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DATE & TIME	STATUS OF ITEM	LOCATION
November 14, 2014 , 1:01 pm	Delivered	**NEW YORK, NY 10007**

Your item was delivered at 1:01 pm on November 14, 2014 in NEW YORK, NY 10007.

DATE & TIME	STATUS OF ITEM	LOCATION
November 14, 2014 , 9:48 am	Out for Delivery	NEW YORK, NY 10007
November 14, 2014 , 9:38 am	Sorting Complete	NEW YORK, NY 10007
November 14, 2014 , 6:59 am	Arrived at Post Office	NEW YORK, NY 10007
November 13, 2014 , 9:33 pm	Departed USPS Origin Facility	JERSEY CITY, NJ 07097
November 13, 2014 , 9:19 pm	Arrived at USPS Origin Facility	JERSEY CITY, NJ 07097
November 13, 2014 , 6:03 pm	Departed Post Office	NEW YORK, NY 10029
November 13, 2014 , 4:34 pm	Acceptance	NEW YORK, NY 10029

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----------------------------------X

DOMINIC M. FRANZA, 92A3659,

Petitioner,

-against-

JAMES STINSON, Superintendent,

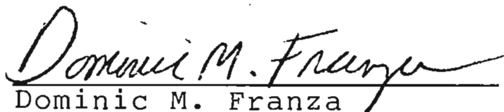
Respondent.

-----------------------------------X

NOTICE OF MOTION
98 Civ. 5484
(LAK)(AJP)

Please Take Notice, that upon the annexed affidavit of Dominic M. Franza, duly sworn to the 26th day of December, 2013, and upon all the proceedings heretofore had herein, petitioner will move this Court, before the Hon. Lewis A. Kaplin, U.S.D.C., J., at the Courthouse located at 500 Pearl Street, New York, N.Y. for an Order, pursuant to Fed. R. Civ. P., Rule 60(b)(4), vacating the June 30th, 1999, judgment, on the ground the Court's judgment is in violation of Due Process of Law as this Court inadvertently denied petitioner of the opportunity to be heard on the merits.

Most Respectfully



Dominic M. Franza
92A3659
Fishkill Corr. Facility
P.O. Box 1245
Beacon, N.Y. 12508
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------------------------------X

DOMINIC M. FRANZA,

Petitioner,

-against-

JAMES STINSON, Superintendent,

Respondent.

----------------------------------X

Affidavit

98 Civ. 5484

(LAK)(AJP)

State of New York)
)ss.:
County of Saratoga)

I, Dominic M. Franza, being duly sworn, deposes and says:

1. I am the petitioner in the above-entitled proceeding. I make this affidavit (supported by a memo of law) in support of the motion for relief from this Court's June 30th, 1999, judgment (98 Civ 5484)(Franza v. Stinson, 58 F.Supp.2d 124 (S.D.N.Y. 1999)), pursuant to Fed. R. Civ. P. 60(b)(4), as this Court's judgment is in violation of due process of law due to depriving your petitioner of the opportunity to be heard on the merits. A failure to grant this motion would sanction the corrupt conduct of various N.Y.P.D. Detectives and Officers, as well, sanctioning the corrupt conduct of two N.Y. County prosecutors, who all have violated the U.S. Constitution under the 14th Amendment, leaving your petitioner unconstitutionally imprisoned.

2. On July 20th, 1993, petitioner filed a CPL §440 motion. While petitioner's motion was inexpertly drawn, petitioner

charged the prosecutors with the knowing use of false evidence, in violation of a constitutional right, among other Constitutional violations. Petitioner set forth sworn allegations, supported with evidence which your petitioner claimed came from the People's discovery material's (Dkt 1 p. 17 [Writ of habeas corpus]; Writ Exhibit "6" pp. 1-2 [CPL §440 motion]).

FACTS AND EVIDENCE BEFORE THIS COURT

Shooting Incident

3. On defense direct, Mr. Nelson Dacosta (Mrs. Mendez's Son & Mrs. Franza's Brother) denied making a Police report saying someone threatened to kill him and his Family. However, on cross he admitted in making the report. Telling the Police about a threat so a trace would be done, as a man was asking for his wife. That a lady called claiming a misunderstanding because his wife owed $200.00 for Avon products (Dkt 1 p. 10; Writ Ex. "4" pp. 1610-1611, 1617-1621 [Trial transcripts]; Writ Ex. "6" pp. 74-75).

4. Mr. Dacosta's wife left him before the shooting's of Mrs. Mendez and Mrs. Franza (Writ Ex. "4" [Mrs. Franza]: 386, [Dacosta]: 1609-1610; Writ Ex. "6" p. 75).

5. On July 16th, 1990, two men, posing as Police officers, went to Mrs. Mendez's apartment looking for Mr. Dacosta. The shorter male being dark skinned, husky, and having a knap sack. In a report it was stated the men said they would be back (Dkt. 1 p. 10; Writ Ex. "4" [Mendez]: 257-265, 275-278, [Franza]: 382-383, [Giorgio]: 660-666, 728-730, [Dacosta]: 1610-1611; Writ Ex.

"6" p. 72).

6. The shooting's of Mrs. Mendez and Mrs. Franza occurred on July 17th, 1990, at 485 West 187st, Apt. 1D, at 7:20 p.m., by a man claiming to have flowers for Mrs. Franza. Not locking the door, Mrs. Mendez went to the rear of the apartment to ask Mrs. Franza if she wanted the flowers, where she was taking a shower. It was then, at the rear of the apartment, that Mrs. Mendez sustained five (5) gunshot wounds at a distance, and Mrs. Franza sustaining one (1) gunshot wound, by this floral delivery man (Dkt.1 p.11; Writ Ex. "4" [Mendez]: 222-231, 233-234, 248, 265-273, 281-282, 284-285, [Franza]: 313-314, 323-325, 327; Writ Ex. "6" pp. 7, 48, 50, 53-57, 60-61).

7. After the shooting's Mrs. Franza thereafter claimed, she crawled to the front of the apartment, where she was claimed to have been found bleeding profusely by Police. Mrs. Franza stated she could not stop the blood from coming out of her mouth. She claimed to have written on a wall, and telling the Police petitioner sent the shooter. The paramedics arriving three to five minutes later (Dkt. 1 pp. 12-13; Writ Ex. "4" [Aponte]: 140-151, 158, [Alexander]: 176-180, 188-189, [Franza]: 314-315, [Bourges]: 417-418, 427, [Giorgio]: 562; Writ Ex. "6" pp. 56, 62-65).

8. Prior to the Police arriving at the shooting scene, a Mr. Benitez observed two men running from 485 West 187st, the smaller male being light black or dark Hispanic, having a canvas bag (Dkt. 1 p. 12; Writ Ex. "4" [Benitez]: 81; Writ Ex. "6" p. 73-74).

9. At the Hospital Mrs. Franza stated, nine (9) Doctors were trying to bring her Mother back to life. Telling her, "Yes, Mrs. Mendez, come on, you can do it, you can do it" (Dkt. 1 p. 12; Writ Ex. "4" [Franza]: 315-316; Writ Ex. "6" p. 65).

10. Mrs. Mendez stated, her left hand is not used anymore. That she can't hold anything anymore (Writ Ex. "4" [Mendez]: 248; Writ Ex. "6" p. 66).

11. Det. Osbourn, of the crime scene unit, took into evidence two lead bullets, a floral box with a red ribbon, and a floral delivery note. He claimed he gave these items to P.O. Alexander to voucher. Taking twenty photos of the apartment, which revealed the evidence taken. These items were entered into evidence (Dkt. 1 p. 14; Writ Ex. "4" [Alexander]: 180-185, [Osbourn]: 515-525, 532-533; Writ Ex. "6" pp. 5-6).

12. Det. Osbourn after investigating typed up a report on everything done, revealing the evidence recovered, which his handwritten notes reveal. Also revealing the time he arrived at the shooting scene, 1940 hrs (7:40)(Dkt. 1 p. 15; Writ Ex. "4" [Osbourn]: 529; Writ Ex. "6" pp. 7-8, 46-47).

13. Both Mrs. Mendez and Mrs. Franza claimed, the crime scene photos shown reflected the state of the apartment the day of the shooting's: Where the lone shooter was standing at the rear of the apartment; where they were shot and fell at the rear of the apartment; where the phone is that Mrs. Franza used to called the Police. Such photos were entered into evidence (Dkt.1 p.12; Writ Ex. "4" [Mendez]: 232-234, [Franza]: 316-325; Writ Ex. "6" pp. 4, 55-56, 61).

14. P.O. Aponte, P.O. Alexander, Det. Giorgio, and Det. Osbourn claimed, the crime scene photos shown reflected the state of the apartment the day of the shooting's: Where the floral box with the delivery note on top were on a chair; where the lead bullet on the bathroom floor was; where Mrs. Franza was found at the front of the apartment; where the wall is that Mrs. Franza wrote on; the flowers in the kitchen sink. Such photos were entered into evidence (Dkt. 1 pp. 13-14; Writ Ex. "4" [Aponte]: 153-158, [Alexander]: 177-187, [Osbourn]: 517-525, [Giorgio]: 563-564, 668-669; Writ Ex. "6" pp. 3-5).

15. Of notable mention, Det. Osbourn stated, when he was shown the crime scene photo of the bullet on the bathroom floor, that the bullet was in that position when he first noticed it (Dkt. 1 p. 14; Writ Ex. "4" [Osbourn]: 524-525; Writ Ex. "6" pp. 4-5).

16. On August 24th, 1990, Det. Giorgio in his writing provided petitioner with a copy of the alleged floral delivery note left at the scene of the shooting's, by the shooter. Petitioner voluntarily provided Det. Giorgio with Ten (10) handwritten exemplars. Det. Giorgio gave these exemplars to Det. John Breslin (N.Y.P.D. Document examiner) to compare against the original floral delivery note. Det. Breslin stated, petitioner's handwritten exemplars matched the handwriting on the original floral delivery note, thereby connecting petitioner to the shooting incident. The exemplars were entered into evidence (Dkt. 1 p. 15; Writ Ex. "4" [Giorgio]: 580-596, 600, 676-680, 742, [Breslin]: 1197-1211, 1327; Writ Ex. "6" pp. 70-71).

THE PEOPLE'S DISCOVERY MATERIALS REVEALING FALSE EVIDENCE AND FALSE TESTIMONIES

Shooting Incident

17. As previously mentioned, Mrs. Mendez claimed she sustained five (5) gunshot wounds, and Mrs. Franza claiming she sustained one (1) gunshot wound. Det. Osbourn claimed he only recovered two bullets, a floral box with a red ribbon, and a floral delivery note, as reflected in the crime scene photos, and in his forensic report & handwritten notes. Petitioner provided the Certified Medical records of Mrs. Mendez and Mrs. Franza, which proved the above were all complete fabrications. It being a physical impossibility for Det. Osbourn to have only recovered two bullets at the shooting scene, and it being a physical impossibility for Det. Osbourn's crime scene photos not to have revealed ballistic damage anywhere (Dkt. 1 p. 19; Writ Ex. "6" pp. 48-50).

18. Mrs. Mendez's Certified Medical records revealed, she sustained in excess of five (5) gunshot wounds, and that all of her gunshot wounds were through and through. Such being clearly revealed, without the need of a Medical expert to point out, as a simple viewing shows the gunshot wounds to different parts of her body (Dkt. 1 p. 19; Writ Ex. "6" pp. 48-50).

19. Mrs. Franza's Certified Medical records revealed, she sustained one (1) gunshot wound from a .22 caliber weapon at close range, and that such gunshot wound was through and through (Dkt. 1 p. 19; Writ Ex. "6" pp. 49-50).

20. Petitioner further proved through Mrs. Mendez's Medical records that, she had carbon particles surrounding her left hand. Such proving she was shot at an extreme close range, not at a distance as she stated (Dkt. 1 p. 20; Writ Ex. "6" pp. 54, 60).

21. Petitioner further proved through Mrs. Mendez's Medical records that, Mrs. Mendez had a 98% survival rate, and being fully awake and responsive upon arrival at the Hospital. Not being brought back to life by nine (9) Doctors as stated by Mrs. Franza (Dkt. 1 p. 25; Writ Ex. "6" pp. 65-66).

22. Petitioner further proved through Mrs. Mendez's Medical records that, Mrs. Mendez threatened to kill herself two times if she was not allowed to call her Husband. Threatening to choke herself if anyone came near her. Being placed on two point restraints due to pulling out her I.V. lines (Writ Ex. "6" pp. 65-66).

23. Petitioner further proved through Mrs. Mendez's Medical records that: she sustained no gross motor or sensory loss; her lungs being clear; having no respiratory distress; having a low risk of cardiac arrest, and; moving all extremities well (Writ Ex. "6" p. 66).

24. As previously mentioned, Mrs. Mendez and Mrs. Franza claimed, there was only one shooter, and that the shooting's occurred at the rear of the apartment. Petitioner provided numerous documents which proved there were two (2) men in the apartment, and that the shooting of Mrs. Mendez occurred at the front of the apartment, not the rear of the apartment. Such

proving the shooting scenario was a complete fabrication (Dkt. 1. pp. 23-24; Writ Ex. "6" pp. 53-57).

25. The Federal search warrant and Arrest warrant affidavits proved, Mrs. Mendez was shot when she opened the door (Dkt. 1 p. 24; Writ Ex. "6" pp. 59-60).

26. The Crime Victim Board application of Mrs. Franza proved, by Mrs. Franza's own words, that two (2) men pushed her Mother into the apartment and shot her. That she was shot when she came to the rescue (Dkt. 1 p. 24; Writ Ex. "6" p. 58).

27. A Puerto Rico P.D. report proved, Mrs. Mendez was shot when she opened the door. Such information coming from Mrs. Mendez's Sister (Dkt. 1 p. 24; Writ Ex. "6" p. 60).

28. N.Y.P.D. reports proved, two (2) men were in the apartment. Information in one report coming from Mr. Nelson Dacosta, Mrs. Mendez's Son (Dkt. 1 p. 24; Writ Ex. "6" pp. 57-58).

29. A District Attorney Data sheet proved, Mrs. Mendez was shot when she opened the door (Dkt. 1 p. 24; Writ Ex. "6" pp. 58-59).

30. A.D.A. Brancato, in opening, stated Mrs. Franza was at the rear of the apartment when the Police arrived (Dkt. 1 p. 24; Writ Ex. "6" p. 126).

31. As previously mentioned, P.O. Aponte, P.O. Alexander, Det. Osbourn, Mrs. Mendez, and Mrs. Franza, all claimed the crime scene photos shown fairly and accurately depicted the apartment the day of the shooting's. Petitioner provided all the crime scene photos proving, they contained physical

impossibilities within themselves (Dkt. 1 pp. 17-23; Writ Ex. "6" pp. 9-17, 23, 28-29, 39, 42-44, 48, 50-53, 53A, 62-65).

32. Petitioner provided a copy of a Certified document from the Naval Observatory, from the Chief Astronomer, that proved Sunset on July 17th of 1990 (day of shooting) was at 8:24 p.m. (Dkt. 1 p. 17-18; Writ Ex. "6" p. 9).

33. Petitioner further provided copies of Certified Weather reports proving, there were no weather conditions obstructing natural light at Sunset (Dkt. 1 p. 18; Writ Ex. "6" pp. 9-13).

34. Petitioner further provided a copy of the Audubon Society Field Guide to North American Weather that proved, in July the Earth's tilt toward the Sun prolongs twilight (Dkt. 1 p. 18; Writ Ex. "6"pp. 14-16).

35. Petitioner claimed for the reasons above, there should have been natural light outside at Sunset (Dkt. 1 p. 18; Writ Ex. "6" p. 16).

36. Petitioner proved, crime scene photo 13, with a small blow up, reveals the time on the clock to be 8:14. However, photos 12, 9, 7, 4, taken earlier than photo 13, reveal it to be nighttime outside. A physical impossibility (Dkt. 1 p. 18; Writ Ex. "6" pp. 7-8, 16-17).

37. Petitioner proved, through photo 9, the camera was working fine, as it barely picked up a man in the street. Asserting had there been natural light outside it would have registered (Dkt. 1 pp. 18-19; Writ Ex. "6" pp. 23, 28-29, 39, 42-44).

38. Petitioner further proved, two photos revealing the same

area of a wall each revealing a different porcelain picture. The frames being different from one another, as well a figurine in one photo not appearing in the other (Dkt. 1 p. 20; Writ Ex. "6" p. 53).

39. Petitioner further proved, in one photo there is a blood stain on a rag on the floor in the shape of an "S". However, in another photo the "S" shape is gone (Dkt. 1 p. 21; Writ Ex. "6" p. 51).

40. Petitioner further proved, in one photo there are two black objects and one silver object on the table. However, in another photo one black object is missing (Dkt. 1 p. 21; Writ Ex. "6" p. 50-51).

41. Petitioner further proved, in one photo there being a lamp and table inches away from a wall. However, in another photo the lamp and table are gone (Dkt. 1 p. 21; Writ Ex. "6" p. 52).

42. Petitioner further proved, in one photo there is a black box under a table. However, in another photo the black box is missing (Dkt. 1 p. 21; Writ Ex. "6" p.p. 51-52).

43. Petitioner further proved, in one photo there being a large white object draped over a chair. However, in another photo the white object is missing (Dkt. 1 p. 21; Writ Ex. "6" p. 52).

44. Petitioner further proved, in one photo there being blood on the wall, with pencil writing, which Mrs. Franza was claimed to have written at the front of the apartment. However, in another photo the pencil writing is gone (Dkt. 1 p. 22; Writ Ex.

"6" p. 52-53).

45. Petitioner further proved, in one photo there being a box of flowers on a chair, with a note on top. However, in another photo the note is missing on the box (Dkt. 1 p. 22; Writ Ex. "6" p. 53A).

46. Petitioner further proved, there is a small white object right center of the rug in the bathroom. However, in another photo the white object is missing (Dkt. 1 p. 22; Writ Ex. "6" p. 53A).

47. Petitioner further proved, the last photo taken revealing one bullet on the bathroom floor. However, in other earlier photos the bullet is gone, when Det. Osbourn stated the bullet was in that position when he first noticed it (Dkt. 1 p. 22; Writ Ex. "6" p. 48).

48. Petitioner further proved, in one photo there being a chair with a floral box on top. Such butted tight against the stereo cabinet, with a blue shirt draped over the back rest of the chair, covering the side of the stereo cabinet. However, in another photo the side of the stereo cabinet can be seen (Dkt. 1 p. 22; Writ Ex. "6" p. 51).

49. Petitioner further proved, the photos reflect no damage to the bathroom door or blood as the bullets passed through Mrs. Mendez, where she claimed to have been shot (Dkt. 1 p. 22; Writ Ex. "6" p. 50).

50. Petitioner further proved, the photos reveal no extreme amounts of blood at the front of the apartment, just very small patches of blood where Mrs. Franza was allegedly found bleeding

profusely at the location for five (5) minutes (Dkt. 1 p. 23; Writ Ex. "6" pp. 62-65).

51. Petitioner further proved, the photos reveal there are no drops of blood on the gold rug from the rear of the apartment to the front of the apartment, which Mrs. Franza would of had to of crawled across to get to the front of the apartment, where she was claimed to have been found bleeding profusely (Dkt. 1 p. 23; Writ Ex. "6" pp. 62-63).

52. Petitioner further proved, the photos reveal there are no foot prints in the blood where Mrs. Mendez was claimed to have been shot. Such being a physical impossibility as E.M.S. would of had to of stepped in the blood in order to assist her (Dkt. 1 p. 23; Writ Ex. "6" p. 64).

Puerto Rico Incident

53. Mrs. Franza, in November of 1989, went to Puerto Rico for her Brother's funeral. She claimed she gave petitioner her Grandmother's address 2629 Paseo Aguilla, Levittown, Catano, Puerto Rico, and her phone number in case petitioner needed to get a hold of her. As well, giving petitioner the phone number of her Aunt in Puerto Rico (Dkt. 1 pp. 25-26; Writ Ex. "6" p. 89).

54. Mrs. Franza's Grandmother was claimed to have lived with Miss Lamboy, Mrs. Mendez's Sister, at 2629 Paseo Aguilla, telephone number 1-809-784-1630. Miss Lamboy stated her Mother's name was Rosa Matos. Mrs. Mendez stated her Mother's name was Rosa Lamboy. Mrs. Franza stated her Grandmother's name was Rosa

Lamboy Roman (Dkt. 1 p. 26; Writ Ex. "4" [Mendez]: 244-246, [Franza]: 310, [Lamboy]: 754-758; Writ Ex. "6" pp. 83-84, 88, 92-93).

55. Miss Lamboy stated, her Mother lived with her all of her life. Her Mother passing away in November of 1990 (Writ Ex. "4" [Lamboy]: 757; Writ Ex. "6" p. 83).

56. On February 5th, 1991, Miss Lamboy received a notification slip from Federal Express, which was on her gate. Such having her name, address, and phone number (Dkt. 1 p. 26; Writ Ex. "4" [Lamboy]: 759; Writ Ex. "6" p. 83).

57. Miss Lamboy made arrangements with Federal Express to receive the package through her neighbor. When Miss Lamboy received the package from her neighbor, she slightly opened the package and observed instruments of a pipe bomb. The Police arriving twenty five minutes later, disarming the device. The notification slip was entered into evidence (Dkt. 1 pp. 26-27; Writ Ex. "4" [Lamboy]: 758-761, 767-770, [Agent Garcia]: 1063-1102; Writ Ex. "6" pp. 79-80, 83-85).

58. Special Agent Chris Behan (A.T.F.) learned on February 11th, 1991, a pipe bomb was sent via Federal Express to the Roman Family. He recognized the Federal Express Airways Bill shown to him. Receiving such from Thomas Sullivan of Federal Express. This document was entered into evidence (Dkt. 1 p. 27; Writ Ex. "4" [Behan]: 840-841, 856-858; Writ Ex. "6" p. 78).

59. S.A. Behan also recognized an American Express money order shown to him. Such was entered into evidence (Dkt. 1 p. 28; Writ Ex. "4" [Behan]: 884-886; Writ Ex. "6" 98).

60. Mr. Thomas Sullivan, of Federal Express, was shown the Package Tracking Inquiry for the Federal Express Airways Bill. He stated such reveals where the package has been, etc. Such document was never entered into evidence. He also stated the Airways Bill contained the number of an American Express money order (Dkt. 1 p. 28; Writ Ex. "4" [Sullivan]: 1105-1111; Writ Ex. "6" pp. 78-79).

61. In October of 1991, Det. Breslin, having over a hundred pages of petitioner's handwriting, could not connect petitioner to the Federal Express Airways Bill and the American Express money order (Dkt. 1 p. 28; Writ Ex. "4" [Breslin]: 1328-1337, 1345-1355, 1421; Writ Ex. "6" p. 96).

62. Det. Giorgio requested Det. Breslin to compare petitioner's new exemplars against the Federal Express Airways Bill, and the American Express money order. Det. Breslin thereafter concluded petitioner's exemplars matched such documents (Dkt. 1 p. 28; Writ Ex. "4" [Giorgio]: 615-619, [Breslin]: 1211-1236; Writ Ex. "6" pp. 96-99).

THE PEOPLE'S DISCOVERY MATERIALS REVEALING FALSE EVIDENCE AND FALSE TESTIMONIES

63. As previously mentioned, Mrs. Franza stated she gave petitioner her Grandmother's address and phone number, in case petitioner needed to contact her in Puerto Rico. Petitioner provided various documents which proved the documents used in connection with the shipment (Federal Express Airways Bill & American Express money order) were tampered with in order to connect petitioner to the shipment (Dkt. 1 p. 29; Writ Ex. "6" pp. 80-82, 86, 91, 93-94).

64. Petitioner proved a Puerto Rico P.D. Sergeant from the station informed the press that, the package had the name of Miss Lamboy, and was addressed to 2615 Paseo Aguilla where the Pantoja Family reside (Dkt. 1 p. 29; Writ Ex. "6" p. 80).

65. Petitioner proved through a Puerto Rico P.D. report that, Miss Lamboy called Mr. Pantoja and asked him to come over (Dkt. 1 p. 29; Writ Ex. "6" p. 81).

66. Petitioner proved through another Puerto Rico P.D. report that, Mrs. Pantoja was asked to abandon her residence for her safety, by the Police (Dkt. 1 p. 29; Writ Ex. "6" p. 81).

67. Petitioner proved through the Package Tracking Inquiry that, the package had an incorrect recipient address, when the package was claimed to have gone to the right address from inception (Dkt. 1 p. 29; Writ Ex. "6" pp. 78-79, 82, 93-94)

68. Petitioner proved Miss Lamboy told the press that, she does not know the origin of the Roman Family. Also stating, she has lived alone for years at 2629 Paseo Aguilla. The article further stated, they believed there was something wrong with the shipment (Writ Ex. "6" p. 82).

Case In Chief

69. After the People rested, A.D.A. Brancato conceded their case in chief revolved around handwriting, and handwriting being used to identify the perpetrator (Dkt. 1 p. 16; Writ Ex. "4" [Court & A.D.A. Brancato]: 1507-1508).

Closing Argument

70. A.D.A. Brancato outlined the evidence and testimonies revolving around the shooting incident and the Puerto Rico

incident (Dkt. 1 p. 16; Writ Ex. "4" [Brancato]: 1819-1820, 1828-1829, 1845, 1848-1864, 1866-1867, 1870, 1875-1879, 1884, 1890-1891, 1903-1904).

Jury's Sole Request For A Testimonial Read Back

71. The jury's sole request for a read back, requested Det. Breslin's analysis concluding petitioner's handwriting matched the handwriting on the floral delivery note. Thereafter rendering verdicts of guilty (Dkt. 1 p. 16; Writ Ex. "4" [Jury]: 1967-1971, 1973-1974, 1991-2001).

Opposition To CPL §440 Motion

72. A.D.A. Gregory Sheindlin in opposition for the People stated, petitioner's motion was confusing, factually inaccurate and without merit (Dkt. 1 p. 32; Writ Ex. "14" [Opposition]).

Court's Decision

73. Justice Bookson held, petitioner's motion was "largely based on unsubstantiated charges." Petitioner's assertions being "self serving," "wishful thinking," and "without merit." That the evidence was "overwhelming," and the prosecution and counsel doing exemplary work (Dkt. 1 p. 34; Writ Ex. "18" [Decision]).

Petitioner's Appellate Brief

74. With respect to the CPL §440 denial, petitioner made a two point single argument (Dkt. 1 p. 34; Writ Ex. "2" [Appellate Brief]).

75. The first point:

> The Trial Court's order summarily denying appellant's C.P.L. §440 Subd. [1] post conviction motion pursuant to C.P.L. §440.10 2 [B] upholding the presumption of regularity and indictment, when

> sufficient facts do not appear in the record, sufficient facts and documentary evidence not being shown to be insufficient as a matter of law, not being in dispute that appellant has been denied due process of the law (N.Y. Const. Art. 1§6; U.S. Const. Art 7, 14th Amendment); the right against unreasonable searches and seizures (N.Y. Const. Art. 1§12; U.S. Const. Art. 7, 4th Amendment); receiving ineffective assistance of counsel (N.Y. Const. Art. 1§6; U.S. Const. Art. 7, 6th Amendment), in that the prosecutors knowingly presented false evidence and testimony at the Grand Jury, Pretrial, and trial as well Rosario and Brady violations, defense counsel with knowledge, constitutes a denial of due process of law within the meaning of Article 1, Section 6 of the State Constitution, and Article 7, 14th Amendment, Section 1, of the Federal Constitution,....

76. The second point:

> [A]s well, constituting a denial of equal protection of the law within the meaning of C.P.L. §440.30. Subd. 3 [A, B, C], Article 1, Section 11 of the State Constitution, and Article 7, 14th Amendment, Section 1, of the Federal Constitution.

77. The appellate court affirmed the denial of the CPL §440 motion on the merits, and also denied the filing of the CPL §440 motion exhibits, People v. Franza, 239 A.D.2d 201 (1st Dept. 1997)(Dkt. 1 p. 38).

78. The N.Y. Court of Appeals did not allow entry, People v. Franza, 90 N.Y.2d 904 (1997)(Dkt. 1 p. 39).

Federal Habeas Corpus Petition

79. On July 31st, 1998, petitioner filed for 28 U.S.C. §2254 relief. Petitioner claimed "The Trial Court's denial of petitioner's CPL §440 post conviction motion constituted a

denial of due process of law and equal protection of the law," based upon the facts and evidence before the trial court and appellate court as cited, supported by a host of exhibits before the trial court (Dkt. 1 pp. 5, 9-39, Ex's 1-26).

Memorandum Of Law In Support

80. In support of the habeas petition petitioner filed a memorandum of law. Petitioner made the following argument (Dkt. 2 p. 73 [Memo of Law]):

> The Trial Court's denial of petitioner's CPL §440.10 Post Conviction motion constituted a denial of due process of law and equal protection of the law. U.S. Const. Art. 7, 14 Amendment, Section 1.

81. Petitioner claimed the trial court's factual finding was not supported by the record. Also that, the District Attorney's office violated the cardinal standard principles under United States v. Agurs, 427 U.S. 97, 103 (1976) and Giglio v. United States, 405 U.S. 150, 153-154 (1972), prohibiting a conviction to stand based upon the knowing use of false evidence and testimonies (Dkt. 2 pp. 73-86).

Additional Memorandum Of Law In Support

82. On November 17th, 1998, petitioner filed another memorandum of law in support, raising a Miller v. Pate, 386 U.S. 1 (1967) Constitutional violation (Dkt. 11 [Memo of Law]).

District Attorney's Answer Affirmation

83. The District Attorney's office filed an answer against petitioner's habeas petition (Dkt. 12 [Answer Affirmation]).

Memorandum Of Law In Support

84. The District Attorney's office stated in the memorandum of law in support that, "the trial court's summary denial of

petitioner's post conviction motion to vacate judgment was entirely proper" (Dkt. 13 p. 4 [Memo of Law]).

85. Claiming state procedures in deciding collateral post conviction motions may not be the basis for habeas review. Also that, petitioner has failed to demonstrate anything meriting relief under 28 U.S.C. §2254(d) (Dkt. 13 pp. 8-17).

Petitioner's Traverse

86. In response to the District Attorney's answer petitioner filed a traverse (Dkt. 16 [Traverse]).

Memorandum Of Law In Support

87. In support of the traverse petitioner filed a memorandum of law in support. Petitioner claimed this Court can grant the habeas petition under 28 U.S.C. §2254(d)(1)(2)(e) (Dkt. 19 pp. 3, 6 [Memo of Law]).

Magistrate Peck's Report And Recommendation

88. This Court assigned Magistrate Andrew J. Peck to prepare a report & recommendation. Magistrate Peck held the following, Franza v. Stinson, 58 F.Supp.2d 124, 151-152 (S.D.N.Y. 1999):

> II. THE TRIAL COURT'S DENIAL OF FRANZA'S CPL § 440.10 MOTION IS NOT COGNIZABLE IN A HABEAS PETITION, BUT IN ANY EVENT, THE DENIAL DID NOT VIOLATE FRANZA'S DUE PROCESS OR EQUAL PROTECTION RIGHTS.
>
> A. Procedural Defects in a CPL § 440 Proceeding Are Not Cognizable in Federal Habeas Review.
>
> B. Even if the Court Were to Address Franza's Claim on the Merits, He is Not Entitled to Habeas Relief.
>
> Even if the Court were to address Franza's claim on the merits, the Court would not find the state court's failure

to grant Franza's CPL § 440 motion sufficient to constitute a denial of his constitutional rights.

Petitioner's Objections

89. On June 21, 1999, petitioner filed objection's to Magistrate Peck's report & recommendation. Petitioner claimed, what "Magistrate Peck failed to realize is whether the relevant facts were found by the Trial Court and if the correct legal standard was applied to them by the Trial Court." (28 U.S.C. §2254[d][1][2]). In particular claiming, petitioner's claim is cognizable under 28 U.S.C. §2254(d)(2) (Dkt. 36 pp. 3-5 [Objection's]).

This Court's Decision

90. This Court adopted Magistrate Peck's report & recommendation, substantially for the reason's therein (Dkt. 38 [Decision]). Franza v. Stinson, 58 F.Supp.2d, at 127-129.

Petitioner's CPL §440 Claim And The District Attorney's Concession

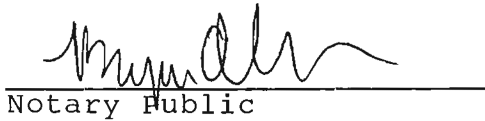
91. It should be noted, petitioner claimed numerous times that, the majority of the exhibits in support of the CPL §440 were the People's discovery materials. However, A.D.A. Sheindlin in opposition stated petitioner's motion was factually inaccurate. Rightly so, A.D.A. Remer-Smith admitted before this Court that, "indeed" petitioner used the People's discovery materials as exhibits (Dkt. 1 p. 32; Writ Ex. "6" p. 46, 48, 53B, 77, 97, 129; Writ Ex. "14"; Dkt. 12 ¶16; Dkt. 13 pp. 5-6; Dkt. 22 ¶5 [Opposition to Discovery Motion]).

Wherefore, petitioner prays that this Court vacate its judgment and render an adjudication on the merits, as this

Court's judgment as it stands is in violation of due process of law due to depriving your petitioner of the opportunity to be heard on the merits as the ground is cognizable for habeas review, which is clearly proven within the memorandum of law simultaneously filed with this motion.

Dominic M. Franza
92A3659

Subscribed to and sworn to before me
this 26 day of December, 2013



Notary Public

BRYAN ALLEN
Notary Public, State of New York
Qualified in Saratoga County
No. 01AL6242096
Commission Expires June 20, 2015

DOMINIC M. FRANZA

Petitioner

-against-

JAMES STINSON

Superintendent

Respondent

MEMORANDUM OF LAW

IN SUPPORT OF

MOTION FOR RELIEF FROM JUDGMENT

PURSUANT TO FED. R. CIV. P. 60(b)(4)

---

98 Civ. 5484

(LAK)(AJP)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------------------------------X

DOMINIC M. FRANZA,

Petitioner,

-against-

JAMES STINSON, Superintendent,

Respondent.

----------------------------------X

Memorandum of Law

98 Civ. 5484

(LAK)(AJP)

PRELIMINARY STATEMENT

Petitioner makes this Memorandum of Law in support of the motion for relief from this Court's June 30th, 1999, judgment (98 Civ. 5484), pursuant to Fed. R. Civ. P. 60(b)(4), as this Court's inadvertent judgment is in violation of Due Process of Law, due to depriving petitioner of the opportunity to be heard on the merits.

A failure to grant this motion would sanction the corrupt conduct of various N.Y.P.D. Detectives and Officers, as well, sanctioning the corrupt conduct of two N.Y. County A.D.A.'s, who all have violated the U.S. Constitution under the 14th Amendment.

On July 20th, 1993, petitioner filed a CPL §440 motion. While petitioner's motion was inexpertly drawn, petitioner charged the prosecutors with the knowing use of false evidence, in violation of a Constitutional right, among other Constitutional violations. Petitioner set forth sworn allegations, supported with evidence which your petitioner claimed came from the

People's discovery material's (Dkt 1 p. 17 [Writ of habeas corpus]; Writ Exhibit "6" pp. 1-2 [CPL §440 motion]).

FACTS AND EVIDENCE BEFORE THIS COURT

Shooting Incident

On defense direct, Mr. Nelson Dacosta (Mrs. Mendez's Son & Mrs. Franza's Brother) denied making a Police report saying someone threatened to kill him and his Family. However, on cross he admitted in making the report. Telling the Police about a threat so a trace would be done, as a man was asking for his wife. That a lady called claiming a misunderstanding because his wife owed $200.00 for Avon products (Dkt 1 p. 10; Writ Ex. "4" pp. 1610-1611, 1617-1621 [Trial transcripts]; Writ Ex. "6" pp. 74-75).

Mr. Dacosta's wife left him before the shooting's of Mrs. Mendez and Mrs. Franza (Writ Ex. "4" [Mrs. Franza]: 386, [Dacosta]: 1609-1610; Writ Ex. "6" p. 75).

On July 16th, 1990, two men, posing as Police officers, went to Mrs. Mendez's apartment looking for Mr. Dacosta. The shorter male being dark skinned, husky, and having a knap sack. In a report it was stated the men said they would be back (Dkt. 1 p. 10; Writ Ex. "4" [Mendez]: 257-265, 275-278, [Franza]: 382-383, [Giorgio]: 660-666, 728-730, [Dacosta]: 1610-1611; Writ Ex. "6" p. 72).

The shooting's of Mrs. Mendez and Mrs. Franza occurred on July 17th, 1990, at 485 West 187st, Apt. 1D, at 7:20 p.m., by a man claiming to have flowers for Mrs. Franza. Not locking the door, Mrs. Mendez went to the rear of the apartment to ask Mrs.

Franza if she wanted the flowers, where she was taking a shower. It was then, at the rear of the apartment, that Mrs. Mendez sustained five (5) gunshot wounds at a distance, and Mrs. Franza sustaining one (1) gunshot wound, by this floral delivery man (Dkt.1 p.11; Writ Ex. "4" [Mendez]: 222-231, 233-234, 248, 265-273, 281-282, 284-285, [Franza]: 313-314, 323-325, 327; Writ Ex. "6" pp. 7, 48, 50, 53-57, 60-61).

After the shooting's Mrs. Franza thereafter claimed, she crawled to the front of the apartment, where she was claimed to have been found bleeding profusely by Police. Mrs. Franza stated she could not stop the blood from coming out of her mouth. She claimed to have written on a wall, and telling the Police petitioner sent the shooter. The paramedics arriving three to five minutes later (Dkt. 1 pp. 12-13; Writ Ex. "4" [Aponte]: 140-151, 158, [Alexander]: 176-180, 188-189, [Franza]: 314-315, [Bourges]: 417-418, 427, [Giorgio]: 562; Writ Ex. "6" pp. 56, 62-65).

Prior to the Police arriving at the shooting scene, a Mr. Benitez observed two men running from 485 West 187st, the smaller male being light black or dark Hispanic, having a canvas bag (Dkt. 1 p. 12; Writ Ex. "4" [Benitez]: 81; Writ Ex. "6" p. 73-74).

At the Hospital Mrs. Franza stated, nine (9) Doctors were trying to bring her Mother back to life. Telling her, "Yes, Mrs. Mendez, come on, you can do it, you can do it" (Dkt. 1 p. 12; Writ Ex. "4" [Franza]: 315-316; Writ Ex. "6" p. 65).

Mrs. Mendez stated, her left hand is not used anymore. That

she can't hold anything anymore (Writ Ex. "4" [Mendez]: 248; Writ Ex. "6" p. 66).

Det. Osbourn, of the crime scene unit, took into evidence two lead bullets, a floral box with a red ribbon, and a floral delivery note. He claimed he gave these items to P.O. Alexander to voucher. Taking twenty photos of the apartment, which revealed the evidence taken. These items were entered into evidence (Dkt. 1 p. 14; Writ Ex. "4" [Alexander]: 180-185, [Osbourn]: 515-525, 532-533; Writ Ex. "6" pp. 5-6).

Det. Osbourn after investigating typed up a report on everything done, revealing the evidence recovered, which his handwritten notes reveal. Also revealing the time he arrived at the shooting scene, 1940 hrs (7:40)(Dkt. 1 p. 15; Writ Ex. "4" [Osbourn]: 529; Writ Ex. "6" pp. 7-8, 46-47).

Both Mrs. Mendez and Mrs. Franza claimed, the crime scene photos shown reflected the state of the apartment the day of the shooting's: Where the lone shooter was standing at the rear of the apartment; where they were shot and fell at the rear of the apartment; where the phone is that Mrs. Franza used to called the Police. Such photos were entered into evidence (Dkt.1 p.12; Writ Ex. "4" [Mendez]: 232-234, [Franza]: 316-325; Writ Ex. "6" pp. 4, 55-56, 61).

P.O. Aponte, P.O. Alexander, Det. Giorgio, and Det. Osbourn claimed, the crime scene photos shown reflected the state of the apartment the day of the shooting's: Where the floral box with the delivery note on top were on a chair; where the lead bullet on the bathroom floor was; where Mrs. Franza was found at the

front of the apartment; where the wall is that Mrs. Franza wrote on; the flowers in the kitchen sink. Such photos were entered into evidence (Dkt. 1 pp. 13-14; Writ Ex. "4" [Aponte]: 153-158, [Alexander]: 177-187, [Osbourn]: 517-525, [Giorgio]: 563-564, 668-669; Writ Ex. "6" pp. 3-5).

Of notable mention, Det. Osbourn stated, when he was shown the crime scene photo of the bullet on the bathroom floor, that the bullet was in that position when he first noticed it (Dkt. 1 p. 14; Writ Ex. "4" [Osbourn]: 524-525; Writ Ex. "6" pp. 4-5).

On August 24th, 1990, Det. Giorgio in his writing provided petitioner with a copy of the alleged floral delivery note left at the scene of the shooting's, by the shooter. Petitioner voluntarily provided Det. Giorgio with Ten (10) handwritten exemplars. Det. Giorgio gave these exemplars to Det. John Breslin (N.Y.P.D. Document examiner) to compare against the original floral delivery note. Det. Breslin stated, petitioner's handwritten exemplars matched the handwriting on the original floral delivery note, thereby connecting petitioner to the shooting incident. The exemplars were entered into evidence (Dkt. 1 p. 15; Writ Ex. "4" [Giorgio]: 580-596, 600, 676-680, 742, [Breslin]: 1197-1211, 1327; Writ Ex. "6" pp. 70-71).

THE PEOPLE'S DISCOVERY MATERIALS REVEALING FALSE EVIDENCE AND FALSE TESTIMONIES

Shooting Incident

As previously mentioned, Mrs. Mendez claimed she sustained five (5) gunshot wounds, and Mrs. Franza claiming she sustained one (1) gunshot wound. Det. Osbourn claimed he only recovered

two bullets, a floral box with a red ribbon, and a floral delivery note, as reflected in the crime scene photos, and in his forensic report & handwritten notes. Petitioner provided the Certified Medical records of Mrs. Mendez and Mrs. Franza, which proved the above were all complete fabrications. It being a physical impossibility for Det. Osbourn to have only recovered two bullets at the shooting scene, and it being a physical impossibility for Det. Osbourn's crime scene photos not to have revealed ballistic damage anywhere (Dkt. 1 p. 19; Writ Ex. "6" pp. 48-50).

Mrs. Mendez's Certified Medical records revealed, she sustained in excess of five (5) gunshot wounds, and that all of her gunshot wounds were through and through. Such being clearly revealed, without the need of a Medical expert to point out, as a simple viewing shows the gunshot wounds to different parts of her body (Dkt. 1 p. 19; Writ Ex. "6" pp. 48-50).

Mrs. Franza's Certified Medical records revealed, she sustained one (1) gunshot wound from a .22 caliber weapon at close range, and that such gunshot wound was through and through (Dkt. 1 p. 19; Writ Ex. "6" pp. 49-50).

Petitioner further proved through Mrs. Mendez's Medical records that, she had carbon particles surrounding her left hand. Such proving she was shot at an extreme close range, not at a distance as she stated (Dkt. 1 p. 20; Writ Ex. "6" pp. 54, 60).

Petitioner further proved through Mrs. Mendez's Medical records that, Mrs. Mendez had a 98% survival rate, and being

fully awake and responsive upon arrival at the Hospital. Not being brought back to life by nine (9) Doctors as stated by Mrs. Franza (Dkt. 1 p. 25; Writ Ex. "6" pp. 65-66).

Petitioner further proved through Mrs. Mendez's Medical records that, Mrs. Mendez threatened to kill herself two times if she was not allowed to call her Husband. Threatening to choke herself if anyone came near her. Being placed on two point restraints due to pulling out her I.V. lines (Writ Ex. "6" pp. 65-66).

Petitioner further proved through Mrs. Mendez's Medical records that: she sustained no gross motor or sensory loss; her lungs being clear; having no respiratory distress; having a low risk of cardiac arrest, and; moving all extremities well (Writ Ex. "6" p. 66).

As previously mentioned, Mrs. Mendez and Mrs. Franza claimed, there was only one shooter, and that the shooting's occurred at the rear of the apartment. Petitioner provided numerous documents which proved there were two (2) men in the apartment, and that the shooting of Mrs. Mendez occurred at the front of the apartment, not the rear of the apartment. Such proving the shooting scenario was a complete fabrication (Dkt. 1. pp. 23-24; Writ Ex. "6" pp. 53-57).

The Federal search warrant and Arrest warrant affidavits proved, Mrs. Mendez was shot when she opened the door (Dkt. 1 p. 24; Writ Ex. "6" pp. 59-60).

The Crime Victim Board application of Mrs. Franza proved, by Mrs. Franza's own words, that two (2) men pushed her Mother into

the apartment and shot her. That she was shot when she came to the rescue (Dkt. 1 p. 24; Writ Ex. "6" p. 58).

A Puerto Rico P.D. report proved, Mrs. Mendez was shot when she opened the door. Such information coming from Mrs. Mendez's Sister (Dkt. 1 p. 24; Writ Ex. "6" p. 60).

N.Y.P.D. reports proved, two (2) men were in the apartment. Information in one report coming from Mr. Nelson Dacosta, Mrs. Mendez's Son (Dkt. 1 p. 24; Writ Ex. "6" pp. 57-58).

A District Attorney Data sheet proved, Mrs. Mendez was shot when she opened the door (Dkt. 1 p. 24; Writ Ex. "6" pp. 58-59).

A.D.A. Brancato, in opening, stated Mrs. Franza was at the rear of the apartment when the Police arrived (Dkt. 1 p. 24; Writ Ex. "6" p. 126).

As previously mentioned, P.O. Aponte, P.O. Alexander, Det. Osbourn, Mrs. Mendez, and Mrs. Franza, all claimed the crime scene photos shown fairly and accurately depicted the apartment the day of the shooting's. Petitioner provided all the crime scene photos proving, they contained physical impossibilities within themselves (Dkt. 1 pp. 17-23; Writ Ex. "6" pp. 9-17, 23, 28-29, 39, 42-44, 48, 50-53, 53A, 62-65).

Petitioner provided a copy of a Certified document from the Naval Observatory, from the Chief Astronomer, that proved Sunset on July 17th of 1990 (day of shooting) was at 8:24 p.m. (Dkt. 1 p. 17-18; Writ Ex. "6" p. 9).

Petitioner further provided copies of Certified Weather reports proving, there were no weather conditions obstructing

natural light at Sunset (Dkt. 1 p. 18; Writ Ex. "6" pp. 9-13).

Petitioner further provided a copy of the Audubon Society Field Guide to North American Weather that proved, in July the Earth's tilt toward the Sun prolongs twilight (Dkt. 1 p. 18; Writ Ex. "6"pp. 14-16).

Petitioner claimed for the reasons above, there should have been natural light outside at Sunset (Dkt. 1 p. 18; Writ Ex. "6" p. 16).

Petitioner proved, crime scene photo 13, with a small blow up, reveals the time on the clock to be 8:14. However, photos 12, 9, 7, 4, taken earlier than photo 13, reveal it to be nighttime outside. A physical impossibility (Dkt. 1 p. 18; Writ Ex. "6" pp. 7-8, 16-17).

Petitioner proved, through photo 9, the camera was working fine, as it barely picked up a man in the street. Asserting had there been natural light outside it would have registered (Dkt. 1 pp. 18-19; Writ Ex. "6" pp. 23, 28-29, 39, 42-44).

Petitioner further proved, two photos revealing the same area of a wall each revealing a different porcelain picture. The frames being different from one another, as well a figurine in one photo not appearing in the other (Dkt. 1 p. 20; Writ Ex. "6" p. 53).

Petitioner further proved, in one photo there is a blood stain on a rag on the floor in the shape of an "S". However, in another photo the "S" shape is gone (Dkt. 1 p. 21; Writ Ex. "6" p. 51).

Petitioner further proved, in one photo there are two black

objects and one silver object on the table. However, in another photo one black object is missing (Dkt. 1 p. 21; Writ Ex. "6" p. 50-51).

Petitioner further proved, in one photo there being a lamp and table inches away from a wall. However, in another photo the lamp and table are gone (Dkt. 1 p. 21; Writ Ex. "6" p. 52).

Petitioner further proved, in one photo there is a black box under a table. However, in another photo the black box is missing (Dkt. 1 p. 21; Writ Ex. "6" p.p. 51-52).

Petitioner further proved, in one photo there being a large white object draped over a chair. However, in another photo the white object is missing (Dkt. 1 p. 21; Writ Ex. "6" p. 52).

Petitioner further proved, in one photo there being blood on the wall, with pencil writing, which Mrs. Franza was claimed to have written at the front of the apartment. However, in another photo the pencil writing is gone (Dkt. 1 p. 22; Writ Ex. "6" p. 52-53).

Petitioner further proved, in one photo there being a box of flowers on a chair, with a note on top. However, in another photo the note is missing on the box (Dkt. 1 p. 22; Writ Ex. "6" p. 53A).

Petitioner further proved, there is a small white object right center of the rug in the bathroom. However, in another photo the white object is missing (Dkt. 1 p. 22; Writ Ex. "6" p. 53A).

Petitioner further proved, the last photo taken revealing one bullet on the bathroom floor. However, in other earlier photos

the bullet is gone, when Det. Osbourn stated the bullet was in that position when he first noticed it (Dkt. 1 p. 22; Writ Ex. "6" p. 48).

Petitioner further proved, in one photo there being a chair with a floral box on top. Such butted tight against the stereo cabinet, with a blue shirt draped over the back rest of the chair, covering the side of the stereo cabinet. However, in another photo the side of the stereo cabinet can be seen (Dkt. 1 p. 22; Writ Ex. "6" p. 51).

Petitioner further proved, the photos reflect no damage to the bathroom door or blood as the bullets passed through Mrs. Mendez, where she claimed to have been shot (Dkt. 1 p. 22; Writ Ex. "6" p. 50).

Petitioner further proved, the photos reveal no extreme amounts of blood at the front of the apartment, just very small patches of blood where Mrs. Franza was allegedly found bleeding profusely at the location for five (5) minutes (Dkt. 1 p. 23; Writ Ex. "6" pp. 62-65).

Petitioner further proved, the photos reveal there are no drops of blood on the gold rug from the rear of the apartment to the front of the apartment, which Mrs. Franza would of had to of crawled across to get to the front of the apartment, where she was claimed to have been found bleeding profusely (Dkt. 1 p. 23; Writ Ex. "6" pp. 62-63).

Petitioner further proved, the photos reveal there are no foot prints in the blood where Mrs. Mendez was claimed to have been shot. Such being a physical impossibility as E.M.S. would

of had to of stepped in the blood in order to assist her (Dkt. 1 p. 23; Writ Ex. "6" p. 64).

Puerto Rico Incident

Mrs. Franza, in November of 1989, went to Puerto Rico for her Brother's funeral. She claimed she gave petitioner her Grandmother's address 2629 Paseo Aguilla, Levittown, Catano, Puerto Rico, and her phone number in case petitioner needed to get a hold of her. As well, giving petitioner the phone number of her Aunt in Puerto Rico (Dkt. 1 pp. 25-26; Writ Ex. "6" p. 89).

Mrs. Franza's Grandmother was claimed to have lived with Miss Lamboy, Mrs. Mendez's Sister, at 2629 Paseo Aguilla, telephone number 1-809-784-1630. Miss Lamboy stated her Mother's name was Rosa Matos. Mrs. Mendez stated her Mother's name was Rosa Lamboy. Mrs. Franza stated her Grandmother's name was Rosa Lamboy Roman (Dkt. 1 p. 26; Writ Ex. "4" [Mendez]: 244-246, [Franza]: 310, [Lamboy]: 754-758; Writ Ex. "6" pp. 83-84, 88, 92-93).

Miss Lamboy stated, her Mother lived with her all of her life. Her Mother passing away in November of 1990 (Writ Ex. "4" [Lamboy]: 757; Writ Ex. "6" p. 83).

On February 5th, 1991, Miss Lamboy received a notification slip from Federal Express, which was on her gate. Such having her name, address, and phone number (Dkt. 1 p. 26; Writ Ex. "4" [Lamboy]: 759; Writ Ex. "6" p. 83).

Miss Lamboy made arrangements with Federal Express to receive the package through her neighbor. When Miss Lamboy received the

package from her neighbor, she slightly opened the package and observed instruments of a pipe bomb. The Police arriving twenty five minutes later, disarming the device. The notification slip was entered into evidence (Dkt. 1 pp. 26-27; Writ Ex. "4" [Lamboy]: 758-761, 767-770, [Agent Garcia]: 1063-1102; Writ Ex. "6" pp. 79-80, 83-85).

Special Agent Chris Behan (A.T.F.) learned on February 11th, 1991, a pipe bomb was sent via Federal Express to the Roman Family. He recognized the Federal Express Airways Bill shown to him. Receiving such from Thomas Sullivan of Federal Express. This document was entered into evidence (Dkt. 1 p. 27; Writ Ex. "4" [Behan]: 840-841, 856-858; Writ Ex. "6" p. 78).

S.A. Behan also recognized an American Express money order shown to him. Such was entered into evidence (Dkt. 1 p. 28; Writ Ex. "4" [Behan]: 884-886; Writ Ex. "6" 98).

Mr. Thomas Sullivan, of Federal Express, was shown the Package Tracking Inquiry for the Federal Express Airways Bill. He stated such reveals where the package has been, etc. Such document was never entered into evidence. He also stated the Airways Bill contained the number of an American Express money order (Dkt. 1 p. 28; Writ Ex. "4" [Sullivan]: 1105-1111; Writ Ex. "6" pp. 78-79).

In October of 1991, Det. Breslin, having over a hundred pages of petitioner's handwriting, could not connect petitioner to the Federal Express Airways Bill and the American Express money order (Dkt. 1 p. 28; Writ Ex. "4" [Breslin]: 1328-1337, 1345-1355, 1421; Writ Ex. "6" p. 96).

Det. Giorgio requested Det. Breslin to compare petitioner's new exemplars against the Federal Express Airways Bill, and the American Express money order. Det. Breslin thereafter concluded petitioner's exemplars matched such documents (Dkt. 1 p. 28; Writ Ex. "4" [Giorgio]: 615-619, [Breslin]: 1211-1236; Writ Ex. "6" pp. 96-99).

THE PEOPLE'S DISCOVERY MATERIALS REVEALING FALSE EVIDENCE AND FALSE TESTIMONIES

As previously mentioned, Mrs. Franza stated she gave petitioner her Grandmother's address and phone number, in case petitioner needed to contact her in Puerto Rico. Petitioner provided various documents which proved the documents used in connection with the shipment (Federal Express Airways Bill & American Express money order) were tampered with in order to connect petitioner to the shipment (Dkt. 1 p. 29; Writ Ex. "6" pp. 80-82, 86, 91, 93-94).

Petitioner proved a Puerto Rico P.D. Sergeant from the station informed the press that, the package had the name of Miss Lamboy, and was addressed to 2615 Paseo Aguilla where the Pantoja Family reside (Dkt. 1 p. 29; Writ Ex. "6" pp. 80).

Petitioner proved through a Puerto Rico P.D. report that, Miss Lamboy called Mr. Pantoja and asked him to come over (Dkt. 1 p. 29; Writ Ex. "6" p. 81).

Petitioner proved through another Puerto Rico P.D. report that, Mrs. Pantoja was asked to abandon her residence for her safety (Dkt. 1 p. 29; Writ Ex. "6" p. 81).

Petitioner proved through the Package Tracking Inquiry that, the package had an incorrect recipient address, when the package

was claimed to have gone to the right address from inception (Dkt. 1 p. 29; Writ Ex. "6" pp. 78-79, 82, 93-94)

Petitioner proved Miss Lamboy told the press that, she does not know the origin of the Roman Family. Also stating, she has lived alone for years at 2629 Paseo Aguilla. The article further stated, they believed there was something wrong with the shipment (Writ Ex. "6" p. 82).

Case In Chief

After the People rested, A.D.A. Brancato conceded their case in chief revolved around handwriting, and handwriting being used to identify the perpetrator (Dkt. 1 p. 16; Writ Ex. "4" [Court & A.D.A. Brancato]: 1507-1508).

Closing Argument

A.D.A. Brancato outlined the evidence and testimonies revolving around the shooting incident and the Puerto Rico incident (Dkt. 1 p. 16; Writ Ex. "4" [Brancato]: 1819-1820, 1828-1829, 1845, 1848-1864, 1866-1867, 1870, 1875-1879, 1884, 1890-1891, 1903-1904).

Jury's Sole Request For A Testimonial Read Back

The jury's sole request for a read back, requested Det. Breslin's analysis concluding petitioner's handwriting matched the handwriting on the floral delivery note. Thereafter rendering verdicts of guilty (Dkt. 1 p. 16; Writ Ex. "4" [Jury]: 1967-1971, 1973-1974, 1991-2001).

Opposition To CPL §440 Motion

A.D.A. Gregory Sheindlin in opposition for the People stated, petitioner's motion was confusing, factually inaccurate and

without merit (Dkt. 1 p. 32; Writ Ex. "14" [Opposition]).

Court's Decision

Justice Bookson held, petitioner's motion was "largely based on unsubstantiated charges." Petitioner's assertions being "self serving," "wishful thinking," and "without merit." That the evidence was "overwhelming," and the prosecution and counsel doing exemplary work (Dkt. 1 p. 34; Writ Ex. "18" [Decision]).

Petitioner's Appellate Brief

With respect to the CPL §440 denial, petitioner made a two point single argument (Dkt. 1 p. 34; Writ Ex. "2" [Appellate Brief]).

The first point:

> The Trial Court's order summarily denying appellant's C.P.L. §440 Subd. [1] post conviction motion pursuant to C.P.L. §440.10 2 [B] upholding the presumption of regularity and indictment, when sufficient facts do not appear in the record, sufficient facts and documentary evidence not being shown to be insufficient as a matter of law, not being in dispute that appellant has been denied due process of the law (N.Y. Const. Art. 1§6; U.S. Const. Art 7, 14th Amendment); the right against unreasonable searches and seizures (N.Y. Const. Art. 1§12; U.S. Const. Art. 7, 4th Amendment); receiving ineffective assistance of counsel (N.Y. Const. Art. 1§6; U.S. Const. Art. 7, 6th Amendment), in that the prosecutors knowingly presented false evidence and testimony at the Grand Jury, Pretrial, and trial as well Rosario and Brady violations, defense counsel with knowledge, constitutes a denial of due process of law within the meaning of Article 1, Section 6 of the State Constitution, and Article 7, 14th Amendment, Section 1, of the Federal Constitution,....

The second point:

> [A]s well, constituting a denial of equal protection of the law within the meaning of C.P.L. §440.30. Subd. 3 [A, B, C], Article 1, Section 11 of the State Constitution, and Article 7, 14th Amendment, Section 1, of the Federal Constitution.

The appellate court affirmed the denial of the CPL §440 motion on the merits, and also denied the filing of the CPL §440 motion exhibits, People v. Franza, 239 A.D.2d 201 (1st Dept. 1997)(Dkt. 1 p. 38).

The N.Y. Court of Appeals did not allow entry, People v. Franza, 90 N.Y.2d 904 (1997)(Dkt. 1 p. 39).

Federal Habeas Corpus Petition

On July 31st, 1998, petitioner filed for 28 U.S.C. §2254 relief. Petitioner claimed "The Trial Court's denial of petitioner's CPL §440 post conviction motion constituted a denial of due process of law and equal protection of the law," based upon the facts and evidence before the trial court and appellate court as cited, supported by a host of exhibits before the trial court (Dkt. 1 pp. 5, 9-39, Ex's 1-26).

Memorandum Of Law In Support

In support of the habeas petition petitioner filed a memorandum of law. Petitioner made the following argument (Dkt. 2 p. 73 [Memo of Law]):

> The Trial Court's denial of petitioner's CPL §440.10 Post Conviction motion constituted a denial of due process of law and equal protection of the law. U.S. Const. Art. 7, 14 Amendment, Section 1.

Petitioner claimed the trial court's factual finding was not supported by the record. Also that, the District Attorney's

office violated the cardinal standard principles under United States v. Agurs, 427 U.S. 97, 103 (1976) and Giglio v. United States, 405 U.S. 150, 153-154 (1972), prohibiting a conviction to stand based upon the knowing use of false evidence and testimonies (Dkt. 2 pp. 73-86).

Additional Memorandum Of Law In Support

On November 17th, 1998, petitioner filed another memorandum of law in support, raising a Miller v. Pate, 386 U.S. 1 (1967) Constitutional violation (Dkt. 11 [Memo of Law]).

District Attorney's Answer Affirmation

The District Attorney's office filed an answer against petitioner's habeas petition (Dkt. 12 [Answer Affirmation]).

Memorandum Of Law In Support

The District Attorney's office stated in the memorandum of law in support that, "the trial court's summary denial of petitioner's post conviction motion to vacate judgment was entirely proper" (Dkt. 13 p. 4 [Memo of Law]).

Claiming state procedures in deciding collateral post conviction motions may not be the basis for habeas review. Also that, petitioner has failed to demonstrate anything meriting relief under 28 U.S.C. §2254(d) (Dkt. 13 pp. 8-17).

Petitioner's Traverse

In response to the District Attorney's answer petitioner filed a traverse (Dkt. 16 [Traverse]).

Memorandum Of Law In Support

In support of the traverse petitioner filed a memorandum of law in support. Petitioner claimed this Court can grant the

habeas petition under 28 U.S.C. §2254(d)(1)(2)(e) (Dkt. 19 pp. 3, 6 [Memo of Law]).

Magistrate Peck's Report And Recommendation

This Court assigned Magistrate Andrew J. Peck to prepare a report & recommendation. Magistrate Peck held the following, Franza v. Stinson, 58 F.Supp.2d 124, 151-152 (S.D.N.Y. 1999):

> II. THE TRIAL COURT'S DENIAL OF FRANZA'S CPL § 440.10 MOTION IS NOT COGNIZABLE IN A HABEAS PETITION, BUT IN ANY EVENT, THE DENIAL DID NOT VIOLATE FRANZA'S DUE PROCESS OR EQUAL PROTECTION RIGHTS.
>
> A. Procedural Defects in a CPL § 440 Proceeding Are Not Cognizable in Federal Habeas Review.
>
> B. Even if the Court Were to Address Franza's Claim on the Merits, He is Not Entitled to Habeas Relief.
>
> Even if the Court were to address Franza's claim on the merits, the Court would not find the state court's failure to grant Franza's CPL § 440.10 motion sufficient to constitute a denial of his constitutional rights.

Petitioner's Objections

On June 21, 1999, petitioner filed objection's to Magistrate Peck's report & recommendation. Petitioner claimed, what "Magistrate Peck failed to realize is whether the relevant facts were found by the Trial Court and if the correct legal standard was applied to them by the Trial Court." (28 U.S.C. §2254[d][1][2]). In particular claiming, petitioner's claim is cognizable under 28 U.S.C. §2254(d)(2) (Dkt. 36 pp. 3-5 [Objection's]).

This Court's Decision

This Court adopted Magistrate Peck's report & recommendation, substantially for the reason's therein (Dkt. 38 [Decision]). Franza v. Stinson, 58 F.Supp.2d, at 127-129.

Petitioner's CPL §440 Claim And The District Attorney's Concession

It should be noted, petitioner claimed numerous times that, the majority of the exhibits in support of the CPL §440 were the People's discovery materials. However, A.D.A. Sheindlin in opposition stated petitioner's motion was factually inaccurate. Rightly so, A.D.A. Remer-Smith admitted before this Court that, "indeed" petitioner used the People's discovery materials as exhibits (Dkt. 1 p. 32; Writ Ex. "6" p. 46, 48, 53B, 77, 97, 129; Writ Ex. "14"; Dkt. 12 ¶16; Dkt. 13 pp. 5-6; Dkt. 22 ¶5 [Opposition to Discovery Motion]).

ARGUMENT

THIS COURT'S JUDGMENT IS IN VIOLATION OF DUE PROCESS OF LAW AS THIS COURT HAS INADVERTENTLY DEPRIVED PETITIONER OF THE OPPORTUNITY TO BE HEARD ON THE MERITS ON A COGNIZABLE HABEAS CORPUS GROUND ACCORDING TO THE CONGRESSIONAL INTENT OF 28 U.S.C. §2254(a)(d)(1)(2)(e)(1) AND UNITED STATES SUPREME COURT RULINGS.

It is beyond question, "[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended ***,"" U.S. Const. Art. I, § 9, cl. 2. Harris v. Nelson, 394 U.S. 286, 290 (1969).

As well it is well established, "[t]here is no higher duty of a court, under our constitutional system, than the careful

processing and adjudication of petitions for Writs of habeas corpus, for it is in such proceedings that a person in custody charges error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." id, at 292.

As evidenced below, this Court "must" vacate its judgment to fulfil its duty, as this Court has, inadvertently, failed to carefully process and adjudicate petitioner's cognizable ground on the merits, thereby violating the Congressional intent of 28 U.S.C. §2254(a)(d)(1)(2)(e)(1), process due. Thus, denying petitioner of the opportunity to have the merits fairly judged under Due Process of Law.

> The state prisoner had before a federal court an application for habeas relief seeking an adjudication on the merits of the petitioner's claims,.... Woodford v. Garceau, 538 U.S. 202, 206 (2003).

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982).

A. Congressional Intent Of 28 U.S.C. §2254(a)(d)(1)(2)(e)(1)

1. The Habeas Jurisdictional Statue 28 U.S.C. §2254(a)

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Thus, the Congressional intent of 28 U.S.C. §2254(a) "unambiguously provides that a federal court may issue a writ of

habeas corpus to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States.'" Swarthout v. Cooke, ___ U.S. ___, (2011), 131 S.Ct. 859, 861.

2. **The Habeas Standard Of Review 28 U.S.C. §2254(d)(1)(2)**

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeeing.

Thus, the Congressional intent of 28 U.S.C. §2254(d)(1)(2) "bars relitigation of any claim "adjudicated on the merits" in state court, subject only to the exceptions in §2254 (d)(1) and (d)(2)."... "The statue refers only to a "decision," which resulted from an adjudication." Harrington v. Richter, ___ U.S. ___, (2011), 131 S.Ct. 770, 784.

> As we have explained before, §2254(d) places "new constraint[s] on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Id., at 412, 120 S.Ct. 1495. Our cases make clear that AEDPA in general and §2254(d) in particular focus in large measure on revising the standards used for evaluating the merits of a habeas

> application. See id., at 412-413, 120 S.Ct. 1495; Lindh, supra, at 329, 117 S.Ct. 2059 (noting that "amended §2254(d) ... governs standards affecting entitlement to relief"); see also Early v. Packer, 537 U.S. 3, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002)(per curiam)(applying AEDPA's standards); Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct 357, 154 L.Ed.2d 279 (2002)(percuriam)(same). Woodford v. Garceau, 538 U.S., at 202.

In setting preconditions on the power of a Federal habeas court to grant a State prisoner's application for a writ of habeas corpus, Congress expressed no intention to allow trial court collateral post conviction procedural error to bar vindication of substantial Constitutional rights on habeas review under 28 U.S.C. §2254(d)(1)(2). This was an intentional act by Congress, evidenced by the inclusion of a collateral post conviction ground which was held not cognizable for habeas review under 28 U.S.C. §2254(i):

> (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Thus, it must be presumed a State court collateral post conviction procedural error does not bar vindication of substantial Constitutional rights on habeas review:

> "[W]here Congress includes particular language in one section of a statue but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russelo v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)(internal quotation marks omitted). Dean v. United States, 556 U.S. 568, 573 (2009).

It should be noted, the U.S. Supreme Court in Slack v. McDaniel, 529 U.S. 473, 483 (2000), pertaining to 28 U.S.C. §2253(c), did more than presume it said so:

> The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under §2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.

Further proof, it is Congress's intent not to allow a State court procedural error to bar vindication of substantial Constitutional rights on habeas corpus review, is as follows.

Prior to the enactment of AEDPA Fay v. Noia, 372 U.S. 391, 426-427 (1963) held, allegations of unconstitutional restraint, conferring Federal court jurisdiction (28 U.S.C. §2254(a)) are not defeated by anything that may occur in State court proceedings. That State court procedural rules must give way to overriding Federal policy:

> [W]e have consistently held that federal court jurisdiction is conferred by the allegations of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceeding. State procedural rules plainly must yield to this overriding federal policy.

Since the ruling above was made prior to AEDPA's implementation, the Congressional enactment of AEDPA governing habeas corpus proceedings neither cites to the ruling above, nor does the language of the Congressional enactment make any effort to affect this ruling. It is well established, "Congress is presumed to be aware of an administrative or judicial

interpretation of a statue and to adopt that interpretation when it re-enacts a statue without change." Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). Forest Grove School Dist. v. T.A., 557 U.S. 230 (2009), 129 S.Ct. 2482, 2492.

Thus, the adoption of Fay v. Noia is indicative that Congress's intent has been correctly ascertained by the U.S. Supreme Court. Under this circumstance, it is more than presumed that Congress expects its habeas corpus statues to be read in conformity with Fay v. Noia. Porter v. Nussle, 534 U.S. 516, 528 (2002):

> This Court "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents."

As a result, 28 U.S.C. §2254(a)(d)(1)(2)(e)(1) encompasses Fay v. Noia as a governing rule of law, sanctioned by Congress.

As the U.S. Supreme Court has spoken, as to what 28 U.S.C. §2254(a) means as adopted, it is the duty of this Court to respect the understanding of this governing rule of law. Rivers v. Roadway Express, Inc, 511 U.S. 298, 312 (1994):

> "It is this Court's responsibility to say what a statue means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.

In light of all the above, "absent a constitutional barrier, it is not for [this Court] to substitute [its] view of ... policy for the legislation which has been passed by Congress." 14 Penn Plaza, LLC v. Pyett, 556 U.S. 247, 270 (2009).

In sum, as Congress did not comment on or make any changes to blunt the effect of Fay v. Noia, it must be construed that

Congress intended to incorporate Fay v. Noia - that State procedural error does not bar vindication of substantial Constitutional rights on habeas review.

Clearly, the principle and policy above apply to habeas review of denials of post conviction motions. Knowles v. Mirzayance, 556 U.S. 111, 114 (2009)(Denial of post conviction motion reviewed under 28 U.S.C. §2254(d)(1)); Woods v. Allen, 558 U.S. 290, 130 S.Ct. 841, 845 (2010)(Denial of post conviction motion reviewed under 28 U.S.C. §2254(d)(2).

Thus, the Congressional intent of 28 U.S.C. §2254(d)(1)(2) encompasses Fay v. Noia as a governing rule on habeas review. That it is the allegation of an unconstitutional restraint which warrants a review on the merits under the standards of 28 U.S.C. §2254(d)(1)(2) and, that State procedural rules must yield to this overriding Federal Policy, evidenced by 28 U.S.C. §2254(d) itself, as it is the merits that must be reviewed under the standards of (d)(1) and (d)(2) which scrutinize a State court decision on the law as determined by the U.S. Supreme Court, and the facts found.

3. The Habeas Standard Of Review 28 U.S.C. §2254(e)(1)

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Thus, the Congressional intent of 28 U.S.C. §2254(e)(1) is

that, a "factual determination by a State court [is] presumed correct absent clear and convincing evidence to the contrary," ..., that a "factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court, §2254(d)(2)." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003):

> Where 28 U.S.C. 2254 applies our habeas jurisprudence embodies this deference. Factual determinations by State courts are presumed correct absent clear and convincing evidence to the contrary, §2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, §2254(d)(2); see also William, 529 U.S., at 399, 120 S.Ct. 1495 (opinion of O'CONNOR, J.).

B. This Court's Inadvertent Judgment Is In Violation Of Due Process Of Law Due To Depriving Petitioner Of The Opportunity To Be Heard On The Merits On A Cognizable Ground For Relief

1. Petitioner's Cognizable Habeas Corpus Ground For Relief

It is beyond question, petitioner claimed the prosecutors knowingly presented false evidence and false testimonies within the CPL §440 motion, fully supported by numerous discovery materials from the prosecutors. This was clearly a U.S. v. Agurs, 427 U.S. 97, 103 (1976); Giglio v. U.S., 405 U.S. 150, 153-154 (1972); Miller v. Pate, 386 U.S. 1, 2-7 (1967); Napue v. Illinois, 360 U.S. 264, 269-270 (1959) Constitutional violation, entitling petitioner to a reversal of the conviction (Dkt. 1 pp. 10-30; Affidavit ¶'s 2-71; pp. 1-15 herein).

In light of A.D.A. Sheindlin's baseless opposition, evidenced by A.D.A. Remer-Smith's concession, the trial court found

petitioner's motion was "largely based on unsubstantiated charges," being "self-serving," "wishful thinking," and the evidence being "overwhelming" (Dkt. 1 pp. 32, 34; Writ Ex.'s "14" & "18"; Dkt. 12 ¶16; Dkt. 13 pp. 5-6; Dkt. 22 ¶5; Affidavit ¶'s 72-73, 91; pp. 15-16, 20 herein).

On direct appeal petitioner argued the trial court's denial of CPL §440 relief denied petitioner of Due Process of Law in that, the prosecutors knowingly presented false evidence and false testimonies at trial (Dkt. 1 p. 34; Writ Ex. "2" p. 38; Affidavit ¶'s 74-75; p. 16 herein).

As well, petitioner argued such conduct above also constituted a denial of Equal Protection of the Law within the meaning of CPL §440.30(3)(a)(b)(c) (Dkt. 1. p. 34; Writ Ex. "2" p. 38;; Affidavit ¶'s 76; p. 17 herein).

In spite of the showing the appellate court affirmed the denial on the merits, and denied the filing of the CPL §440 motion exhibits. The court of appeals denying entry (Dkt. 1 pp. 38-39; Affidavit ¶'s 77-78; p. 17 herein).

Based upon the same facts and evidence presented to the trial court, petitioner claimed before this Court that, the trial court's denial constituted a denial of Due Process of Law and Equal Protection of the Law (Dkt. 1 pp. 5, 9-39; Writ Ex.'s "1"-"26"; Affidavit ¶79; p. 17 herein).

Within the two memorandum of laws in support, petitioner claimed the trial court's factual finding was not supported by the record. Also that, the prosecutors violated the cardinal principles under U.S. v. Agurs, Giglio v. U.S., Miller v. Pate,

by presenting false evidence and false testimonies at trial (Dkt. 2 pp. 73-86; Dkt. 11; Affidavit ¶'s 80-81; pp. 17-18 herein).

Petitioner in the memorandum of law in support of the traverse claimed, this Court can grant the habeas petition under 28 U.S.C. §2254(d)(1)(2) (Dkt. 19 pp. 3, 6; Affidavit ¶87; p. 18 herein).

Magistrate Peck, in light of the above, held the trial court's denial of the CPL §440 was not cognizable for habeas relief. That "Procedural Defects in a CPL § 440 Proceeding Are Not Cognizable in Federal Habeas Review." Failing to address the merits as a result, "Even if the Court Were to Address Franza's Claim on the Merits. He is Not Entitled to Habeas Relief" (Affidavit ¶88; p. 19 herein; Franza v. Stinson, 58 F.Supp.2d, at 151-152; Bell v. Miller, 500 F.3d 149 (2nd Cir. 2007)(Contrary to fact construction).

Petitioner objected, and claimed what "Magistrate Peck failed to realize is whether the relevant facts were found by the trial court and if the correct legal standard was applied to them by the trial court" (Dkt. 36 pp. 3-5; Affidavit ¶89; p. 19 herein).

In light of all the foregoing, this Court adopted Magistrate Pecks report & recommendation, substantially for the reason's therein (Dkt. 38; Franza v. Stinson, 58 F. Supp.2d, at 127-129; Affidavit ¶90; pp. 20 herein).

2. **This Court Inadvertently Violated Due Process Of Law By Denying Petitioner Of The Opportunity To Be Heard On The Merits On A Cognizable Ground For Habeas Relief**

It is beyond question, petitioner sought habeas corpus review

under the standards of 28 U.S.C. §2254(d)(1)(2)(e)(1).

This Court's inadvertent adoption of Magistrate Peck's incorrect holding, as the trial court's procedural error did not bar vindication of petitioner's U.S. v. Agurs, Giglio v. U.S., Miller v. Pate, Napue v. Illinois Constitutional rights, deprived petitioner of the opportunity to be heard on the merits, as the sole question before this Court was whether petitioner's Constitutional rights have been preserved. It is evident the trial court and appellate court did not preserve petitioner's Constitutional rights.

> We have stated expressly that on habeas review "What we have to deal with is not the petitioner's innocence or guilt but solely the question whether their constitutional rights have been preserved." Moore v. Dempsey, 261 U.S. 86, 87-88 (1923).

Petitioner now ask this Court to vacate its judgment, which is in violation of Congress's intent, and fulfil its duty by reaching the merits of petitioner's U.S. v. Agurs, Giglio v. U.S., Miller v. Pate, and Napue v. Illinois Constitutional claim under the standards of review under 28 U.S.C. §2254(d)(1)(2)(e)(1), which petitioner was entitled too in 1999, as it is evident the State courts did not preserve petitioner's Constitutional rights.

> There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief. Stewart v. Martinez-Villareal, 523 U.S. 637, 643-644 (1998).

C. Habeas Corpus Rule 12 Renders A Reasonable Time Assessment Inapplicable

It is established, "[f]ederal habeas corpus, though a civil remedy, is different from general litigation." Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 269 (1978).

Thus, "the Rules of Civil Procedure are not automatically applicable to habeas proceedings." Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971). "Nor may a court ignore statutes, rules, and [United States Supreme Court] precedents specific to habeas corpus in favor of general equitable principles." Calderon v. Thompson, 523 U.S. 538, 554 (1998); Lonchar v. Thomas, 517 U.S. 314, 323 (1996).

As it is "presume[d] that Congress expects its statutes to be read in conformity with [United States Supreme Court] precedents," Clay v. United States, 537 U.S. 522, 527 (2004), thus statutory interpretation of habeas is informed "by general principles underlying [United States Supreme Court] habeas corpus jurisprudence." Calderon, 523 U.S., at 554.

Therefore, once the United States Supreme Court has spoken, as to what a statue means, it is the duty of other courts to respect that understanding of the governing rule of law. Rivers v. Roadway Express, Inc., 511 U.S., at 312.

Under Rule 12 of the Rules Governing Section 2254 cases Congress held, "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under

these rules." See, Gonzalez v. Crosby, 545 U.S. 524, 529 (2005). With this in mind it will be evident "reasonable time" assessments have no application to petitioner's circumstances.

It is beyond question, "AEDPA allows every prisoner one full opportunity to seek collateral review." Littlejohn v. Artuz, 271 F.3d 360, 363 (2nd Cir. 2001); 28 U.S.C. §2254(a); See, Stewart v. Martinez-Villareal, 523 U.S., at 643-644):

> There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

Clearly, "[t]he general concern that civil plaintiffs have an opportunity for a full adjudication of their claims is particularly heightened in the AEDPA context, where the gatekeeping provisions of the statue stringently limit a petitioner's ability to raise further issues in a subsequent action." Ching v. United States, 298 F.3d 174, 177 (2nd Cir. 2002); 28 U.S.C. §2244(a)(b)(1)(2)(A)(B)(i)(ii)(3)(A)(B)(C)(D).

Thus, it is paramount that every prisoner receive one full adjudication on habeas corpus review based upon cognizable claims, as "[f]inality is essential to both the retributive and the deterrent functions of criminal law." This is so as, "[n]either innocence nor just punishment can be vindicated until the final judgment is known." Calderon v. Thompson, 523 U.S., at 555.

As Stewart v. Martinez-Villareal is a governing rule of law under 28 U.S.C. §2254(a), the application of the "reasonable

time" assessment under Rule 60(b) would create an inconsistency with the habeas statue, rules and United States Supreme Court precedents.

It would be implausible that 28 U.S.C. §2254(a) and Stewart v. Martinez-Villareal - which take pains to ensure that every prisoner receive one full opportunity to seek habeas relief - is to be ignored in favor of an inconsistent framework, which would violate the suspension clause of the Writ of Habeas Corpus, and the Due Process Clause, a result that must not occur under the Doctrine of Constitutional avoidance:

> [W]hen a statue is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. Harris v. United States, 536 U.S. 545, 555 (2002).

Thus, a serious Constitutional question would arise if petitioner did not receive an adjudication on the merits, as such would constitute a complete denial of Federal collateral habeas review of petitioner's ground on the merits, suspending the writ of habeas corpus. Clearly, to deny petitioner's application upon a "reasonable time" assessment would be unconstitutional.

In any event, the "reasonable time" assessment should not be considered, as petitioner has shown "extraordinary circumstances" justifying the reopening of the final judgment. Gonzalez v. Crosby, 545 U.S., at 535.

In reality, the "reasonable time" assessment should not be used against petitioner, as petitioner is entirely not at fault

in any way for this Court's inadvertent judgment. Petitioner did nothing but apprise this Court that 28 U.S.C. §2254(d)(1)(2) was the standard of review to be used.

With respect to petitioner's previous Rule 60(b)(6) motions, it is evident petitioner has not slept on his rights throughout the years to assert a right to review.

Lastly, petitioner solely seeks review of the U.S. v. Agurs, Giglio v. U.S., Miller v. Pate, and Napue v. Illinois Constitutional violations, and waives all other claims. In the event, this Court orders a hearing petitioner does not want an attorney assigned and wants to be present at all stages.

CONCLUSION

Petitioner prays for an Order of this Court vacating its judgment and that this Court issue a new decision in conformance with the law.

Most Respectfully

Dominic M. Fraruga