

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2018

JOHN VIVO III - PETITIONER  
VS.  
STATE OF CONNECTICUT - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO  
SUPREME COURT STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI  
JOINT APPENDIX

JOHN VIVO III  
ID#204103  
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**QUESTION(S) PRESENTED**

1. DID THE STATE COURT OF LAST RESORT ERROR BY DECLINING TO REVIEW THE PETITIONER'S REQUEST FOR REVIEW UNDER PLAIN ERROR DOCTRIN THE APPLICATION OF §53-202k BECAUSE:
  - A. THE FACTS OF THE CASE DOES NOT FIT THE ELEMENTS OF THE CHARGE.
  - B. UNDER CONN.GEN.STAT.§53-202K THERE IS AN EXPLICIT STATUTORY EXCEPTION.
2. WHETHER THE STATE COURT OF LAST RESORT ERROR BY REJECTING THE PETITIONER'S ARGUMENTS.

## LIST OF PARTIES

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 judgement is the subject of this petition is as follows:

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The Honorable Robert J. Devlin, Jr., Judicial District Courthouse, 1061 Main Street, Bridgeport, CT 06604.

FOR THE PETITIONER: John Vivo III, Self Represented, ID.#204103, Cheshire C.I., 900 Highland Avenue, Cheshire, CT 06410.

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IN THE  
SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI  
JOINT APPENDIX

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Petitioner respectfully prays that a Writ Of Certiorari issue to review the judgment below.

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OPINION BELOW

The Order of the highest state court to review the merits was without opinion appears at APPENDIX A to the petition and has been designated for publication but the Petitioner has no way of knowing whether it was yet reported. State v. Vivo, (No. PSC-17-0488) (Decided May 23, 2018).

The Appellate Court summarily affirmed the Judgment of the trial court (Devlin, J.) in a per curium Memorandum Decision, appears at APPENDIX B to the petition and is reported at State v. Vivo, 179 Conn.App.906(2018).

The Consolidated Memorandum Of Decision Re: Motion For Recusal Of Judge, Motion For Change Of Venue, Motion To Correct Illegal Sentence of Connecticut Superior Court, Judicial District of Fairfield at Bridgeport dated October 5, 2015 in State v. Vivo (CR94-95080) appears at APPENDIX C.

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JURISDICTION

The date on which the highest state court decided the petitioner's case was May 23, 2018. The Petition For Certiorari is filed within ninety days of that date.

The Jurisdiction of this court is involved under 28 U.S.C. 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part as follow:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to have the assistance of counsel for his defense.

U.S.CONST.AM.VI.

The Fifth Amendment to the United States Constitution provides in pertinent part as follow:

No person shall be held to answer for a... crime, unless on a presentment or indictment... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb... nor be deprived of life, liberty... without due process of law.

U.S.CONST.AM.V.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follow:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty... without due process of law; nor deny to any person... the equal protection of the laws.

U.S.CONST.AM.XIV.

Article First to the Constitution of the State Of Connecticut provides in pertinent part as follow:

Declaration Of Rights. That the great and essential principles of liberty... may be recognized.

ARTICLE 1st.

Section 8 to the Constitution of the State Of Connecticut provides in pertinent part as follow:

In all criminal prosecutions, the accused shall have a right... to a speedy, public trial by an impartial jury. No person shall be... deprived of life, liberty... without due process of law.

SEC.8.

Section 9 to the Constitution of the State Of Connecticut provides in pertinent part as follow:

No person shall be... detained or punished, except in cases clearly warranted by law.

SEC.9.

Section 19 to the Constitution of the State of Connecticut provides in pertinent part as follow:

The right of trial by jury shall remain inviolated.

SEC.19.

Article Fifth of the Amendments to the Constitution of the State of Connecticut provides in pertinent part as follow:

No person shall be denied the equal protection of the law.

ARTICLE 5.

### STATEMENT OF THE CASE

On the evening of February 23, 1994 Yolanda Martinez and William Terron crossed a court yard at Bridgeport's Evergreen Apartments, they encountered three men. Martinez identified Joel Rodriguez and Eric Floyd. The state's case depicted the Petitioner pulling Terron near a fence and fatally shooting him, then later shooting Martinez in her legs. State v. Vivo, 241 Conn. 665, 667 (1997) [N.1]

In 1995 at the trials, the state introduced testimony through their Firearms Expert Edward Jachimowicz a Ballistician and cartridges as evidence that an Assault Weapon MAC 11 was used for the shooting.

Following the jury trials (Gormley, J. presiding) [N.2] the Petitioner was convicted of murder, in violation of Conn.Gen.Stat. §53a-54a(a); assault in the first degree, in violation of Conn.Gen.Stat. §53a-59(a)(1), and commission of a class A, B or C felony with a firearm, in violation of Conn.Gen. Stat. §53-202k. The court imposed a total effective sentence of seventy-five years of imprisonment. (ie., consecutive terms of sixty years for murder, ten years for first degree assault, and five years for firearms offense.) The conviction was affirmed on direct appeal in State v. Vivo, 241 Conn. 665 (1997).

Thereafter in 2003 the Petitioner filed a Petition For Writ of Habeas Corpus which was denied by Judge Rittenband and certification to appeal was granted. The Appellate court "vacated" the conviction under §53-202k because that statute is a sentence enhancement provision and not a crime. John Vivo III v. Commissioner Of Correction, 90 Conn.App. 167, 177 Cert. Denied, 275 Conn. 925 (2005).

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N.1 The Petitioner was arrested without probable cause or an arrest warrant.

N.2 The Petitioner had two jury trials. The First commenced on August 1, 1995, Judge Gormley declared a mistrial due to a jury deadlock on August 23, 1995. The Petitioner had an alibi defense and a mistake in identity defense. The case was retried approx 30 days later for a second time, commencing on September 25, 1995 before Judge Gormley again and ended on December 6, 1995.

In 2007, the Petitioner filed another Petition For Writ of Habeas Corpus, alleging that both his prior habeas counsel and trial counsel had rendered ineffective assistance. The habeas court (Schuman, J.) denied the petition. The Appellate Court dismissed the Petitioner's appeal in a per curium memorandum decision. See. Vivo v. Commissioner Of Correction, 115 Conn.App.901, Cert.Denied, 293 Conn.903(2009).

In 2011, the Petitioner filed an Amended Motion To Correct An Illegal Sentence. Proceedings were held on June 15, 2011 for the determination of appointment of counsel, and now without counsel the Petitioner proceeded self-represented on July 13, 2011 (Judge Devlin presided). On July 29, 2011, Judge Devlin issued a Memorandum Of Decision denying the first and second ground, as to the third ground of an abundance of caution, Judge Devlin scheduled a hearing to formerly resentence the Petitioner. On August 19, 2011 Judge Devlin resentedenced the Petitioner and issued a revised Mittimus to a total effective sentence 75 years as follows: murder 60 years; assault first 15 years (10 years was enhanced by §53-202k, 5 years) to run consecutive to each other. (APPENDIX B) Thereafter the Petitioner appealed Judge Devlin's ruling. See. State v. Vivo 147 Conn.App.414, 417(2003), Cert.Denied, 314 Conn.901(2014), Cert.Denied, 135 S.Ct. 1164(2015)

On February 10, 2015, the Petitioner filed, another Motion To Correct An Illegal Sentence, Motion For Change Of Venue and Motion to recuse Judge Devlin from hearing the motions. (APPENDIX D) On September 30, 2015, Judge Devlin presided at a hearing on these motions, which he denied in an October 5, 2015 Memorandum Of Decision. (APPENDIX C) On appeal, the Petitioner raised a claim under the Plain Error Doctrin regarding the sentence enhancement statue §53-202k and attacked the denial of his recusal claim. The Appellate Court summarily affirmed the judgment of the trial court (Devlin, J.) in a per curium memorandum decision. State v. Vivo, 179 Conn.App.906(2018) (APPENDIX E) The Petitioner seeked review from the State's

highest court and was denied without opinion. State v. Vivo, (No.PSC-17-0488) (decided May 23,2018) (APPENDIX A )

This appeal arose from the denial of the Petitioner's claims raised under the Plain Error Doctrin regarding the sentence enhancement statue §53-202k and the denial of his motion to recuse Judge Devlin from hearing the claims on its merits.

#### REASON FOR GRANTING THE PETITION

1. The Petitioner has been resentenced under Conn.Gen.Stat.§53-202k in the assault count by Judge Devlin. The weapon MAC 11 that the state alleges that the Petitioner used to shoot the victims is exempt from §53-202k for sentence enhancement purpose. The Petitioner maintains that since "Assault Weapons" as defined in Conn.Gen.Stat.§53-202a are exempt from §53-202k the sentence enhancement imposed on the Petitioner is illegal and must be vacated. Violating the Petitioner's U.S.CONST.AM.VI,V,XIV,CONN.CONST.ARTICLE FIRST,SEC.8,9,19,ARTICLE 5 provisions.

2. And because the resentencing on the application of §53-202k is the subject of Argument A, the abuse of the trial courts (Devlin,J.) discretion in refusing to recuse himself because any factual dispute involving in a claim of judicial bias requires an evidentiary hearing, and if so, it should be conducted before another judge. Violating the Petitioners U.S.Const. and Statutory provisions.

3. For those compelling reasons this court should consider "whether the state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court Of Appeals;

4. A state court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court, as to call for an exercise of this court's supervisory power.

## ARGUMENT A

QUESTION 1. DID THE STATE COURT OF LAST RESORT ERR BY DECLINING TO REVIEW THE PETITIONER'S REQUEST FOR REVIEW UNDER THE PLAIN ERROR DOCTRIN, THE APPLICATION OF §53-202k BECAUSE A. THE FACTS OF THE CASE DOES NOT FIT THE ELEMENTS OF THE CHARGE: B. UNDER CONN.GEN.STAT. §53-202k THERE IS AN EXPLICIT STATUTORY EXCEPTION.

It is the resentencing on the application of §53-202k thats the subject of Argument A, Question 1. A. and B., and the abuse of discretion by Judge Devlin in refusing to recuse himself as set forth in Argument B.

This is truly an extra ordinary situation....the trial court committed Plain Error and the error produced a Manifested Injustice, the record factually is adequate and not debatable.

The state is not prejudiced by addressing these claims now, the court may avoid the necessity of another proceeding. The Petitioner respectfully request for this court to address these claims at this stage of the proceedings.

### A. THE FACTS OF THE CASE DOES NOT FIT THE ELEMENTS OF THE STATUE.

In this case the Petitioner ask this court to take Judicial Notice of the record previously filed in this case. Nevertheless, the Petitioner position that the trial testimony of the state's firearm expert Edward Jachimowicz establishes the factual predicate for his claim that an assault weapon MAC 11 was used.

At the hearing held on September 30,2015 before the trial court (Devlin,J.). The Petitioner asserts that "the facts in the case dont fit the elements to the charge". (R. ,Pet.Br.Appdx.A6,Par.14.) And on Appeal to the Honorable Appellate Court, in its brief, The Petitioner asked to take Judicial Notice of the record previously filed in this case.(R. ,Pet.Br.P:11) In the matter of State v. John Vivo III, Docket No. CR94-95080, Before the Honorable Joseph T. Gormley, Jr.,Judge. 2nd Trial Transcripts dated October 4,1995, in the Expert Testimony of Edward Jachimowicz (Ballistician) Transcrpit page 4 (R. ,Pet.Br.Appdx.A.45). He testified in relevant parts:

..."The 18 fired cartridges case by the firing pin impression in his opinion were fired from a SWD-11, which is the MAC 11, a 9 millimeter semi-automatic pistol"...(R. ,Pet.Br.Appdx.A45,T4)

And at the oral arguments in the Appellate Court during the pendency of this appeal the Petitioner advised the court the following Transcript may be considered in the arguments of the appeal because the transcripts were delivered after the date of the filing of his brief. Transcript, Expert Testimony of Edward Jachimowicz, 1st Trial August 17, 1995, State v. Vivo (FBT CR94-95080), State v. Floyd (FBT CR94-96508). The States Attorney Mr. Satti asked the following question of Mr. Jachimowicz:

..."Q. Do you need to have a weapon to determine if the cartridge that is a spent cartridge is fired from the same weapon as another spent cartridge? In other words, do you actually have the weapon?

A. No."...(T.173)

He further Testified:

..."Q. In your examination, with regards to trying to determine the weapon they were fired from is just essentially a scientific procedure on your part?

A. That's correct."...(T.186) (R. ,Pet.Appdx.Pet.For Cert.,A24.)

The particular facts of this case support a claim that a great injustice has occurred. The Petitioner not only argues that A. THE FACTS OF THE CASE DOES NOT FIT THE STATUTE, BUT THAT;

B. UNDER CONN. GEN. STAT. §53-202k THERE IS AN EXPLICIT STATUTORY EXCEPTION.

At the time of the Petitioner's offense, Connecticut General Statutes (Rev. to 1995) §53-202k (APPENDIX E3) provides an explicit exception, in relevant parts that:

..."except an assault weapon, as defined in section 53-202a"...

Connecticut General Statute §53-202a(1) Assault Weapons: Definition, (APPENDIX E1) provides in relevant parts that:

..."(a) as used in this section and section 53-202b to 53-202k, inclusive, and subsection (h) of section 53a-46a, "assault weapon" means: (1) any selective-firearm capable of fully automatic, semiautomatic or burst fire at the option of the user or any of the following specified semi automatic firearms: ... MAC-11 and MAC-11 carbine type"...

Based upon the expressed statutory exception. The Penal Statue must be construde strictly. A fundamental principle of statutory construction is that penal statutes are to be construed strictly in favor of the accused. State v. McGann, 199 Conn.163, 177(1986); State v. Edwards, 201 Conn.125,132(1986); State v. Whiteman, 204 Conn.98, 101(1987). Where a defendant's liberty is at stake, the necessity for a strict construction limitation is very compelling. State v. Whiteman, 204 Conn. at 103. See. also State v. White, 204 Conn.410,424(1997). The principle "protects the fundamental constitutional right to liberty." State v. Smith, 194 Conn.213,221-22 n.7 (1984)

§53-202k extends to the maximum punishment beyond that which otherwise be imposed upon conviction of an underlying class A,B or C felony, "Due Process" requires that the dispositive question of 1.)Whether the defendant used a firearm in the proscribed manner and 2.)Whether the accused used a "proscribed firearm" in the commission of that felony.

The Petitioner is entitled to a jury determination of "every element" of §53-202k. The jury heard evidence of a proscribed firearm (MAC 11) but erroneously applied those facts to the law.

The proscribed use of a qualified firearm under §53-202k required a factual finding, an essential element, independant of whether a firearm was used in the proscribed manner, specifically "except an assault weapon", as defined in §53-202a.

Had the jury applied that exception under the facts of the case §53-202k could not be applied under the law. See. State v. Velasco, 253 Conn.254(2000).

The Petitioner has been resentedenced under Conn.Gen.Stat. §53-202k in the assault count by Judge Devlin. The weapon MAC 11 that the state alleges that the petitoner used to shoot the victim is exempt from §53-202k for sentence enhancement purposes. The Petitioner maintains that since "Assualt Weapons" as defined in Conn.Gen.Stat.

§53-202a are exempt from §53-202k the sentence enhancement imposed on the Petitioner is illegal and must be vacated. Violating the Petitioner's U.S.Const. Am.VI,V,XIV,Conn.Const.Article 1st,Sec.8,9 & 19,Article 5 provisions.

#### ARGUMENT B

#### QUESTION 2.WHETHER THE STATE COURT OF LAST RESORT ERROR BY REJECTING THE PETITIONER'S ARGUMENT.

As previously indicated it is the resentencing on the application of §53-202k that's the subject of Question 1. A & B and the abuse of discretion by Judge Devlin in refusing to recuse himself as set forth more fully below.

The Appellate Court rejected the Petitioner's arguments by Memorandum Decision (APPENDIX C), in relevant parts stating:

"I.Motion For Recusal Of Judge. The defendant seeks the recusal of me as the judge to adjudicate and rule on the present motion to correct illegal sentence. Although the motion asserts that I have a personal interest, bias and prejudice in the outcome of the case and have acted vindictively toward the defendant, nothing was offered at the September 30th hearing (APPENDIX F) to support these assertions. The defendant basic reason to seek recusal is because I denied his earlier motion.

Disqualification of a judge is governed by Practice Book §1-22 and Code of Judicial Conduct Rule 2.11. None of the grounds for disqualification apply in this case, Moreover, the Code of Judicial Conduct places upon all Judges the responsibility to hear and decide all cases assigned to them unless disqualification is required. Code of Judicial Conduct Rule 2.7.

The motion to recuse the judge is denied".(APPENDIX C 1)

The Petitioner relies upon..."Any factual dispute involve in a claim of Judicial Bias require an evidentiary hearing, and if so, it should be conducted before another judge." Szypula v. Szypula,2 Conn.App.650,653,482(1984),id.

The Petitioner also relied upon Conn.Prac.Bk.§1-22. Where it states in pertinent part:

"A judicial authority shall...be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Judicial Conduct." Conn.Prac.Bk.§1-22(a)

And, Rule 2.11 of the Code of Judicial Conduct directs:

"A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonable be questioned.."Code of Judicial Conduct Rule 2.11(a).

The Petitioner also relies upon: An objective observer (a person who considers all the circumstances, rather than a subjective observer who takes bites & pieces of information).Cited in Tracey v.Tracey,97 Conn.App.278,282(2006).

The standard is whether there is an appearance of partiality. See. Code of Judicial Conduct Canon 3(c)(1), provides: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonable be questioned."

First, the Petitioner allges specific acts of bias as part of the Trial Judge. Cf.State v. Webb,238 Conn.389,462,680 A.2d 147(1996), citing in relevant part, supra, Tracey, id.280. By way of Motion To Recusal Of Judge, February 10,2015.

(APPENDIX D)

1. That Devlin must recuse himself and apppoint another judge to preside over Petitioner's Motion For Correction Of Illegal Sentence.
2. That Judge Devlin had changed or modified the Petitioner's legal sentence ...when he was without inherent authority to do so, illegally resentencing the Petitioner.
3. Judge Devlin has a personal interest, bias and prejudice in the outcome of this case.
4. That Judge Devlin acted vindictively towards Petitioner in resentencing him illegally.
5. That a fair and impartial trial cannot be had with Judge Devlin having anything to do with it." (id.APPENDIX D)

The Petitioner relies upon: Canon 3(c) of the Code of Judicial Conduct that governs Judicial Disqualification.

"(1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where (A) The judge has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding..." Canon 3(c). This encompasses two distint grounds for disqualification: Actual bias and the appearance of partiality..."The appearance and the existence of impartiality are both essential elements of a fair trial."(Internal quotation marks omitted). Consiglio v. Consiglio,48 Conn.App.654,659,711 A.2d(1998).

As such, "to prevail on its claim of a violation of this Canon, a party need not show actual bias. The party has met its burden if it can prove that the conduct in question gave rise to a reasonable appearance of impartiality."N.4, Abington Ltd.

Partnership v. Heublein, 246 Conn.815,819-20,717 A.2d 1232(1998),aff'd after remand, 257 Conn.570,778 A.2d 885(2001). Citing Tracey v. Tracey,97 Conn.App.278,281 (August 2006). Considering the facts of this case there is reasonable appearance of impartiality. A manifested injustice occurred because once Judge Devlin decided a matter before him, the judge necessarily is biased against any subsequent action challenging the validity or propriety of that judgment, specifically the post judgement motions, as such as Petitioner's Motion To correct An Illegal Sentence. (APPENDIX D4)

The State Court of last resort has decided a question of substance...in a way probably not in accord with applicable decisions of the United States Supreme Court. Violating The Petitioner's U.S.Const.Am.VI,V,XIV,Conn.Const.Article 1st,Sec. 8,9 & 19,Article 5 provisions. For those reasons Certiorari should be granted.

DATE: AUGUST 16,2018

RESPECTFULLY SUBMITTED



JOHN VIVO III, Pro Se