

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Joshua Moses — PETITIONER
(Your Name)

vs.

United States of America RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Third Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joshua Moses
(Your Name)

FCI- Fort Dix, Unit 5812
(Address)

Joint Base, MDL 08640
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED FOR REVIEW

- 1.) Whether the Prosecutor's conduct in charging petitioner with a multiplicitous indictment to gain a tactical advantage so infected the trial with unfairness that the resulting conviction and sentence was a denial of due process.
- 2.) Whether trial counsel was constitutionally ineffective due to Counsel's own personal interest, that includes being in an impatient rehabilitation program, undergoing chemotherapy treatments, and taking Oxycontin 20 & 30mg, effectively abandoning petitioner's substantial Sixth Amendment Rights.
- 3.) Whether subsequent counsel was constitutionally ineffective in failing to include claims relating to trial counsel's ineffectiveness in April 20, 2015, Motion for New Trial ("That was late filed") and failed to include trial counsel's condition before and during trial that substantially affected petitioner's Sixth Amendment Rights.
- 4.) whether the trial court erred in failing to sufficiently inquire into the conflict petitioner repeatedly detailed in complaints to the Court in Letters and Email Correspondence to Counsel.
- 5.) Whether the Trial Court overlooked or misapprehended the substantial evidence and proofs petitioner put forth in support of his claim that Counsel was affected by the Chemotherapy and Oxycontin:

The arrest report of the governments witness Tyreese Lomax dated 11/23/13, that trial counsel via email exchanged claimed could not find or did not exist, that the District Court claimed in it's 1/24/18 Memorandum that Tyreese Lomax was not arrested for, let alone convicted of pulling a firearm on petitioner's witness who made the complaint and were available to testify at trial, but that trial counsel failed to subpoena due to his own personal interest.

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☐ For cases from **federal courts**:

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

☒ reported at Moses v. USA, No. USA3# 18-1569; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☒ reported at USA v. Moses, No. 16-6545; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 29, 2018.

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

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

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

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment
Fifth Amendment

STATEMENT OF THE CASE

On May 13, 2014, petitioner was arrested via indictment and charged with Two Counts of Title 18 U.S.C. § 922 (g)(1). Attorney Robert M. Gamburg was privately retained for the purposes of representation, and made an appearance at petitioner's Pre-Trial Detention Hearing Same day.

On June 27, 2014, the trial court scheduled a status of counsel hearing within which Surrogate Counsel Mr. Jerome Gamburg (Robert's Father) was present. The Court then informed petitioner that his attorney of record " was not well right now " and requested a two month continuance, that the trial court reasoned three months was appropriate, and scheduled trial date for September 29, 2014.

There was a complete breakdown in communication with counsel during which petitioner later learned trial Counsel was in an inpatient rehab while undergoing Cancer treatments, and taking Oxycontin.

Petitioner communicated his dissatisfaction with Counsel to the Court via Letters/Filing and to Counsel via Email exchange with Counsel's Office.

Trial began October 8, 2014, resulting in petitioner being convicted of both counts of the indictment on October 10, 2014. Trial Counsel filed a post-conviction motion for judgment of acquittal pursuant to Rule 29, that the trial court denied on November 3, 2014. Petitioner then filed a letter/motion with the court detailing an inherent conflict of interest due to Counsel's own personal interest.

On December 4, 2014 the trial court held another status hearing and appointed new counsel same day.

On January 2, 2015, the Government filed a Motion to dismiss count two of the indictment on the ground that the evidence introduced at trial established that petitioner simultaneously possessed all firearms on November 21, 2013, which constituted a single offense under 18 U.S.C. § 922(g)(1).

The trial court granted the governments motion on January 9, 2015. Subsequent counsel filed a late motion for New Trial pursuant to Rule 33 on April 20, 2015, which was denied as untimely.

On May 12, 2015, petitioner was sentenced on Count One of the indictment to 102 months imprisonment, three years of supervision, a \$1000 fine and \$100 special assessment. Subsequent counsel appealed the order denying the motion for new trial and petitioner's sentence.

The Third Circuit Court denied this appeal in its entirety on June 21, 2016. (See) United States v. Moses, 653 F.App'x 91,92 (3rd Cir.2016). Subsequent this denial appointed counsel sought a writ of Certiorari to the United States Supreme Court. See Moses v. United States, 137 S.Ct. 397 (10/31/16).

Subsequent the denial of the petition for Writ of Certiorari, petitioner, Pro-Se, filed an application pursuant to 28 U.S.C. § 2255 on December 10, 2016, and raised four grounds of Constitutional violations related to his Sixth Amendment rights to the effective assistance of counsel. District Court Judge John R. Padova, who was not petitioner's trial judge, but the government's C.I. witness (Derrick Rhodes) who testified against petitioner 10/2014, judge in a prior unrelated case that Derrick Rhodes was still on probation for judge Padova's sentence during petitioner's trial, issued his Memorandum Opinion 1/24/18, denying petitioner's § 2255 motion in its entirety and declined to issue a certificate of appealability. In March 2018, petitioner pursuant to 28 U.S.C. § 2253(c) submitted an application to the Third Circuit Court of Appeals presenting a substantial showing of the denial of his Constitutional rights. The third Circuit Panel entered judgment June 29, 2018, denying petitioner's application pursuant to 28 U.S.C. § 2253(c), petitioner's request to supplement the Certificate of appealability, and petitioner's motion seeking summary judgment, and motion in opposition to any late response submitted by the appellee.

Petitioner did not petition the Third Circuit Panel for Re-hearing or Re-hearing En Banc.

This action, petitioner for Writ of Certiorari to the Supreme Court follows:

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

- 1.) The Third Circuit Panel's holding that the District Court correctly denied petitioner's 2255 motion is erroneous and conflicts with a decision of the United States Supreme Court and/or another holding of the Third Circuit Court of Appeals.
- 2.) The proceedings involved one or more questions of exceptional importance and the court overlooked or misapprehended the correct standard in which an inquiry must cover, and failed to pursue the inquiry necessary to establish and understand the facts leading to the conflict resulting in a fundamental miscarriage of justice.
- 3.) The Third Circuit Panel overlooked or misapprehended the error of the District Court in light of the compelling evidence and facts petitioner put forth in support of his conflict and ineffective assistance claims that deserved encouragement to proceed further.

1.) Petitioner respectfully submits that the District Court erred when it denied petitioner's 2255 motion based on an inherent conflict of interest due to counsel's own personal conflict that is, trial counsel abandoned petitioner's substantial sixth amendment rights by being in an inpatient rehabilitation program, undergoing chemotherapy treatments and taking Oxycontin (Opioids) which caused counsel to be impaired and deficient for failing to investigate the case, adequately prepare for trial, move to dismiss count two as Multiplicitous, withdrawing his motion challenging the audio video tapes without consulting petitioner, and rendering incorrect legal advice, that the District Court in its 1/24/18 memorandum also concluded fell below an objective standard of reasonableness.

The District Court overlooked or ignored the correct legal standard and failed to pursue the necessary facts to understand the conflict which lead to a fundamental miscarriage of justice. See Calderon v. Thompson, 523 U.S. 538, 140 L.Ed. 2d 728, 118 S.Ct. 1489 (1998). Petitioner further submits that he brought this matter to the courts attention several times prior to trial and the court overlooked or ignored the inherent consequences associated with Oxycontin and Chemotherapy treatments. The court did not take into consideration petitioner's substantial sixth amendment rights by failing to assess the nature and extent of the conflict that petitioner did not consent to.

The record in this case supports that the petitioner had good cause to seek substitute counsel when prior to trial petitioner repeatedly contacted the court conveying his dissatisfaction with counsel's inability to perform his duty, failure to investigate, conduct interviews with witnesses, communicate rationally with petitioner regarding his defense, multiplicitous charges and incorrect guideline calculation.

The Court failed to consider as part of its inquiry into the conflict issues petitioner expressed whether there was merit to inquire further into the impact of counsel's Oxycontin use, condition, and chemotherapy treatments. Under prevailing standards jurist of reason would find it debatable that counsel, toiling under an illness created good cause to extend the inquiry into the

nature and circumstances in which petitioner complained. This error by the District Court in light of the facts and evidence deserves encouragement to proceed further.

The District Court assumed without analysing the finding that because Counsel admitted to using Oxycontin at the December 4, 2014, status hearing, that counsel's deficiency did not prejudice petitioner's defense, and deprived petitioner of a fair inquiry into the cause of his dissatisfaction with counsel. See McMahon v. Fulcomer, 821 F.2d 934, 942 (3rd Cir.1987).

The District Court's resolution of the issue was extremely capricious and limited, which is contrary to clearly established federal law as determined by the Supreme Court. The inquiry is not the underlying merits of petitioner's claim. The claim was counsel's condition and Oxycontin use absolutely conflicted counsel's ability, in preparing for trial.

Appropriately construing and applying well-established authority applying basic constitutional protections from this court, and Third Circuit Court, to the facts of record in this matter, the opinions of the courts below violates hornbook constitutional protections See Miller-El v. Cockrell, 537 U.S. 322, 154 L.Ed. 2d 931 (2003).

At June 27, 2014, status hearing petitioner had no knowledge as to counsel's condition or dependency upon the drug he was taking, nor did the court's inquiry extend into that matter. The trial court stated to petitioner that trial counsel filed a motion for continuance, and the basis for the continuance motion was that petitioner's attorney "is not well right now", not the other way around, surrogate counsel (Robert's Father) did not explain to petitioner at this ~~6~~6/27/14 hearing counsel's condition & treatment. Despite this fact, the trial court stated that petitioner could not come back later and argue prejudice regarding the continuance, which was not the issue.

The District Court's purported premise was a mischarectorization and a smoke-screen that surrogate counsel (trial counsel's father) allegedly discussed his son's medical condition with petitioner. Despite this the court never inquired into the subsequent impact of counsel's condition and treatment that included opioids and an impatient rehab program.

The issue was confused by design. At December 4, 2014, status hearing, the inquiry was supposed to be undertaken on the issue of the affects of counsel effectively abandoning petitioner, due to counsel's own personal interests. Respondents replied using a disingenuous tactic to misdirect the importance and significance of petitioners detailed conflict issues that included email exchanges and other proofs that counsel was not functioning as the effective counsel guaranteed under the Sixth Amendment. The issue was not cancer or chemotherapy, the issue was and remains whether counsel was under the influence of narcotics during the pendency of the trial. It was never about recovery. The conflict was based on counsel's deficiency that affected petitioner's substantial Sixth amendment rights. See U.S. v. Cormier, 2017 U.S. District Lexis 79734 (M.D.Pa 2017); U.S. v. Bowman, 348 408, 417 (4th Cir.2003); Supra

The Court attempted to deflect the issue, which is predicated upon the fact that inquiry did not address the more compelling constitutional issue. The critical component test for a conflict of interest claim is a two-step inquiry. It was functionally unreasonable for the court not to follow circuit precedent on the issue of the two-step inquiry. See McMhaon v. Fulcorner, 821 F.2d 934, 942 (3rd Cir.1987).

On August 14, 2014, trial counsel filed a motion challenging the audio video evidence in the government's motion dated June 13, 2014. Trial counsel subsequently withdrwew the August 14, 2014 motion without consulting petitioner. Counsel sought to challenge that the audio/video had been tampered with, was not accurate, and petitioner specifically asked counsel to have an independent analysis performed to ascertain that it had not been tampered with. The 8/14/14 withdrawl of the motion was subsequent the June 27, 2014, status hearing. Clearly counsel's actions became uncharectristic to petitioner prior to the narcotics and treatment counsel received. Counsel was in no shape to argue the 8/14/14 motion and could not from an inpatient rehab program.

Counsel put forth no strategic reason for not Challenging the authentication of the government's evidence or witnesses, who stood to benefit from their testimony in the government's favor. Same prejudice occurred from the multiplicitous indictment that

was presented to a Grand Jury in March 2014, in this case, that the government claimed was never read until after trial when they were preparing for sentencing and noticed in an abundance of caution the Fifth Amendment double jeopardy violation in charging and convicting petitioner of a multiplicitous indictment.

Petitioner repeatedly raised this issue in letters to the trial court and in email exchanges to counsel's office. The government went on to imply that petitioner received a windfall by the government as a favor by dismissing count two before sentencing. Despite this pretended favor, the dismissal of count two was not a cure-all and was of no consequence for the prejudice in which petitioner suffered at trial and the enhanced sentence petitioner received under relevant conduct for the dismissed count that was also dismissed with prejudice. Petitioner further adopts the claim that appellate counsel was deficient for overlooking, ignoring, and failing to raise the issue of impairment creating a conflict in counsel's actions, where there exists some evidence of conflict. Subsequent the conflict issues being brought to the court's attention prior to trial, the court permits counsel to withdraw after trial from any further participation as counsel, which was extremely capricious and raises serious questions as to the fairness of the proceedings. If the court saw fit to remove counsel after conviction, what stopped the court from same consideration prior to the conviction? What drastically altered the conflict to permit the court to make the decision after the fact and not prior to conviction? Reasonable jurists in this instance would encourage this debate to proceed further in light of the compelling issues raised herein. Petitioner respectfully requests this Honorable Court grant allowance of appeal because the intrinsically and obviously flawed holdings of the Third Circuit Panel and District Court's opinions conflicts with this Court's holdings and is worthy of discretionary review by this Honorable Court.

Petitioner pray this court remand this matter back to the district court and order an evidentiary hearing be held on his conflict of interest claims, due to counsel's own personal interest, allowing the parties to present evidence as to whether counsel's condition may have been so impaired rendering deficient performance that resulted in ineffective assistance of counsel, or in the alternative, vacate petitioner's conviction and sentence and order a new trial be held due to the prejudice injected into the proceedings for good cause shown:

Dated this 14th of August 2018
~~19th~~ ~~July~~

Respectfully Submitted
JOSHUA MOSES
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Joshua Moses

CERTIFICATE OF SERVICE

I, Joshua Moses, declare under the penalty of perjury, that I placed a copy of a petition for writ of Certiorari addressed to the United States Supreme Court, Clerk of Courts by placing the aforementioned documents in the institutional mailing system on or about 7/19, 2018 Postage Pre-paid.

8/14

JOSHUA MOSES

Joshua Moses