No. 24-7034

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

District of Columbia

Jacques Dorcinvil — PETITIONER
(Your Name)

vs.

Marlyn Kopp — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS 2nd CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jacques Dorcinvil # 10A0681
(Your Name)

Sing Sing Correctional Facility
(Address)

354 Hunter st, Ossining, NY 10562
(City, State, Zip Code)

(Phone Number)

QUESTION PRESENTED

Whether the late filing of a Notice of Appeal by a District Court's clerk sent by a pro se prisoner can deprive the Court of Appeals of jurisdiction over an appeal that is statutorily timely

LIST OF PARTIES

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

RELATED CASES

Dorcinvil v Kopp, 71 F,supp,3d 128 US District Court for the Eastern district, judgment entered on 1/5/24

Dorcinvil v Kopp, No 2024 wl 5431478 Leave to the US Court of Appeals for the 2nd circuit denied on Oct, 23, 2024

Dorcinvil v Kopp, rehearing to the US Court of Appeals denied on Jan 8, 2025

2/21/24 Electronic index, in lieu if record, filed entered on 3/5/24

2/27/24 Prisoner appeal on behalf of Jacques Dorcinvil received on 2/21/24 opened, entered 2/27/24 1;31 PM

2/27/24 Defective document, motion for assignment of pro bono counsel, for Certificate of appealability, at docket entry 3, on behalf of Appellant Jacques Dorcinvil copy to pro se Appellant, filed, entered 2/27/24 1;38 PM

2/27/24 Instructional forms, to pro se litigant sent, Entered 2/27/24 1;41 PM

3/8/24 Motion for Certificate of Appealability on behalf of Jacques Dorcinvil filed service date 2/13/24 by US Mail entered 3/18/24 3;24 PM

3/8/24 Motion to proceed in Forma Pauperis Jacques Dorcinvil filed, Service date 3/8/24 by no service, Entered 3/18/24 3;25 PM

3/18/24 Defective document, motion for certificate of appealability at docket entry 9, on behalf of Jacques Dorcinvil, copy to pro se, filed entered 3/18/24 4;56 PM

3/18/24 Defective document, motion to proceed in Forma Pauperis, at docket entry 10, on behalf of Jacques Dorcinvil, copy to pro se filed entered 3/18/24 5;00 PM

3/21/24 Notice to Appellee Marlyn Kopp for failure to file an appearance sent entered 3/21/24 12;08 PM

3/22/24 Notice of Appearance as substitute counsel/ additional (14) counsel, on behalf of Marlyn Kopp, filed entered 3/22/24 8;14 AM

3/26/24 Defective document notice of appearance, at docket entry 14, on behalf (15) of Marlyn Kopp filed entered 3/26/24 3;02 PM

3/26/24 Form D P on behalf of appellant Jacques Dorcinvil filed, service date (19) Date 3/26/24 by no service, entered 4/22/24 2;23 PM

3/26/24 Acknowledgment and notice of appearance, on behalf of appellant Jacques (20) Dorcinvil filed service date 3/26/24 by no service, entered 4/22/24 2;28 PM

3/26/24 Motion, to proceed in Forma Pauperis on behalf of appellant Jacques (21) Dorcinvil, filed, service date 3/14/24 by US mail entered 4/22/24 2;30 PM

3/27/24 Notice of apearance as substitute counsel additional counsel, on behalf (16) of Marlyn Kopp filed entered 3/27/24 8;09 AM

4/2/24 Cured defective document, notice of appearance, at entry 16, on behalf (17) of appelle Marlyn Kopp

4/2/24 Attorney, Keith Dolan, for Appellee Marlyn Kopp, added entered 4/2/24
(18) 9;20 AM

5/1/24 Defective document, form D-P, at docket entry 19, on behalf of appellant
(22) Jacques Dorcinvil, copy to pro se filed, entered 5/1/24 12;38 PM

5/1/24 Defective document acknowledgment, Notice of Appearance, at docket entry
(23) 20, on behalf of appellant Jacques Dorcinvil, copy to pro se, filed entered
5/01/24 12;40 PM

5/2/24 Cure defective document, motion to proceed in Forma Pauperis, at entry
(24) 21, on behalf of Jacques Dorcinvil, filed entered 5/2/24 1;16 PM

5/3/24 Strike order, striking appellant Jacques Dorcinvil motion for Certificate
of Appealability, for assignment of pro bono counsel at entry number 3, 9 from
(25) the docket, copy to pro se filed, entered; 5/3/24 10;03 AM

5/3/24 Order dated 5/3/24 stating this appeal may be subject to dismissal by
(26) 5/24/24, unless appellant Jacques Dorcinvil moves for Certificate of Appea-
lability, copy to pro se appellant filed entered 5/3/24 10;00 AM

5/23/24 Motion for extension of time, on behalf of Appellant Jacques Dorcinvil
(27) filed, service date 5/23/24 by no service date 5/23/24 by no service,
Entered 5/28/24 10;15 AM

5/29/24 Defective document, motion for extension of time, at docket entry 27,
(28) on behalf of appellant Jacques Dorcinvil pro se, filed entered 5/29/24 4;36 PM

5/29/24 Motion for Certificate of appealability, on behalf of appealability,
(29) on behalf of appellant Jacques Dorcinvil, filed service date 5/23/24 by
US mail, Entered 5/30/24 4;43 PM

5/31/24 Strike order, striking appellant Jacques Dorcinvil Form D P filed at
(30) Entry number 19 from the docket, copy to pro se, filed entered 5/31/24
3;53 PM

5/31/24 Strike order, striking appellant Jacques Dorcinvil acknowledgment Notice
(31) of appearance from at entry # 20 from the docket, copy to pro se filed
entered 5/31/24 4;02 PM

5/31/24 Order, dated 5/31/24, stating this appeal may be subject to dismissal
(32) by 6/21/24, unless appellant Jacques Dorcinvil, submits acknowledgment and
notice of appearance, copy to pro se appellant filed entered 5/31/24

6/6/24 Defective document, motion for Certificate of Appealability at docket
(33) entry 29, on behalf of appellant Jacques Dorcinvil, copy to pro se, filed
entered 6/6/24 4;05 PM

6/18/24 Acknowledgment and notice of appearance, on behalf of appellant Jacques
(34) Dorcinvil filed, service date 6/12/24 the US mail, Entered 7/2/24 12;48 PM

6/18/24 Form D-P, on behalf of appellant Jacques Dorcinvil, filed services date
(35) 6/13/24 by US mail entered 7/2/24 2;06 PM

7/1/24 Motion for Certificate of Appealability, for permission to file an oversized
(36) motion, on behalf of appellant Jacques Dorcinvil, filed service date 6/22/24
by US Mail, entered 7/2/24 2;14 PM

Dorcinvil v Kopp, no 24-462 US Court of Appeals for the 2nd Circuit denied leave to appeal on Oct, 23, 2024

Dorcinvil v Kopp, No 24 462 US Court of Appeals for the 2nd Circuit accept petition for rehearing on Jan, 2, 2025

Dorcinvil v Kopp, No 24-462 US Court of Appeals for the 2nd circuit, Petition for rehearing denied on Jan, 8, 2025

People v Dorcinvil, Kings County Ind# 1106 denied on 3/6/12; 440 motion

People v Dorcinvil, Ind# 5106 Kings County Supreme Court 440,10; §2221 denied on Sept, 11, 2012

People v Dorcinvil, Ind# 2012-03026 Appellate Div, 2nd department 440,10 leave to appeal denied on 1/29/13

People v Dorcinvil, Ind# 5106-07 Appellate Division 2nd dept, 440,10 denied on 9/8/13

People v Dorcinvil, 122 Ad3d 874 (2d Dept, 2014) Direct appeal denied on 11/19/14

People v Dorcinvil, 25 NY3d 950 (2015) Levae to appeal to the Court of Appeals denied on 3/26/15

People v Dorcinvil, 25 NY3d 1162 (2015) reconsideration to the Court of Appeals denied on 6/15/15

People v Dorcinvil, 53 MIsc 3d 1210(a); 440,10-440,10(a) motion denied by the kings County court on 10/27/16

People v Dorcinvil, 149 Ad3d 867 (2d dept, 2017) Writ of Coram Nobis denied on 4/12/17 Appellate Div, 2nd department

People v Dorcinvil, 2016-13011; 440,10 leave to appeal denied in the Appellate Div, 2nd dept, on August 18, 2017

People v Dorcinvil, 30 NY3d 979 (2017) leave to the Court of Appeals denied on Oct, 27, 2017; 440,10 motion

People v Dorcinvil, 29 NY3d 1091 (2017) writ of coram nobis leave to appeal to the Court of Appeals denied on Jul, 20, 2017

People v Dorcinvil, writ of coram nobis; reconsideration to the Court of Appeals denied, 30 NY3d 949 (2017)

People v Dorcinvil, 175 AD3d 1421 (2d dept 2019) 440,10(1-a) motion leave to appeal denied on Sept, 18, 2019 in the Appellate Division 2nd department

People v Dorcinvil, 34 NY3d 1077 (2019) 440,10(1-a) leave to appeal to the Court of Appeals denied on Dec, 12, 2019

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TABLE OF AUTHORITIES CITED

STATUTES AND RULES

OPINION BELOW

The relevant prior opinions in this matter of the US District Court for THE Eastern District of New York and the US Court of Appeals for the 2nd Circuit are presented the Appendix-A-1-2, The decision of the US District Court for the Eastern District Court is reportedf at 71 F,Supp,3d 128 (EDNY 2024), The decision of the US Court of Appeals for the 2nd Circuit is reported at 2024 WL 5431478 (2nd Cir 2024)

JURISDICTION

The Us Court of Appeals for the 2nd circuit dismissed Petitioner's appeal from the denieal of his petition for Habeas Corpus on October 23, 2024, The petition for panel rehearing was denied on January 8, 2025, This Court's jurisdiction is invoked under 28 U,S,C 1254

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U,S,C § 2253

In a habeas Corpus proceeding before a circuit or District Judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the circuit where the proceeding is had

Federal Rules of Appellate Procedure, Rule 3(a)

Filing the Notice of Appeal, An appeal permitted by law as of right from a District Court to a Court of Appeals shall be taken by filing a Notice of Appeal with the clerk of the District Court within the time allowed by Rule 4, Failure of an appellant to take any step other than the timely filing of a Notice of Appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, Which may include dismissal of the appeal,

Federal Rules of APpellate Procedure, Rule 4(a)(1) & (5)

(a) Appeals in Civil cases

(1) In a civil case in which an appeal is permitted by law as of right from a District Court t a Court of Appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the District Court within 30 days after the date of entry of the judgment or order appealed from; but if the US or an officer or agency thereof is a party, the notice of appeal may be filed by any party 60 days after such entry, If a notice of appeal is mistankenl;y filed in the Court of Appeals, the clerk of the Court of appeals shall note thereon te date on which it was received and transmit it to the clerk of the District Court and it should be deemed filed in the District Court on the date so noted

(5) The District Court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a), Any such motion which is filed before the expiration of the prescribed time may be ex parte unless the court otherwise requires, Notices of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules, No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, which every occurs later,

Federal Rule of Civil Procedure, Rule 7(b)

(b) Motion and other papers

(1) An application to the Court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought, THe requirement of writing is fulfiled if the motion is stated in a written notice of the hearing of the motion,

(2) The rules applicable to captions, signings, and other matters of form of pleadings apply to all motions and other papers provided for by these rules,

(3) All motion shall be signed in accordances with Rule 11

STATEMENT OF THE CASE

The charges against the Petitioner arose from the alleged assault on Petitioner's ex-girlfriend Claudette Marcellus and her son Brian Marcellus on January 14, 2007 on bedford Ave, in Brooklyn. Ms Marcellus later drope the charges and signed a waiver with the District Atorney's office declining prosecution.

On May 4, 2007, at the same address Ms ,Marcellus was stabbed to death and her son was also stabbed but survive ,Petitioner was charged by kings County indictment #5106/07 with murder in the second degree, attempted murder in the second degree, assault in the second and third degree ,criminal possession of weapon in the fourth degree and criminal contempt .

Trial against Petitioner began on November 19, 2009 before the Honorable Matthew D'Emic, Justice of the New York State Supreme Court, Kings County, and a jury. On December 2, 2009. Petitioner was convicted of murder in the second degree ,attempted murder in the second degree and criminal contempt

The People's case

The State evidence implicating Petitioner in the murder of Claudette Marcellus and the attempted murder of Brian Marcellus consisted solely of the testimony of Brian Marcellus and much of his direct testimony was elicited through leading question to inculpate Petitioner. As Justice D'Emic observed during trial "There was no other evidence whatsoever which identified Petitioner as the perpetrator"

Brian's testimony about the January 14, 2007 incident was as follow:
I met Petitioner through my mother in the month of November of 2006 (G J-7) He stated that he always referred to him as "Stanley" He testified that on January 14, 2007 him and his mother arrived home from visiting friends to find the door locked and that Petitioner had open the door for them, At about 1:30 or 2:00 AM, while sitting on his bed in the living room he heard Petitioner and his mom arguing in the bedroom (T 23-25) his mother came out, seeming dizzy and shakking, with a red mark on her shoulder and she was knocked out seeming dizzy and shakking, with a red mark on her shoulder and she was knocked out, felt dizzy and came outside (G J-9)

Petitioner entered the livingroom and hit his mother on the head and face (T,26, 30)(G.J-10) He then grabbed a broomstick and stucked it on Petitioner's face, and Petitioner grabbed the broomstick from him and beat his mom with it

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The following symbols will be used to designated reference tothe record in the present case: T: The trial transcripts; SH: Suppression Hearing; VD: Voire Dire; Apt: Apartment; DCJ: Dade County jail

causing it to bend a little bit (T. 26- 27, 29-30, 33-34)(G,J-10) then his mother told him to call the police, but did not (T,27) contrary to his Grand Jury's testimony where he never mention anything about calling the police (G,J-11)

Although Brian testified that he did not call the police (T,27), the people introduce a 911 call from January 14, 2007. On which a woman can be heard screaming and a man yelling (T, 88-89, 93; people s EXHIBIT-11; NYPD tape technician Regina Ward). The tape include no conversation between a caller and a 911 operator.

He testified that he started to run out of the apt. and that petitioner chased him with a metal chair and threw it at him but missed, as he was exiting the building. Petitioner grabbed him by the jacket and beat him up, punching him in the face and kicked him in the head. As a result of this incident Ms, Marcellus obtained an order of protection against Petitioner (T, 27-28, 35) On cross-examination he admitted to defense counsel that he told ACS that he injured himself as he ran from that house and felt on the floor (T,48-49)(440 motion, dated 11/15/11; EXHIBIT-H; 440 motion, dated 12/9/15 EXHIBIT-C)

On redirect, he contradicted himself and claimed that he has lied to ACS to protect his mother because the police had threaten to arrested his mother and take him away if she let petitioner in the Apartment (T. 55-56), Brian further testified that on May 4, 2007 at about 1:00 or 2:00 AM at the same address, he was sitting on his bed, he heard Petitioner arguing with his mother (T,35-36) Although Brian had gave him no motive for the argument (T-36) the prosecution brought a witness "Allison Sciplin" to testify over objection that she heard a female voice screaming "'I dont have any'" (T,147) Brian testified that Petitioner ran into the kitchen and came back with a buther knife and tried to stabb his mother on the legs (T-36-37), She kept on saying stop (T. 37)

That he got up from his bed and Petitionetr chased him around that house with knife (T,37-38) that Petitioner pushed him onto the couch, and his mother sat into the way. And Petitioner started stabbing them at the same time (T. 38) that her mother tried to call the police, but Petitioner took the phone out of the jack (T,38-39) and as they were bleeding on the couch, Petitioner threw Brian s computer and the television on the floor, packed his clothes and leave (T,39).

That his mother rose from the couch, topless and asked Petitioner to help her, but Petitioner told her to get the "F" out of the way, And left, (T,40)

Brian testified that her mother limped out of the apartment to get help while remaining inside (T,40) Petitioner, who had been wearing a white T-shirt returned to the Apt, In a orange jacket, walked past the livingroom bed on which he was laying, and went out to the window (T. 40-42)

Although Brian testified that he opened the door for the police (T,42-43) Det. Greenwood testified that they broke the door to find Brian unconscious (T-100-01, 113). He testified that he first spoke to the police 3 days after the incident contrary to his Grand Jury testimony where he told them, it was 4 weeks (G,J-23), Brian also told defense counsel during cross-exam, that the police and the DA told him what happened on May 4 and showed photograph of Petitioner (T- 51-53).

Other prosecution witnesses

Det, Michael D'Arbanville testified that on Jan. 14, 2007 at about 12:30 PM he met the Marcelluse's when they returned from the hospital (T,189-209), and about 10 hours earlier, Night Watch det, Briano and Mc Cabe had first respond to the scene, investigate and interviewed the Marcelluses (T,200-01, 204)

The Marcellus's apt. was in a complete state a disaray, furniture was knocked over, the phone cord ripped from the wall. A metal chair and broom broken and blood on a chair and cell phone (T.190-92, 196-97; People's EXHIBIT-19-20) Ms.-Marcellus shirt was torn and bloody, had five staples on her scalp and swollen or bruised head ,lip, cheek bones, shoulders, back and hand (T,193, 405; people's-21 A-C)

Brian left eye was swollen (T-193-94, people's-1). He had no broken bones and had been prescribed rest, artificial tears, and pain medication (Chrony;406) On January 2007, D'Abanville arrested Petitioner, who gave him his first name, middle and last name, date of birth, social security number, height and weight approximately 5 ft 10 and 170 pounds. A picture of Petitioner with shaved head no facial hair was also introduce by the prosecutor as EXHIBIT-24 (T, 197-199) Order of protection, which Petitioner signed barred him from contacting the Marcelluses between May 19 and May 9, 2007 (T. 471, people's 40-41)

Officer Ephraim Tirado, testified that, himself and officer John Caroll who did not testified responded to a 911 call around 1:42 AM, on May 4, 2007 and find Ms. Marcellus lying partly on the sidewalk covered with blood , and unconscious (T. 62-64) Tirado testified that he also observed a shirt and another piece of clothing on the sidewalk nearby (T. 74-75). That he followed a trail of blood into the building lobby and saw bloody footprint leading in front of the closed of

Ms, Marcellus apt (T- 65-66)

Det, Paul Greenwood from the Emmergency Unit Services (ESU) testified that he arrived at the scene around 2:30 AM (T, 97-99) himself and few other officers knocked on Ms Marcellus door, after received no answer, they removed the apt's door were they found Brian Marcellus unconscious and unable to follow basic command (T, 99-117)

Paul Leonardos the landlord of the building testified that he saw a man whoo was staying with the Marcelluses on the video removed by the police (T, 134-35) 138 39), but never made an Court idnetification of Petitioner (T, 124). He testified that he had never change the recording device to daylight saving time (T-130) and the event apparantly occured between 1:33 and 1:55 AM and hour later than indicated on the videotape. He testified that the video system hold a capacity inside the lobby and ouside thefront and back of the building (T,124-27). Although Leonardos could not identified Petitioner, the prosecutor try to stand next to Petitioner for an identification, played the video 4 times, Even after Mr. Leonardos said that is not an expert, the stenographer erase that testimony and typed on the transcript that Leonardos said that " a lot of persorn change (T. 124 -492), Defense counsel first objection about the video was also erased in the transcript (V.D-74) and Brian Marcellus never saw the video at trial.

Sgt, John Asam, testified that he was from Technical Assistance Response Unit and help the detectives and the building's landlord Paul Leonardos watch the video, the surveillance camera had produce (T - 352)and the DVD tape was handed to det, Briano (T,312)

Allison Sciplin, a next door neighbor, called 911 twice after she was awaked by a loud noise, a woman screaming, "I dont have any, and a child scream (T-144-47), She also open her apt. door and stepped into the hall, after she heard an exhalation. She also testified that before returning in her apt, She saw bloody handprint on the stairway.

Det, Nancy Palermo tetsified that he and det. Walsh who was the lead detective of this case arrived to the scene around 3:30 AM (T.367) they first observed with a sheet (T .368) they proceed and took pictures of the exterior of the building and also the lobby (T,369), they recovered eveidence such as a pink hanger, wire hanger, with a black shirt with a gray stripes on it (W-1) a black plastic hanger (W 2) a black shirt, J.C Clothing USA, with no size on it that was

commingled with a yellow plastic hanger and a black wire pants hanger and a black wire pants hanger at the entrance right before the door opening of the building 2665 Bedford Ave (W-5)additional hangers (W-6-9)(T.366-386).She testified that her testimony was based on det Walsh notes havent testified at trial (T.377)

Det, Charles Platt testified that on June 4, 2008, he were asked by the DA office to take DNA from Petitioner, after he took the swab, he brought it to the Police dept's lab and they forward it to the medical examiner's office (T, 320-21)

Doctor Valery Chorny testified that on May 4, 2007, Brian could not speak and had some difficulty breathing (T-407 418-19, 424) A small bony fragment had entered Brian's brain tissue, causing bleeding swelling and likely the brief seizure he suffered shortly after arriving at the hospital (T-409-10). A trache-otomy tube was inserted and he was sedated (T-410-412) Heremained in thee hospital for almost a month before being discharged to a long term care rehabilitation (T-414)

Det, John Anselmo testified that he, det. Briano, Steven Gonzalez, and Sgt. Chris Malone arrived at the scene between 2:00 and 2:30 AM and canvassed the area (T- 426-28). They observed a female on the sidewalk area in front of that location not responsive, A young boy out and they gave him to EMS for treatment. He recovered a bloody knife in front of 2727 Bedford Ave;

Ineffective Assistance of Counsel

1 Failure to pursue a MAPP Hearing and call potential witnesses

Mr. Stanford J, Bandelli was appointed by the Court as counsel for the Petitioner under Article 18-B of the County Law. On first visit, Petitioner explained to him what took place on January 14, 2007 (See, 440 motion, dated 11/15/11; 440 motion dated 12/9/15 statement of fact) Petitioner also explained to him that on May 3, 2007, he went to Long Island s DMV to ensure and register his car, a black mercury that he had purchased (See, 1st and 2nd 440 motion) thatday Petitioner had also to go to Miami for the Haitian's flag parade they celebrate every 18th of May,

Petitioner returned to Brooklyn after he had register his car. He want to Felix Mario's house on 2913 Clarendon Ave. Before leaving for Miami, Florida. Petitioner spent some time with few other friends who was in the house, beside of Stephen Renaud, Gerard and Mario. After playing domino for some time, Stephen Renaud Mario and Gerard went to drope Petitioner at the Penn Station for him to take a train to go to Miami (See §2221 motion dated 3/7/12, EXHIBIT-B Affidavit of Stephen Renaud, Gerard and

and Mario. After playing domino for some time, Stephen Renaud Mario and Gerard went to drope Petitioner at the Penn Station for him to take a train to go to Miami (See §2221, dated 3/7/12 EXHIBIT B; Affidavit of Felix Mario 440 motion dated 12/9/15; Affidavit of Stephen Renaud; Reply brief 6/3/16 affidavit of Stephen Renaud)

On May 24 , 2007 while in Miami . Petitioner ran out of money and decide to call his Mother in Haiti to obtain $60 dollars from her, Petitioner's mother told him that she ll send the money on May 26 And on May 26 2007 Petitioner went to the Consulate , the said residence was entered illigaly by the police where Petitioner was put into without the consulate consent and taken to their Precinct and to DCJ awaiting extradion . While at DCJ Petitioner was stripped of his properties ($60 , green card , driver license , NYS ID , other State Id s , few business cards debit card , a pair of shades and a sun hat) And a pink slip receipt was handed to him for the properties (See, 440 motion , dated 11/15/11; EXHIBIT-C, 440 motion dated 12/9/15 EXHIBIT-E)

On May 30, 2007 2 detectives from NYPD, det, Perry and Henn came to DCJ waites for Petitioner's properties at the voucher window (S-H-54) and took Petitioner back to New York , 70th Precinct where Perry decline to give back his properties . Petitioner was also not allowed to use the phone (See , motion dated 11/15/11 P-1-2; 440 motion dated 12/9/14 P-22-40) Petitioner was then arraigned

While in Rikers Island , he make several copies of the receipt handed to him by DCJ for his properties and gave the original to defense counsel, He informed Petitioner that the aforsaid search and seizure was illigal , and that the retention or use of any of the properties seized constitutes an infringment of petitioner's Four Amendment Constitutional right, That his investigator, Mr. Johnston will contact the consuls in Miami and they will be produced at pre trial, and also obtained the money and the properties seized by det. Perry. He made separate reqests for the properties in 2 diferent court appearances, follow by an Omnibus motion where a MAPP hearing was requested but the DA claimed in her reciprocal cross-motion that no properties was recovered from Petitioner (Supreme Court files)

These properties were later recovered at the scene of the crime in a jacket (T-178-452) Counsel failed to requested for them at the suppression hearing when det. Perry testified that he waites for Petitioner's properties at DCJ's window properties clerk (S-H-54) and also did not objected to their introduction at trial. The Consuls were never called either at pre-trial or at trial, Neither nor defense counsel who handled the case ever sought to confirm their information

2, The implicit hearsay testimony

Detective Joseph Perry was assigned to investigate the May 4 incident, Perry testified that Petitioner became a suspect when he arrived at the scene and spoke to det. Briano of the Night Watch who did not testified (T, 455-56), Det, Perry testified as follow:

Q Did you speak with anybody when you get to the scene?
A yes, I did
Q Who did you speak with?
A Det, Briano from Night Watch
Q And after you spoke with det. Briano, what did you do?
A We had a suspect we were looking for,
Q Who was that?
A Jacques Dorcinvil

Mr Bandelli did not object to this line of question when the police failed to produce det, Briano,

3, Additional hearsay not object

The prosecutor further managed to convey to the jury over objection that the Petitioner was the man in the videotape introduce by the people at trial . Det, Perry testified that the surveillance videotape showed the Petitioner running out of the location with what appeared to be clothes and minutes later running back to the location (T,456-57). The prosecutor also elicited from perry that the police received "numerous tips "on their hotline, one came to the squad office and spoke to these people (T, 458) Counsel only made a general objection Petitioner never had any rights to be protected because he never had any attorney

4, Counsel failure to request for a FRYE Hearing and present experts

At trial the people called Dr . Marie Samples who testified that Petitioner' s DNA called Male Donor-A (T . 283-84) was found on only one of the 100 to 200 items submitted for testing, a black jacket recovered in the apt, (T - 283-84, 287, 289-90) Scraping from the Jacket's collar and cuffs which would have rubbed against the wearer's skin, contained a mixture of DNA consistent with Petitioner, Ms,Marcellus and potentially a third donor (T, 283-84 287) Ms, Marcellus DNA also was found in blood stains on the jacket (See, 400 motion, dated 12/9/15; EXHIBIT-L)

Moreover during the proceeding defense counsel submitted a subpoena for an expert in Forensic Pathology and medicine, "Dr, Elliot Gross" (440 motion, dated 11/15/11. P-8; 440 motion, dated 12/9/15, p-19) But counsel never produce that expert and did not request for a FRYE Hearing to determine whether or not the evidence should be admissible. See, also (Supreme Court files)

Furtermore, scientists toward the Country agree that Genetic material is easily transferable where a victi struggles with the perpetrator (See, 440 motion dated 12/9/15 ; Reply dated 6/3/16, EXHIBIT-11) Throughout the trial the trial, the prosecutor elicited through det, Forte (T, 168) and through the testimony of Forensic Pathologist, Dr. Frede Frederic that it appeared to be evidence of struggle in Ms, Marcellus apartment (T. 344)

In a autopsy report performed by Dr, Gumpeni submitted to the defense showed that only a blood samples and a rape kit was submitted to the forensic biology (See, 440, dated 12/9/15, EXHBIT-M) Dr, Frederic testified that she doesn't know if any nailscraping were ever tested because the report was from another doctor. Defense counsel never point out that DNA profiles from fingernails scaping has led to notable exonerations and had such evidence been received at trial, the verdict would have been more favorable to the Petitioner.

5, Counsel failure to strike a juror who express actual bias

During Voire Dire, defense counsel upon questioning the first panel of juror made an inquiry from the prospective jurors tofind out if there was an actual bias the fact that Petitioner was an Haitian immigrant and if that would in anyway influence the verdict, Several prospective jurors had raised their hands (See, 440-motion, dated 12/9/15, P-43-44) Juror# Ramona Resilien told counsel that; I think that I'll be very nervous (V,D-68) and the trial court "I dont know, my stomach is bubbling already (V,D-69), Before the peremptory challenge, Petitioner requested from counsel to removed all the jurors who had raised their hands for cause from the venire within the enumerates relationships of CPL§ 270,20(1)(b) but defense counsel failed to strike juror# 12., Ramona Resilien who become the forewoman.

At that time counsel did not exaust his peremptory challenge, Petitioner requested from counsel to removed all the jurors who had raised their hands for cause from the venire within the enumerates relationships of CPL§ 270,20(1)(b) but defense counsel failed to strike juror# 12, "Ramona Resilien" who become the forewoman

At that time counsel did not exaust his peremptory challenges, Counsel did not ask the prospective jurors as a group, whether they could be impartial in the case (V.D 70 71),,but juror Ramona Resilien did not respond to the question, Defense counsel neither question her, nor attempted to remove her top obtained an Equivocal assurance of impartiality after the prosecutor had told the judge during

lunch recess that "She witness selecting forewoman Ramona Resilien talking to defense counsel , contrary to the Judge instruction (V.D--74-77)

Juror Resilien never individually stated or suggested whatsoever that she could be impartial, either initially or through rehabilitation and defense could never requested an equivocal assurance of impartiality of that juror, but called for a side bar , and waived Petitioner's attendance without his consent, where what was said is not on the trial transcript "I think I'll be very nervous, I dont know, my stomach is bubbling," Petitioner was able only to presume that the juror was partial and actually biases against him. And the purpose of approaching counsel during lunch recess was to reminded him that he failed to remove her (See, 440 motion, dated 9/15/16, P-41-51)

6, Counsel failure to object during summation

The prosecutor began her summation by asserting that the case was "not a whodunit" it was about a 12 year boy named Brian who watched his mother get slaughtered as he almost died (T-500) with every single plunge of the knife into her mother Petitioner intend to kill her (T,500)

This man killed Claudette, He killed Brian's mother, This case is about one witness It's about what Brian told us, a 12 year-old-boy, That's what this little guy right here told us, It's about what that little guy told us about what happened and there is no mistake there is no lie (T,501)

Repeatedly stating that Brian loved his mother" (T,508-09), the prosecutor argued that Brian tried to protect her knowing better than his mother the danger Petitioner posed to the family; she paid the biggest price" (T,504)

And unfortunately, Brian has to pay the price for that now too, Everytime Brian looks in the mirror and sees those scars on his face, he's got to remember the price that his mother and him paid (T,504)

The prosecutor then recited a litany of things "a guilty man" would do she asked "who leave his wallet and identification in his jacket in a apartment where he has been leaving for months, and go to Miami for a month, and answered I submit to you that's a guilty man "(T,506) She continued:

Who lives with his girlfriend and her son months and then leaves in the middle of the night and goes to Miami and never checks on what happened to that persom? "A guilty man" who leaves the apartment with his clothes in his hands? someone who want to erase all traces of himsel being in that apartment who needs a change of clothes because he's going on a trip who maybe needs to change his clothes because there is evidence on them

Who take clothes who still on a hanger? A guilty man
Who never ever, ever comes back? A guilty man
Who sees his girlfriend's dead, half naked body in the middle of Bedford Ave and walks right by her? the persorn who did it, A guilty man
who doesnt call 911 when this persorn he's been living with for months is hurt?
The persorn who did it,
The persorn who did this is the persorn who took those clothes and left the apt,
who owns those clothes, The persorn who was living there and "that is the guilty man, Jacques Dorcinvil" (T,506-07)

The prosecutor argued that the jury would have no problem determining that Petitioner was the man on the videotape from looking at it again (T,507)

Claiming it doesn't matter if Leonardos failed to identified Petitioner in Court, the Prosecutor argued that Leonardos identified him when it really mattered, on May 4, 2007 when he told the police the man was the boyfriend (T,507), Petitioner "looks a little different here, "with no shaved head (T,507)

The prosecutor argued that Petitioner must have intended to killed Claudette Marcellus" when he plunged the knife into her"; he intended "35 times to kill her" with each knife thrust" that got taken out and put back in" (T,508) He intended to kill her " the moment that knife hit her body again as she sat on her little boy to protect him from Petitioner,"" Those wounds were all here to protect this child who knew better than his mother what was going on" (T,508)

The prosecutor declared,

If one officer or 50 officers or a thousand officers show up afterwards, it doesnt change what the Petitioner did, He killed Brian's mother and he tried to kill Brian and then he climbed out of the back window and fled to Miami (T,510)

She concluded:
Ladies and gentlemen, when you deliberate, please remember that Brian Marcellus tried to protect his mom, He tried to protect her in January and he tried to protect her in May from the danger that Jacques Dorcinvil was, He wasn't able to, but when he came here today, he gave her a voice" and he told us what happened, And when the Judge asks you to deliberate, "I'm going to ask you to give both Claudette and Brian a voice" (T,510)

OTHER DUE PROCESS VIOLATION

Counsel request for the psychological records

During the proceeding, defense counsel made a request for the complainant psychological records, The prosecutor alleged that, they are not relevant and the trial court denied counsel's request on the ground that, he had reviewed them in camera and found nothing relevant to the defense Defense counsel again

renewed his request during Voire Dire (V,D-7-13) and told the court that a report from St, Mary's Hospital made by a Ph.d and a MD who analyzed Brian that was provide to him demonstrate that there was some type of Though disorder that preceded this particular incident and his school records indicate that he also have significant developmental problems and even issues in the quality of his though process and that maybe something that i s permissible for use of impeachment purpose on cross exam. with regard to the credibility of thisa witness based on the reason for ordering a psychological evaluation, The court denied the request,

The motion for the video

Prior to trial, defense counsel made 2 separates objection for the introduction of the videotape that the people introduce at trial (People's- EX-14), the first objection was not fully submitted in the transcript because the stenographer failed to type it See. (V-D-74). The second objection goes as follow

Mr,Bandelli: I have one thing also, before we open.,I anticipate the DA is going to introduce videotape and I'm going to object to the introduction of the videotape ahead of their opening statement because I dont want her to talk about the videotape ahead if there is going to be rule that he cant be used, and is a couple of things to be a rule that he cant be used.,and is a couple of things about the video, the time is off by an hour.,Number 2 and they dont know how they did it, but initially this thing is on 16 differents boxes but at the end they seem to have a continious flow of events, so I know if the video is altered in some way or how it is that the videotape went from 16 boxes to a sequence of events, So. your honor I m going to object to the introduction of the videotape as evidence, and I'm challenging it on the basis that it does not accurately reflect either the time or what initially videotaped in the videotape,

ADA;PAISNER: First of all, your honor, we can establish the foundation to various witnesses. the owner of the building whose security system it, then through detectives from from TARU UNIT who are the one who are the you know, the video from the original cassete into the DVD form, They're there to be cross examined about what they did it And those first boxes is then sees one at a time, We've had this tape the entire time, He knew about the time diference because it was reflected in the DD5,

THE COURT: Anyway that goes to the weight not the admissibility so, you know, I'll deny the application .You have an exception to my ruling for the record

MR.BANDELLI: I do except, I dont necessarily think it goes to weight ,it goes to the accuracy of what's contained on the videotape,

THE COURT: You'll cross examine him about that, That's certainly. you know good subject for cross examination.

MR.BANDELLI: I understand, Judge

THE COURT ALL RIGHT, I ll see you at 2:15

The trial court denied the 2 request made by defense counsel,

The Severance motion

During the proceeding and during Voire-Dire, defense counsel move to sever the January 14 from the May 4, 2007 incident on the ground that they are 2 separates incident, and could not rely on the January 14 incident to prove that Petitioner had commited the crime of May 4, 2007 because Ms. Marcellus had signed a waiver with the DA office declining prosecution and when the jury heard about the first case and the second case, it's going to interfere with their ability to distinguish the evidence and would jeaopardize Petitioner 5th Amendment's right by virtue of the fact that Petitioner being tried under one indictment involving both cases. The prosecutor alleged that Brian was a witness in both cases and will testified to that, And the court claimed that the witness was comming from a different jurisdiction and didn't want to bring him back twice, denying the request to sever the cases (V,D-2-7)

Motion to strike how Petitioner came to be in custody

In a Omnibus motion, defense counsel moved to precluded any evidence obtained in violation of Petitioner's 6th Amendment rights, At the suppression hearing, ADA Paisner acknowledged that statements "4 and 5" submitted on their Voluntary Disclosure Form (VDF) where taken in violation of Petitioner's 6th Amenment rights, but requested from the trial court to use them for impeachment if Petitioner wishes to testifies (Suppression Hearing 4, 67-68, 70) Petitioner did not take the stand, ADA, Bedford who was also presented at the Suppression Hearing elicited statements "4 and 5" from det, Perry over defense counsel objection at trial (T, 462-63) denying the Petitioner's right to a fair trial and due process of law,

Motion for the missing witness charge

After det, Anselmo testified, and before the People called det, Perry and rested (T,472) defense counsel requested a missing witnness charge as to det, Briano who had been present on both incidents (T,443-44), Interrupting counsel the court asked how Briano was in the People's control, the only thing it need to know (T,444) When counsel responded that they had a mechanism to bring someone from NYPD, the prosecutor said she had learn that Briano hd retired with an out-of-State address and that the people had no subpoena power out-of-State (T,444), Agreeing, the Court held Briano was "not under the people's control" and denied the missing request (T,444, 45)

Defense counsel protested, asking again for the missing witness charge for Briano, whom he described as "critical" to the case (T,44-45), Counsel noted that, according to the paperwork, Briano heard Brian say something, but the people's expert testified that Brian Could not speak, which created a big issue (T,445), The court repeated that Briano was not under the people's "control" and "that's that" (T,445)

Following the charge, defense counsel renewed his request for missing witness instruction, arguing that the people had an "absolute responsability" to call Det, Briano, who was the first responding officer at both incidents (T,529) It was not the defense burden to demonstrate that the people had the "means to bring in detectives who are collecting a pension on murder cases" (T,529), When the court asked, "what if he says no, he wont come in because they're going to cut his pension off," defense counsel responded "that's not what I heard, They didn't offer that" (T,529-30), The court repeated that counsel had not convinced it that Briano was under their control" (T,530), The prosecutor referred back to her earlier representation that Briano 'doesn't live in this State and I have no subpoena power to force him to come in (T, 350), Commenting, he can say no; all right," the court denied the application (T,530)

The objection of Petitioner's criminal record

The prosecutor also elicited from det, Perry direct examination that Petitioner had a criminal history. Det, Perry testified that, after Briano identified Petitioner the police did a computer checks on him and found "Past complaints, past arrests, places that he worked" (T,457)

ADA,BEDFORD: You stated you would be the lead detective on this case what did you do next as lead detective?
DET,PERRY: Well, we did a computer checks on Jacques Dorcinville and we locate family members, people who know him, Past complaints, past arrests. Place that he worked
MR BANDELLI: Objection, Move for mistrial,
THE COURT: Overruled, Go ahead,
DET,PERRY: We visited all these locations,
MR,BANDELLI: Judge, I ask that the be striken, Objection your honor,

Deliberation, verdict and sentencing

During deliberations, the jury requested to see the surveillance video, Brian testimony, and some of the DNA testimony (T,532), The jury convicted Petitioner on all counts but first degree asault (T,534-35)

Petitioner's Direct appeal

Petitioner was represented on direct appeal by court-apponited counsel, Erica Horwitz, In her brief she raised 2 issues: Petitioner was denied his rights

to due process and confrontation (A)The lead detective's testimony that he had his "Suspect" after talking to det Briano; (B) Additional Hearsay implicating Petitioner and suggesting he had "Past arrests" and Complaints; and (C)The court's refusal to give a missing witness charge as to Briano the initial investigator of both crimes, although his unvailability was not established, 2) Appellant was denied a fair trial by (A) the admission of unnecessary and gruesome photograph of the bloody, half-naked decedent; and (B) The prosecutor's summation comments that, inter alia, appealed to the jurors' symphaty for the surviving child, entreated them to give the victims "a voice" with the verdict and assured them that the child told the truth and Petitioner was a guilty man

Petitioner Pro-Se Supplemental Brief

Petitioner also filed a Pro-Se supplemental brief where he raised 5 issues; 1) Appellant was deprived of his rights to due process of law under the 5th, 6th and 14th Amendments when the trial court abused it's discretion by allowing the complainant witness to testify under oath over objection and refusing to direct the prosecutor to furnish appellant with the psychological records and evaluation that was done in evaluating the complainant witness prior and after the incident for impeachment purposes, 2) Appellant was deprived of his rights to due process of law under the 14th Amendment by the trial court (A) permitting the prosecutor to use an unredacted videotape showing the deceased; a blow up photograph when the deceased was alive in the evidence board in a effort to appeal to the jurors emotions and sentiment and (B) A repetitive enlarge "Arrest Photo" to prejudice Appellant 3) Appellant was denied a fair trial when the trial court denied to sever the January 14, 2007 incident from the May 4, 2007 incident 4) Appellant was denied his right to due process when the prosecutor elicited a statement from det Perry on direct which the court had ruled could be use for impeachment purpose if Appellant took the stand 5) Appellant was denied his rights to the effective assistance of counsel and his rights to a fair trial by defense counsel failing to pursue a "MAPP" HEARING", and providing a medical expert

On November 19, 2014, the Appellate Division 2nd dept, affirmed Petitioner s conviction, finding the issues unpreserved, without merit or harmless given the purportedly overwhelming evidence of his guilt, It also rejected the Pro-Se claims, finding as to the innefectiveness issue that it was a "mixed claim" "that should be brought in a CPL,440.10 proceeding, People v Dorcinvil, 122 AD3d 874, 877-78 (2d Dept. 2014), Leave to the Court of Appeals was denied on March 26, 2015 People v Dorcinvil 25 NY3d 950 (2015)

The CPL §440,30 proceeding

The Court's decision in 2012

In a post judgment motion sworn to on November 15, 2011, and also based on CPL,440,10 grounds, Petitioner requested, in relevant part, that the jacket and the black shirt be tested for DNA pursuant to CPL,440,30(1-a), The motion made no request for DNA testing of fingernail evidence, The people opposed the motion for DNA testing, and for §440,10 relief, in a affirmation and memorandum of law dated February 7, 2012, the Court described Petitioner's motion as one to vacate his conviction pursuant to CPL§ 440,10 based on ineffective assistance of counsel, misconduct on the part of the prosecutor and mistakes on the part of the Court, (Decision and order, dated and entered Mar, 6, 2012, D'Emic,J) The Court held that most of the issues raised apeared on the record and were matters for direct appeal, that defense counsel had conducted a vigorous and zealous defense, and none of the comlaints against counsel, the prosecutor, or the court were factually correct, and the law and the facts, the court summarily denied the motion, Its decision make no reference to CPL§440,30(1-a) or Petitioner's request for DNA

The Appellate Division 2nd dept, also denied leave to appeal in decision and order dated Jan, 29, 2013 (2013 WL 1897728), petitioner not knowing that the Supreme court judge made a decision, move for a motion to renew and reargue base on §2221 the motion was denied on Sep, 12, 2011, Leave to the Appellate Div, 2nd dept, was denied on August 8, 2013 (2012-09491)

The 2015 Motion for DNA Testing

In a sworn motion dated Dec 9, 2015, Petitioner moved Pro Se pursuant to CPL§ 440,10 and CPL§ 440,30(1 a) for a new trial and DNA testing and a hearing on both motions Petitioner argued that his trial attorney was ineffective for not calling a DNA expert With respect to the §440,30(1-a) motion, Petitioner requested DNA testind of Ms, Marcellus's fingernail scraping, the jacket (people's EX-7) and the black shirt (W-3), Petitioner argued that, had testing been conducted on these items and the results been admitted at trial ,a reasonable probability existed of a more favorable outcome, Petitioner also attached an OCME laboratory report dated Nov 24, 2008. Although that report states that blood was found on a black shirt, and DNA testing showed that it came from Caludette and Brian Marcellus, the same report states on page 3, "Trace evidence/pocket contents included with and/or collected from the following items was not examined and will be returned with the evidence" black shirt, blue jeans (EX-J). Petitioner argued that the shirt dropped by the

man who left the building might have had the man's DNA profile on it and thus exculpated Petitioner but it had not been tested (Pro-Se brief at 62, 71, 74-75)

In support of his application for testing of fingernail evidence, Petitioner noted the police testimony regarding the condition of the apartment and apparant struggle as well as the medical examiner's testimony concerning defensive wounds on Ms, Marcellus s hands, He argued that, since a fight had apparantly taken place between Ms Marcellus and her assailant her untested fingernail scraping were most like to provide a clearer profile of the true perpetrator and conclusively exculpate Petitioner" (Pro-Se Brief at 61, 76 77)

Petitioner also noted that DNA evidence from fingernail scrapings is customarily preserved to test for DNA, and relied upon by the prosecution to establish the assailant's identity, He provides examples of cases in which the evidence had contributed to guilty verdicts and, in many cases, to exonerations (Pro-se Brief at 78-81), In his case, however, the Autopsy Inventory (EX-M) indicated that only the rape kit and blood samples were sent for testing (Pro-se Brief at 77) The boxes for "nails" and "Swabs; oral anal vaginal," as well as hair (scalp and Pubic), were not checked on the report (EX-M)

The people opposed the request for DNA testing of material they claimed was already tested at trial or which does not exist on the ground that Petitioner had previously requested DNA testing of the jacket and the black shirt, and the court's prior decision should be deemed a procedural bar to these claims (Affirmation in opposition, dated Mar,22,2016, at p-24; people's Memorandum of law at 30-31),

The people also argued that the motion should be denied because the OCME had already tested those items of clothing and "retesting of evidence for DNA material is not provided for in CPL§ 440,30(1-a)" additional, Petitioner had failed to show there would have been more favorable outcome if the items were retested and the DNA test results "were not the only evidence used to prove Petitioner's guilt" (Memorandum of law at 34-36)

Finally, the people asserted that Petitioner's claim concerning forensic material under the decedent's fingernails was "speculative" While claiming that the Autopsy inventory report "clearly indicates" that no nail evidence was colected, they acknowledged that Dr, Fred Frederic testified, based on the report of the doctor who performed the autopsy, that she "did not know if fingernail scrapings were collected" (Memorandum of law at 37 n 13). They nevertheless concluded that

Petitioner could not argue that DNA testing of her fingernail scapings, "Which do not appear to exist" would exculpate him (Memorandum of Law at 37 n.13)

In his Reply papers, Petitioner challenged the people's opposition to testing of fingernail evidence and assertion that such evidence did not appear to exist (CPL§ 440,10 Pro Se Reply, sworn to June 3, 2016, at 41-43), He argued that it was the people's duty under the statute as gatekeeper of the evidence, to locate the specific evidence sought and make it available for testing, and to offer more than conclusory asertions that the evidence no longer existed citing People v Barnwel (Pitts), 4 NY3d 303, 311-12 (2005) and People v West 41 AD3d 884 (3d Dept, 2007) He further argued that, given the evidence that the decedent wrestled with the assailant, and the scientific articles he had attached showing that DNA can be transferred during such a struggle (Reply EX-11), testing of the fingernails would confirm the lack of physical evidence connecting Petitioner to the decedent's body and guilt (Reply Brief at 42-43)

Petitioner also diputed the People's claim that the black shirt was tested, He argued that, even assuming that it had been tested,, the Nov, 24, 2008, report attached to his original motion also showed that "trace evidence" from the shirt "was not" examined (Reply Br at 36-37)

Additionally, Petitioner drew the court's attention to an investigation of the OCME that revealed that an analyst and the deputy director of the department had mishandled evidence and falsified reports, as reported in an attached 2013 article in the NY Law journal (Reply Br, at 37; Reply EX-10) According to the article, the inspector general's "lengtly report on bothed tests and questionable practices" by the OCME recounted a "long history of subpar work," incompetence, mishandling of evidence, and reporting of inaccurate or incomplete information by the analyst "Serrita Mitchell" who worked at OCME for a decade before being suspended from casework in 2011,

The lab's deputy director, "Theresa Caragine," who subsequently resigned, was discovered to have rewritten reports or reassigned reports when she desagreed with the findings in violation of lab policy, rather than bringing the matters to the DNA technical leader for abitration (Reply EX-10), The Inspector General said significant disagreements among analysts should be revealed and testing reflecting such dissension should be maintained in the case file and recommended that OCME and NY laboratories consider protocols to document and report such disagreements surrounding data analysis an conclusions (Reply EX-10)

The Court's ruling

In it's decision and order entered Nov. 3, 2016, the court denied Petitioner's motion for DNA testing (Mem. dated Oct, 27, 2016, D'Emic, J), The Court held that it's order on Petitioner's prior motion to vacate the conviction, which included the same claim, was now a bar to Petitioner's claim, which this court will not reviewed again," citing CPL§ 440,10(3)(b) (Dec. at 11), It further ruled that the items identified by Petitioner were already tested by the OCME, and his DNA profile was in the scrapings taken from the jacket containing his wallet, passport, and other identification (Dec. at 11). The court concluded that the criminal procedure law does not contain any provision for retesting of evidence for DNA material See CPL§ 440,20(1-a)(a)(1); People v Holman, 63 AD3d 1088 (2d Dept, 2009), Here where DNA testing was conducted in his case and the results did not exonerate or tend to exonerate Petitioner, Petitioner has failed to show that there would have been a more favorable result at trial were the retested and the results admitted at trial (See, CPL§ 440,30(1-a)(a)(1) (Dec.at 11-12). The court's decision makes no reference to the request for testing of fingernail evidence.

Denial of Ineffective Asssitance of Appellate Counsel

While the CPL§ 440,10 and 440,30(1-a) was pending, Petitioner also filed a Error Writ of Coram Nobis where he raised that Appellate Counsel did not raised on direct appeal that trial court render Ineffective Assistance when she failed to preserve Petitioner's right to Confrontation when the trial court allowed the prosecutor to introduce into evidence the DNA reports of Dr, Noelle Umback and the Autopsy report of Dr, Gumpeni who did not testified over objection at trial through 2 surrogate experts denied Petitioner his Constitutional right to Confrontation the motion was filed Pro Se on July 6, 2016. The Kings County and the Appellate counsel counsel opposed the motion on the ground that this issue couldnt exonerate Petititioner and the Appellate Div, 2nd dept. denied the application People v Dorcinvil, 149 AD3d 867 (2d Dept, 2017), and the New York Court of Appeals denied leave to appeal on July 20, 2017, People v Dorcinvil, 85 NE3d 102 (NY 2017)

On January 24, 2020, Petitioner timely filed his Habeas Corpus and included a leter requesting that the District court held the the petition in abeyance until the Court of Appeals decided his request for reconsideration on my denial of leave to appeal On Feb, 27, 2020 Petitioner alerted the District Court of the denial of the reconsideration and requesting that they adjudicate his Petition. The letter was accompanied with a second petition for a writ of Habeas Corpus identical to the first, exhibits, and another Memorandum of law also identical.

In his Habeas Corpus, Petitioner raised: 1) Ineffectiive Assistance of trial counsel for failure to preserve Petitioner's rights to Confrontation by the lead detctive's testimony that he had his suspect after talking to det, Briano, b) Petitioner was not afforded the Effective Assistance of counsel when he failed to object to implicit hearsay testimony by the lead detective's testimony that the surveillance videotape showed Petitioner's running out of the location with what appeared to be clothes and minutes later running back to the location, and that the police received numerous tips on their hotline, a tip came into the squad office, and he spoke with these peoples, 2) Petitioner was denied the effective assistance of counsel when he failed to object during summation, 3)Petitioner was denied the effective assistance of counsel when he failed to pursue a MAPP Hearing, 4)TRIAL COUNSEL WAS Ineffective when he failed to consult a DNA expert and request for a FRYE hearing, 5) Trial counsel was Ineffective when he failed in his obligation to investigate and call to the stand witnesses favorable to the defense, 6) Petitioner was denied his right to due process by the Court's refusal to give a missing witness charge as to Briano, the initial investigator of both crimes, although his unvailability was not established 7) Petitioner was denied his rights to due process by the implicit hearsay testimony of detective Perry implicating Petitioner and suggesting he had "Past Arrests and Complaints" 8)Petitioner was denied a fair trial by the admission of unnecessary and gruesome photograph of the blood, half naked decedent, 9) Petitioner was deprived of his rights to due process of law when the trial court abuse it's discretion by allowing the complainant witness to testify under oath over objection, and refusing to direct the prosecutor to furnish Petitioner with all the psychological records and evaluation that was done and evaluating the complainant witness prior and after the incident for impeachment purpose, 10) Petitioner was deprived of his rights to due process of law by the trial court permitting the prosecutor to use an unredacted videotape shjowing the deceased; a blow up photograph when the deceased was alive in the evidence board in a effort to appeal to the jurors emotions and sentiments and b) A repetitive enlarge "Arrest Photo" to prejudice Petitioner, 11) Petitioner was denied a fair trial when the trial court denied to sever the January 14, 2007 incident from the May 4, 2007 incident, 12) Petitioner was denied his right to due process when the prosecutor elicited a statement on direct which the court had ruled could be used for impeachment purposes if Petitioner took the stand, 13) The peole violated Brady v Maryland and CPL§ 240,20 when they witheld evidence favorable to the Petitioner until their 8th witness testify and advocated perjured

testimony 14) Petitioner was denied the effective assistance of counsel when he failed to strike a juror who express actual bias against Petitioner 15) Petitioner's Appellate Counsel was Ineffective when she failed to raised on direct appeal that Petitioner's counsel render ineffective assistance when she failed to preserve Petitioner's right to Confrontation, when the trial court allowed the prosecutor to introduce into evidence the DNA reports of Dr, Noelle Umback and the Autopsy report of Dr, Gumpeni at trial through 2 surrogate experts,

THE DISTRICT COURT'S MEMORANDUM AND ORDER

On January 5, 2024, the District Court (Kiyo A, Matsumoto, EDNY) dismissed the Petition without either appointed counsel or conducting an evidentiary hearing, The judment dismissing the Petition was entered on January 9, 2024, Dorcinvil v Kopp, 710 F,Supp,3d 128 (EDNY 2024), Petitioner received the decision on January 18, 2024, App-A-1 , Thereafter still Pro-Se, with lacked access to the law library Petitioner made due dilligence and drafted and presented to his custodian a Notice of Appeal with objection to the Memorandum and a request for a Certificate of Appealability dated 2/13/24

Petitioner also sent a copy of the evelope as Exhibit that he received from the District Court on January 18, 2024, App-A-2 , In an Order dated 2/21/24, 11;07 AM and filed the same day, the District Court denied the motion, Dorcinvil v Kopp, 1;20-CV-00600-KAM-LB, App=A-3, Petitioner was not notified of the lateness of his Notice of Appeal, so he did not file a motion for extension of time as allowed by Federal Rules of Appellate Procedure 4(a)(5), and Respondent never objected to the untimeliness,

Petitioner did however received several documents from the District Court's clerk [illegible] which he filed and sent to the clerk, It was not until the 3/5/24, the clerk filed the Notice of Appeal with the clerk of the Court of Appeals, App- B-p-1-5 (Docket of the District Court, and Court of Appeals)

THE SECOND CIRCUIT DECISION

On 3/23/24 Petitioner then filed a request for a Certificate of Appealability in the US Court of Appeals for the 2nd Circuit of NY, which gave him an end run by kept on sending him several documents to filed on the ground they are defective, App- B-p-1-6

On 5/3/24 the Court of Appeals request that my motion for Certificate of Appealability and assignment of counsel be striken from the docket and claimed

that my Appeal may be subject to dismissal on 5/24/24 unless I moves for a Certificate of Appealability,Received on May 3, 2024 App-B, p-3

Petitioner again filed a Motion for extension of time and Certificate of Appealability which was received on 5/23/24, The Clerk of the Court of Appeals again wait 5 days later to file the motion; Entered 5/28/24; 10:00 AM and 5/30/24 4;43 PM4;05 PM

Petitioner received other documents in the same month of May and June Which was deemed defective by the Court of Appeals after he had correctly filed them and sent them to the clerk, In the Month of May and June 2024 the Court of Appeals requested that I filed permission for an oversized motion because it was too many pages in the brief I previously sent them, The oversized brief motion and the request for Certificate of Appealability was received by the Court of Appeals on 6/22/24 and entered on 7/2/24; 2;14 PM

On October 23, 2024, the Court of Appeals denied Petitioner's motion and claimed that the Notice of Appeals was untimely in the District Court, App-C-p-1 On 11/7/24 Petitioner move for a 30 days extension to extend the time to petition for a panel rehearing, In an order dated December 17, 2024 the Court of Appeals stated that a mandate issued as an administrative error on December 12, 2024 is recalled App-C, p-2

On January 2, 2025 the accept motion to panel Rehearing and in a Order dated January 8, 2025, the Court of Appeals denied the motion for Panel Rehearing and approve the District Court rationale App- C, P-3

REASONS FOR GRANTING THE WRIT

Petitioner's Notice of Appeal was timely filed under Houston v Lack, 108 S,ct 2379; Hamer v Neighborhood Housing Services, 13 S,ct 13(2017); Henderson Ex Rel. Henderson v Shinsiki, 131 S,ct 1197(2011)

The Federal Rules of Appellate Procedure require the filing of a Notice of Appeal with the clerk of the District Court within the time allowed by Rule 4 in order to appeal a decision of District Court, Fed. R. App. P. 3(a), The time allowed by Rule 4 is 30 days after the date of entry of the judgment or order appealed from, Fed.R.App.P.4(a), In this case the US District Court for the Eastern District of New York entered it's order dismissing Petitioner's petition for a Writ of Habeas Corpus on January 5, 2024 Dorcinvil v Kopp 710 F.Supp.3d 128 2024 WL 69093 ((2024)), The dismissal was docket by the District court

clerk on 1/9/24 App-A, p-3, Petitioner received the decision on the 1/18/24 with a post mark of App-A, p-2. Petitioner therefore had till 2/18/24 to file his NOticeof Appeal. Petitioner with lack access to the law library made due dilligence and obtain special access to the law library on

On 2/13/24 Petitioner deposited the Notice of Appeal objection to the Memorandum and decision and a request for a Certificate of Appealability. That Notice according to the Docket # of the District Court was probably received 2 days later by the clerk just like any other legal mail sent to any New York Court. It is unclear if the clerk entered the Notice right away or wait till 2/20/24 or 2/27/24 because the public docket text said something and the copy they sent to me for record said something else, App-B-1, p-1-3 and C-3

While the Court in Bowless v Russell, 551 US 205, 210 stated that the timely filing of a Notice of Appeal is jurisdictional technical compliance with Rule 3 and 4 may be excused when it cannot fairly be exacted, Fed,R,App,P-3, Advisory committee Note, The Rules themselves allow theCourt to assist the litigants in rectifying mistakes when their Notices if filed too early Fed,R,App. P,4(a)(2) (Shall be treated as filed after entry of the judgment or order) And on the day thereof or too late Fed,R,App, P 4(a)(5) (Upon a showing of excusable neglect or good cause, may extend the time for filing a Notice of Appeal) This flexibility reflects the policy of the Rules to ensure justice without slavish regard to formality. A liberal and flexible view of the Notice of Appeal requirements is particularly relevant to Pro Se litigants who are unskilled and untrained in the law. Several cases treating late filed Notices as timely under particular circumstances, Hamer v Neighborhood Hosing Services. 13 S,ct 13 (2017); Henderson ex-rel, Henderson v Shinseki. 131 S,ct 1197; Fallen v US, 378 US 139 (1964); Houston v Lack, 108 S.ct 2379 (1988); Richey v Wilkins, 335 F,2d 1 (2nd Cir, 1964); Riffle v US, 299 F,2d 802 (5th Cir 1962); US v Girtley, 242 Fed,Appx 137 (5th Cir, 2007)

Rule 4(a)(5) of the Federal Rules of Appellate procedure addresses the procedure by which a litigant canpreserve his right to appeal after the expiration of 30 day appeal period, The rule allows the District Court to "extend the time for filing the time for filing a Notice of Appeal" if the litigant makes a showing of excusable or good cause, Fed,R,App, P,4(a)(5) the rule, as amended in 1979, provides that the extension maybe granted" upon motion filed not later than 30 days after the expiration of time prescribed by this Rule 4(a) Id, The motion for extension of time may be filed ex-parte before the expiration of the time period

but Notice must be given to all parties if the Notice is filed after the expiration of time period, Id

In Fallen v US, 378 US 139 (1964), an indigent defendant attempted to appeal his criminal conviction and sentence within the time allowed, Although Fallen had been represented at trial by counsel, and had inquired about his right to appeal as an insolvant 378 US at 140, his attorney withdrew immediately after sentencing and Fallen was left to accomplish his appeal Pro Se, One day following his sentencing, On Jan, 16, Fallen, who was paraplegic and also suffering from influnenza, was returned to a hospital in Atlanta, where he was not allowed visitors, Presumably on Jan 23, Fallen wrote letters requesting a new trial and an appeal but those letters were not received by the clerk's office until Jan, 29 4 days after the time period prescribed in the Former Rule 37(a)(2) had expired

The lower court appointe counsel to argue Fallen's motion for new trial but never decided the issue of the timeliness of the appeal, Upon the goverment's motion, the US Court of Appeals for the 5th Circuit dismissed the appeal as being untimely filed, Fallen v US, 306 F,2d 697 (5th Cir, 1962), Rev'd 378 US 138 (1964), In it's opinion, the 5th Circuit recognized that other jurisdictions applied a more liberal rule, 306 F,2d at 703, (citing Williams v US, 188 F,2d 41 (DC, Cir-1951); Wallace v US 174 F,2d 112 (8th Cir, cert, denied, 337 US 947 (1949); and that the presence of constitutional issues might require consideration of a belated appeal, Id, at 703, Under the circumstances, however, the Court held that Fallen's timely mailing was not timely filing, Judge Rives, in his dissent, noted that this Court had recently approved the aplication rejected by the 5th Circuit majority, See, Coppedge v US, 369 US 438, 442 n,5 (1962)(Citing Williams v US, 188 F,2d 41 (D,C, Cir, 1951) and had required liberality in viewing papers filed by indigent and incarcerated defendants as equivalents of Notices of Appeal, to preserve the jurisdiction of the Courts of Appeals, 369 US, at 442 N,5

The Court granted certiorari, Fallen v US, 374 US 826 (1964) and reversed the 5th Circuit's dismissal of Fallen's appeal, 378 US 139 (1964) "Overlook, in our view was the fact that the Rules are not' and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances, 378 US at 142, While it is true that the Court mentioned the admonition of fairness set out in Rule 2 of the Federal Rules of Criminal Procedure as one beasis for it's decision it also emphasised Fallen's appearance without counsel, his transfer his lack of legal training, his lack of access to legal materials, and his timely mailing,

The Court found no reason on the basis of what this record disclose to doubt that Petitioner's date at the top of the letter was an accurate one and that subsequent delays were not chargeable to him, Id, at 143-44, The Court thus concluded that" since Petitioner did all he could under the circumstances, We decline to read the Rules so rigidly as to bar a determination of his appeal on the merits" Id at 144

Justices Stewart, Harlan, Clark and Brennan, in the concuring opinion, suggested that in such a case, the jailer is in effect the clerk of the District Court,, Id, at 144, While it might be necessary in some cases to remand for a determination of the date of delivery, the Goverment had conceded that Fallen delivered his Notice of Appeal to prison authorities for mailing within the time period allowed.

The flexibility and fairness of Fallen has been demonstrated in a lower court case that succeed Fallen; in Rothman v US, 508 F,2d 648 (3rd Cir, 1975) an order was entered denying a 28 U,S,C §2255 motion on November 8, 1973 This inmate dated a Notice of Appeal on Jan, 4, 1974 but the Notice was not received until Jan 17, 1973, Because it was not accompanied by the appropriate fees the Notice was not docketed until Jan 30, 1974, this rebutting the Fallen majority's presumption that the document was mailed on the date recorded, remand was necessary to determine if the prisoner filed his Notice within the time prescribed by Fallen

In Houston v Lack, 158 S,ct 2379 (1988) who succeed Fallen a Pro Se Tennesse prisoner drafted a Notice of Appeal from the Federal Court's judgment dismissing his Habeas Corpus petition, and 27 days after the judgement, deposited the Notice with the prison authorities for mailing to the District Court. The date of deposit was recorded in the prison's outgoing mail log. Because Pettiioner lacked the necessary funds prison authorities refused his requests to clarify the Notice for proof that it had been deposited for mailing on the day in question and to send the Notice air mail Although the record contains no evidence of when the prison autorities actually mailed the Notice "Filed" 31 days after the Habeas Corpus judgement that is, one day after the expiration of the 30 day filing period for taking an appeal under Federal Rule of Appellate Procedure 4(a)(1),

For this reason, the Court of Appeals dismissed the appeal as jurisdictional out of time, while neither the District Court nor respondent suggested that the Notice of Appeal might be untimely. This Court grant Certiorari and reverse the judgment of the Court of appeals. The Court held that a pro se prisoner's Notice of Appeal was filed at moment of delivery to prison authorities for forwarding to

District Court. The Court further held that the situation of prisoners seeking to appeal without the aid of counsel is unique, Such prisoners cannot take the steps other litigants can take to monitor the processing of their Notices of Appeal and to ensure that the Court clerk receives and stamped their Notices of appeal before the 30 day deadline. Pro Se prisoners cannot personally travel to the Courthouse to see that the Notice is stamped "filed "or establish the date on which the court received the Notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the pro se prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the US Postal Service or a private express carrier; and they can follow its progress by calling the court to determine whether the Notice has received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it .

Pro Se prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them, worse, the pro se prisoner has nc choice but to untrust the forwarding of his notice of appeal to prison authorities who he cannot control or supervise and who may have have every incentive to delay. No matter how far in advance the pro se prisoner delivers his notice to the prison authorities, he can never be sure that it will be untimately get stamped filed on time. And if there is a delay the prisoner suspects is atributable to the prison authorities, he is unlikely to have any means of proving it, for his confinment prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the Notice on the date received. Unskilled in law unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access the prison authorities and the only information he'll likely have is the date he delivered the notice to those prison authorities and the date ultimately stamped on his notice, Id.

In 2011 again this Court held in Henderson, Henderson v Shinseki, 131 S.ct 1197 that 120 day deadline on filing appeals to veterans Court is not jurisdictional In Henderson, Petitioner after the VA denied his claim for supplemental disability benefits, he filed a Notice of Appeal in the Veterans Court, missing the 120 day

filing deadline by 15 days. Petitioner argues that his failure to timely file should be excused under equitable tolling principles. While his appeal was pending this Court decided Bowles v Russell, 551 US 205 (2007), which held that the statutory limitation on the lenght of an extension of time to file an Notice of Appeal in a ordinary civil case is jurisdictional so that a party's failure to file within that period could not be excused. The Veteran Court of Appeals concluded that Bowles compelled jurisdiction treatment of the 120 day deadline and dismissed Henderson's untimely appeal. The Federal Circuit affirmed.

This Court held that the deadline for filing a Notice of Appeal with the Veterans Court does not have jurisdiction consequences P,p 1202-07, This Court held that Federal Courts have an independent obligation to ensure that they dont exceed the scope of their subject matter jurisdiction and thus must raise and decide jurisdictional questions that the parties either overlook or elect not to to press, that congress did not clearly prescribed that the 120 day deadline be jurisdictional but a claim processing Rules, which seek to promote the ordely progress of litigation by requiring parties to take certain procedural steps at specified times.

Henderson was follow by Hamer v Neighborhood Housing Services of Chicago, 138 S,ct 13 (2017), Petitioner Hamer filed an employement discrimination suit against Respondents. The District Court granted Respondents motion for summary judgment, entering final judgment on Sept, 14, 2015. Before October 14, the date Hamer's Notice of Appeal was due. her attorneys filed a motion to withdraw as counsel and a motion for extension of the appeal filing deadline to give Hamer time to secure new counsel. The District Court granted both motions, extending the deadline to 2 months extensions even though the governing Federal Rule of Appellate procedure, Rule 4(a)(5)(c), confines such extensions to 30 days, concluding that Rule 4(a)(5)(c)'s time prescription is jurisdictional, the Court of Appeals dismissed Hamer's appeal and relied on Bowles v Russell, This Court grant certiorari and reversed .

This Court held that the 7th Circuit failed to grasp the distinction between jurisdictional appeal filing deadlines and deadlines states only in mandotary claim processing rules and therefore non jurisdictional , abrogating Freidzon V OAO Luke oil, 644 Fed,App, 52; Peters v Williams, 353 Fed,Appx 136; and US V Hawkins, 298 Fed App, 275

As this Court has generally recognized it is the Court s duty to assure to the greatest degree possible, within the statutory framework for appeals created

by congress, equal treatment for every litigant before the bar "Coppedge v US (Good faith within statute providing that appeal may not be taken in Forma Pauperis if the Court certifies in writing that is not taken in good faith, must be judge by objective and not subjective standard, and defendant's good faith effort is demonstrated when he seeks Appellate review of any issue not frivolous) Liberal view of papers filed by indigent and incarcerated defendants must be taken particularly when the litigants's pro-se position has already caused disavantages, Id. (Citing Lempke v US, 346 US 325 (1973)(Premature notice of appeal deemed timely); williams v US, 188 F.2d 362 (DC Cir, 1951)(Notice of appeal delivered to deputy within time period after expiration was timely); Jordan v US District of Columbia, 233 F.2d 362 (DC Cir. 1956)(Petition for mamdamus deemed notice of appeal)

Here, Petitioner received the district court's decision on 1/18/24. Therefore Petitioner had 30 days from the date he received the decision to appeal the district court's decision. See, Irvin v Dept. of Veteran Affairs, 131 S.ct 453 (Letter by former employee's attorney was receipt which started the 30 day period within which suit had to be filed) Petitioner on 2/13/24 deposited his Notice of Appeal to the prison legal mail box. His preparation was hampered by his lack of counsel, his lack of legal training. Notwithstanding these significant barriers Petitioner managed to prepare a Notice of Appeal which met the requirement of Rules 3 App-C-p-4 , Petitioner obviously desired to appeal the decision of the District Court which was rendered without a hearing. In addition Petitioner managed to put his Notice of Appeal, objection to the Memorandum and [illegible] Order and a request for a Certificate of Appealability to the prison legal mail box within sufficient time for it to arrive at the District Court. Petitioner indigency prevent him from securing a more reliable delivery service. Within days of the delivery of his Notice. Petitioner received an order from the District Court dated 2/21/24; 11:07 AM and filed the same day where the District Court denied the motion to leave stating that Per the Court Memorandum and Order, the Court certifies that any appeal from that order would not be taken in good faith and thus denies and Forma Pauperis status for the purposes of Petitioner's appeal and Rely on Coppedge v US, 369 US 438, 444-45 (1962)

The Court of Appeals in turn gave Petitioner an end run by sending him a bunch of documents to file and after they received them claimed that Petitioner improperly filed them, and also kept on sending more papers more than 17 or 18 times. And it's only after the time period provided by the rules for filing of a motion for extension had expired FED.R.APP, P.4(a)(5). The October 23, 2024

in a decision from the Court of Appeals did Petitioner learn that his Notice had been untimely filed in the District Court. For these reasons the Couut of Appeals forfeit their right to seek dismissal. Respondent did not either objected the untimelyness. Petitioner's appeal should not be denied because he failed to meet the strict requirements of the rule. These forfeitures and waivers alone or in combination warrant a remand to the 2nd Circuit for consideration of Petitioner's appeal on the merits.

Additionally, equitable considerations such as the "unique circumstances" doctrine can excuse the filing of a Notice of Appeal outside the time period provided by Rule 4. On at least 3 occasions or more, this Court has excused the late filing of a Notice of Appeal where the Petitioner was misled by the District Court into believing that the Notice of Appeal would be timely. Although this Court overruled those cases to the extent that they authorized an exception to a jurisdictional rules. The unique-circumstances doctrine is consistent with disposition of cases on the merits and strongly discourage summary dismissal of cases based upon good-faith procedural violations that cause no prejudice to any party

B. THE COURT OF APPEALS ERRED IN HOLDING THAT IT LACKED JURISDICTION WHEN THERE IS STRONG POSSIBILITY THAT PETITIONER'S NOTICE OF APPEAL MAY HAVE BEEN RECEIVED ON TIME

Petitioner's notice of appeal from the District Court's order of January 5, 2024, dismissing his petition for Writ of Habeas Corpus was stamped filed on 2/20/24; Docket on 2/27/24; 1;07PM. A review of the record discloses that the Notice of Appeal, objection to the Memorandum and request for a Certificate of Appealability were mark 2/20/24 but the District Court and the Court of Appeals docket it on 2/27/24; 1;07 PM or 1;13 This notice was apparantly mailed from only Manhattan on 2/13/24 and stamped received by the clerk in Manhattan, which is 1:00 hour drive from the jail. Any legal mail from Sing Sing c.f. to New York take 2 days to reach their destination. Respondent never mailed any answers. It is possible that the Eastern District's clerk custom may be to file all papers received by mail few days later upon receipt. If this is the case, then it is equally possible that Petitioner's Notice of Appeal may have actually been received on 2/15/24, but not filed by the clerk until the 2/20/24 or the 2/27/24. If so Petitioner's appeal was timely

Several Circuit of the Court of Appeals was faced with similar cases: In Hegler v Board of Education, 447 F.2d 1078 (8th Cir. 1971) the 8th Circuit Court of Appeals found that when the clerk was on leave on August 26 through 28 and

the appellee's counsel whose office was located in the same town as the clerk's, received his service copy of the Notice on August 28, the Appellant was entitled to a presumption that the clerk had received the Notice of August 28, the 13th day. In Da'Ville v Wise, 470 F.2d 1364 (5th Cir.,Cert.denied, 414 US 818)(1973), the 5th Circuit Court of Appeals found that there was strong possibility that appellant's notice was received within the time allowed but, due to District Court operating procedures, not marked filed until the 13th day. Id. at 1365. Under those circumstances, the court of Appeals held that the appellee had failed to carry it's burden of showing that the appeal was untimely. Id.; US V Solly, 545 F.2d 874 (3rd Cir. 1976)(Whenever a Notice of Appeal is filed in a District Court, it is filed as of the time is actually received, even though it is designated as filed by the clerk's office at a later date.)Id. at 876. Since it was unclear from the record when the Notice was actually received, the Court of Appeals retained jurisdiction while remanding to the District Court for an inquiry into the date of receipt. Id; Rothman v US, 508 F.2d 648 (3d Cir. 1975) (Same); In US V Preston, 352 F.2d 352 and Silverton v Valley Transit Cement Co. Inc, 237 F.2d 143 (9th Cir. 1956), the Courts of Appeals have hesitated to dismiss appeals when it appeared that there was a possibility that the Notice of Appeal was actually received by the clerk prior to it's formal filing. Given the drastic consequences of failing to satisfy the jurisdictional requirement of a timely Notice. This solicitude is well warranted

In the case of Pro-Se habeas Corpus petitions filed without the help of a lawyer, friends or funds, this hesitation to dismiss without a full inquiry should be even stronger. The 2nd Circuit however, showed no such concern for Petitioner, even though, as discussed above, there are facts in the record that suggest possible receipt of the Notice on 2/15/24. Regardless of whether the burden of proving the date of actual receipt lies with the appellant. See the cases cited above. The Court of Appeals should be fully informed of the relevant jurisdictional facts before dismissing a Pro-Se appeal. Since the facts before the Court of Appeals docket and the one for the District Court are not clear as to the date of actual receipt, remand to the District Court for further inquiry would have been appropriate US V Solly, 545 F.2d 874 (3d Cir. 1976). Dismissal of the appeal without further inquiry was error and should be reversed

C AS A NONJURISDICTIONAL CLAIM PROCESSING RULE, FEDERAL RULE OF APPELLATE PROCEDURE 4(a) IS SUBJECT TO EQUITABLE CONSIDERATIONS SUCH AS THE UNIQUE CIRCUMSTANCES DOCTRINE

This Court recognizes the unique circumstances doctrine as an equitable basis upon which to reach the merits of an appeal. The Court also recognizes that

a party should not be penalized for relying on a District Court ambigous actions as assurance that an appeal filed at certain time was timely should not be denied the right to appellate review, In Harry Truck Lines inc v Cherry Meat Packers, Inc 371 US 212 (1962) Upon motion filed before the expiration of the original time to appeal, the District Court granted an extension of time to appeal because the plaintiff's cocounsel had went on vacation, even though the plaintiff's attorney in record had already received notice from the District Court's adverse judgment, Id at 610-11, In reliance on the District Court's extension of time, The plaintiff filed it's notice of appeal outside the initial 30 day period to appeal but within the time set by the District Court, Id, The 7th Circuit however concluded that because the plaintiff had received notice of the District Court's judgement, the District Court was not authorized to extend the time to appeal Id, at 611-12 The 7th Circuit therefore dismissed the appeal, Id at 612 This Court reversed Harris Truck Lines, Inc v Cherry Meat Packers, Inc, 371 US 215 (1962) ('Harris Truck Lines II), In reversing this Court recognized the obvious great hardship to a party who relies upon the trial judge's finding of excusable neglect prior to the expiration of the 30-day period and then suffers reversal of the finding, admonished the Courts of Appeals to give great deference to a district court's extension of time to appeal, and concluded that the record contains a showing of "Unique Circumstances" sufficient that the Court of Appeals ought not to have disturbed the District Court's ruling, Harris Truck Lines II, 371 US at 217

In Thompson v Immigration & Naturalization Service, 375 US 384 (1964), this Court extended the reasoning set forth in Harris Truck Lines II, In Thompson, although the party's motion for a new trial was belatedly filed, the District Court assured him that the motion was filed "in ample time," Thompson, 375 US at 386, The party filed a Notice of Appeal within 60 days of the district Court's disposition of the motion for a new trial, but not within 60 days of the original judgment, Id, at 384-86, Had the motion actually been filed "in ample time" the the time to file a Notice of Appeal would not have begun to run until the District Court disposed of tthe motion, Id at 385-86, However, because the motion was untimely, the filing of the motion did not toll the time to appeal, Id, The 7th Circuit therefore dismissed the appeal as untimely, Id at 387, This Court reversed in view of the "Unique Circumstances" and directed the 7th Circuit to consider the appeal on the merits, Id; see also Osterneck v Ernst & Whitney, 489 US 169, 179 (1989)(Explaining that Thompson excuses a tardy notice of appeal "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer

that the act has been properly done); Wolfsom v Hankim, 376 US 203, 203 (1964) (Summarily reversing the dismissal of an appeal, based upon the reasoning in Harris Truck Lines II and Although this Court in Bowles overruled Harris Truck Lines II and Thompson to the extent they purport to authorize an exception to a jurisdictional rule, Bowles did not overruled these cases as applied to nonjurdictional rules, Bowles, 551 US at 214; see also Mobley, 806 F,3d at 577 (citations omitted), Indeed the DC Circuit had many times applied the "Unique Circumstances" doctrine to excuse the filing of an untimely post judgment motion, Mobley, 806 F,3d at 577 78 In particular it concluded that appellant s untimely motion under Federal Rule of Civil Procedure 59(e) was caused by the District Court erroneous assurance regarding deadline for that motion Id Accordingly, the DC Circuit applied the unique circumstances doctrine to conclude that the Rule 59(e) motion was to be deemed timely and that the motion therefore tolled the time to file a notice of appeal, Id; see also Khan v US Dept, of justice, 494 F 3d 255, 258 60 (Concluding that Bowles did not alter the ability of a court to recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); 16A Charles Alan Wright & Arthur R, Miller, Federal Practice & Procedure § 3950,1 (4th ed, 2017) (Noting that the Unique Circumstances doctrine may be excuse noncompliance with nonjurisdictional rules) Application of the Unique Circumstances doctrine to nonjurisdictional deadlines is fully consistent with this Court's precedents, See, Carlisle v US, 517 US 416, 436 (1996)(Ginsburg J, Concurring)(Quoting 4A Wright & Miller, Federal Practice & Procedure § 1168 at 501)(Noting that this Court's decisions in Thompson and Harris Truck Lines II are "based on a theory similar to estoppel")

The Court of Appeals for the 9th Circuit reached a similar result in Re Estate of Butler's Tire and Battery Co., Inc, 592 F.2d 1028 (9th Cir 1979) An action by a bankruptcy trustee to subordinate the security interest of Ferrous financial service. 20 days after the bankruptcy court entered its judgment, the appellant filed a request for extension of the time to appeal to district court. The oral argument on the motion for extension was scheduled after the expiration of the 20 days extension period allowed under bankruptcy rule 802 upon a showing of excusable neglect. The bankruptcy Court granted the extension byt the district court dismissed the appeal for untimeliness. The 9th Circuit rvearsed, stating "we concluded that Ferrous reasonably witheld filing of the notice of appeal until the court had ruled on the claim of excusable neglect and should not be

penalized for relying upon the court's decision to calendar argument for a date beyond the applicable time limits." Id. at 1032 (foote omitted)

This Court's decision in Schacht is also instructive. In that criminal case, the Petitioner filed a petition for a writ of certiorari outside the time period permitted by the Rules of this Court, and the Government argued that the Court could not consider the merits of the petition because the time period in the Rules cannot be waived. Schacht, 398 US at 63. Rejecting the Government's view. This Court explianed that the time period to file a petitioj for a writ of certiorari in a criminal case is not a jurisdictional rule, and that the rule "contains no language that calls for so harsh an interpretation. Id. at 63-64. Rather the Court explained that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." Id. at 64. See also Hamer v Neighborhood Housing Services, 13 S.ct 13 (2017); Henderson ex-rel, Henderson v Shinseki, 131 S.ct 1197 (2011) (Same); Fallen v US, 378 US 139 (1964); Houston v Lack, 108 S.ct 2379 (1988)(same); US V Girtley, 242 Fed.Appx 137 (5th Cir 2007) (Same)

This Court and other Federal Courts precedents demonstrate that the Federal Rules should be construed to favor an adjudication of claims on the merits. This Court has noted that the Rules should generally not be construed to require "summary dismissal" and instead should "not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. "Surowitz, 383 US at 373; see also Foman, 371 US at 181 (1962) (rejecting the notion that a defect in a notice of appeal was fatal to the appeal and concluding that" it istoolate in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such technicalities") Fed.R.Civ.P.1 (providing that the Federal Rules of Civil Procedure "should not be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding") Based on this Court's precedents. Rule 4(a)(5) should be construed to be subject to equitable considerations.

D PETITIONER'S NOTICE OF APPEAL SHOULD BE TREATED AS A MOTION FOR EXTENSION OF TIME UNDER RULE 4(a)(5)

Rule 4(a)(5) sets forth the procedure by which a litigant may receive an extension of time within which to file the notice of appeal, The rule provides

that a motion may be filed within 30 days of the prescribed time period requesting an extension of time for filing a notice of appeal, "Upon showing of excusable neglect or good cause" the court may grant 30 day extension or up to a 10 day extension from the entry of the order granting extension, Prior to 1979 the counterpart to Rule 4(a)(5) had provided as follows:

Upon a showing of excusable neglect, the District Court may extend the time for filing the notice of appeal by any party for a period not exceeed 30 days from the expiration of the time otherwise prescribed by this subdivision, Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate,

Fed,R,App, 4(a), 28 USC, App, (1976), Under this predecessor to present Rule 4(a)(5), an untimel filed a notice of appeal filed within sufficient time to allow the District Court to extend the time to file the notice entitled the litigant to justify his delay in accordance with the rule, US V Lucas, 597 F,2d 243 (10th Cir 1978); Moorer v Griffin, 575 F,2d 87 (6th Cir 1978); US V Shillingford 568 F,2d 1106 (5th Cir 1978); Graig v Garrison, 549 F,2d 306 (4th Cir 1977); Reed v Michigan, 398 F,2d 800 (6th Cir, 1968) The accepted contruction was clear that any document filed within the total appeal time (generally 30 days from the entry of the order plus 30 days) which could be construed as either the notice of appeal or a motion for extension entitled the pro se litigant to justify his delay and entiled the District Court to excuse it,

This portion of the rule was amended in 1979 for limited purposes, First, te literal reading of the rule had produced some confusion and even some criticism most notably by Judge Friendly of the US Court of Appeals for the 2nd Circuit, In Re Orbitec Corp, 520 F,2d 358 (2d Cir, 1975), The literal language of the rule seemed to suggest that the request for extension of time and the order granting an extension would both have to occur within 30 days after the expiration of the original appeal period, This construction had been strengthened by the early committee comments to the rule's predecessors and case law, J, Moore, B, Ward & Lucas, 9 Moore's Federal Practice ¶-204,13(2) (2d ed, 1987) Thereafter, following a 1966 decision by the 4th Circuit, thegeneral rule of preserving the appeal if the notice of appeal was filed within the total appeal time developped and became generally applied, Evans v Jones, 366 F,2d 722 (4th Cir, 1966); see J, - Moore, B, Ward, & Lucas, 9 Moore's Federal Practice ¶-204,13(2) n,10 (2d ed, 1987)

Still some confusion remained as to the timing of the order granting an extension of time, Judge Friendly explored the controversy in Re Orbitec Corp, 520 F,2d 358 (2d Cir, 1975), Therein the 2nd Circuit held that a Notice of Appeal had to be filed no later than 60 days after the judgment from which an appeal sought, The court also refused to treat a motion at that time, IN order to clarify this uncertainty the rule was amended in 1979 to allow the notice to be filed within 10 days of the order granting an extension of time, In addition to correcting this situation, the 1979 amendment specified that any request for extension must be made by motion, though at particular times the motion may be ex parte, Finally, the amendment added an additional ground for which an extension might be sought "Good cause" Fed,R,App, P,4(a)(5)

Following the amendment to the rule, many courts began to apply a different, but neither required nor suggested, interpretation to motions extensions of time, Courts that had previously held that late-filed notices of appeal could be treated as motions, changed their interpretations and attributed the change to the 1979 amendments without careful analysis, Shah v Hutto, 722 F,2d 1167 (4th Cir, 1983), Cert. denied, 466 US 975 (1984); Pryor v Marshall, 711 F,2d 63 (6th Cir, 1983); Mayfield v US Parole Comm'n, 647 F,2d 1053 (10th Cir, 1981); Sanchez v Board of Regents, 625 F,2d 521 (5th Cir 1980)

The 4th Circuit more carefully scrutinized the judicial rule change in Shah v Hutto, 722 F,2d 1167 (4th Cir 1983), Cert, denied, 466 US 975 (1984), A panel of the 4th Circuit upheld the Circuit's earlier decisios in allowing a late filed notice of appeal to serve as a motion for extension of time, Shah v Hutto, 704 F 2d 717 (4th Cir, 1983), On rehearing en banc, the panel decision was overturned and the 4th Circuit declared that notices of appeal without manifest requests for additional time would not be construed as motions, Id at 1168-69, In so holding, the court dismissed an appeal of a pro se civil rights action even though the notice was either misdelivered or lost in the post office and notwithstanding the fact that the litigants were pro se and incarcerated, The dissents recognized as has the commentators in the area, that the rule change was not intended to affect the motion for extension but only to address and correct the In Re Orbitec Corp, 520 F,2d 358 (2d Cir 1975) problem, Shah v Hutto, 722 F,2d 1167, 1169 (Haynsworth J. Dissenting), Cert denied, 466 US 975 (1984), J, Moore, B, Ward & J, Lucas, 9 Moore's Federal Practice ¶-204-02(1)(2d, ed. 1987) In dissent, Judges Hansworth, Winter, Murnaghan, and Ervin noted that the 1979 amendments effected 3 substantive changes in Rule

4(a)(5), none of which is relevant to the problem presented in this case, " Id, at 1169, The dissent went on to discuss the Orbitec revision which "Solved a vexing problem created by a rigid interpretation of an earlier version of the rule, Nothing in those changes, however, appears to be a rejection of the kind of flexible application of the rule represented by Craig v garrison, and kindred cases in both the Supreme Court and the Court of Appeals Id

Some Courts have continued to give validity to the pre-1979 amendment interpretation, following the rationale of the dissent in Shah v Hutto, 722 F,2d 1167 (4th Cir 1983), at least to the extent that a remand for a good cause or excusable neglect determination is required, In Fearon v Henderson, 756 F,2d 267 (2d Cir, 1985) a District Court remand was ordered by the US Court of Appeals for the 2nd Circuit in a §1983 action in which the Notice of Appeal was filed 60 days after judgment was entered, The Court remanded and ordered the District Court to determine whether to treat the notice of appeal as an application for extension of time pursuant to rule 4(a)(5) and whether, in the interests of justice, the late appeal should be allowed," Id, at 267-68 (citing Stirling v Chemical Bank 511 F,2d 1030 (2d Cir, 1975), See also US V Batista, 22 F,3d 492

In the case at bar the US Court of Appeals for the 2nd Circuit never gave Petitioner that opportunity, instead they gave him an end run with a ton of papers to file and later claimed they defective and had him refiled them, They never addressed the issues raised in his filing, App C-p3 nor remand to permit the District Court to do so,

Some Courts, while not allowing the late filed notice of appeal to serve as the motion, have provided a procedure to assist the litigant who files a notice of appeal which he relies on as timely, In US v Lucas, 597 F,2d 243 (10th Cir 1979), the US Court of Appeals for the 10th Circuit saw inequities which existed for Pro Se litigants and grappled with the problem that occurs when the pro se litigant is not notified of his technical noncompliance until it is too late to remedy the problem by filing a motion for extension of time, "it would be most helpful if the District Court would advise a would be appellant, and particularly one who is pro se, that his notice of appeal is untimely, thereby putting him on notice that some immediate action is yet required to secure appellate jurisdiction," Id, at 245, The 8th Circuit in

Cambell v White, 721 F,2d 644 (8th Cir, 1983) fortified the procedure by declaring it mandatory that District Court clerks review notices of appeal for timeliness and advise pro se litigants when it is necessary for them to file a motion for extension of time, Additionally the court required the preparation of a notice for litigants when it is necesary for them to file a motion for extension of time, Additionally the court required the preparation of a notice for litigants which explained the time requirements of Rules 3 and 4 Id at 647 Although the 6th Circuit endorsed these protections in the pro se context in Reho v US, 53 F4th 397 (2022), it provided no such protection for Petitioner, App-C-p-3 , Thus Petitioner learned of the untimelyness of his petition after it was too late to do anything to rectify the situation, App-C-p-3 , and his appeal from the denial of his petition for Habeas Corpus has been barred permanently,

This Court has described the writ of Habeas Corpus as the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action It's pre-eminent role is recognized by the admonition in the Constitution that: "The privilege of the Writ of Habeas Corpus shall not be suspended US CONS, Art 1 § 9, cl, 2, The scope and flexibility of the writ its capacity to reach all manner of illigal detention, its ability to cut through barriers of form and procedural mazes have always been emphasied and jealously guarded by courts and lawmakers, The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected, Harris v Nelson 394 US 286 290-91 (1969), Although it is a civil proceeding, EX Parte Tom Tong, 108 US 826 (1883) this "label is gross and inexact " Harris at 293-94, In recognizition of the unique nature of the proceding, Id, at 294, Rule 81(a)(2) of the Federal Rules of Civil Procedure and Rule 11 of the Rules governing §2254 cases in the US District Courts limit the applicability of the Federal Rules of Civil Procedure, In the context of pro se petition for Habeas Corpus the requirement of a formal motion for extension, such as would satisfy rule 7(b) of the Federal Rules of Civil Procedure is inconsistent with the leniency which this Court has shown pro se litigants in general, see, Haines v Kerner, 404 US 519 (1972), and Habeas Corpus petitioners in particular, See, Holiday v Johnston, 313 US 342, 350 (1941), In habeas corpus cases, above all others, "the proponent before the Court is not the Petitioner but the Constitution of the US, Chessman v Teets, 354 US 156 (1957), For that reason, if no other, Petitioner's pro se Notice of Appeal filed and mailed to the District Court on 2/13/24 should be treated as timely

or, alternatively, as a motion for an extension of time and the case returned to the District Court for determination of the issue of excusable neglect under Rule 4(a)(5)

CONCLUSION

For the reasons set above, Petitioner Jacques Dorcinvil respectfully requests that the judgment of the US Court of Appeals for the 6th Circuit be reversed and this case remand for consideration on the merits or, in the alternative, that the case be remanded with instruction for further remand to the US District Court for the Eastern District of New York for a full inquiry into the jurisdictional facts,

Jacques Dorcinvil #10A0681

Sworn To Before Me This day

4th Day of April 2025

Sebastian Adams
20A1206

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not available