

No. 25-5564

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

AGUSTIN GARCIA, PETITIONER

FILED

JUL 28 2025

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

VS

STATE OF NEW JERSEY, et al., RESPONDENT

ON PETITION FOR CERTIORARI TO

SUPERIOR COURT OF NEW JERSEY/ APPELLATE DIVISION  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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AGUSTIN GARCIA  
E.S.S.P., Lock Bag R, 2-D  
Rahway, New Jersey 07065  
(City, State, Zip Code)

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(Phone Number)

QUESTION(S) PRESENTED

1. WHETHER THE STATE COURT'S MAY 23, 2025 ORDER (App. A), AFFIRMING LOWER COURT'S DEC. 21, 2021 ORDER (App. C-D), WHICH HAD BEEN ISSUED EXCLUSIVELY RELYING ON JUDGE JAMES J. GUIDA'S AUG. 25, 2016, MARCH 3, 2017 AND MARCH 28, 2017 ORDERS (App. J-L), ISSUED WITHOUT ALREADY ASSIGNED COUNSEL BEING PRESENT AND WITHOUT ANY PARTICIPATION FROM HIS PART (Jan. 25, 2019 Trans. 62-1 to 63-3; App. G-I), DEPRIVED PETITIONER OF DUE PROCESS OF LAW AND THE ASSISTANCE OF COUNSEL GUARANTEED BY THE 6TH AND 14TH AMENDMENTS OF U.S. CONSTITUTION?

LIST OF PARTIES

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

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

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

[ ] For cases from federal courts:

The opinion of the United States court of appeals appears at appendix \_\_\_\_\_ to the petition and is

[ ] reported a \_\_\_\_\_; or  
[ ] has been designated for publication but is not reported; or  
[ ] is unpublished.

[X] For cases from State courts:

The Opinion of the highest state court to review the merit appears at appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or  
[ ] has been designated for publication but is not reported; or  
[X] is unpublished.

The Opinion of the Superior Court of New Jersey/ Appellate Division appears at appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or  
[ ] has been designated for publication but is not reported; or  
[X] is unpublished.

## **JURISDICTION**

**[ ] For cases from federal courts:**

**The date on which the United States Court of Appeals decided my case was \_\_\_\_\_**

**[ ] No petition for rehearing was timely filed in my case.**

**[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date; \_\_\_\_\_; and a copy of the order denying rehearing appears as appendix.**

**[ ] An extension of time to file the petition for writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in application No. \_\_\_\_\_ A \_\_\_\_\_.**

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

**[X] For cases from state courts:**

**The date on which the highest state court decided my case was May 6, 2025. A copy of that decision appears at Appendix B.**

**[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.**

**[ ] An extension of time to file the petition for certification was granted to and including (date) on (date) in Application No. \_\_\_\_\_ A \_\_\_\_\_.**

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED**

### **AMENDMENT 1:** Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assembly, and to petition the government for a redress of grievance.

### **AMENDMENT 5:** Criminal action-provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **AMENDMENT 6:** Right of the accused.

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

### **AMENDMENT 14: Section 1. [Citizens of the United States.**

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

## STATEMENT OF THE CASE

Petitioner first post-conviction relief petition, where New Jersey State's scheme provides first opportunity to raise ineffective assistance of counsel, was denied on May 4, 2007. (App. S). Four days later, on May 8, 2007, Petitioner filed Motion (May 4, 2007 Trans. 43:18-21; Da: 799-908; 910-1032), supplementing first post-conviction relief record pursuant to N.J.C.R. 1:7-4(b), "made not later than 20 days after service of final [May 4, 2007 order [App. S]]", and or for "New Trial based on Newly Discovered Evidence 'may be made at any time' [N.J.C.R. 3:20-2]", i.e., International Media Service, Inc.'s April 4, 2007 forensic expert analysis and report (Da: 1-16). As evidenced by accompanying appendix (Da: 249-256), this motion was received twice by Superior Court of New Jersey/ Law Division, Bergen County Prosecutor and New Jersey Public Defender: first on May 24, 2007 (Da: 249-253); and second, on August 7, 2007 (Da: 254-256).

Neither, the May 8, 2007 or August 7, 2007 packages appear on Superior Court of New Jersey/ Law Division's dockets dated 04-16-14, 12-21-21, 12-28-21 (Da: 323-4; 456-7; 1037; 1057-8), evidencing lower court's failure to file this motion. This court's inaction or abuse, which flagrantly violated N.J.C.R. 3:22-7: "Criminal Division Manager shall make entry of the filing ... and shall

promptly notify ... presiding judge", thereby, subjecting Petitioner to "fundamental [State v. Laurick, 498 U.S. 927 (1990)] miscarriage of justice".<sup>1</sup>

This Superior Court/ Law Division's failure deprived Petitioner of his right to first PCR, because the critical timely and properly filed motion supplementing first PCR record never made it into the record until June 1.2016, when matter was referred by court to New Jersey Public Defender (App. G), who assigned Assistant Deputy Public Defender (App. I), who filed sworn certification with Superior Court of New Jersey attesting under oath:

"As the Court may be aware, in 2017 the Office of the Public Defender reviewed Mr. Garcia's requests and pro-se motions concerning certain video evidence utilized at his trial and agree that said motions have merit [Da: 225-227]."

Thereafter, assigned counsel reported to PCR court:

(1) "The Public Defender ... was so compelled by Mr. Garcia's presentation not only of -- his case, but also the law that Our Office has decided to take [it!] [Jan. 25, 2019 Trans. 5:1-5]";

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<sup>1</sup> Carter v. Hills, 2004 U.S. Dist. LEXIS 22301: "A federal court may review a procedurally defaulted claim where petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate Miscarriage of Justice. "Cause" sufficient to excuse procedural default require a showing that some objective factor, outside the Petitioner's control prevented compliance with [New Jersey] procedural rules. "Actual Prejudice" occurs when an error had cause the actual and substantial disadvantage of Petitioner's Fundamental Injustice has been defined to encompass instances in which newly discovered evidence make it more likely than not that a reasonable juror would find Petitioner not guilty."

(2) "[I]t is our position that the [first] PCR attorney [we assigned] was ineffective[!]<sup>2</sup> e.g., "rendering aid and support to the State's opposition" contrary to Rue, *infra* at Fn. 2, when he indicated to the court: "[The video] wasn't tainted at all ... It is nothing in there relative to disparity of the language that was transcribed between the actual transcript of the tape ... and what my client's expert's is [May 4, 2007 Trans. 4:2-3; 20-23]; Jan. 25, 2019 Trans. 5:15; 16:23-24"].

Disregarding extraordinary circumstances resulting from Superior Court of New Jersey/ Law Division's failure to comply with N.J.C.R. 3:22-7, *supra* at p. 5, and the procedural bar exemption resulting in light of Carter v. Gills, 2004 U.S. Dist. LEXIS 22301, *supra* at Fn. 1, p. 4, and also in light of N.J.C.R. 3:22-4[2].<sup>3</sup>

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<sup>2</sup> N.J.C.R. 3:22-6[2]; State v. Rue, 175 N.J. 1, 16-17 (2002): "made plain that counsel is not at liberty to concede lack of merit but rather is obliged to state defendant's argument without expression of counsel's own opinion of their worthlessness, leaving the ultimate determination to the judge.>"; "To satisfy the Sixth Amendment of the Constitution, "counsel must function as an advocate for the defendant, as opposed to (a friend of the court)." Entsminger v. Iowa, 386 U.S. 748, 751 (1967); Anders v. California, 386 U.S. 738, 744 (1967); Herring v. New York, 422 U.S. 853, 862 (1975); Jones v. Barnes, 463 U.S. 745, 758; 103 S.Ct. 3308, 3316 (1983); United States v. Cronic, 466 U.S. 648, 655-56 (1984).

<sup>3</sup> "As to application of the procedural bar of the rule to claim of ineffective assistance of counsel, ordinarily exempt under subsection (c) ... cautioning as well against disposition on procedural grounds for foreclosing federal habeas corpus review in accord with Harris v. Reed, 489 U.S. 255 (1989)"; "Exception to foreclosure: (1) if the ground for relief [Martinez v. Ryan, 1012 U.S. LEXIS; 23 Fla. L. Weekly Fed. S 175: "Where the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise the ineffective assistance claim, the collateral proceeding is the equivalent to a prisoner's direct appeal as to that claim (...)" Halbet v. Michigan, 545 U.S. 605, 617, 125 S.Ct. 2582, 162 L.2d 552] could not have been raised on direct appeal; (2) the

Worse yet, Superior Court of New Jersey/ Law Division reached another low point in its “abuse” pattern, i.e., issuing orders dated August 25, 2016, March 3, 2017 and March 28, 2017 (App. J-L), without any participation by already assigned counsel<sup>4</sup> (Jan. 25, 2019 Trans. 62-1 to 63-3), clearly another Fragrant Fundamental Miscarriage of Justice, *supra* at Fn. 1, p. 5.

Finally, on January 25, 2019, Superior Court of New Jersey assessed merit of what should have been assigned counsel, Emile Lisboa's Oct. 15, 2018 interlocutory discovery motion and related argument [Da: 221-234), still neglecting to rule on merit of Petitioner's May 8, 2007 Motion (May 4, 2007 Trans. 43:18-21; Da: 799-908; 9110-1032), supplementing first post-conviction relief record pursuant to N.J.C.R. 1:7-4(b), *supra* at above page 4, Petitioner will rely on his 08-21-24 Amended Petition for Certification (App. V) and supporting appendix (App. X (AKA "Da: 1-1128") filed before Supreme

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enforcement of the bar would result in Fundamental Injustice; (3) the denial of relief would be contrary to the Constitution of the United States or the State of New Jersey."

<sup>4</sup> N.J.C.R. 3:4-2(2.1): “[O]nce the right to counsel has attached, it is clear that the right to counsel requires the presence of counsel at every critical stage of the proceedings, including motions, summations, charge, and sentencing, and denial of that right will ordinarily nullify a consequent conviction without defendant's need to demonstrate specific resultant prejudice. State v. Deluzio, 274 N.J. Super. 101, 118-121 (App. Div. 1993), affd o.b. 136 N.J. 363 (1994).

Court of New Jersey, pertaining matter captioned number 089560). (App. B),  
repeated and reasserted herein at length;

Additionally, Petitioner humbly submits the following:

First, Superior Court of New Jersey/ Appellate Division's May 23, 2024 Order (App. A) deprived Petitioner of his right to complete defense (476 U.S. 690), i.e., affirming lower court's December 21, 2021 order (App. C-D), after this same court had arbitrarily failed to assess merit of first PCR pro-se supplementary Point II Discovery request (May 4, 2007 Trans. 56-15 to 57-9), acknowledged as received by the Judge: "The Court received the volumes from your client [May 4, 2007 Trans. 2:22-23]). But immediately, arbitrarily refusing ruling, i.e., answering to Garcia: "I did file a motion for discovery specifically requesting that a copy of the original videotape that was described by the Detective Dombroski [Da: 99-100] .. -- Judge: "I don't have the papers on that ... I will deny that motion [May 4, 2007 Trans. 56-15 to 57-19]."

Thereafter, capriciously neglecting to assess merit of discovery request Point II of Petitioner's May 8, 2007 Motion (Da: 249-256; 800; 898-904), supplementing first PCR record (Da-1013), timely and properly filed pursuant to N.J.C.R. 1:7-4(b), supra at above page 4. Thereby, making original wedding videotape unavailable and rendering unsupported by the record Superior Court of New Jersey/ Appellate Division's December 21, 2021 finding:

"Defendant's fifth PCR petition alleges the same claims regarding the video recording of the murder that he raised in his direct appeal and in his first four PCR petitions [N.J. Super. Dock. # A-1913-21";

Here, it should be noted, that Petitioner's May 8, 2007 Motion (May 4, 2007 Trans. 43:18-21; Da: 249-256; 799-908; 9110-1032), filing was deliberately delayed by Superior Court of New Jersey/ Law Division, in flagrant violation of N.J.C.R. 3:22-7: "Criminal Division Manager shall make entry of the filing ... and shall promptly notify ... presiding judge", thereby, preventing assessment of ineffective assistance of trial and first PCR counsel issue,<sup>5</sup> e.g., failure to seek forensic testing of wedding videotape, state's evidence-in-chief, within the context of evidentiary hearing, to support such judicial finding.<sup>6</sup>

State of New Jersey v. Askia Nash, 20 N.J. LEXIS 79 (Jan. 22, 2013)"; even

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<sup>5</sup> State v. Hannah, 2021 N.J. LEXIS 798 (Aug. 18, 2021): HELD: Based on the record, Hannah has established that his counsel rendered constitutionally deficient representation and that, but for counsels' errors, there is a reasonable probability that the outcome of the trial would have been different. The Court reverses the judgment of the Appellate Division denying Hannah post-conviction, and remands for a new trial.

<sup>6</sup> State v. Garcia, No. A-3939-01T2 (App. Div. May 11, 2004). cert. den. 181 N.J. 545; 573-574; 589 (2004): "Whether or not defendant was assaulted prior to the shooting and the immediacy of the shooting were key issues in this case where jury had the lesser offenses of manslaughter to consider. (...) the video tape constituted objective proof of the timing and sequence of what occurred [Emphasis added.]"

disregarding assigned counsel, Assistant Deputy Public Defender, Emile Lisboa's new technology argument (Jan. 25, 2019 13-23 to 14-3; 37-24 to 38-25], instead irrationally giving deference to ruling in unrepresented OPRA proceeding, i.e., erroneously affirming:

"[Defendant] went to Judge Mizzol and demanded the State produce all the ev-- particular evidence under OPRA, and under PCR because they have to make -- they have to keep it, they have to preserve it, and they're obligated to turn it over, and Judge Mizzol denied it [Jan. 25, 2019 Trans. 12-23 to 14-3]."

Undeniably, deferring to this quoted OPRA ruling is belied by OPRA judge's remark: "This is not a criminal proceeding where there are constitutional [rights] [Nov. 30, 2016 Trans. 32:12-21 (N.J. Super./ Law Div., Augustin Garcia v. New Jersey Attorney General's Office, Bergen County Prosecutor's, And Ridgefield Police Department, Dock.# BER-L-6475-16]", flagrant fundamental miscarriage [498 U.S. 927] of justice, warranting granting of Certiorari;

Second, Superior Court of New Jersey/ Appellate Division's May 23, 2024 Order (Append. A) Deprived Petitioner of his right to due process of law and the assistance of counsel, guaranteed by the First, Sixth and Fourteenth Amend. U.S. Const., i.e., affirming lower court's Dec. 21, 2021 order, rubber-stamping Judge James J. Guida's Jan. 25, 2019 ruling, whereby, after questioning Defendant: "[Y]ou are telling me now that you had all this

potential evidence back ten years ago?<sup>7</sup> [Jan. 25, 2019 Trans. 60:14-18]" and confronted with his own fatal error, unveiled by Defendant, pertaining to his August 25, 2016, March 3, 2017 and March 28, 2017 rulings:

"I was assigned counsel when you deny -- When you denied the [May 8, 2007] motion, I had already been assigned counsel on June 1 [2016]. I had already Mr. Emile Lisboa representing me [App. G-I]." -- Mr. Lisboa: "What he's saying is that you denied it, okay, after I was assigned, but before I could even [enter appearance]" -- "Defendant: Without counsel." -- "Mr. Lisboa: Without counsel." -- "Judge: Then, that's appealable, period ...

[Jan. 25, 2019 Trans. 62:3-20]".

Disregarding this documented fragrant violation of Defendant's constitutionally guaranteed right to counsel, Judge James J. Guida opted for rubber-stamping his own August 25, 2016, March 3, 2017 and March 28, 2017 rulings, issued without already participation presence and without any participation by already assigned counsel, see, N.J.C.R. 3:4-2(2.1); State v. Deluzio, supra at fn. 4, p. 7, arbitrarily ruling:

"Defendant then filed, on August 25th [2016], a motion -- the court entered an order [App. J] -- excuse me -- on August 25, 2015. Subsequently, the defendant filed another motion for a new trial alleging newly discovered evidence, namely that the -- that the video tape was tampered. On March 3rd, 2017 -- or was not fully provided to him. On March 3rd, 2017 the court denied that motion [App. K]. The defendant then filed another motion to reconsider the court's order of denying the

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<sup>7</sup> State v. Hannah, 2021 N.J. LEXIS 798, 850-1 (Aug. 18, 2021) "The passage of time alone cannot bar relief to a defendant deprived of a fair trial."

new trial motion, and that was denied subsequently on March 28th, 2017 [App. L]

[Jan. 25, 2019 Trans. 65-21 to 66-6]"

Regrettably, Judge James Guida, instead of invoking inherent authority to correct his own critical error, i.e., issuing August 25, 2016 order without presence nor any participation by Emile Lisboa, who he either knew or should have known was representing Petitioner following Criminal Division Manager's June 1, 2016 referral (App. G), he decided to go step further on his "abuse of judicial process" journey, affirming:

"This defendant argues alternatively that it might be the basis for a new trial to discover new evidence, and this court has ruled prior [uncounseled] application [App. J] that any -- any facet, and if I didn't rule it now, I'm going to make sure -I am going to make clear at this point that any facet, any issue concerning the video tape is not newly discovered evidence."

Undeniably, this remark by Judge James Guida represents yet another attempt to rubber-stamp his own flawed August 25, 2016 ruling, again, issued outside "evidentiary hearing context" and without presence nor any participation by Emile Lisboa, who he either knew or should have known was representing Petitioner following Criminal Division Manager's June 1, 2016 referral (App. G), rendering this last quoted remark or ruling as invalid as the August 25, 2016 ruling, because although counsel was now present at the January 25, 2019 hearing, the content of the pending May 8, 2007 motion was

not being assessed on the merit, only the interlocutory motion for discovery filed by assigned counsel was under discussion, meaning that Judge Guida's rubber-stamping of prior invalid August 25, 2016 order is as null and void as his prior uncounseled order, see, N.J.C.R. 3:4-2(2.1); State v. Deluzio, *supra* at fn. 4, p. 7, warranting reversal and remand for further proceeding to correct resulting fundamental miscarriage of justice.

Based on this quoted record, Judge Gary Wilcox's Dec. 21, 2021 opinion (App. D) constituted rubber-stamping of Judge James J. Guida's Aug. 25, 2016, March 3, 2017 and March 28, 2017 unreasonable, arbitrary and capricious orders [App. K-L], all arbitrarily entered without any participation by already assigned counsel<sup>8</sup> (Jan 25, 2019 Trans. 62-1 to 63-3), denying Petitioner's May 8, 2007 Motion, supplementing the first PCR record (May 4, 2007 Trans. 43:18-23; Da-1013), filed pursuant to N.J.C.R. 1:7-4(b), whereby, Point I raised: "The initial collateral proceeding raising ineffective assistance [545 U.S. 617] of counsel [which is equivalent [545 U.S. 617] to direct appeal]", even disregarding lower court's deliberate failure to comply with N.J.C.R. 3:22-7, *supra* at above page 4, which again, prevented "assessment within the context of evidentiary hearing" of ineffective assistance of counsel, i.e., failure

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<sup>8</sup> "The accused is denied counsel at critical stage. It make even greater sense to presume prejudice when counsel's deficiency forfeits an appellate proceeding all together [120 S.Ct. 1029, 146 L.Ed. 985, 528 U.S. 259, 286]"

to seek forensic testing of wedding videotape, State's evidence-in-chief, flagrant fundamental miscarriage [498 U.S. 927] of justice, see Carter v. Hills, *supra* at fn. 1, p. 5, warranting granting of Certiorari;

Third, on December 21, 2021, Superior Court of New Jersey/ Appellate Division summarized issue presented by Petitioner as follows:

"POINT I[:] [THE JUDGE['S] DEC. 21, 2021 "NO COGNIZABLE" DENIAL RELYING SOLELY ON [ANOTHER] JUDGE['S] AUGUST 25, 2016, MARCH 3, 2017 AND MARCH 28, 2017 RULINGS (App. J-L),

ENTERED WITHOUT ANY PARTICIPATION BY ALREADY ASSIGNED COUNSEL (Jan. 25, 2019 Trans. 62:3-19; App. G-I), I.E., FAILING TO RULE ON MERIT OF APPELLANT'S JULY 25, 2019, LAST AMENDED ON 11-05-21 PROPERLY AND TIMELY FILED INSTANT SUBSEQUENT PCR PETITION (Da: 400-401; 488 491; 594-635; 1033-1036), RAISING INEFFECTIVE ASSISTANCE BY ASSIGNED COUNSELS ... ON MATTER LITIGATED BY NEW JERSEY PUBLIC DEFENDER UNTIL RECENT SUPREME COURT OF NEW JERSEY'S APRIL 5, 2022 DENIAL OF DOCKET NO. 086339 (App. R), "'IS WHOLLY UNSUPPORTED BY THE EVIDENCE.' UNITED STATES V. HOFFECKER, 530 F.3d 137, 183 (3d Cir. 2008)", DEPRIVING APPELLANT OF HIS CONSTITUTIONALLY PROTECTED RIGHT TO THE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW, GUARANTEED BY THE 6TH AND 14TH AMEND. U.S. CONST. AND ART. 1, PAR. 1 OF N.J. CONST., WARRANTING REVERSAL AND REMAND FOR FURTHER PROCEEDINGS TO CORRECT RESULTING FUNDAMENTAL UNFAIRNESS AND/OR MISCARRIAGE OF JUSTICE.

A. ASSIGNED COUNSEL, ASSISTANT DEPUTY PUBLIC DEFENDER['S] EGREGIOUSLY INEFFECTIVE ASSISTANCE OF COUNSEL, I.E., FAILING TO EVEN ENTER APPEARANCE ADHERING TO N.J.C.R. 3:8-3, 3:22 6A, ABANDONED APPELLANT, ALLOWING [THE] JUDGE ... TO ENTER ORDERS DATED AUGUST 25, 2016, MARCH 3, 2017 AND MARCH 28, 2017 (App. J-

L), AND APPELLATE DIVISION'S AUG. 31, 2007, JAN. 26, 2018, APR. 6, 2018, DEC. 7, 2018 Orders (Da: 420; 459; 476; 478); AND SUPREME COURT'S JAN. 23, 2018 (Da-458) ORDERS WITHOUT ANY PARTICIPATION OF ALREADY ASSIGNED COUNSEL (JAN. 25, 2019 TRANS. 62: 3-19; App. G-I). THEREBY, DEPRIVING APPELLANT OF RIGHT TO COUNSEL AND DUE PROCESS OF LAW, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF U.S. CONSTITUTION.

B. ASSIGNED COUNSEL, ASSISTANT DEPUTY PUBLIC DEFENDER ... RENDERED INEFFECTIVE ASSISTANCE TO PETITIONER, I.E., FAILING TO PERFORM REQUIRED INVESTIGATION TO ACQUIRING (SIC) THE MOST BASIC UNDERSTANDING OF THE CASE, ERRONEOUSLY FILE[D] BY HER AS FROM FINAL ORDER, INSTEAD [OF] AS INTERLOCUTORY...

**POINT II: IN THE ALTERNATIVE, BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, THE PCR COURT ERRED IN DENYING AN EVIDENTIARY HEARING.**

[N.J. Super.'s Dock. # A-1913-21; Op. pp. 8-10 (App. Div. May 23, 2024; App. A)]

In his reply brief, defendant raised the following argument:

CONTRARY TO RESPONDENT'S ALLEGATION (RESP.'S BR. 10-11 (NOV. 9, 2023)), INSTANT MATTER IS NOT PROCEDURALLY BARRED UNDER N.J.C.R. 3:22-5, DUE TO COURTS' FAILURE TO ASSESS "WITHIN THE CONTEXT OF EVIDENTIARY HEARING [1013 N.J. LEXIS 79 (JAN. 22, 2013)] THE VIDEOTAPE FORENSIC EVIDENCE (APLT.'S DA: 1-16 (MAY 26, 2022)), FILED IN SUPPORT OF APPELLANT'S MAY 8, 2007 MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE, "SUPPLEMENTING THE FIRST PCR RECORD["] PURSUANT TO N.J.C.R. 1:7-4(b). (MAY 4, 2007 TRANS. 43:18 21; Da: 249-256; 799-1032). [N.J. Super.'s Dock. # A-1913-21; Op. pp. 10-11 (App. Div. May 23, 2024; App. A)]"

**Following Superior Court of New Jersey/ Appellate Division's finding:**

**"We affirm the December 21, 2021 order of the trial court. Defendant's fifth PCR petition alleges the same claims regarding the video recording of the murder that he raised in his direct appeal and in his first four PCR petitions. Those claims were repeatedly determined to be meritless. We see no legal basis, which would permit defendant to raise these previously rejected claims in a fifth PCR petition. Affirmed [N.J. Super.'s Dock. # A-1913-21; Op. pp. 11-12 (App. Div. May 23, 2024; App. A]."**

**This Superior Court of New Jersey/ Appellate Division's December 21, 2021 ruling is clearly unreasonable, capricious, arbitrary and unsupported by sufficient credible evidence in the record, particularly, noting that court's finding: "Defendant's fifth PCR petition alleges the same claims regarding the video recording of the murder that he raised in his direct appeal and in his first four PCR petition. Those claims were repeatedly determined to be meritless [App. A, p. 11]", must be viewed in light of lower court's deliberate failure to comply with N.J.C.R. 3:22-7, supra at above page 5, i.e., timely filing and ruling on merit of Petitioner's May 8, 2007 Motion, supplementing first PCR post-conviction relief record pursuant to N.J.C.R. 1:7-4(b) (May 4, 2007 Trans. 43:18-21; (May 4, 2007 Trans. 43:18-21; Da: 249-256; 799-908; 9110-1032), "made not later than 20 days after service of final (May 4, 2007 order [App. S]", and/or for "New Trial based on Newly Discovered Evidence 'may be made at any time' [N.J.C.R. 3:20-2]", i.e., International Media Service, Inc.'s April 4, 2007 forensic expert analysis and report (Da: 1-16). As**

evidenced by accompanying appendix (Da: 249-256), this motion was received twice by Superior Court of New Jersey/ Law Division, Bergen County Prosecutor and New Jersey Public Defender: first on May 24, 2007 (Da: 249-253); and second, on August 7, 2007 (Da: 254-256).

Neither, the May 24, 2007 nor August 7 packages appear on lower court's logs. (Da: 323-324; 1037; 1057-1058), evidencing Superior Court of New Jersey/ Law Division's failure to file this motion as of August 16, 2014. This court's inaction or abuse, i.e., deliberate failure to comply with N.J.C.R. 3:22-7, prevented assessment within the context of evidentiary hearing of counsel's ineffectiveness, e.g., failure to seek forensic testing of wedding videotape, State's evidence-in-chief, thereby, subjecting Petitioner to "fundamental [State v. Lawrick, 498 U.S. 927 (1990); Black Law Dictionary at 6971] miscarriage of justice", thereby, triggering the procedural bar exemption resulting in light of Carter v. Gills, 2004 U.S. Dist. LEXIS 22301, *supra* at Fn. 1, and also in light of N.J.C.R. 3:22-4[5], *supra* at fn. 2, p. 6.

Consequently, having objectively demonstrated Superior Court of New Jersey/ Law Division's failure to comply with N.J.C.R. 3:22-7, i.e., timely filing Petitioner's May 8, 2007 Motion ((May 4, 2007 Trans. 43:18-21; Da: 249-256; 799-908; 9110-1032), supplementing first PCR record pursuant to N.J.C.R. 1:7-4(b), instead, deliberately delaying referral to New Jersey Public Defender

until June 1, 2016 (App. G) for assignment of counsel, Emile Lisboa, who filed  
sworn certification before Superior Court of New Jersey/ Law Division  
attesting under oath: "As the Court may be aware, in 2017 the Office of the  
Public Defender reviewed Mr. Garcia's requests and pro-se motions  
concerning certain video evidence utilized at his trial and agree that said  
motions have merit [Da: 225-227]"

Thereafter, assigned counsel reported to PCR court:

"(1) "The Public Defender was so compelled by Mr. Garcia's presentation, but also the law that Our Office had decided to take [it]"  
[I]t is our position that the [first] PCR attorney [we appointed] was ineffective e.g., "rendering aid and support to the State's opposition" contrary to Rue, 175 N.J. at 19, Fn. 2, p. 6, i.e., telling the court: "[The video] wasn't tainted at all ... It is nothing in there relative to disparity of the language that was transcribed between the actual transcript of the tape ... and what my client's expert's is [May 4, 2007 Trans. 4:2-3; 20-23]; Jan. 25, 2019 Trans. 5:15; 16:23-24"].

(2) "... '[I]t is our position that the [first PCR attorney was ineffective[!] ... [Jan. 25, 2019 Trans. 16:23-24]"

(3) "If you take a look at what the previous expert had translated out, the substantial -- the substantial dialogue, substantial screening, there's a thud [detected by Forensic Expert at camera clock number "00:18.19 or 66 seconds before first shot firing] [Sound of a thud or dull sound of a heavy object striking a solid surface, there is a thud before the shot, okay, which if presented to the jury would have corroborated other evidence in the case -- [Jan. 25, 2019 Trans. 26-21 to 27-1]";

(4) "[N]otwithstanding the translation issue, but what the jury was presented is essentially Mr. Garcia walking and firing a shot, that basically the whole case, okay ... Now, if you take a look at what the previous expert had translated out [Da: 10-16], the substantial dialog, substantial screening, there's is a "[00:18.9 or 66 seconds before first

shot firing] [Sound of a thud or dull sound of a heavy object striking a solid surface [Da-10], before the shot, okay, which if presented to a jury would have corroborated other evidence in the case --- [Jan. 25, 2019 Trans. 26-17 to 27-1; 64:6-9];

(5) "[M]y position is that pursuant to my obligation to deliver effective assistance ... and in my effort to investigate whether or not there is bona fide motion for a new trial based upon new evidence ... I can't do my job ... So. 'I'm being ... rendered [ineffective by you!]' [Jan. 25, 2019 Trans. 36\_23 to 37-7];

(6) "You know, and -- again, if my position always with the -- the prosecutor's office has been ... if they have nothing to hide then turn it over and it -- it's right there -- [Jan.25, 2019 Trans. 35:11-15];

(7) "[P]lower that be in my office who assigned me this task after reviewing much of this, is that it does appear to have been a struggle prior to the shots going off. The -- the understanding may be that if that can be enhanced, okay, that if some of the background noise can be taken out, some of the voices can be enhanced, it may well just corroborate, okay, the defense originally at the trial which is that Mr. Garcia [was] hit first before this whole thing went down, okay. So, again, this was back in the day, 2007 technology, we're now in 2019, judge, we can do so much more with enhancements ... you know, digitized. So, again, judge, this may be completely exculpatory and [GREAT] material in the -- in the same vein, but I can't do anything. I can't do anything with it at all if I don't have a copy of -- the video -- which again, I don't think it too onerous to the pros -- how much could it cost to -- to burn me a copy [Jan. 25, 2019 Trans. 37 24 to 38-25];

(8) "When you have a video, which then has [detected by Forensic Expert at camera clock number "00:18.19 or 66 seconds before first shot firing] [Sound of a thud or dull sound of a heavy object striking a solid surface, and "Sound consistent with struggle<sup>9</sup> is heard at time of

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<sup>9</sup> In an interview published in the Record Newspaper, a juror related the following: "The jury searched the video tape for signs of self-defense, replaying it several times, at least one in slow motion, said the juror who was interviewed. Using a watch and counting 'One Mississippi, two Mississippi,' they timed the interval between Garcia's knock at the door and the first shot:

entry, which is not presented to the jury [Jan. 25, 2019 Trans. 40:24-25]";

(9) "This was discovered after trial. This enhancement with this transcript [App. X-3(a):101-109] by a certified interpreter [Jan. 25, 2019 Trans. 29-23 to 30-2].

Alternatively, Petitioner humbly argued, that contrary to New Jersey Superior Court/ Appellate Division's finding, the retesting of original wedding videotape would have uncovered the existence of a second video tape never mentioned in court or concealed by prosecutor, which was detected through Team Audio Inc.'s Oct. 21, 2020 preliminary forensic draft: (a) "11:00 interesting shot of other cameramen appears, who is him? Where is this video?"; (b) "13:58 1st shot fired of the five shots fired, together ... with dialog of Augustin professing his love "My love ... I love you, Lilly [Da-1109]..." This *res gestae* deletion from transcript handed by prosecutor to the Jury of material and relevant exculpatory evidence remained hidden from the Jury due to defense counsel's failure to seek forensic testing of wedding videotape, despite their own statement arguing to the court as to why the videotape should not be admitted, Appellant's counsel, Oliver stated:

(1) "Your Honor, the tape to a certain extent is prejudicial, also because it only captures the minute were -- or the seconds in which the Appellant 'four second' she said. There just wasn't enough time for him to be attacked and respond'. 'There just wasn't enough time for him to be attacked and respond' said the juror, 'tried to hear and didn't hear (any) of that [Da-74]"

approaches the decedent. It doesn't catch and it doesn't give you the affect of what happened at the door. It doesn't give you the effect of the altercations that occurred prior to that ... (March 22, 2001 Trans. 13:1-4; 14:10-13) (Emphasis added);

(2) "As a matter of fact in the tape itself, for us to hear that statement, Mr. Jerejian and I when we review it, we had to play the tape over 50 times. (Emphasis added) -- so, in other words, to the ear, without -- just as in the normal sequence, you have to watch it in slow motion." (Emphasis added) (Mar. 1, 2001 Trans. 13:1 4; 14:10-13)

Judge stated, concerning the viewing of tampered wedding video tape copy introduced into evidence by prosecutor:

(1) "My other concern with the sound is with these cuts, it makes continuity -- that's one of the other factors I have. I'm not sure with checking this with the video on, that each one flows into the others (...)" [Emphasis added] (Mar. 1, 2001 Trans. 15:20-24); (2) "If I were to resolve [video timing] I would agree with [defendant] It's more than four seconds long on the videotape." (Emphasis added) (May 4, 2007 Trans. 49:16-17)

Surprisingly, defense counsel failed to seek critically needed forensic testing. Strickland v. Washington, 104 S.Ct. 2052, 2066 (1984): "Counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." After trial, Petitioner's family hired the service of International Media Service to perform forensic testing of wedding video tape. This analysis revealed that wedding video tape had in fact

been tampered by prosecutor,<sup>10</sup> deleting over one minute of video between Petitioner's knock at door and the first shot: first, deleting evidence of the struggle detected by forensic expert: ((S)ounds consistent with a struggle is heard at the time of entry. 26 seconds prior to the shooting a struggle is heard on the videotape upon entry of the house by defendant [Da-2]; and, second, altering and concealing critical exculpatory res gestae: "My love ... I love you, Lilly [Da: 13-14; 1109] .

Appendix "W" provides clear Comparative analysis of side-by-side Forensic Expert's wedding videotape transcript against State's tampered wedding videotape transcript introduced in court and shown and delivered to Jury. Additionally, following record objectively unearth prosecutor's tampering of wedding videotape:

(1) S-1A.: "The video cassette tape displayed the number 3119CIWA ST120 on the heel of the cassette." (Emphasis added) (Feb. 14, 2001 Trans. 5-12 to 5-15; 7-2 to 7-16; Da: 99-100)

(2) Videographer, Ramon Nunez, testified: (a) "there are 30 frames in one second of video." (Feb. 14, 2001 Trans. 30-3 to 30-4); (b) "... they have a

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<sup>10</sup> Jones v. Bagley, 696 F.3d 475, 486 (6th Circ. 2012) "[T]he prosecution's suppression of information material to the defense is a claim that is not time barred and not procedurally barred."

time serial number that give you the time." (Oct. 2, 2001 Trans. 208-24 to 208-25)

(3) Above serial number 3119 found on original cassette timer (Da-99), seized by authorities from videographer, reveals that this tape had been running for 104 seconds or 1.4 minutes. (3119 divided by 30 images per second) This is confirmed by Judge's findings: (1) "1506, (...) the videographer retrieves the camera. That's when he picked it up and walks outside." (Mar. 22, 2001 Trans. 32-13 to 32-16); (2) "2401 is (...) the end of the tape." (Mar. 22, 2001 Trans. 34-5 to 34-7) (Emphasis added)

(4) Considering trial judge's findings: (a) "[wedding videotape was originally over an hour, it is about twelve minutes now.]" (Oct. 4, 2001 Trans. 166-12 to 166-16); (b) "My other concern with the sound is with these cuts, it makes continuity -- that's one of the other factors I have. I am not sure with checking this with the video on, that each one flows into the others (...)" (Emphasis added) (Mar. 22, 2001 Trans. 15-20 to 15-24); (c) "if I were to resolve [video timing] I would agree with [defendant] It's more than four seconds long on the videotape." (May 4, 2007 Trans. 49-16 to 49-17)

Consequently, it's undeniable that judge never received nor reviewed the original wedding videotape nor copy of same video, (May 4, 2007 Trans. 57-8 to 57-9) instead, the Court received a doctored copy which was produced

by Prosecutor's team, i.e., merging images from more than one tape, transforming 1.4 minutes of video into ... about two hours. (May 4, 2007 Trans. 52-11)

This documented prosecutor's tampering of wedding videotape, and the turning off of existing sound on videotape presented to and hand delivered to Jury paved the way for Jury to accept prosecutor's closing, *supra* at fn. 7, p. 19, at faith value: "If you watch the tape and you think about what Garcia says happened and you count the seconds it can't happen the way he said it did. There isn't enough time for it to have happened the way he say it did ["David then punched Defendant on the right side of his head and Defendant fall against the wall..." ..." Oct. 26, 2001 Trans. 126:21-24; Aplt.'s Br. pp. 16; 20-25 (May 26, 2022)]". (Oct. 18, 2001 Trans. 83-24 to 84-8)

#### REASON FOR GRANTING THIS WRIT

Defense counsels were egregiously ineffective at all levels:

First, defense counsels allowed unchallenged authentication of wedding videotape, State's evidence-in-chief, see State v. Garcia, *supra* at fn. 6, p. 9, by Detective David Cassirer, who did not satisfy any of the requirements pursuant to "N.J.R.E. 901[IE] note 18. "To authenticate (...) videotape, witness must identify persons, places or things shown." State v. Wilson, 135 N.J. 4, 637 A.2d 1237 (1994); N.J.R.E. 901(I) "Authentication of motion pictures

ordinarily includes testimony by a person present at the time the motion pictures were taken that they accurately depict the events as he saw them when they occurred.'" Balian v. General Motors, 121 N.J. Super. 118, 296 A.2d 317 (App. Div. 1972).; U.S. v. Goldin, 311 F.3d 191 (3d Circ. 2002) "Videotape of demonstration was properly authenticated by camera operator, rather than film editor, even though 15-minute tape was edited version of complete two-hour tape." F.R.E. 901. Worse yet, as revealed by above comparative analysis of wedding videotape transcript prepared by forensic expert with certified translator (Da: 1-16) against fraudulent transcript prepared by prosecutor (Da: 72-3), Cassirer's testimony was a flagrant act of perjury, whereby, he falsely testified as follows:

"Q. Lieutenant, was the original S-VHS tape that you received from investigator -- Detective Dombrowski and Barbados, was that original tape the source for all of the images shown on this tape that we just played? –

A. Yes, it is the source. (Feb. 14, 2001 Trans. 31-8 to 31-12)

Q. And was there any outside source of images placed on that tape? -- A. No other image, no other signal. No.

Q. And with the exception of the work that you did in creating the slow motion portions of that tape, were there any other additions, changes, editing whatsoever in any way done? –

A. No, Sir. Just the slow motion. (Feb. 14, 2001 Trans. 31-20)

Q. And is this tape as you viewed it today, in the same condition -- does it show the same things that it showed when you originally

made that tape? -- A. Yes, Sir. (Feb. 14, 2001 Trans. 31-21 to 31-24)

Q. No changes, additions, deletions from it? -- A. None" (Feb. 14, 2001 Trans. 31-25 to 32-1)";

Second, failing to perform forensic testing of wedding videotape (Da: 1-16), state's evidence in chief, see fn. 6, p. 9, even after their extortion of over one hundred thousand dollar (\$100,000.00) from defendant's family (App. Y), and considering their argument to the court:

(1) (Y)our Honor, the tape to a certain extent is prejudicial, also because it only captures the minute where -- or the seconds in which the Appellant approaches the decedent. It doesn't catch and it doesn't give you the affect of what happened at the door. It doesn't give you the affect of the altercations that occurred prior to that... (Mar. 22, 2001 Trans. 9-17 to 23) (Emphasis added);

(2) "As a matter of fact in the tape itself, for us to hear that statement, Mr. Jerejian and I when we review it, we had to play the tape over 50 times. (Emphasis added) -- so, in other words, to the ear, without -- just as without -- just as with the shooting, you can't see it in the normal sequence, you have to watch it in slow motion." (Emphasis added) (Mar. 22, 2001 Trans. 13-1 to 13-4; 14-10 to 14-13)

These defense "counsels'" statements alone demonstrate that defense counsels were unable to decipher content of videotape without the assistance of forensic expert testing, particularly significant is the fact that they had prepared Defendant's testimony and they either knew or should have known that Defendant's testimony made no sense, whatsoever, confronted with content of above quoted perjury testimony by David Cassirer and fraudulent

transcript (Da: 72-3) introduced into court by prosecutor and hand delivered by Judge to Jury.

Clearly, defense counsels failed: "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 104 S.Ct. 2052, 2066. Consequently, without the benefit of forensic testing of wedding videotape, defense counsel had only two choices left, (1) to persuade Defendant not to testify; and (2) alternatively, to resign their representation. This Defense counsels' failure paved the way for an erroneous conviction based primarily on the tampered videotape as evidenced by Juror's report to Bergen Record Newspaper (Da-74). This trial counsels' failure was followed by first PCR counsel, whereas, assigned counsel advocated on behalf of State "rendering aid and support to the State's opposition", i.e., telling the court:

"[The video] wasn't tainted at all ... It is nothing in there relative to disparity of the language that was transcribed between the actual transcript of the tape ... and what my client's expert's is [May 4, 2007 Trans. 4:2-3; 20-23].

Thereby, assigned first PCR counsel, Michael Paul was flagrantly violating mandatory authority: "To satisfy the Sixth Amendment of the Constitution, "counsel must function as an advocate for the defendant, as opposed to (a friend of the court)." Entsminger v. Iowa, 386 U.S. 748, 751 (1967); Anders v. California, 386 U.S. 738, 744 (1967); State v. Rue, 175 N.J. 1, 16-17 (2002).

Finally, during courts proceedings pertaining to Petitioner's May 8, 2007 motion supplementing first PCR record, assigned counsel, Emile Lisboa allowed courts' adverse rulings to be entered without him being present in court and without any participation from his part (Jan. 25, 2019 Trans. 62-1 to 63-3), causing ineffective assistance to counsel issue raised at all levels to have escape assessment on the merit adhering to Strickland v. Washington's squarely established two prong testing, warranting Certiorari to correct resulting fundamental miscarriage of justice.

Based on foregoing, Petitioner humbly submits, that contrary to Superior Court of New Jersey/ Appellate Division's December 21, 2021 finding: "Defendant's fifth PCR petition alleges the same claims regarding the video recording of the murder that he raised in his direct appeal and in his first four PCR petition. Those claims were repeatedly determined to be meritless", Because Petitioner's May 8, 2007 Motion, supplementing first PCR record, pursuant to N.J.C.R. 1:7-4(b), instant matter, was part and parcel of the first PCR, the correct assessment should have been in light of State v. Nash, 212 N.J. 518, 535 (Jan. 13, 2013):

"[E]vidence clearly capable of altering the outcome of a verdict that could have been discovered by reasonable diligence at the time of trial would almost certainly point to ineffective assistance of counsel ... ' [We] would not require a person who is probably innocent to languish in prison because the exculpatory evidence

**was discoverable and overlooked by a less than reasonable diligent attorney.”**

**See, Strickland v. Washington, 466 U.S. 668 (1984): “stating that grant of new trial because of ineffective assistance of counsel depends on whether result would have been different but for counsel's deficiency.”**

**Consequently, Petitioner humbly beg this Honorable Court to grant him Certiorari to correct resulting fundamental miscarriage of justice.**

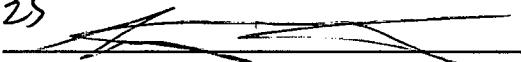
**Petitioner relies upon the Amended submitted to the Supreme Court of New Jersey (App. W), for further explication of the issues involved, and respectfully request permission to file a supplemental brief should this petition for certiorari be granted.**

**I, Agustin Garcia, humbly beg the court to relax the Rule and not hold him to the same stringent standard as that of a practicing attorney with regards to the construction of these pleadings, citing Haines V. Kerner, 44 U.S. 519; Estelle V. Gamble, 429 U.S. 97, 106 (1976); Neitzke V. Williams, 490 U.S. 319, 330 n.9 (1989); Roman V. Jeffes, 904 F. 2d 192, 197 (3rd Circ. 1990).**

**I certify, pursuant to N.J.C.R. 1:4-4(b), that the foregoing statements made by me are true and correct. I am aware that if any of the above statements are willfully false, that I will be subject to punishment.**

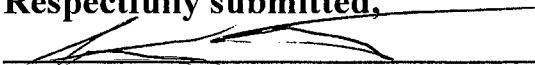
## CONCLUSION

The petition for a writ of certiorari should be granted.

Executed on July 21, 2025 *August 26, 2025*   
Agustin Garcia/ SBI # 822642-B/ 428336  
East Jersey State Prison  
Lock Bag R, Rahway, N.J. 07065

## CERTIFICATE OF PRO SE COUNSEL

Agustin Garcia, pro se, hereby certifies that the statements of fact in the accompanying petition and Certiorari are true to his knowledge and that statements made on information and belief are true to the best of his knowledge and belief.

Dated: July 21, 2025 *August 26, 2025*   
Respectfully submitted,  
Agustin Garcia/ SBI # 822642-B/ 428336  
East Jersey State Prison  
Lock Bag R, Rahway, N.J. 07065