

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

REGINALD SWINTON — PETITIONER
(Your Name)

vs.

STEVEN RACETTE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

REGINALD SWINTON, # 07A3279

(Your Name)
AUBURN CORRECTIONAL FACILITY
135 STATE STREET, P.O. BOX 618

(Address)

AUBURN, NEW YORK 13024
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Is the lower courts' analysis, in not attributing responsibility to the prosecution's deliberate, and negligent two year delay, in not promptly bringing petitioner to a trial on non-complexed, street offenses, as demonstrated by the record, the result of incorrectly applying the Sixth Amendment's Speedy Trial Clause, which this Court holds to be especially significant, predicated on a fundamental misapprehension and, or misattribution of the standard enumerated in Barker v. Wingo, and its progenies, that calls for this Court's correction ?

and,

Is the current habeas court's analysis of the pro se application seeking relief from the judgment of the First Habeas Court, the result of misapprehending and misapplying relevant provisions, found by this Court to be especially significant, based on a fundamental error in understanding and, or applying reasonably, the Supreme Court's precedent and governing habeas mandate applicable thereto, that calls for this Court's correction ?

LIST OF PARTIES

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

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

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- Order of the United States Court of Appeals, Second Circuit, Swinton v. Racette, App. No. 17-2105, January 2, 2018.
- B Judgement; Memorandum and Order, United States District Court, Southern District of New York, Swinton v. Racette, 12 Civil 9051 (VSB), (FM); June 20, 2017; June 30, 2017.
- C Judgment; Memorandum and Order, United States District Court, Southern District of New York, Swinton v. Racette, 15 Civil 2812 (VSB), (FM), June 20, 2017; June 30, 2017.
- Judgment; Memorandum and Order, United States District Court, Southern District Court of New York, Swinton v. Fogg, 15 Civil 2812 (VSB); September 19, 2016; September 22, 2016.
- D Report and Recommendation, United States District Court, Southern District of New York, Swinton v. Racette, 12CV9051-VSB-FM, September 20, 2016.
- E Order of the United States Court of Appeals, Second Circuit, Swinton v. Racette, App. No. 17-2105, April 12, 2018.
- F People v. Swinton, 87 A.D.3d 491 (1st Dept., 8/25/11), lv. den., 18 N.Y.3d 862 (12/2/11); App. No. 4473; N.Y. Co. Ind. No. 3524/05.
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix N to the petition and is

☒ reported at 2018 WL 322843; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix I,D,P to the petition and is

☒ reported at 2017 WL 2664196; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix F to the petition and is

☒ reported at 87 A.D.3d 491 (1st. Dept., 8/25/11) or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the NEW YORK STATE COURT OF APPEALS court appears at Appendix F to the petition and is

☒ reported at 18 N.Y.3d 862 (12/2/11); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was JANUARY 2, 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: APRIL 12, 2018, and a copy of the order denying rehearing appears at Appendix E.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was DEC 2, 2011.
A copy of that decision appears at Appendix F.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[Appendices Under Seperate Cover]

APPENDIX

I. Federal

A. Statutory Provisions

1. United States Constitution, (Const.)

" Amendment VI

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

" Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. United States Code, (U.S.C.)

a. Title 28, Judiciary and Judicial Procedure

AA 28 U.S.C., § 2241

BB 28 U.S.C., § 2243

28 U.S.C., § 2246-- Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or, to file answering affidavits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

APPENDIX

- 28 U.S.C., § 2248. Return or answer; conclusiveness
- The allegations of a return to the writ of habeas corpus or of answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.
- CC 28 U.S.C., § 2253
- DD 28 U.S.C., § 2254
- b. Title 28, Federal Rules of Civil Procedures for the United States District Courts, (FRCP)
- EE FRCP, Rule 5
- FF FRCP, Rule 60
- c. Title 28, Rules Governing Section 2254 Cases in the United States District Courts, (Rule)
- GG Rule 4
- HH Rule 5
- II Rule 7
- JJ Rule 8
- KK Rule 11
- LL Rule 12
- d. Title 28, Federal Rules of Appellate Procedure, (FRAP)
- MM FRAP, Rule 35
- NN FRAP, Rule 40
- e. Title 28, Local Rule of the United States Court of Appeals for the Second Circuit, (LR)
- OO LR, 35.1
- PP LR, 40.1

II. State of New York

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appendix

A. Statutory Provisions

i. State Constitution (N.Y. Const.)

QQ

Article I, Section 6

ii. Criminal Procedure Law, (C.P.L.)

C.P.L., § 30.20 Speedy Trial; in general

1. After a criminal action is commenced, the defendant is entitled to a speedy trial.

2. Insofar as practicable, the trial of a criminal action must be given preference over civil cases; and the trial of a criminal action where the defendant has been committed to the custody of the sheriff during the pendency of the criminal action must be given preference over other criminal actions.

RR

C.P.L., § 30.30

SS

C.P.L., § 200.20

TT

C.P.L., § 710.30

STATEMENT OF THE CASE

During a two week period in June of 2005, several nighttime, apartment brake-in's take place on the East and West sides of midtown Manhattan, wherein the female occupants are sexually assaulted and robbed. It is reported that Darwin Franklin, a registered, level-three sex-offender on parole, is arrested in the area as a result.

I am later arrested and charged with these crimes on July 8, 2005, based on reports that my latent, palm print and DNA are purportedly recovered in the second and first victim's apartment. A line-up is conducted by the district attorney's office, but I am not identified by the victims as the assailant. However, the third complaintant is reported to have made a questionable voice identification stating that, if my voice was softer, I would, or could be the perpetrator. My home, which I share with my wife and daughters, is searched but no evidence incriminating me is produced.

I am indicted by a New York County Grand Jury on, or about July 14, 2005, which issues a fourteen count indictment charging several counts of burglary, sexual assaults, and robbery for each of the three incident. The prosecution immediately moved for a Court order to secure hair and saliva samples from me; however, the Court denied the request as premature.

I was formally arraigned in the Supreme-Court on the counts in the indictment on August 15, 2005. I pleaded not guilty. The State announced its readiness for trial at this time.

The prosecution, thereafter, moved for and secured a Court order on September 29, 2005, permitting it samples of my pubic hairs and saliva. It would be over a month later, before the

prosecution would actually execute the Court's Order. After the extraction and examination of such biological evidence was done, the results found no match with the evidence taken from the crime scenes.

It is during this same period that the defense made a timely Omnibus motion, and other particularized pleadings requesting, among other evidence, allegedly supporting the independent proof for each offense charged, discovery regarding Darwin Franklin arrests; the forensic evidence that is said to have served as the basis for the search warrant and my arrest, and; clarification as to the victim who actually made the alleged voice identification. What followed was a series of delays by the State wherein it either "forgot" to produce the specifically requested forensic evidence; chose not to specifically, or timely, respond to the particularized and specific defense, discovery requests, even after ordered by the Court to do so, and; intentionally left the Court and the defense ignorant or misinformed about the relevant evidence requested. There was no other discovery sought by the defense.

Due to a potential conflict of interest that the Legal-Aid agency had in representing me, as well as Mr. Franklin, another attorney was substitute and assigned by the trial court to represent me. However, prior to said reassignment, the first attorney had drafted and explained to me the reason for proposing a severance of the charges. It was counsel's understanding that, because the only evidence connecting me to the third offense, based on the state's evidentiary assertions, was the alleged questionable voice identification such, if tried along with the

first, two offenses, wherein there is alleged latent, and DNA evidence, would be prejudicial and unfair, towards my efforts to explain before the jury my innocence of the other offenses. I agreed and signed my approval for such a motion to be made. However, the newly assigned attorney did not adopt or submit such a severance application to the trial court.

Due to the State's delays, upon which I and the prosecution, were not being produced in Court, on many consecutively and non-consecutively scheduled court dates, I, with the newly assigned attorney's approval and adoption, submitted a pro-se., motion as to the State's violation of my statutory and constitutional right to a Speedy Trial.

Upon completion of all pleadings by me and the prosecution, the trial court denied the motion as being "specious". The trial court was of the opinion that I was responsible for all the delays complained of, due to defense motions; and that the People were virtually always ready for trial. See, Appendix "M". The Court went on to admonish counsel that unless he first vetted, and then approved any furture pro-se., filings, the trial court would not accept such pleading henceforth. I sought to renew, and pleaded with the trial court to reconsider its speedy trial determination. My pleas, however, fell on the trial court's deaf ears. I, and family members, nonetheless, continued to complain about the State's delay violating my right to a speedy trial, going so far as to complain to judicial and governmental officials, and having the trial court admonish me that:

"I am the guy that makes the decision. If I am wrong you take it up with the Appellate Division. And that leads me to your letters. Your letters refers to, that you are all upset that I denied you leave to reargue the 30.30. Well let me put you at ease. You made a 30.30 motion. I said you were wrong. If it turned out that you are convicted and I am wrong on my decision on 30.30 you win the whole bag of marble. Okay? So it doesn't matter whether I hear your 30.30 reargument or not. If you get convicted in this case and, in fact, you are [right] as you are convinced you are [right] in your 30.30 you win. Okay? So relax."(Tr.,4/30/07, p.149-150).

Just prior to the prosecution's presentation of its case in chief to the trial jury, it informed the trial court and the defense, for the first time, that it did not have evidence, as indicated in the indictment, withwhich to sufficiently meet its prima facie burden of proof as to the identity of the perpetrator of the third offense before the jury. Testimonial evidence later showed that it was the victim from the first offense that made the questionable voice identification. The People then moved, and the trial court admitted, and later instructed the jury on an impermissible, "other crime" evidentiary ruling that if, upon the prosecution's presentation of evidence as to the identity of the perpetrator being established beyond a reasonable doubt, in the first two offenses in the indictment, the jury could then find the identity of the assailant having been established beyond a reasonable doubt, in the third offense. Trial counsel objected to this ruling, and the court's other, commingled evidentiary, impleachment ruling. I was prevented from testifying in my defense. I was found guilty on all charges submitted; although in a series of jury notes to the trial court, there were questions as to whether it was lawful to find me guilty of the third offense, to which the trial court merely

reiterated its earlier instruction.

I was then held for a persistent, violent felony offender, (PVFO), hearing. There, I contested the use of the 1975 plea conviction, being a predicate, because this conviction was achieved by the unconstitutional denial of my right to retain and be represented by counsel of my choice. Trial counsel did not render any effective assistance in helping me controvert this prior conviction. The trial court adjudicated me a PVFO.

At sentencing, I submitted a pro-se motion seeking to set aside the verdict, and for a substitution of counsel at the sentencing. It was my contention that, along with the state's speedy trial violations, there were a number of other constitutional violations that occurred before, and during the trial, independant, but essentially all stemming from the trial counsel's inadequate assistance. The sentencing court did not review my pleadings, but allowed counsel to speak. When I was allowed to address the Court, I sought to place on the record my reasons for the complaints, but was ordered by the sentencing court not to. The pro-se., motion was denied, and I was sentenced as a persistent felony offender, (PFO), to a term of imprisonment, with an aggregate total of 150 years to life for the three offenses.

I then made a post-conviction motion to set aside the judgment regarding the 1975 plea conviction, on the grounds that the denial of my constitutional right to counsel. The motion was denied by a Bronx County trial judge. See, Appendix "J". Fedral relief on the matter was denied, being considered a second/successive petition. See, Appenndix "K"

On the direct appeal, counsel filed a brief consisting of

five claims. I submitted a pro-se., supplemental brief raising the statutory and constitutional denial of the right to a Speedy Trial. The prosecution, in its pleadings before the trial and appellate court, never argued the constitutional issues of the Speedy Trial claim. The Appellate Division affirmed the conviction and rejected the pro-se. claim See, Appendix "F". Both appellate counsel's and my pro-se., leave application to the New York State Court of Appeals was denied. Ibid. I then petitioned to the Federal court for a writ of habeas corpus. See, Appendix "B", [12-CV-9051, (VSB), (FM)].

During this period, I requested the habeas petition be stayed and held in abeyance, which the District Court granted, pending resolution of the state court's review of the Error Coram Nobis motion submitted. The motion was later denied, without opinion, by the Appellate Division, with the New York State Court of Appeals denying leave thereafter. The habeas court permitted me to amend the instant petition to include those constitutional claims from the error coram nobis motion. See, Appendix "G".

It is also during this time that I filed with the district court, the motion challenging the integrity of the "First Habeas Court's" proceeding, seeking relief from the 1978 Judgment regarding the unconstitutionality of the 1975, plea of guilty conviction. See, Appendix "C", [15-CV-2812, (VSB)]. In its determination, the District Court adopted the fact-findings as narrated in the trial court's People v. Swinton, [19 Misc.3d 247], decision. See, Appendix "J". The District Court went on to believe the Rule 60 motion was not proper because the 1975, plea conviction complained of had "expired" and I, no longer was "in

custody" at the time of filing the motion for relief from the judgement. The habeas court went on to find the Rule 60 motion is no more then a second/successive habeas filing that was, not only filed in an unreasonable time, but that the claims presented are without merit. See, Appendix "C".

Regarding the habeas petition pending before the district court, the District Court adopted the Magistrate's Report and Recommendationm findings that, itself, merely adopts the objectively unreasonable determination of fact, and application of law of the state courts. Here, although the habeas court found that I was "presumptively prejudiced" by the length of the state's delay, and I had timely asserted my right to a speedy trial, I, nonetheless, am the blame for the delay complained of, due to defense motion practice, and adjournments "consented to by the parties". Additionally, I had not shown any sufficient, or actual prejudice to the defense as a result. See, Appendice "B"; "D"; "O"; "P".

In denial of both petitions, the District Court would not issue a Certificate of Appealability, (COA), believing the claims presented did not demonstrate a substantial showing of a violation of a constitutional right. See, Appendix "C"; "N". My petitions for a Certificate of Appealability, before the Second Circuit Court of Appeals, after consolidation of appeal number 17-2127, with appeal number 17-2105, is denied for the same reasons. Appendix "A". The petition for reconsideration and hearing en banc is denied without further review on April 12, 2018. See, Appendix "E".

I now ask this Court, respectfully, to correct their errors.

REASONS FOR GRANTING THE PETITION

I am not an attorney. Nor do I have any pretensions of, or a wish to being treated as one. See, Erickson v. Pardus, 551 U.S. 89, 94 (2007); Haines v. Kerner, 404 U.S. 519, 520 (1972). Yet, I am not ignorant. I can read.

It is in perusal of the Constitutional and statutory texts, that I have learned the State, in failing to promptly bring me to trial, as repeatedly requested, on what were non-complexed, common criminal offenses, secured its conviction by the denial of the Sixth Amendment right to a Speedy Trial. U.S. Const., Amend VI; see, e.g., Dickey v. Florida, 398 U.S. 30 (1970).

I am further informed by the Supreme Court precedents, of the significance and importance withwhich this Court especially holds in correcting state violations of this "fundamental" right. Barker v. Wingo, 407 U.S. 514, 515, 519-521 (1972); see, e.g., Dickey v. Florida, supra, 398 U.S. at pp. 39-46 (Brennan, J., Concurring); Smith v. Hooey, 393 U.S. 374, 377-380 (1969).

It is in such respects, based on the particular facts and circumstances in this case, that I believe the lower courts' failure in adhering to the Constitutional mandate and Supreme Court precedents, is a departure from such accepted and usual course of judicial proceedings, and of such public interests, as to call for an exercise of this Court's supervisory power. Sup.Ct. Rule, Rule 10(a); e.g., Miller-El v. Cockrell, 537 U.S. 322 (2003); see, also, Boyer v. Louisiana, 569 U.S. 238, 241 (2013), (Justice Sotomayor, Dissenting).

In Barker v. Wingo, and its progeny, the Supreme Court

established, and made clear the rule and the manner of its application in determining whether an accused's Sixth Amendment right, pursuant to the Speedy Trial Clause, has been violated. Ibid, 407 U.S. at pp. 530-533; e.g., Betterman v. Montana, 136 S.Ct. 1609 (2016); Vermont v. Brillon, 556 U.S. 81 (2009); Doggett v. United States, 505 U.S. 647 (1992); Moore v. Arizona, 414 U.S. 25 (1973); see, Dickey v. Florida, supra.

Barker enumerated a four part, reasoning process in determining whether claims of an accused's right to a Speedy Trial has been violated. Ibid; see, also, People v. Tranovich, 37 N.Y.2d 442 (1975). The first factor is the length of the delay that is found "presumptively prejudicial" This is the "triggering mechanism" for further speedy trial inquiry.^{1/} The second factor is the reason for the ^{delay} and whether it is "deliberate" and, or negligence". The third factor is the accused's assertion of his right to a Speedy Trial; the fourth factor being the prejudiced incurred to the defendant as a result of the delay. This fourth factor "should be assessed in light of the interests of the defendant[]" which the speedy trial right was designed to protect. " Ibid, 407 U.S. at 531- 533.

Of these four factors, the reason for who actually is "more to blame for" a deliberate and, or negligent delay, whether the defendant or prosecution, is the "flag all litigants seek to capture. . . ." Vermont v. Brillon, 556 U.S. at 90 (quoting, Doggett v. United States, 505 U.S. at 651); United States v. LoudHawk, 474 U.S. 302, 315 (1986).

In otherwords, and as relevant to this petition, under what circumstances will the State's deliberate delay, as shown in the

record, be attributed heavily to the prosecution, and not unreasonably imputed to the accused. This is the issue presented, before the district court, upon which it found the trial court's speedy trial determination not objectively unreasonable in denial of the habeas writ, and refusal to issue a Certificate of Appealability, (" COA "), to the Second Circuit, Court of Appeals on. Appendix " B "; see, 28 U.S.C., § 2254; Boyer v. Louisiana, 569 U.S. at p. 242, (Justice Sotomayor, Dissenting); William v. Taylor, 529 U.S. 362 (2000); Dickey v. Florida, supra; cf., Vermont v. Brillion, 556 U.S. at pp. 91-92 (" . . . the Vermont Supreme Court made a fundamental error in its application of Barker that calls for this Court's correction. [It] erred in attributing to the State delays caused by ' the failure of several assigned counsel. . . to move [the accused's] case forward; and in failing adequately to take into account the role of the [defendant's] disruptive behavior in the overall balance. ")

In petitioning for a COA before the Second Circuit Court of Appeals, I made a detailed showing of the relevant Barker factors as violated by the prosecution, and the prejudicial effects the delay had on hampering the defense and skewing the fairness of the entire process, based on the evidence in the State court proceeding. All of which, reasonable jurists could have debated the district court's assessment of the speedy trial claim, in its unreasonable deference to the trial ^{court's} disregard of the clear and convincing evidence of the prosecution's design to keep the Court and defense ignorant or misinformed, from the time of arrest until during trial-- almost two years-- as to its legal inability to have promptly tried petitioner on all counts in the indictment

, being the result of purposeful deliberateness, that should have heavily been attributed to the prosecution, rather than imputed unreasonably to petitioner.

The Second Circuit's finding, however, that I had not made a substantial showing of the denial of a constitutional right, is an erroneous assessment of the speedy trial rule and facts governing this case, being the result of a critical misapprehension and misapplication of the COA standard imposed by the applicable statutory text, and this Court's precedent, before the Second Circuit Court of Appeals had jurisdiction to review and determine the denial of habeas relief by the District Court, on the full merits. 28 U.S.C., § 2253 (c)(2); Miller-El v. Cockrell, 537 U.S. 322 (2003).

This fundamental error of the Circuit Court is exacerbated further by its acquiescence given the habeas court who, in turn yielded to the trial court's objectively unreasonable imputation to petitioner, being the actual cause for the two year delay, all predicated upon an objectively unreasonable determination of the facts, in light of the evidence presented at the state court proceeding.

Here, the Circuit Court abused its discretion in applying an erroneous standard towards making a threshold determination whether issuance of a COA is warranted for further appellate review. There are a number of reasons the denial of the COA is in error. See, Ibid.

The Circuit Court's appellate review, went beyond the threshold standard of inquiry authorized. Ibid, at p. 327. An

introductory and general, but non-conclusive, summary evaluation of the Speedy Trial claim was required to be made, in light of the Barker factor in dispute. Ibid. Had such an evaluation been conducted, it would have shown that I had made a prima facie demonstration, substantially showing that the prosecution is the actual cause for, and blame should have been attributed to the State for the speedy trial delay, and not the petitioner, which reasonable jurists could have found debatable whether the District Court erred in denying the habeas application. The second Barker factor was critical in a preliminary assessment of whether to issue a COA for further review. I had, concomittantly, met this statutory burden, and a COA should have issued. Ibid.

However, by its opinion denying a COA, the Circuit Court assessed the relief sought in terms of a specified, "entitlement to relief", merit based standard, predicated on the district court's 2254 requirement, particularly that of subdivision [d][2], [e][1]. This is not what the statute governing the issuance of a COA authorized, nor required. See, 28 U.S.C., § 2253; Miller-E1, 537 U.S. at p. 327.

In making an initial assessment whether I had made a substantial showing of purposeful, prosecutorial delay, debatable amongst reasonable jurists, the essential question to be generally, but non, conclusively determined at this threshold stage of review, is the factual persuasiveness of the prosecution's justification excusing such contested delay. Ibid.

In that respects, the People claimed exclusions, based on defense motions, and "consent of the parties" adjournments,^{2/}

See, Appendix "D". However, under the facts and evidence before the state court, the justification is implausible or fantastic, and no more than a pretext for the State's deliberate two year delay to trial. Consequently, the real question is whether the trial court's finding of fact of such explanation being credible, is objectively unreasonable under the circumstances.

In accepting the prosecution's excuse, in response to the pro-se., speedy trial challenges, the trial court did not measure such in light of the record of the prosecution's design to keep both the Court and the defense ignorant or misinformed that, any trial, let alone a speedy trial, could not be lawfully had for almost two years, on all the counts in the indictment. See, People v. Sibblies, 22 N.Y.3d 1174, 1181 (2014), (Grafteo, J., Concurring); People v. Blue, 114 Misc.2d 383, (Sup.Ct., Kings Co., 1982); People v. England, 84 N.Y.2d 1, 4 (1994).

It is in light of the State's deficiency of evidence to go to trial on all counts as indicated in the indictment, that the unreasonableness or improbability of their explanation becomes debatable. Ibid. This is buttressed further by the fact that the very evidence relied on at trial was known, and always accessible to the prosecution, since the inception of my arrest, two years earlier.

Further, even if I, for the sake of argument, assume accountability for the 161 days for defense, motion practice, see, Appendix " D ", still left outstanding and unexplained by the State, is the 495 days delay. However, in light of the record evincing the People's deliberate, bad faith actions, from the time of arrest, to the insufficiency of evidence to make a prima facie, trial case, being made known by the prosecution, which

hampered the defense from making anew a Speedy Trial challenge,^{3/} the trial court's finding of facts in acceptance of the State's proffered rationale, is clearly and convincingly belied by the record in the state court proceeding. See, Appendix " M "; Miller -El v. Cockrell, 537 U.S. at p. 340.

Consequently, the deference given the trial court's speedy trial assessment, imputing to the petitioner, virtually all of the accountability for the delay, was not supported, nor warranted at this stage of the COA petition inquiry, and was an abandonment or abdication by the federal courts in the exercise of its pleenary responsibility to find "the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." Ibid.

Here, the Circuit Court, and the District Court, did not give full consideration to the substantantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted, without question, the state court's evaluation of the demeanor of the prosecution. . .", on a question of fact as to who actually is to blame for the two year delay. An inquiry going to the heart of the speedy trial analysis. Ibid, 537 U.S. at 341; see, Barker v. Wingo, 407 U.S. at 531

Yet, for purposes of a COA, threshold assessment of the Speedy Trial claim, my appealability request could support reasonable jurists debate, demonstrating the District Court erred in failing to attribute to the prosecution, its deliberate and negligent violation of the Barker standard, and its progeny. See, Boyer v. Louisiana, 569 U.S. 238, 241, 242, (Justice Sotomayor, J., Dissenting); cf, Vermont v. Brillon, 556 U.S. 81, 91 (2009).

I, not only, demonstrated the People's accountability for the inordinate length of their delay, by the evidentiary facts in the record, but I also presented prima facie evidence to the federal courts in this regards. I timely and repeatedly asserted my Speedy Trial right during the state, pretrial proceedings, wherein I substained the burden of establishing the prosecution's liability for the Speedy Trial violation. I was entitled to relief.

On federal review, I presented evidence from the state proceeding, directly related to and contradicting the prosecution's conduct, demonstrating its deliberateness, and official "findable" negilgence including, but not limited to, its impermissible evidentiary request and jury instruction, when it could no longer keep the Court or the defense ignorant or misinformed as to their inability to provide a speedy trial as requested; which, had such evidence been made known, prior to the actual trial, that fact would have rendered the State's entire case liable for a speedy trial violation. But, the State making such information known during the trial, precluded me from any further Sixth Amendment challenges, on Speedy Trial grounds. N.Y.C.P.L., § 210.20[2]; People v. Lawrence, 64 N.Y.2d 200 (1984); but, see, Betterman v. Montana, 136 S.Ct. 1609, 1612 (2016).

It is in this regards, that the trial court's factual finding that the prosecution was always ready for a trial, is clearly and convincing belied by the evidence in the state court proceeding. None of which, the trial court took into its consideration in balancing the "appropriate" factors towards reasonably

determining whether my speedy trial right was violated by the State. Such prima facie evidence, being the basis for the Sixth Amendment violation, would have supported issuance of the petitioned for COA. See, Miller-El, 537 U.S. at 341.

Afterwhich, with proper federal jurisdiction established, the entire Circuit Court could have conducted a lawful, full review on whether the trial court's decision to attribute to petitioner, and not reasonably to the prosecution, the Speedy Trial delay complained of, was entitled to an objectively unreasonable application, and determination of the Barker rule. See, Ibid; Barker v. Wingo, 407 U.S. at p. 531.

However, the Circuit Court, in accepting, without question, the lower court's evaluation of this critical issue, failed to render the full and proper consideration due to the substantial evidence, prima facially put forth by me, towards supporting issuance of the COA. Miller-El, supra, p. 341. Thus, in not correctly applying the factors the Supreme Court have found to be especially significant, the trial court failed to reasonably attribute responsibility for the delay to the State, in light of the "sensitive balancing process", required under Barker. Ibid, at p. 533.

In doing so, the Circuit Court placed an unfair and unreasonable demand on the COA petition submitted. The standard applied by the Circuit Court, in this instance, extended the statutory rule for issuance of the COA, beyond its intended purpose as determined by the United States Supreme Court. See, 28 U.S.C., § 2253; Miller-El, supra, at p. 342.

In short, the Circuit Court in my case, rather than

determine the debatability of the Speedy Trial claim amongst reasonable jurists instead, sought to resolve the merits of the Sixth Amendment claim, at the threshold stage. Yet, in finding the petition was not entitled to relief on the merits, the Circuit Court did so without having first properly secured, and established jurisdiction. Ibid.

The Circuit Court of Appeals should have issued a COA to determine whether the District Court's evaluation of habeas relief, in this case, was an erroneous view of the facts, and a clear error of law. See, Barker v. Wingo, supra. It is for these reasons that I believe this petition for Certorari be granted, and for any other and further relief by this Court deemed just, proper and fair. Miller-El v. Cockrell, supra.

So, too, for not dissimilar reasons, the Circuit Court's failure to issue the COA requested regarding the petition for former appeal number 17-2127, consolidated under appeal number 17-2105. Appendix " A "; see, Appendix, " C " .

In concluding I did not make a substantial showing of violation of a Constitutional right, the review court abused its discretion. It misapprehended, or misattributed relevant facts, statutory provisions, and governing Supreme Court precedents, which resulted in an erroneous non-jurisdictionally, entitled resolution-of-the-merits-for-relief review, rather than a proper preliminary, threshold assessment of whether reasonable jurists could find debatable the District Court's evaluation of the motion for relief that challenged the integrity of the habeas court's proceeding, that led to the judgment complained of. See, 28 U.S.C., § 2253; 28 U.S.C., Federal Rules of Civil Procedure,

Rule 60; Gonzalez v. Crosby, 545 U.S. 524 (2005); Miller-El, supra, p. 327.

I presented a prima facie case, demonstrating facts in support of my challenge to the faulty habeas proceeding. I made available copies of the certified, state records regarding the plea proceedings, plea withdrawal hearing, sentencing minutes, as well as both state, appellate briefs filed by defendant and the prosecution.

The District Court, however, gave unquestioned deference to the state court's assessment of the facts, based on the factual findings as taken from People v. Swinton, [19 Misc.3d 247 (Sup.Ct, Bronx Co., 2008)]. E.g., Appendices "C"; "J"; see, Miller-El, supra, pp. 339-341. The adoption by the Circuit Court, without question, of the lower courts' finding of fact, under the circumstances, was clear error. Such error would have unreasonably affect making a preliminary, threshold, general overview, as to reasonable jurists debatability of the District Court's assessment of the facts. See, Appendix "C". Moreover, such unwarranted fact unreasonably imputed to me a ploy to stave off the trial that is said to have started. However, whether a trial had "actually" and "properly" commenced as claimed, or whether petitioner's actions were a cry for help, could have found debate amongst reasonable jurists. In point of fact, the May 12, 1975, event was not the start of a trial, but the first day a plea offer is made, and rejected by me; and the request to relieve and retain new counsel to represent me is denied by the Judge, without inquiry. The significance of such factual distinction in demonstrating my intent being to correct a genuine

and actual conflict of interests between attorney and client, with an objectively unreasonable denial of the right to retain counsel of choice, being made before any actual trial properly commenced, reasonable jurists could have found debatable. Ibid.

Thus, it is conceivably reasonable to see how the District Court, in its unquestioned but unwarranted deference to the state court's evaluation of the facts, in exclusion to the certified record provided before it, could lead to a mischaracterization, resulting in a skewed and clearly erroneous determination based thereon, of the District Court saying that I "seek[] to resuscitate [my] claim regarding the Bronx trial court's denial of his motion for appointment of new counsel. . ."; as "taken from the [state] court's [C.P.L., § 440.10] decision in *People v. Swinton*, [19 Misc.3d 247 [Sup.Ct., Bronx Co., 2008]; but, see, Chandler v. Fretag, 348 U.S. 3, 9 (1954), (Collected Cases).

In this respect, the Circuit Court, as the District Court, abandoned or abdicated its judicial review, by not giving full consideration to the substantial evidence put forth in support of petitioner's prima facie showing for relief. Miller-El, supra, 537 U.S. at p. 341.

This reasoning also extends to the Court's erroneous review on questions of procedural law.

Under the facts of this case, the District Court's assessment, not questioned by the Circuit Court, that the 1975 conviction was jurisdictionally "expired", and I not "in custody" thereon at the time the Rule 60 motion was filed, reasonable jurists could find debatable. Garlotte v. Fordice, 515 U.S. 39, 48 (1995); see, 28 U.S.C., §§ 2241(C)(3); 2254(a). 4/

I was still serving the sentence for the 1975, conviction when I filed the Rule 60 motion for relief on, or about February 26, 2015. At this time, I was serving three consecutive sentences stemming from the 1975 plea conviction; a 1986 burglary conviction; and the instant sentence imposed for the 2007 conviction. Under New York State law, each prior indeterminate sentence is to run consecutive to the subsequent, indeterminate felony sentence imposed. Thus, the terms of imprisonment for the first and second sentence, is added to the back of the third. All sentences are then to be completed in order of precedent. See, N.Y.P.L., § 70.25; People v. Ramon, 239 A.D.2d 198 (1st Dept., 1997). Thus, under either State or Federal jurisdiction, the 1975 conviction would not be considered "expired", or I found not to be not "in custody", to preclude lawful review and determination of the claims on the merits. E.g., Smalls v. Batista, 191 F.3d 272, 276-277 (2d Cir., 1999); see, People v. Swinton, 19 Misc.3d 247.

In short, reasonable jurists could have found debatable whether the District Court's not "in custody" evaluation of the 1975 conviction was not necessarily a negative, collateral consequence, as viewed by the District Court. See, Peyton v. Rowe, 391 U.S. 54, 64 (1968); Frazier v. Wilkinson, 842 F.d 42, 44 (2d Cir., 1988); and was not "expired", for federal jurisdictional purposes, and could be entertained on the merits under the Rule 60 motion submitted.

In any event, whether the 1975 conviction is based on a negative, collateral consequence, in order to satisfy the "in custody" requirement, for a latter collateral attack challenging

the enhanced persistent, felony sentence imposed in 2007, reasonable jurists could find debatable whether the District Court abused its discretion in finding federal jurisdiction was not available to not only have lawfully heard this independent, substantial issue, see, Peyton v. Rowe, supra; Ramunno v. United States, 264 F.3d 723, 725 (7th Cir., 2001), (citing with approval, Slack v. McDaniels, 529 U.S. 473, 484-485 (2000); but abused its discretion in erroneously reviewing issues, in light of the exception carved out in Lackawanna County District Attorney v. Coss, [532 U.S. 394, 404-405 (2001, which, according to the District Court, is an exception I do not meet, based on a "failure to appoint, substitute counsel" issue the District Court believes I am raising. See, Appendices, " C "; " D ". These are threshold issues reasonable jurists could have found debatable in the District Court's assessment of the Rule 60 motion. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Had the COA petition not been mischaracterized, but preliminarily evaluated under the proper standard, reasonable jurists could have found debatable the District Court's assessment of the Rule 60 motion being no more than a successive petition. However, according to the Second Circuit Court of Appeals, Rule 60 as "a motion is not a second or successive habeas petition. . . ." Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d. Cir., 2001). In this instance, reasonable jurists could have debated whether ". . .[the] district court. . .[was not being] careful [in] . . . not precipitously treat[ing the] Rule 60 motion as a second collateral attack. . . ." Gittens v. United States, 311 F.3d 529, 532 (2d Cir., 2002).

These same reasonable jurists could have also found debatable the District Court's misapprehension and misattribution of the Rule 60 claim, being no more than a means to "resuscitate", or relitigate an attack on the merits of the First Habeas Court's decision. See, Gonzalez v. Crosby, 545 U.S. 524, 532 & n5 (2000); Harris v. United States, 367 F.3d 74, 77 (2d. Cir. 2001). Although I had confined my challenge squarely on the enumerate Rule 60 grounds, it is conceivable that the District Court's confusion stems from erroneously evaluating the Rule 60 motion as "invalidating the [1975] state conviction." This is a misapprehension of the motion. At best, the Rule 60 provision would "just merely reinstate the previously dismissed petition for habeas, opening the way for further proceedings seeking ultimately to vacate the conviction." Rodriguez v. Mitchell, supra, 252 F.3d at p. 198; see, Gonzalez v. Crosby, supra, 545 U.S. at p. 528.

In this respects, my narrative of historical, background facts, in facilitating an accurate appraisal of the events surrounding the flaws in the First Habeas Court's proceedings, consistent with the Rule 60 claims presented, is reasonable. Indeed, reasonable jurists could find debatable the District Court's misattributing of "papers that might not have been intended to be a request to file a second or successive collateral attack as if they were so intended. . . .[Petitioner] might well have thought that he was trying to persuade the District Court that its denial of his initial collateral attack was subject to challenge. Understanding the new AEDPA procedures is difficult enough for judges and lawyers. . . .[; as such, a]

pro-se prisoner[] cannot be expected to have all the complexities of these procedures in mind." Gittens v. United States, supra, 311 F.3d at p. 533; see, also, Price v. Johnston, 334 U.S. 266, 292 (1948).

These clearly erroneous assessments of the relevant facts, and erroneous view of the law, reasonable jurists could find debatable whether the District Court abused its discretion in its procedural evaluation of the Rule 60 motion. Browder v. Division of Correction of Illinois, 434 U.S. 257, 263 (1978); see, Miller-El v. Cockrell, supra, 537 U.S. at p. 327; Torres v. United States, 833 F.3d 164, 165 (2d. Cir., 2016).

This discretionary abuse extends to the District Court's and the Circuit Court's unquestioned deference given the First Habeas Court's mischaracterization of the merits of the Rule 60 grounds presented for relief. Miller-El, supra, pp. 341-342. Here, I made a substantial prima facie showing of evidence, upon which, preliminarily, reasonable jurists could have debated the District Court's evaluation of whether the timing of the pro-se filing was reasonable under the circumstances, also debating whether the evidence in support of the Rule 60 grounds stated, demonstrated the omissions in the First Habeas Court's proceeding, leading to its determination in not issuing the writ, were a denial of constitutional rights. See, Ibid, at p. 327; Gonzalez v. Crosby, 545 U.S. 524, 539, n1 (2000), (Breyer, J., Concurring).

Regarding the matter of timeliness in filing the pro-se, Rule 60 motion, reasonable jurists could have found debatable whether the District Court abused its discretion, in finding that

the Rule 60 motion was not filed in a reasonable time, in light of the specific circumstances of the case when, factors other than just length of time from discovery to filing, are taken under consideration. Rule 60(c)(1); e.g., Doe v. Briley, 562 F.3d 777, 781 (6th Cir., 2009); Venture Industries Corp v. Autoliv, ASP, Inc., 457 F.3d 1322, 1328 (D.C., Cir., 2006); see, Gonzalez v. Crosby, supra 545 U.S. at p. 535.

As a threshold matter, the two Rule 60 grounds raised and relied on, reasonable jurists could find the district court's discretionary assessment of untimeliness, debatable. See, 28 U.S.C., Fed. Rules of Civil Proce., Rule 60(b)(4), [void judgment]; Rule 60(d), [independant action in equity]; United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 270 (2010); "R" Best Produce, Inc., v. DiSapio, 540 F.3d 115, 123-124 (2d Cir., 2008); Central Vermont Public Service Corp., v. Herbert, 341 F.3d 186, 189 (2d Cir., 2003); Matter of West Texas Marketing Corp., v. Kellogg, 12 F.3d 497, 503, n3 (5th Cir., 1994).

In any event, I made a substantial showing, prima facially, demonstrating that I was unable to obtain pertinent state records necessary in not abusing the court's time, and in making my case, until I was able to locate the former, retained counsel who represented me on the state appeal. Indeed, when such issues are seen in light of a broader, more encompassing view and reasonable balance of all relevant factors, my filing at the time I did, is no more unreasonable and untimely than as found in not dissimilar filings that have collaterally attacked the integrity of a prior, offending federal judgment. See, e.g., United States v. Morgan, 222 F.2d 673, 675 (2d Cir.), aff'd., 346 U.S. 502, 503 (1953),

(23 years); Doe v. Briley, supra, (30 years).

The very nature of the Rule 60 issues presented, calling into question the integrity of the First Habeas Court's judgment, based on its due process of law denial of a fundamental right to notice and meaningful opportunity to be heard, just to name one example, implicate constitutional matters important not only to petitioner's liberty interests, but also to the public interest in promoting the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Moreover, there is the wide-spread, public interests in insuring the Federal Judiciary is vigilant, in assuring the integrity of the federal courts are kept beyond reproach in its duties of adhering to and carrying out these bedrock Constitutional principles in the administration of equitable justice for all. See, United Student Aid Fund, Inc. v. Espinosa, supra, 559 U.S. at 271; Walker v. Johnston, 312 U.S. 275 (1942); Turner v. Pleasant, 663 F.3d 770, 777 (5th Cir., 2011).

Nor can the state identify, or should it be heard to claim prejudice in its ability to be heard due to such filing at this time. A claim of this nature would be speculative, premature, and disingenuous. See, Rodriguez v. Mitchell, supra, 252 F.3d 191, 198 (2d Cir., 2001); see, also, Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). This, particularly, when the People stood mute during this entire sordid, state proceeding, but had the power to resolve justly the situation to all parties satisfaction during the 1975, plea proceeding. See, Gonzalez v. Crosby, supra, 545 U.S. at p. 529 (" . . . [this is] why we give little weight to respondent's appeal to the virtues of finality.")

Under such evaluation, and overriding concern with the length of time in the filing of the Rule 60 motion, the District Court's assessment appears to be meant to effectively bring to an expedient end, any further review of all future efforts towards an equitable resolution of the First Habeas Court's "pervasive and undemocratic state of affairs." Doe v. Briley, supra, 562 F.3d at pp. 781-782.

It is in light of these concerns, that reasonable jurists could have found debatable whether the District Court abused its discretion in its failure to reasonably consider the other relevant and substantial circumstances and factors, in determining the Rule 60(b)(4) motion, untimely. Ibid.

On the merits, the District Court, in evaluating the Rule 60(b)(4) claim to be without merit, and nothing more than my "disagreement with the [First Habeas Court's] decision or logic [, which] does not render the judgment void", reasonable jurists could find debatable. Miller-El v. Cockrell, supra, 537 U.S. at pp. 327; see, Appendix " C ".

I made a substantial showing of constitutional right violations, in my prima facie demonstration of the First Habeas Court's "egregious" exercise of jurisdiction, that represented a "clear usurpation of power", which lacked even an arguable basis for jurisdiction, done in a manner that contravened due process of law. Central Vermont Public Serv. Corp. v. Herbert, supra, 341 F.3d at p. 190; Baldwin v. Credit Based Asset Serving and Sercuritization, 516 F.3d 734, 737 (8th Cir., 2008); see, United Student Aid Fund, Inc. v. Espinosa, supra, 559 U.S. at p. 271; Oldfield v. Pueblo DeBahia Lora, S.A., 588 F.3d 1210, 1215, n13

(11th Cir., 2009).

From the First Habeas Court's lost of personal jurisdiction over the parties " in the course of the proceedings", in failing to render service of process as to the Order To Show Cause; Respondent's Answer, and other unsubstantiated, misleading and prejudicial documents submitted by the state and relied upon by the habeas court in deciding to deny the writ; to failing to provide me with any "notice" as to these pleadings, nor any meaningful "opportunity to be heard" in my defense. U.S. Const., Amend. XIV; United Student Aid Fund, Inc. v. Espinosa, supra, 559 U.S. at p. 271; Johnston v. Zerbst, 304 U.S. 458, 468 (1938), (quoting, Franks v. Magnum, 237 U.S. 309, 327 (1915); e.g., Hansberry v. Lee, 311 U.S. 32, 41 (1940); Orix Financial Services, Inc. v. Thunder Ridge Energy, Inc., 579 F.Supp.2d 498, 50 (SDNY), aff'd and vacated in part, 369 Fed.Appx. 174 (2d Cir., 2010); United States ex.rel. Schwartzkopf v. Uhl, 139 F.2d 898, 900 (2d Cir., 1943); see, Appendices "EE": "LL".

I had a protected interest that, the First Habeas Court, in its adjudication to deprive me of my liberty, would not do so by denying me the fundamental rights under the Due Process Clause. See, Matthews v. Eldridge, 424 U.S. 319 (1975); Armstrong v. Mango, 380 U.S. 545, 580 (1965); United States ex rel. Schwartzkopf v. Uhl, supra.

These liberty interests are also protected by federal, statutory text, and Supreme Court precedent. See, e.g., 28 U.S.C., §§ 2246; 2248; Walker v. Johnston, 312 U.S. 275, 287 (1941). Had the First Habeas Court provided me notice and meaningful opportunity to be heard, such would have likely

resulted in a different outcome. See, Appendice "BB"; "II"; "KK"; United Student Aid Fund, Inc., supra, 559 U.S. at p. 270; Graves v. Smith, 811 F.Supp.d 601, 609 (EDNY), aff'd sub nom., Graves v. Phillips, 531 Fed.Appx. 27, 29 (2d Cir., 2013); Baldwin, supra, 516 F.3d 737. As a result, many of the acts or failures to act on the part of the First Habeas Court, prior to its determination, were beyond the powers granted it under habeas law and Supreme Court precedent. See, 28 U.S.C., §§ 2242; 2248; Appendice, "BB"; "GG"; "HH"; "II"; "JJ"; Harris v. Nelson, 394 U.S. 286, 93 n3, 299-300 (1969); Walker v. Johnston, supra, 312 U.S. at pp. 284, 286, 287.

So, too, the First Habeas Court's failure to conduct an evidentiary hearing regarding the disputed counsel claim squarely before it. The First Habeas Court's failure, in this instance, did not seek to adequately protect my due process right. See, 28 U.S.C., § 2254[d]; Townsend v. Sain, 372 U.S. 293, 314-316 (1963), overruled in part, Kenney v. Tamayo-Reyes, 504 U.S. 1, 11 (1992); Appendix "I".

The First Habeas Court did realize the Counsel issue was one of my "having been compelled to choose between a guilty pleas and a trial assisted by unstaifactory counsel." Appendix "I". It even goes on to identify, and posit the appropriate constitutional question being, "whether the Sixth Amendment gurantees of adequate counsel were violated. If so then the constitutional violation would infect the subsequent guilty plea." Ibid.

Yet, the First Habeas Court makes no further inquiry of the issue. Opting, instead, to accept the state's fact finding determination. However, as the record clearly and convincingly

demonstrates the state's plea, withdrawal proceeding, did not reasonably conduct a hearing specifically on resolving the federal question regarding the right of choice to retain the effective assistance of conflict-free counsel, rather than saddled with a counsel, both the attorney and client objected to, being appointed at the Judge's discretion. Indeed, there is a significant, constitutional distinction between the right to retain the effective assistance of counsel, of one's own choice, and having a substitute counsel appointed by the court. See, United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006); Chnadler v. Fretag, 348 U.S. 3, 9 (1954), (collected cases); Carlsen v. Jess, 507 F.Supp.2d 968 (E.D., Wis 2007), aff'd., 528 F.3d 1018 (7th Cir., 2008).

In affording the state court's finding of fact such unquestioned deference on such a bedrock, federal question of law and fact, was an abandonment or abdication of this federal court's judicial review responsibility. Miller-El v. Cockrell, 537 U.S. at 340; see, Townsend v. Sain, supra, 372 U.S. at 326, n1; see, also, Miller-El v. Dretke, 545 U.S. 231, 240, 265 (2005); Graves v. Smith, supra, 811 F.Supp.2d at 607, 608.

This prima facie showing in support of issuance of the COA was further buttressed by the state record and appellate briefs, that an appointment of substitute counsel was not the issue being raised. In the state brief, I argued the counsel claim in terms of the state court's deprivation of the right to have the effective assistance of conflict-free, retained counsel of choice, which resulted in an involuntary guilty plea. Although presented under the state constitution for relief, I, nonetheless

cited to federal authority to make my point. See, Von Moltke v. Gillies, 322 U.S. 708, 725 (1948); Glasser v. United States, 315 U.S. 60, 70 (1942).

Thus, even though a sub-issue to that of the plea of guilty question, this counsel issue stood as an independant inquiry to be addressed separate from, but in conjunction with the unconstitutionality of the guilty plea. As the record clearly and convincingly showed there existed an actual conflict of interests between this attorney and me. This counsel admitted he was so "immeshed" in getting me to plead guilty, that he had not "prepared" for a trial, and stated he did not trust himself to try the case. I, on the otherhand, did not want to take a plea of guilty, but preferred to go to trial; and sought to retain different counsel for that purpose, until the Judge summarily told me, "No. He's your attorney."

This difference in interests as to the course of action to be taken, was not lawfully resolved at the state level; nor by the First Habeas Court, prior to deciding the writ. See, Cuyler v. Sullivan, 446 U.S. 335 (1980); Aremienti v. United States, 234 F.3d 820, 823-824 (2d Cir., 2000); see,also, Townsend v. Sain, supra, 372 U.S. at 309, n6. Consequently, in failing to conduct an evidentiary hearing to resolve the counsel issue squarely before it, the First Habeas Court, in failing to adequately protect my due process right, rendered the integrity of its judgement, void. Rule 60(b)(4); see, Appendice " C "; " I "; Hollis v. Estelle, 569 F.Supp. 146 (W.D., Texas), aff'd., 714 F. 2d 136 (5th Cir., 1983).

It is in such light that reasonable jurists could find

debatable the District Court's evaluation of no merit in the motion for relief from the judgment, to be an abuse of discretion. Miller-El v. Cockrell, supra, 537 U.S. at 327.

In bringing a claim, pursuant to an independant action in equity, I sought to correct a grave miscarriage of justice, due to fraud being perpetrated on the First Habeas Court, by the state, in its submission of unsubstantiated, prøjudicial documents submitted and relied on by the federal judge in determining the writ. See, Rule 60[d][3]; United States v. Beggerly, 524 U.S. 38, 46, 47 (1998). The claim was such that reasonable jurists could find debatable the District Court's failure to address the merits of the claim, to be an abuse of discretion. See, Graves v. Phillips, 531 Fed.Appx. 27, 29 (2d Cir., 2013); Freeman v. Chandler, 645 F.3d 863, 867 (7th. Cir., 2011).

In the First Habeas Court's Memorandum/Order, the Court makes reference to allegations regarding my purported admission to the commission of the offense charged. See, Appendix " I ". This claim is purported to be based on documents made available to the habeas court, by the state-- but not petitioner, as a party-- that is said to have took place during the state proceeding.

Yet, not only is such not true, unsubstantiated, and irrelevant to the issues presented for habeas relief, but was highly prejudicial, and meant to bias and predispose the First Habeas Court to reaching a judgment denying the writ, irregardless of the evidence in the record to the contrary. See, Armatas v. Moroullrti, 690 Fed.Appx. 731 (2d Cir., 2017), (citing

King v. First American Investigations, Inc., 287 F.3d 91, 95 (2d Cir., 2002); Turner v. Pleasant, 663 F.3d 770, 776-777 (5th Cir., 2011); cf., Marshall v. Holmes, 141 U.S. 589 (1891), (document forgery).

In this respects, reasonable jurists could find debatable the District Court's unquestioned acceptance of such unsubstantiated documentation, without further determination, in light of the evidence to the contrary presented in the record, to be an abuse of its judicial discretion. Miller-El v. Cockrell, supra, 537 U.S. at 327, 340.

ENDNOTE

1/ Although the District Court acknowledged I met the third and first of the Barker factors it, nonetheless, seeks to mitigate the significance of the uncommonly long, presumptive prejudice, stemming from the prosecution's twenty-two, plus month delay, in bringing to a prompt trial, a common apartment brake in, robbery and sexual assault offense. This, by the mischaracterization of the offense as "relatively complexed". Appendix "D". However, this assessment, in light of the evidence before the state court, is not reasonably supported. See, United States v. Cain, 671 F.3d 271, 296 (2d. Cir., 2012). The state's delay in promptly prosecuting the offense to a trial, is over two, and a half times longer than what is found as the "triggering mechanism" for the length of delay found to be "unduely prejudicial" by the federal courts. Barker v. Wingo, *supra*, 407 U.S. at pp. 530-531; see, Doggett v. United States, 505 U.S. 647, 651-652 (1992); United States v. Vassell, 970 F.2d 1162, 1164 (2d Cir., 1992); People v. Staley, 41 N.Y.2d 789 (1977). Such an unreasonable underestimation of the importance of the first factor, can skew a fair assessment in considering and balancing all other factors and circumsatnces, as set forth in the Barker equation. Ibid, 407 U.S. at pp. 530-533; see, Dickey v. Florida, 398 U.S. 30 (1970).

2/ Under New York State's Speedy Trial rule, the prosecution must state its readiness to promptly bring an accused to trial, based on satisfying several factors. E.g., People v. England, 84 N.Y.2d 1, 4 (1994); see, People v. Taranovich, 37 N.Y.2d 442, 445 (1972); People v. O'Shaugnessy, 124 Misc.2d 1031, 1033 (Sup.Ct., W.Chst. Co., 1984). It is presumed the prosecution will maintain its actual, and implied state of trial readiness. See, People v. Sibblies, 22 N.Y.3d 1174, 1180-1181 (2014), (Grafteo, J., Concurring). Yet, neither the Court, nor the defense is bound by the state's declaration of readiness in determining whether its genuine. E.g., People v. Robinson, 143 Misc.d 163, 164-165 (Sup.Ct., Bx. Co., 1989); see, Vermont v. Brillon, *supra*, 556 U.S. at pp. 90-91; ibid. The prosecution's failure in my case to be ready to proceed to a prompt trial, for almost two years, is deliberately and negligently done by misinforming the Court and the defense otherwise, is due to the state's failure to have complied with all out-come determinative motions necessary to lawfully proceed to trial. The insufficiency of the People's case, resulted in the admission of an impermissible evidentiary, Molinuex, ruling by the trial judge, on April 25, 2007--almost two years after my arrest for the crimes charges. See, Tr., 4/24/07; People v. England, *supra*; People v. Molinuex, 168 N.Y. 269 (1901). Consequently, the prosecution was never genuinely ready to promptly bring me to a trial, let alone a speedy trial; and its prior declarations to the contrary would result in a nullification. E.g., Smith v. Hooey, 393 U.S. 374 (1969); People v. Barden, 27 N.Y.3d 550, 553 (2016); People v. Sibblies, *supra*; People v. Anderson, 66 N.Y.2d 529, 540 (1986); see, People v. Blue, 114 Misc.2d 383, 387-388 (Sup.Ct., Kings Co., 1982).

3/ Under New York State's Speedy Trial provisions, the start of trial precludes any further application challenging the state's violation of an accused's right to a Speedy Trial. N.Y.C.P.L., § § 30.20; 30.30; 210.20[2]; People v. Lawrence, 64 N.Y.2d 200 (1984); but, see, Betterman v. Montana, 136 S.Ct. 1609, 1612 (2016), ("We hold that the [Speedy Trial] gurantee protects the accused from arrest or indictment through trial, . . ").

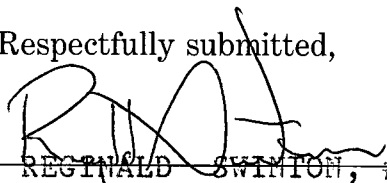
4/ The District Court's assessment of petitioner's footnoted statement in the pro-se., memorandum of law, in support of the motion for relief from the judgment, at page 39, footnote 2, that I seek to directly litigate the 2007, sentencing court's persistent violent felony offender, (PVFO), adjudication, by means of the Rule 60 motion, is read out of context. In this instance, I was merely informing whomever was to be the District Judge assigned of the existence of an additional federal pleading presently being reviewed in the district court, surrounding this state issue. The entry was not intended as an independant, substantive claim within the meaning of the Rule 60 motion. However, because the matter ". . .present[s] a substantial constitutional question, then an independantly substantial statutory issue may come along for the ride." Rammunno v. United States, 264 F.3d 723, 725 (7th Cir., 2001), (citing with approval, Slack v. McDaniels, 529 U.S. 473, 484-484 [2000]).

I respectfully submit that this is not a case where Certorari would be "improvidently granted" because, "the record simply does not support the proposition that much-- let alone 'most' of the delay was cause by the State's failure. . . ." Boyer v. Louisiana, supra, 569 U.S. at p. 241. Mine's is a case where the lower "Court's analysis under Barker was. . .based on a critical misapprehension of [this Court's] precedents:It did not attribute responsibility for the delay to the State, and thus incorrectly applied the factor that [this Court has] found to be especially significant. " Ibid, supra, 569 U.S. at p. 247, (Justice Sotomayor, Dissenting Opinion).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


~~REGINALD SWINTON, #07A3279~~

Date: JUNE 15, 2018