right Twist to be tested with the received firearm and ammunitions by his unit, by him. *See* S.D.N.Y.Dkt. #14-3, at Pg. #239, L. #17-#20. Mr. Fox testified that upon the conclusion of his conducted examination of the gun and ammunition and casing received by him, that the Two(2) bullets and the Three(3) cartridges were fired by this same gun, the "Murder Weapon" recovered from Mr. Pita's Body & personal possession. *See* S.D.N.Y.Dkt. #14-#3, at Pg. #239, L. #20-#23. Lastly, but not final, Mr. Fox testified that, former Detective Tejada had "Fired" One(1) out-of the Two(2) received Live Ammunition for the testing conducted by this same Detective Tejada. *See* S.D.N.Y.Dkt. #14-3, at Pg. #241, L. #15-#18. Mr. Fox Did Not stated, testified to, nor clarified whether he examined the bullets that were recovered from the body of Mr. Pita to be compared with the Two(2) bullets fired by him with the only recovered gun, the "Murder Weapon", from Mr. Pita's Body & Personal Possession.

5. People's Called Witness Doctor Monica Smiddy

The People called Doctor Monica Smiddy ("Dr. Smiddy") as their witness relating to the autopsy conducted of Mr. Pita's deceased Body. Dr. Smiddy testified that she, at the time of the conducted autopsy on May 10, 2009, held a job title of a Medical Examiner #2 while employed by the Office of Chief Medical Examiner of New York City and being a Forensic Pathologist for close to Twenty(20) years. *See* S.D.N.Y.Dkt. #14-3, at Pg. #249, L. #4-#20. Also testified that Mr. Pita's body had Three(3) Clustered gunshot wound entrances all on the

right side of the body, behind the right ear, the right shoulder and the right upper back. *See* S.D.N.Y.Dkt. #14-3, at Pg. #262, L. #1-#6; also S.D.N.Y.Dkt. #14-4, at Pg. #6, L. #8-#10. As well, testified that the bullets recovered from Mr. Pita's body were removed, cleaned, labeled, placed inside an envelope, and placed in a **Ballistic Safe,** and subsequently **logged** in the **Ballistic Safe Logbook** by her. *See* S.D.N.Y.Dkt. #14-4, at Pg. #8, L. #20-#25. Dr. Smiddy Did Not testified, stated nor clarified whether the NYPD Firearm Unit, nor Detectives Tejada &/or Fox, ever obtained the adequately recovered and preserved bullets, from Mr. Pita's body, from the Medical Examiner's Department to be examined with the only recovered gun, the "**Murder Weapon**", from Mr. Pita's body.

6. Jury Charge & Deliberation

On December 11, 2012 at 10:50am the jury were entered into the Court and charged. The jury charge consisted of (I)Intentional Second-Degree Murder, PL § 125.25(1); as the alternative (II)First-Degree Manslaughter, PL § 125.20(1); (III)**Criminal Possession of a Weapon**, PL § 265(1)(b), and; (VI)Criminal Possession of a Weapon, PL § 265(3). *See* S.D.N.Y.Dkt. #14-4, at Pg. #118-#128. The Court Did Not charged the jury with the words of "In Order to Find Defendant Guilty of Intentional Murder in the Second Degree[, PL § 125.25(1)], the Jury[are] Require to Find the Defendant's State of Mind was that of Depraved Indifference", as required by both State & Federal Laws. Deliberation began following the Court's charge, and the alternative jurors were discharged by the Court. *See* S.D.N.Y.Dkt. #14-4, at Pg. #136-#160. Moments later, the jurors requested and received both the Procured **Coerced-Compliant False Self-Incriminating Confessions** (the Written & Video Statements), Petitioner's introduced Medical Records (**Defendant "A"**), and a read-back of the NYPD Police Officer Mr. Cross Testimony. *See* S.D.N.Y.Dkt. #14-4, at Pg. #163-#168; also Pg. #134, L. #16-#18, and; Pg. #157, L. #11-#23. Deliberation was put on recess until Wednesday, December 12, 2012 at 2:25pm, due to a juror's, Anthony Figueroa's, family emergency. *See* S.D.N.Y.Dkt. #14-#4, at Pg. #174-#170. Upon resumption of deliberation on Thursday, December 13, 2012, the jurors requested and received a read-back of the **Intentional Second-Degree**

Murder, PL § 125.25(1), charge and the Court's issued instructions on Intent, for which, once again did not included the words of "In Order to Find Defendant Guilty of Intentional Second Degree Murder[, PL § 125.25(1)], The Jury[are] Require to Find Defendant's State of Mind was that of Depraved Indifference", as required by Law. *See* S.D.N.Y.Dkt. #14-4, at Pg. #187; Pg. #191-#196; also *See* Jury Note/Court Ex. #5. The court recessed deliberation until the following day, Friday, December 14, 2012. Deliberation recess continued until Monday, December 17, 2012 due to the juror's foreperson, Mr. Lawson, having a medical emergency and another juror, Mr. Colon, needing to attend a job interview. *See* S.D.N.Y.Dkt. #14-4, at Pg. #201-#211.

On Monday, December 17, 2012 deliberation resumed and following the Court's lunch recess, the Court received a juror note stating that "It was deadlock on count 1[(Intentional Second Degree Murder, PL § 125.25(1),]" and asking the Court "What is the Next Step". *See* S.D.N.Y.Dkt. #14-4, at Pg. #230. Shortly thereof, the jurors issued another note in request, and received a replay of the Procured Coerced-Compliant Confession Video Statement. *See* S.D.N.Y.Dkt. #14-4, at Pg. #235; also Juror Note/Court's Ex. #8. At 4:29pm on this same date, deliberation was placed on recess until Tuesday, December 18, 2012. *See* S.D.N.Y.Dkt. #14-5, at Pg. #1.

On Tuesday, December 18, 2012 upon resumption of the Court's session, a juror, Ms. Princes Smith, contacted and informed the Court that she could not appear in the court to resume deliberation on the next day. *See* S.D.N.Y.Dkt. #14-5, at Pg. #5, L. #4-#8. Prior to the Court's issued order placing deliberation on recess until the next day, another juror, Ms. Maria Martinez, requested to be excused from further juror participation & deliberation due to "having used up all her fifteen(15) paid days off work for jury services and was no longer being pay" for any additional & further jury services beyond this date, December 18, 2012, by her employer. *See* S.D.N.Y.Dkt. #14-5, at Pg. #14-#16. Jury deliberation was placed on recess until Wednesday, December 19, 2012.

On Wednesday, December 19, 2012 juror deliberation resumed and the jurors requested, and received a read-back of the Court's given instructions on the charge of "**Intentional Second Degree Murder, PL § 125.25(1)**", together with the definition of "**Intent**", for which, once again the Court Did Not included the words instructing the juror that "**In Order to Find Defendant Guilty of Intentional Second Degree Murder[, PL § 125.25(1)], The Jury[are] Require to Find Defendant's State of Mind was that of Depraved Indifference**", as required by Law. *See* **S.D.N.Y.Dkt. #14-5, at Pg. #18-#23**; also *See* **Jury/Court's Ex. #9 & #10**. Following the lunch recess, the jurors issued another note reporting and stating that "**After a Lot of Deliberation We Continue to be Deadlock. We have Discussed the Case many Times and Cannot Reach a Unanimous Decisions at this Point**." *See* **S.D.N.Y.Dkt. #14-5, at Pg. #25-#26**; also *See* **Jury/Court's Note Ex. #11**. Following the Juror's Second **Deadlock Note**, several jurors reported to the Court having difficulties. The juror Foreperson, Mr. Lawson, was unable to return to resume deliberation due to medical needs. Juror #2, Mr. Pantoja, was "**actively feeling ill**". Juror #6, Mr. Figueroa – whom previously had the family emergency --, was at this point requesting to be allow to leave due to another family emergency crisis. An additional juror, Ms. Princes Smith – whom was ill on the previous day --, was having concerns about **Not Being Pay for Any Further Jury Services**, depriving her of income to pay for her bills and cost of living, **essential needs**. *See* **S.D.N.Y.Dkt. #14-5, at Pg. #26**. Upon the issuing of the jury note reporting and stating the difficulties, hardships and severe concerns presented, the Court clearly stated that it "**Personally Think**" that the jurors were never going to resolve Count "1", **Intentional Second Degree Murder, PL § 125.25(1)**. *See* **S.D.N.Y.Dkt. #14-5, at Pg. #27**.

The Court conducted inquiries of the jurors revealed that juror (a)Mr. Pantonja, (b)Mr. Lawson, and (c)Ms. Smith could not return on the next day to resume deliberation; that jurors (d)Martinez could return the next day But would find it a "**Hardship**" due to her employer **No Longer** paying her for **Jury Services** days **Off-Work beyond that point**, and; the jurors (e)Mr. Figueroa & (f)Ms. Negron

Could Not Return the next day due to Personal & Work commitments, respectively, but would be able to return on Friday, December 21, 2012. *See* S.D.N.Y.Dkt. #14-5, at Pg. #31-#39. The Court further expressed, acknowledged, recognized and observed that it was "**Impossible to Proceed Right Now**", and the juror's "Hardships & Difficulties" complaints "**Might Very Well Amount to Physical Hostility**". *See* S.D.N.Y.Dkt. #14-5, at Pg. #42-#43. The Court ordered the continuation of deliberation recess until Friday, December 21, 2012.

On Friday, December 21, 2012 during the Court's session, the Court received a note stating that the jury's Foreperson, Mr. Lawson, have had underwent an emergency toe surgery, unable to make it to resume deliberation on that date, December 21, 2012, but was able to return on the following court session date, Monday, December 24, 2012, if the weather permitted, if it was not raining. *See* S.D.N.Y.Dkt. #14-5, at Pg. #49, L. #5-#11. The Court at this specific point found and held that "at this point" the Court "**Believed Either One[(1)] or Both of the Provisions of the CPL would Justify a Mistrial, 310.60 [&/]or 280.10 the Impossibility of Continuing in a Timely Fashion and/or that the Jury Deliberation for an Extensive Period of Time Without a Verdict. And I'm[(the Court)] Satisfied that No Agreement is Likely Within a Reasonable Time.**" *See* S.D.N.Y.Dkt. #14-5, at Pg. #49, L. #12-#19. Despite the Court's own observation and holdings of the Juror's presented "**Hardships & Difficulties**", and the Juror's, Ms. Negron, clearly expressed and stated complaint about having hardship on returning to the Court to resume deliberation on Monday, December 24, 2012 -- on Christmas Eve –(**interfering** and **disrupting** with her Already Scheduled Family Christmas Plans that were starting on the morning of December 24, 2012 and continuing through the entire day) further expressing that, thus, she **Did Not** wanted to put aside her Family Christmas Plans for the purpose of coming back to the court to resume deliberation, she Could return to the court for a half of day, if need to, the Court still forced the jurors to return on Monday, December 24, 2012 to resume deliberation under the same duress, **hardships & difficulties** presented for the jurors. *See* S.D.N.Y.Dkt. #14-5, at Pg. #56-#57.

On Monday, December 24, 2012 at 10:15am the jurors resumed deliberation and at 10:16am the jurors returned a **Guilty Verdict** for **Intention Second Degree Murder, PL § 125.25(1)**, against Petitioner. *See* **S.D.N.Y.Dkt. #14-5, at Pg. #79-#80.**

C. Federal *Writ of Habeas Corpus* Proceeding

On May 30, 2019 Petitioner, through representing counsel – Alexander Dudelson, Esq. --, timely filed the Petition seeking Federal ***Writ of Habeas Corpus*** Claims Relief pursuant to 28 U.S.C. § 2254 by filing the Petition and supporting documents with the S.D.N.Y. Court in relation to this same State Conviction. *See* **S.D.N.Y.Dkt. #1-#4.**

1. Respondent's Opposition to the Petition Seeking Federal Writ of Habeas Corpus Reliefs

On November 18, 2019, under authorized extensions, respondent – through representing counsel of record, the **Bronx County District Attorney's Office** – filed its opposition documents, along with supporting documents & copy of the trial transcripts. *See* **S.D.N.Y.Dkt. #4-#14.** Within respondent's filed opposition's documents, Memorandum of Law in Support and supporting exhibits, respondent stated, under **"The Facts"**, that "during the early morning of May 10, 2009, Petitioner shot delivery cab driver Roberto Pita three(3) times – in the head, shoulder, and neck – killing him. Petitioner shot the victim while he was driving.[..] Two(2) bystanders[(Mr. Duverge & Mr. Arango)], who have had heard the gunshots from inside the cab and witnessed the crash, ran over to the cab. They saw the victim in the front seat and Petitioner reaching for a pistol laying on the victim's chest[...] later that day, After Obtaining Permission From a Doctor, Two[(2)] detectives[(Mr. Brennan & Mr. Ader)] interviewed Petitioner at the hospital, After He Waived His Miranda Rights.[...] The following day, Petitioner

Voluntarily Made a Video Statement to[a Bronx County] Assistant District Attorney." *See* **S.D.N.Y.Dkt. #13, at Pg. #10.**

Also stating, by quoting respondent's misrepresentation of the material facts, that "Had Petitioner **Never Said a Word** to the Police, the **Proof** that he **Intentionally Killed** Roberto Pita still would have been **Completely Overwhelming**. Eyewitnesses **Renee Duverge** and **Gregory Arango** heard gunshots **from inside** of Pita's cab, and then saw the vehicle drive through a metal fence and crashed in a school. **NO ONE[(1)] GOT OUT OF THE CAB**, and when Duverge and Arango rushed over, **they saw** Pita, slump over and near death, in the driver's seat, and Petitioner, injured but nevertheless **reaching for a pistol**, in the back. Petitioner was, quite simply, **caught red-handed as Pita's Killer**." *See* **S.D.N.Y.Dkt. #13, at Pg. #13.** As well stating that "as noted, on **May 10, 2009**, at approximately **1:00am**, **Two[(2)] eyewitnesses[(Mr. Duverge & Mr. Arango)] heard** gunshots from inside of the victim's cab, and then saw it crash. Inside the cab were the driver, the victim, with gunshot wounds and Petitioner, **alone**, in the back seat. The witnesses [(Mr. Duverge & Mr. Arango)] saw Petitioner **reaching for the gun on the victim's chest.** Later that day, at approximately **5:15pm**, while hospitalized, Petitioner **waived his Miranda Rights** and made a **Verbal Statement** to **two[(2)] Detectives[(Mr. Brennan & Mr. Ader)]**, who took notes of the Statement." *See* **S.D.N.Y.Dkt. #13, at Pg. #14.**

Further, stating that "the following afternoon, on **May 11, 2009**, an[Bronx County] Assistant District Attorney interviewed Petitioner at the Hospital; Petitioner **waived his Miranda Rights again** and made a Video Statement. Petitioner's description of the shooting generally matched what he told the detectives[(Mr. Brennan & Mr. Ader)].[...]Although **NO ONE[(1)] OBSERVED THE SHOOTING**, Counsel had **No Plausible** argument that Petitioner **was not the shooter**. Counsel **Could Not Claim** that the witnesses [(Mr. Duverge & Mr. Arango)] had **Mis-Identified** Defendant[(Petitioner)]. As the Appellate Division held, the **Prosecution had Overwhelming Proof** of Petitioner's **Guilt even without his[(Writtem & Video)] Statement[s]**. *See* **S.D.N.Y.Dkt. #13, at Pg. #15.** Additionally stating that "here, the **Deception** alleged **Engaged** in by the detectives[

Mr. Brennan & Mr. Ader] in this case Did Not provided the basis for a **viable suppression argument**". *See* S.D.N.Y.Dkt. #13, at Pg. #17.

2. Respondent's Opposition to Petitioner's Filed Motion Seeking to Stay, Hold in Abeyance and Leave To Amend the Petition

On February 28, 2020 Petitioner, through representing counsel, filed a motion seeking to stay, hold in abeyance and leave to amend the Petition to include the additional exhausted claims relating to the 911 caller sprint reports in support of the Third Person Defense, the Wrongful Conviction Claim and the Actual innocence Claim. *See* S.D.N.Y.Dkt. #21 & #26-#28.

On April 10, 2020 respondent, through representing counsel of record – **the Bronx Conty Distirct Attorney's Office** – filed opposition documents with supporting exhibits. *See* S.D.N.Y.Dkt. #24. In its opposition documents, under "**The Facts**", respondent reiterated the same facts as stated in their opposition documents to the Petition seeking Federal Habeas Claims relief, as being quoted herein-above under subpart "**1**". *See* S.D.N.Y.Dkt. #24, at Pg. #10.

Additionally, respondent stated that "the record contains no mention of Petitioner ever having mention a third individual – the actual shooter – being inside the cab to the detectives[Mr. Brennan & Mr. Ader] who first interviewed him nor to the[Bronx County] assistant district attorney who took the Video Statement. [...] Even if trial counsel had succeeded in having the[Written & Video] statements suppressed. It is doubtful that the jurors would have given much credence to the anonymous 911 caller. The jurors credited the two[(2)] eyewitnesse's [(Mr. Duverge & Mr. Arango)] testimonies that upon hearing the gunshot and seeing the victim's taxi crash, they ran toward it[, not away from the cab]. They saw only the victim and Petitioner inside the taxi, and they had not seen anyone fleeing from it[(the cab)].[...] The jurors would had no information regarding under what circumstance the anonymous 911 caller had seen the incident. [...] None of the other callers on the sprint report mentioned seeing

anyone running from the taxi. [..] The 911 caller statement has too many unknown for the juror to have accepted it over that of the trial witnesses [Mr. Duverge & Mr. Arango]. It is illogical for Petitioner to argue that the juror would have credited a solo statement by an anonymous individual whose credibility was untested over that of the witnesses[Mr. Duverge & Mr. Arango] who testified at Trial." *See* S.D.N.Y.Dkt. #24, at Pg. #18-#19.

On January 27, 2021 the court entered an Opinion and Recommendation, upon review of the parties submissions, denying Petitioner's motion seeking to stay, hold in abeyance and leave to Amend the Petition to include the exhausted additional Claims, by relying and quoting to the facts stated by respondent in its opposition documents, arguments and statements. *See* S.D.N.Y.Dkt. #30.

3. Petitioner's Filed Motion Seeking Reconsideration of the January 27, 2021 Issued Opinion & Recommendation Report

On February 24, 2021, under granted extensions, Petitioner, through representing counsel, filed a Rule 59(e) & 60(b)(1), Fed.R.Civ.P., motion seeking reconsideration of the Court's January 27, 2021 Opinion & Recommendation Report (denying the filed motion seeking to stay, hold in abeyance and leave to amend the Petition), on the basis that, inter alia: Petitioner was only seeking for Leave to Amend the Petition to include the exhausted additional claims relating to the 911 caller sprint report, the Third Person Defense, Wrongful Conviction & Actual Innocence Claims. *See* S.D.N.Y.Dkt. #33.

Petitioner's representing counsel filed a Declaration in support of the reconsideration motion, stating in part that "6. On February 21, 2020, Mr. Tineo-Santos filed a *Pro Se* Writ of Coram Nobis with the Appellate Division – First Judicial Department. 7. Mr. Tineo-Santos' motion for leave to amend and to stay and hold his Petition in abeyance was filed on February 28, 2020. 8. At the time that the motion was filed, counsel[(Alexander Dudelson, Esq.)] for Mr. Tineo-

Santos was not aware of the filing of or the content of the *Pro Se* **Writ of Coram Nobis**. Counsel[(Alexander Dudelson, Esq.)] for Mr. Tineo-Santos never received the *Pro Se* **Writ of Coram Nobis** from the Petitioner. 9. On February 25, 2020, counsel[(Alexander Dudelson, Esq.)] for Mr. Tineo-Santos was advised that Mr. Tineo-Santos filed a submission[of a wrongful conviction/actual innocence Claims Complaint] with the Bronx[County] District Attorney's Office conviction integrity unit, and that it appeared to be premature since a Habeas Corpus Proceeding was pending. Counsel[(Alexander Dudelson, Esq.)] advised Ms. Russel of the Conviction Integrity Bureau that he was not aware of the filing and was not representing Mr. Tineo-Santos in that proceeding. 10. On March 2, 2020 Counsel[(Alexander Dudelson, Esq.)] for Mr. Tineo-Santos was advised of the *Pro Se* **Writ of Coram Nobis** by the [Bronx County] District Attorney's Office and advised that he did not have knowledge of the application and he was not representing Mr. Tineo-Santos before the Appellate Division. [...] 12. The Office of the[Bronx County] District Attorney filed **opposition[Documents]** to Petitioner's motion on April 10, 2020. At the time the opposition was filed, counsel[(Alexander Dudelson, Esq.)] for Mr. Tineo-Santos was no longer working from his office as a result of the[Covid-19] pandemic, and did not have possession of Mr. Tineo-Santos' file. 13. The **Office of the[Bronx County] District Attorney** APPRAISED this Court of Mr. Tineo-Santos' Appellate Division **Coram Nobis Writ** in his opposition to the Petitioner's motion and enumerated four[(4)] arguments advanced by Mr. Tineo-Santos. 14. The **Office of the[Bronx County] District Attorney** did not mention the several instances and arguments that Mr. Tineo-Santos made regarding his Appellate Attorney's failure to appraise the Supreme Court, Bronx county of the existence of the 911 recording in the CPL § 440.10 application. 15. Petitioner's counsel[(Alexander Dudelson, Esq.)] mistakenly relied on this misstatement/omission by the **Office of the[Bronx County] District Attorney** with reference to arguments made to the Appellate Division – First Judicial Department regarding the 911 recording." *See* **S.D.N.Y.Dkt. #34, at Pg. #3.**

As well, stating that "16. Petitioner's counsel[(Alexander Dudelson, Esq.)] should have rebutted the omission[s] of the Office of the[Bronx County] District Attorney in a reply and appraised this court of Mr. Tineo-Santos' arguments in the Appellate Division – First Judicial Department. It was an absolute mistake not to obtain the Coram Nobis Writ and review it upon receipt of the[Bronx County] District Attorney's opposition. [...] 20. The January 27, 2021 Opinion and Order of this Court is based on an error of facts. The proper facts were available, but were mistakenly not presented to this court. 21. No fault is attributable to Mr. Tineo-Santos for the failure to present his arguments in the Appellate Division, regarding the 911 call, to this court." *See* S.D.N.Y.Dkt. #34, at Pg. #4.

4. Respondent's Opposition to Petitioner's Filed Motion Seeking Reconsideration of the Issued January 27, 2021 Opinion And Recommendation

On March 16, 2021 respondent filed its opposition documents to Petitioner's filed motion seeking reconsideration and relief of the issued January 27, 2021 Opinion and Recommendation Order(denying leave to amend the Petition). *See* S.D.N.Y.Dkt. #38. Respondent reiterated the same statements of facts, as consistently done on all previously filed oppositions documents -- that have been quoted to herein-above under subpart "1" --, in opposition with the addition of stating that "On March 2, 2020, one[(1)] month prior to filing the opposition papers to the stay application, respondent forwarded a copy of the *Pro Se* Coram Application (with its reference to the 911 sprint report claim) to habeas counsel, Alexander M. Dudelson, Esq., via email. Mr. Dudelson verified receipt by responding that he planned to pursue only a NYCPL'440 motion, and that the Coram was unrelated to this habeas application (see Exhibit 1, email correspondence dated March 2, 2020).". *See* S.D.N.Y.Dkt. #38, at Pg. #10-#12.

As well, stating and pointing out that "While declining to reach the merits of the claim, this Court did note that 'There does not appear to be anything

in the record containing any mention of[Petitioner] ever describing(in his[written & video] statement or otherwise) a third individual in the livery cab, which is ostensibly why he has now presented the 911 report as the predicate for his proposed new claim.'[..] The trial jury credited the two[(2)] eyewitnesses'[Mr. Duverge & Mr. Arango] testimonies[...] Whereas the jurors heard and observed the witnesses'[Mr. Duverge & Mr. Arango] testimonies before deciding they were credible, the anonymous caller would not have been present at trial to explain what she had seen. The juror would had no information regarding under what circumstances the 911 caller had seen the incident.[..] None of the other callers on the[911] Sprint report mentioned seeing anyone running from the taxi. It is illogical for Petitioner to argue that the juror would have credited a solo statement by an anonymous individuals whose credibility was untested over that of the witnesses'[Mr. Duverge & Mr. Arango] who testified at Trial." *See* **S.D.N.Y.Dkt. #38, at Pg. #15.**

On May 20, 2021 respondent, through representing counsel of record (The Bronx County District Attorney's Office), filed opposition papers, along with supporting documents and exhibits, under the specific instructions of the S.D.N.Y. Court, reiterating the same facts as it have done on all previously filed opposition documents, as quoted herein-above under subpart "1". *See* **S.D.N.Y.Dkt. #49; in re:#38; re:#35; re:#27.**

5. U.S. Magistrate Judge's Issued August 13, 2021 Opinion & Recommendation Report

On August 13, 2021 the S.D.N.Y. Court, U.S. Magistrate Judge Hon. James L. Cott ("Magistrate Judge"), issued an Order & Report and Recommendation denying both Petitioner's motion seeking reconsideration of the January 27, 2021 Order(denying leave to amend the Petition to include the exhausted claims relating to the 911 call report, the third person defense, and the wrongful conviction/actual innocence claims), and Petitioner's ***Writ of Habeas Corpus*** Claims Relief on their merits. *See* **S.D.N.Y.Dkt. #53.** The Magistrate Judge

held that in "Contrary to respondent's representation, it turned out that[Mr.] Tineo-Santos '**Did in fact file[d] a *Pro se* Coram Nobis Writ in the appellate Division – First Judicial Department**' in which he had argued that '**he was denied effective assistance of counsel when his Appellate Counsel Failed to raise issues regarding the 911 sprint report.**'[..] [Mr.]Tineo-Santos' Counsel[(Alexander Dudelson, Esq.)] admits that he '**Mistakenly relied on**' respondent's representations about the '**arguments made to the Appellate Division – First Judicial Department regarding the 911 recording**' and that he '**should have rebutted the omission[s] of [respondent] in a reply.**'[..] However, the blame does not lay squarely on respondent. **Indeed**, respondent's counsel[**(The Office of the Bronx County District Attorney)**] emailed a copy of[Mr.] Tineo-Santos' application for ***Writ of Coram Nobis*** and specifically asked[Mr.] Tineo-Santos' Counsel[(Alexander Dudelson, Esq.)] if he '**Plan[ned] to add the issues raised in the Coram as part of your application to stay the habeas, or should I consider the Coram as a separate matter pursued *Pro Se* by Defendant[(Petitioner)],**' to which[Mr.] Tineo-Santos' Counsel[(Alexander Dudelson, Esq.)] responded that '**[t]his one[(1)] has nothing to do with me**' and '**I am doing a 440.10 application based on the 911 call, as set forth in my proposed mixed Petition. I have no idea what he is doing in the[Coram] application.**'" *See* S.D.N.Y.Dkt. #53, at Pg. #13-#14.

Also, stating that "Notably, even if the court were to reach the merits of[Mr.] Tineo-Santos' Claim, the result would not be different. Petitioner is claiming, ***ESSENTIALLY,* that the 911 report would have established that another person was present in the livery cab, and therefore it would exonerate him.** But as the court **NOTED** in its Opinion, 'there does not appear to be anything in the record containing any mention of[Petitioner] ever describing (in his statement or otherwise) a third person in the livery cab, which is ostensibly why he has now presented the 911 report as the predicate for his proposed new claim. he alleges only that he 'always stated' the existence of a third person to his attorney.[..] As the respondent point out, in convincing[Mr.] Tineo-Santos the jury ultimately credited the two[(2)] eyewitnesses[(Mr. Duverge & Mr. Arango)], who only saw[

Mr.] Pita and[Mr.] Tineo-Santos inside the livery cab, and they[(the jury)] would not have had any testimony from an anonymous caller explaining what she had purportedly seen, or under what circumstances the caller had observed the incident.[..] It strains Credulity to think that the jury would have credited the statement of an anonymous individual – assuming this statement would even have come into evidence – instead of the eyewitnesses[(Mr. Duverge & Mr. Arango)] who testified at Trial. Thus, given all of these circumstances, Appellate Counsel justifiably did not raise in the 440.10 motion that[Mr.] Tineo-Santos' Trial Counsel had rendered Ineffective Assistant of Counsel by not utilizing the 911 report.[..] The Court does not believe a different result would have obtained even if this evidence had been part of the Trial, or that a 'Manifest Injustice' would occure unless it ruled otherwise. For all these reasons,[Mr.] Tineo-Santos' motion for reconsideration is without merit, the Court will now address his underlying habeas Petition requesting relief under 28 U.S.C. § 2254(d)." *See* **S.D.N.Y.Dkt.#53, at Pg. #15-#17.**

The magistrate Judge concluded his Order & Report and Recommendation by stating stating that "The record contains ample proof independent of the statements[, both Procured Written & Video Coerced-Compliant False Self-incriminating Confessions, to support[Mr.] Tineo-Santos'[Intentional Second-Degree Murder, PL § 125.25(1),] Conviction. **While[Mr.] Tineo-Santos' argument that the statements[, both Procured Written & Video Coerced-Compliant False Self-incriminating Confessions,] provided the only direct evidence of <u>INTENT</u> is accurate**, he fails to address why the strong circumstantial evidence in the record is sufficient to establish[the elements for] <u>Intent</u>.[..] Taken together, the evidence before the jury – including the fact that[Mr.] tineo-Santos and[Mr.] Pita were the only people in the taxi,[Mr.] Pita had been shot three[(3)] times while driving, and a gun was found near[Mr.] Tineo-Santos at the scene of the accident – provides more than enough to support the[elements for Intentional] Second Degree Murder[, PL § 125.25(1),] Conviction such that there is not a reasonable probability that the result would have been different even without the errors of Counsel[s]."

See S.D.N.Y.Dkt. #53, at Pg. #28-#29. Furthermore, the Magistrate Judge stated that "ultimately, [t]his is not a case where[the absence of the Procured Written & Video Coerced-Compliant False Self-Incriminating Confession Statements] would have so clearly 'alter[ed] the entire evidentiary picture' that the [] Court's decision is Indefensible' given the other evidence that supported his[Intentional Second Degree Murder, PL § 125.25(1),] Conviction.[..] Instead, given the record, the First Department could have reasonable concluded that, even without the[Procured Written & Video Coerced-Compliant False Self-Incriminating Confession] statement[s], the verdict would have been the same.[...] his Petition should be Denied." *See* S.D.N.Y.Dkt. 353, at Pg. #30.

6. Final Judgment Entered By The S.D.N.Y. Court Denying the Federal Writ of Habeas Corpus Claims Relief On Its Merits

Upon the timely objection submissions by both parties, on September 14, 2022 the S.D.N.Y. Court, U.S. District Judge Hon. Mary Kay Vuskocil ("District Judge"), issued its final judgment – Memorandum Order Adopting the Magistrate Judge's issued Opinion & Order and Recommendation – denying Petitioner's original Federal *Writ of Habeas Corpus* Claims relief on the merits. *See* S.D.N.Y.Dkt. #58. The District Judge held that "Magistrate Judge James L. Cott issued a thorough and carefully reasoned Report and Recommendation (the 'Report') that the habeas Petition be denied." *See* S.D.N.Y.Dkt. #58, at Pg. #1. Also stating that "as Magistrate Judge Cott concluded, the record contains sufficient evidence, independent of Mr. Tineo-Santos'[Procured Coerced-Compliant False Self-Incriminating Written & Video Confession] Statements, to support finding by the State Court that there was enough evidence for a jury to convict[for Intentional Second Degree Murder, PL § 125.25(1),] and Petitioner was not Prejudiced by Counsel's purported failure.[..] This included evidence that Mr. Tineo-Santos and Mr. Pita were the only people in the Taxi at the time of the shooting, and that a gun was found near Mr. Tineo-Santos at the scene of the

crime. On this record, it was not objectively unreasonable for the State Court to conclude that there was sufficient additional evidence to support Mr. Tineo-Santos'[Intentional Second Degree Murder, PL § 125.25(1),] Conviction.[...] For the above reasons,[...] The report is ADOPTED in its entirety and Mr. Tineo-Santos'[Federal Writ of] Habeas[Corpus Claims Relief] Petition is DENIED." *See* S.D.N.Y.Dkt. #58, at Pg. #7-#8.

D. Rule 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P., *Pro Se* Motion Attacking the Integrity of the Original Federal *Writ of Habeas Corpus* (Civil) Proceedings

On October 26, 2022 the 2nd Cir. Court, through the Clerk's Office, docketed Petitioner's *Pro Se* Notice of Appeal appealing the S.D.N.Y. Court's issued September 14, 2022 Judgment (denying the Federal Writ of Habeas Corpus Claims Relief on its Merits) under 2nd Cir. Appeal Docket No.:22-2736. On October 28, 2022, under the "Prisoner Mail Box Rule", Petitioner submitted a Pro Se letter motion seeking for an extension to file the Pro Se Appeal Brief, for which, the 2nd Cir. Court's clerk issued an Order "denying[Petitioner's *Pro Se*] letter request for an extension of time to file the brief as UNNECESSARY, reminding Appellant[/Petitioner] that his motion for Certificate of Appealability is due November 23, 2022." *See* 2nd Cir. Appeal Docket ("2nd Cir.Dkt.") No. ("#") 12-#15; Also App. E6. On November 01, 2022 , under the "Prisoner's Mail Box Rule", Petitioner submitted a Pro Se motion seeking to hold in Abeyance the Appeal, for which, the 2nd Cir. Court's Clerk issued an "Motion Order, denying motion to hold appeal in abeyance as moot" due to no Certificate of Appealability being issued. *See* 2nd Cir.Dkt. #17-#21. On November 07, 2022, under the "Prisoner Mail Box Rule", Petitioner submitted the *Pro Se* motion seeking COA to appeal the September 14, 2022 S.D.N.Y. Court's issued final judgment (denying the Federal *Writ of Habeas Corpus* Claims Reliefs on its Merits). *See* 2nd Cir.Dkt.#24-#28 Also App. E6.

On January 21, 2023, under the "**Prisoner's Mail Box Rule**", while the Notice of Appeal was Docketed pending the 2nd Cir. Court's Decision on Petitioner's submitted *Pro Se* COA application in seek to appeal the September 14, 2022 judgment (denying the habeas Claims Relief on its merits), Petitioner submitted a **Timely and Comprehensive** Rule 60(a); 60(b)(1); 60(b)(3); 60(b)(6); 60(d), and; 62.1(a)(3), Fed.R.Civ.P., *Pro Se* letter motion with the S.D.N.Y. Court **Attacking** the Integrity of the original Federal ***Writ of Habeas Corpus*** Proceeding to cure defects appearing on the habeas proceeding on the basis that the judgment was procured through **Fraud on the Court** committed by the opposing parties that amounts to a Grave **Miscarriage of Justice**, violating the **Fourteenth Amendment** of the U.S. Constitution. *See* **S.D.N.Y.Dkt. #71**; Also **App. D15**. On May 10, 2023 the S.D.N.Y. Court issued an Order denied the **Rule 60** *Pro Se* letter motion by stating that "For the same reasons previously outlined in this Court's December 5, 2022 and December 28, 2022 Orders, Petitioner's request for relief under Rule 60 is DENIED without prejudice. This Court will not—and indeed, cannot—pass upon issues 'involved in the [pending] appeal.' *Griggs V. Provident Consumer Disc. Co.,* 459 U.S. 56, 58 (1982). Petitioner is on notice that if he files any further repetitious filings challenging the September 14, 2022 Opinion and Order, **Before the Second Circuit's resolution of the pending appeal, the Court will direct Petitioner to show cause why an order barring him from filing any future *Pro Se* Petitions without first obtaining leave of court should not be entered.**" *See* **S.D.N.Y.Dkt. #73**.On June 29, 2023 the 2nd Cir. Court issued a Order denying Petitioner's *Pro Se* COA application (seeking to appeal the Federal Writ of Habeas Claims Relief Denial judgment, entered on September 14, 2022) by stating that "**Appellant, *Pro Se*, moves for a Certificate of Appealability,[...] Upon due consideration, it is hereby ORDERED that the motions[seeking COA] are DENIED and the appeal is DISMISSED because Appellant[/Petitioner] has not 'made a substantial showing of the denial of a constitutional right.' *28 U.S.C. § 2253(c); see Miller-El V. Cockrell,* 537 U.S. 322, 327 (2003).**" *See* 2nd Cir.Dkt. #55-57; also **App. E2**.

On July 12, 2023, under the "Prisoner's Mail Box Rule", Petitioner submitted a Timely & Comprehensive Rule 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P., *Pro Se* letter motion, Attacking the Integrity of the Federal *Habeas* Proceeding to Cure Defects appearing that amounts to a Grave Miscarriage in Justice, with the S.D.N.Y. Court seeking relief of the September 14, 2022 Judgment and to Reopen the Original Federal *Writ of Habeas Corpus* Proceeding on the basis of the judgment being Procured by the opposing parties through, inter alia; Fraud on the Court. *See* S.D.N.Y.Dkt. #79; Also *See* App. D17. On November 07, 2023 the S.D.N.Y. Court, District Judge, issued an Order denying the *Pro Se* Rule 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and 60(d), Fed.R.Civ.P., letter motion (seeking to 'simply' reopen the original Federal ***habeas*** proceeding to Cure Defects appearing, Attacking the Integrity of the ***habeas*** proceeding) by stating that "Petitioner's[*Pro Se*] motion for relief pursuant to Rule[s] 60(a); 60[(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P.,] and to REOPEN this[Original Federal *Writ of Habeas Corpus* proceeding] case is DENIED because the[District] Court does not have Jurisdiction to grant the requested relief", further referring to the 2nd Cir. Court's issued June 29, 2023 Order (App. E2) denying the *Pro Se* COA application (seeking to appeal the DENIAL of the original *Habeas Corpus* Claims Relief on its merits) and erroneously classifying this same June 29, 2023 issued Order (App. E3) denying the *Pro Se* COA application as a DISMISSAL of "Petitioner's Appeal[on the merits of the original Federal *Habeas Corpus* Claim Relief] without opinion, finding that Petitioner had not made a substantial showing of the denial of a Constitutional right[...] DISMISSING that appeal in its entirety". *See* S.D.N.Y.Dkt. #84, at Pg. #3-#4; Also App. B3-B4.

E. United States Court of Appeals For the Second Circuit Proceedings Denying The *Pro Se* COA Application

On November 17, 2023, under the "Prisoner's Mail Box Rule", Petitioner timely submitted the **Notice of Appeal** appealing the S.D.N.Y. Court's issued November 07, 2023 Order refusing to review the timely and comprehensively filed Rule 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P., *Pro Se* letter motion (**Attacking** the Integrity of the original Federal *Habeas Corpus* proceeding to **Cure Appearing Defects**), on the basis of "Lack of Jurisdiction". *See* 2nd **Cir.Dkt. #1.1**; Also **S.D.N.Y.Dkt. #85; App. D1-D17.** On November 29, 2023 the Clerk's office for the 2nd Cir. Court docketed the *Pro Se* Notice of Appeal, along with all transmitted documents from the S.D.N.Y. Court, under the 2nd Cir. Court Appeal docket No.:23-7901. *See* **2nd Cir. Court Docket No.:23-7901 ("2nd.Cir.#23-7901.Dkt.) #1-#19**; Also **App. D1-D17.** On December 12, 2023 Petitioner sought, via *Pro Se* Form T-1080 Motion, a COA to appeal the S.D.N.Y. Court's issued November 07, 2023 Order (refusing to review the **Timely & Comprehensively** filed Rule 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P., attacking the Integrity of the Original Habeas Proceeding to cure appearing defects). On May 02, 2024 the 2nd Cir. Court issued an Order (**App. A1-A3**) denying Petitioner's *Pro Se* application seeking COA to appeal the November 07, 2023 Judgment (**App. B1-B5**), after first sidestepping, without jurisdiction, to take "full consideration" of the merits of the Claims of the Appeal prior to securing the COA. *See* 2nd.**Cir.#23-7901.Dkt. #21.1**; Also **App. A1-A3.**

Reasons For Granting The Writ of Certiorari

A. The Decision Below Squarely Conflicts With The Well Established Decisions & Holding of this Court

The holdings of the Courts below that (1)the District Courts does not have Jurisdiction over, timely & comprehensively, filed Rules 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P., Motion (**Attacking** the Integrity of the original Federal *Habeas Corpus* Proceedings to **Cure Appearing Defects** that

amount to a *Grave* Miscarriage of Justice) 'simply' seeking to reopen the habeas proceeding is directly contrary to holdings and decisions of this Court, and; (2)the 2nd Cir. Court abused of discretion in first sidestepping, without jurisdiction, the COA application, well established, threshold by first and essentially taking "full consideration of the factual or legal bases adduced in support to the claims" in justifying the DENIAL of the COA application, is in contradiction with the decisions and holdings of this Court. *See* Banister V. Davis, 590 U.S. 504, 140 S.Ct. 1698 (2020)("An appeal from the denial of Rule 60(b) relief 'does not bring up the underlying judgment for review.")(citing Browder V. Director, Dept. of Corrections of Illinois, 434 U.S. at 263, 98 S.Ct. 556 (2007)); Tharpe V. Sellers, 583 U.S. 33 (2018); Buck V. Davis, 580 U.S. 100 (2017)("The COA inquiry, we have emphasized, Is Not Coextensive with a merits analysis.[...] This threshold question should be decided WITHOUT 'full consideration of the factual or legal bases adduced in support of the claims.")(Citing Miller-El V. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.nd.2d 931 (2003)); Also Slack V. McDaniel, 529 U.S. 473 (2000).

Additionally, this Court have held that "**Since at least 1935**" it has been established law of the United States that a Judgments, Orders, Proceedings or Convictions obtained through testimony or evidence the Prosecutor knows, or should have known, to be **False** is REPUGNANT to the **Constitution**. Establishing that "a[Judgment, Order, Proceeding or] Conviction, obtained through use of false evidence[or testimony], known to be such by representation of the State, Must fall under the Fourteenth Amendment.[..] The same result obtains when the State, although not soliciting false evidence, allow it to go uncorrected when it appears." See Napue V. Illinois, 360 U.S. 264, at 269, 79 S.Ct. 1173, 3L.Ed.2d 1217 (1959); Also See united States V. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.ed.2d 342 (1976); Giglio V. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972. **Constituting To an Automatic Reversal of the Judgment &/or Conviction.** Mainly, this Court have clarified that "Correct procedure requires that the merits of the Rules[**60(a);**] **60(b)[(1); 60(b)(3); 60(b)(6)**, and; **60(d), Fed.R.Civ.P.,**] motion be

addressed in the first instance by the District Court". See Gonzalez, 125 S.Ct. 2641, at 540. In reiterating that "As we have stress, '[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the Petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty.'" *Id.* citing Lonchar V. Thomas, 517 U.S. 314, 116 S.Ct. 1293 (1996). Recognizing & pointing out that "Fraud on the Court is one[(1)] example of such a defect." *Id.* at Footnote #5(citing Rodriguez, 252 F.3d 191, 199(2nd.Cir. 2001).

B. Importance of The Question Presented, The Decision Below, If Permitted To Stand, Would Likely Trigger Widespread Efforts in The States To Procure Judgments, Order, Decisions And Convictions Through Fraud on The Court

This case presents **FUNDAMENTAL** Questions of the Interpretation of this Court's decisions & holdings in Napue V. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); in Slack V. McDaniel, 529 U.S. 473, 120 S.Ct. 1595 (2000); in Abdur'Rahman V. Bell, 537 U.S. 88, 123 S.Ct. 594 (2002); in Gonzalez V. Crosby, 545 U.S. 524, 125 S.Ct. 2641 (2005); in Buck V. Davis, 580 U.S. 100, 137 S.Ct. 759 (2017); in Tharpe V. Sellers, 583 U.S. 33, 138 S.Ct. 545 (2018), and; in Banister V. Davis, 140 S.Ct. 1698 (2020). The question presented is of a **great public importance** because it effects the operations of Rule 60, Fed.R.Civ.P., and the operation of the COA application process threshold for the Civil and ***Writ of Habeas Corpus*** proceedings in all 50 States, the District of Columbia, and hundreds of Cities and Counties Prisoners. In view of the large amount of Civil litigations over the violation of the U.S. Constitutions raising Federal Questions proceedings, guidance on the questions is also of a great importance to society at large, because it affects their ability to receive fair decisions in proceedings that may result in months or years of added deprivation of Civil rights in violation of the U.S. Constitution Rights.

The issues' importance enhanced by the Fact that the lower Courts in the instant case have Seriously misapplied, misinterpreted, and overlooked the holdings in Slack; Abdur'Rahman; Gonzalez; Buck; Tharpe, and; Banister. This Court has held in these cases, combined, that **Judgments, Orders, Decisions, Proceedings** and/or **Convictions** "obtained" through the use of False evidence, known to be such by representation of the State, MUST fall under the Fourteenth Amendment, and "the same result obtains when the State, although not soliciting false evidence[and/or testimony], allow it to go uncorrected when it appears." *See* Napue, 360 U.S. 264, at **269**; Also *see* Agurs, 427 U.S. 97, at **103**, and; Giglio, 405 U.S. 150, at **153**. Also holding that **Rule 60** *Pro Se* motions challenging "a nonmerits aspect of the First Federal ***Habeas*** Proceedings,[inter alia; Fraud on the Court, Misrepresentation &/or Omission on Material Facts & Evidences committed by the opposing parties in procuring a Judgment, Order, Decision &/or Proceeding, that] sort of Claim IS NOT the equivalent of a ***Habeas*** Claim[, and] It DOES NOT assert a basis for Relief from the State-Court Judgment; RATHER, it seeks to Cure a 'DEFECT' on the Federal ***Habeas*** Proceeding itself." *See* Banister, 590 U.S. 504 (*Citing* Gonzalez, 125 S.Ct. 2641, at **532**). Further holding that a District Court DOES NOT need a COA NOR Permission by the Court of Appeals to have Jurisdiction to review **Timely & Comprehensively** file **Rule 60** motions by *Pro Se* Prisoners seeking to **Cure** "DEFECTS" appearing in the Judgment, Specially defects that amounts to a Grave **Miscarriage of Justice**, inter alia; **Fraud on the Court &/or Misrepresentation &/or Omission of Material Facts &/or Evidence** committed by opposing parties to procure the Judgment.

Furthermore, this Court have held that the Court of Appeals SHALL NOT take in "**Full Consideration**" the merits of the Appeal in deciding to **WHETHER** grant a COA application, because by taking "**full Consideration**" of the merits of the Appeal is an "**abuse of discretion**" in deciding an Appeal on its merits that the Court of Appeals DOES NOT have **Jurisdiction** over. *See* Buck,580 U.S. 100, at ***4-*5** (*Citing* Miller-El V. Cockrell, 537 U.S. 822, at **327**, and **336-337**, 123 S.Ct. 1029, 154 L.Ed. 2d 931 (2003)).

The Common sense understanding of the essential purpose of the Post-Judgment **Rule 60** motions is to CURE DEFECTS, inter alia; **Fraud on the Court, Misrepresentation** &/or **Omission of Material Facts** &/or **Evidences** committed by the opposing parties to procure the **Judgment, Order, Decision &/or Proceeding**, appearing in the "INTEGRITY" of the Civil (*Habeas Corpus*) proceedings that otherwise, if not cured, amounts to **Injustice** and a Grave **Miscarriage of Justice**, in the violation of the **Fourteenth Amendment**. Nothing in the cases of Napue; Slack; Abdur'Rahman; Gonzalez; Buck; Tharpe, nor in; Banister, suggests otherwise. All of these cases acknowledge the importance of **Rule 60** motions, when Timely & Comprehensively filed, to relief parties of Judgments, Orders, Decisions, Proceedings and/or Convictions that have been procured through **Fraud on the Court, Misrepresentation** &/or **Omission of Material Facts** &/or **Evidences** to the Court by the opposing parties.

However, in the instant case, the opposing parties (the **Bronx County District Attorney's Office**) have NOT ONLY procured the September 14, 2022 Judgment (denying the Federal *Writ of Habeas Corpus* Claims Relief) through committing Fraud on the Court, but as well, have consistently & constantly Misrepresented & Omitted both Material Facts and Evidence to the Court relating to the Third Person, the actual shooter, involved in the crashed car incident, and relating to the two(2) drunken witnesses, Mr. **Duverge** & Mr. **Arango**, False Testimonies provided at Trial as the People's case chief witnesses/evidence. The opposing party (the Bronx County District Attorney's Office), despite partial of the Material Evidence and Facts being reflect in the record, omitted the Material Facts and Material Evidence -- that have always been in the opposing party's (**the Bronx County District Attorney's Office's**) possession -- of the Two(2) type of Finger Prints/DNA examples that have been properly and adequately recovered, secured and preserved from the gun (identified as the "**Murder Weapon**" at Trial), specifically from the guns handle & clip, that matchés the Finger Prints/DNA of Mr. Pita and a "Donor A", that DOES NOT matched Petitioner's Finger Prints/DNA. As well, the opposing party (the **Bronx County District Attorney's**

Office) Omitted & Misrepresented the Material Facts & Evidence that Three(3) Cell Phones were recovered, secured and preserved from the car crashed scene containing additional Finger Prints/DNA, and the Material Facts that for Years, since 2020, via letters, letter complaints and *Pro Se* documents filed with both the Bronx County District Attorney's Office and the State-Courts (which copies of the *Pro Se* legal documents, inter alia; Prosecutorial Misconduct, Actual Innocence/Wrongful Conviction Claims Complaint, and *Writ of Coram Nobis* & motions were properly and adequately served upon the Office of the Bronx County District Attorney), Petitioner have informed the opposing party of the Third Person involved and the Exonerating Evidence Available, yet, opposing party continued to file opposing documents with the S.D.N.Y. Court stating otherwise (stating that no exonerating evidence exist, are not in their possession and that Petitioner have never informed the Bronx County District Attorney's Office of the Third Person Involved), to procured the September 14, 2022 Judgment (Denying the Federal *Writ of Habeas Corpus* Claim Relies on its Merits). This Exonerating evidence, together with the 911 Caller Sprint Report DOES in Fact Rises To a More than a Reasonable Doubt that there were not only Three(3) Individuals inside the livery cab, but as well, that the Petitioner DID NOT shoot Mr. Pita, Exonerating the Petitioner from this Wrongful Conviction.

Furthermore, the opposing party (the Bronx County District Attorney's Office) OMITTED the Facts, THAT ARE PARTIALLY ON THE RECORD, that this two(2) called witnesses Mr. Duverge & Mr. Arango were so drunk, assuming that they were actually present at the car crashed scene, that what they claim to believe to be the distance between the corner of 177th street, where they allegedly stood when the shooting took place, and the school wall, where the "High Velocity Speed" passing Taxi crashed into, is of the size of the Court Room, yet, the actual distance is (as testified by NYPD Officer Mr. Fox at Trial and reflected by the created and Maintained Diagram by the NYPD) of the size of a Football Field, approximately over 323' Foot long. What this two(2) drunken witnesses Mr. Duverge & Mr. Arango identified an area with "Street Headlights", is actually a

DARK schoolyard with NO TYPE of lights. What this two(2) drunken witnesses Mr. Duverge & Mr. Arango believed to be the **First NYPD Responding Officers** with their service Weapons out, were actually the **EMT ambulance team**, whom arrived before the **First NYPD Officer Mr. Fox,** with their **flash lights** in hand.

Lastly, and essentially, thus the (a)S.D.N.Y. Court severely abused its discretion in erroneously classifying the previously issued **DENIAL** of the *Pro Se* COA application (**App. E1-E7**)(Denying the COA seeking to appeal the Original Federal Writ of Habeas Corpus Claims Relief) as a **DENIAL** of the Appeal on its Merits, which are not the Same, in justifying its **REFUSAL** to review the subsequently, **Timely & Comprehensively**, filed Rule 60(a); 60(b)(1); 60(b)(3); 60(b)(6), and; 60(d), Fed.R.Civ.P., *Pro Se* motion (Attacking the "Integrity" of the original Federal Habeas Corpus Claim Relief), and; the (b)2nd Cir. Court severe abused of discretion in First Sidestepping, **without jurisdiction**. to take "Full Consideration" the Merits of the Appeal, the legal and factual basis of the claims, in justifying the **DENIAL** of the *Pro Se* COA application, this Court SHOULD CORRECT those severe abuse of discretion, misapplying and misinterpretations of law, and make it Clear that the **DENIAL** of a COA application DOES NOT constitute a DENIAL of an Appeal on its Merits, and; further make it clear that the District Courts **DO HAVE** Exclusive Jurisdiction to review subsequently, Timely & Comprehensively, file Rule **60(a)**; **60(b)(1)**; **60(b)(3)**; **60(b)(6)**, and; **60(d)**, Fed.R.Civ.P., motions (Attacking the "Integrity" of the original Federal ***Habeas Corpus*** Proceeding) after the **DENIAL** of a COA application (seeking permission to appeal the original Federal ***Habeas Corpus*** Claims Relief on its merits).

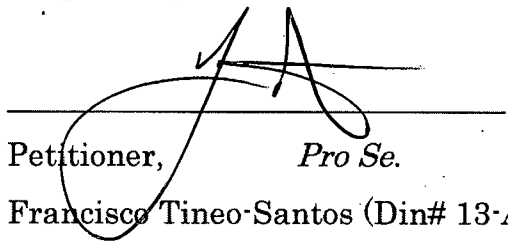
Conclusion

For the Foregoing Reasons, Writ of Certiorari Should Be Granted in the Instant Case.

Date: September 09, 2024

Ulster, New York

Respectfully Submitted



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