NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

DERRICK D. WILSON II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

DERRICK D. WILSON II
PRO SE
REG. NO. 21481-052
FEDERAL CORRECTIONAL
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QUESTIONS PRESENTED

I. When (a) trial counsel informs the court that he is not prepared for trial; and (b) the court's Faretta colloquy does not inquire into the voluntariness of Petitioner's decision to proceed pro se; did the Circuit Court err when it concluded Petitioner voluntarily waived his Sixth Amendment right to counsel, because Petitioner affirmed he was ready for trial, when under Faretta v. California, 422 U.S. 806 (1975) and Johnson v. Zerbst, 304 U.S. 458 (1938), the proper standard for determining the voluntariness of waiver is whether Petitioner's alternative to self-representation was constitutionally offensive?

II. Whether Petitioner made a substantial preliminary showing challenging the veracity of the wiretap applications, relating to "Necessity" (18 U.S.C. §§ 2518(1)(c),(3)(c))--to invoke his Fourth Amendment right against illegal search and seizure, and his right to be heard guaranteed by the Fifth Amendment Due Process Clause, mandating an evidentiary hearing in accordance with Franks v. Delaware, 438 U.S. 154 (1978) and United States v. Giordano, 416 U.S. 505 (1974).

III. Whether Petitioner made a substantial preliminary showing of "outrageous conduct" by the government to invoke his right to be heard guaranteed by the Fifth Amendment Due Process Clause, mandating an evidentiary hearing to determine whether the government engaged in conduct that "shocks-the-conscience".

LIST OF PARTIES

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The opinion(s) of the United States District Court for the Northern District of New York, the Honorable Glenn T. Suddaby are unpublished-except for one:

The opinions of the fourth and third reconsideration motion(s) are unpublished. The decision and order(s) are reproduced in Appendices "D" and "E", respectively.

The opinion for the Rule 29/33 Motions is found at United States v. Wilson, 2016 U.S. Dist. LEXIS 192440 (NDNY). The decision/ order is reproduced in Appendix "F".

The opinions of the second and first reconsideration motion(s) are unpublished. The order(s) are reproduced in Appendices "G" and "H", respectively.

The original opinion of the Omnibus Motion(s) is unpublished. The opinion (Omnibus Decision/Order) is reproduced in Appenix "I".

The District Court made his Faretta conclusions and findings on the record. The transcripts of the Faretta inquiry are reproduced in Appenix "J".

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit affirming the district court's judgment was entered on June 19, 2018. A timely petition for rehearing was filed. The petition for rehearing was denied by the Second Circuit on August 1, 2018.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution is reproduced in Appendix "K".

The Fifth Amendment of the United States Constitution is reproduced in Appendix "L".

The Sixth Amendment of the United States Constitution is reproduced in Appendix "M".

The relevant provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2518(1)(c),(3)(c) are reproduced in Appendix "N".

STATEMENT OF THE CASE

This case raises important, recurring questions concerning the efficacy and efficiency of our nation's criminal justice system, i.e., an indigent defendant's right to be heard: (1) through competent/prepared counsel; and (2) adequate consideration of constitutional claims contesting the legality of the prosecution. Due to the distinction in facts underlying each question presented, the pertinent facts have been set forth below categorically.

A. Involuntary Waiver of Counsel--Hobson's Choice

On June 18, 2014, Wilson was arrested and arraigned in the Northern District of New York, for federal drug offenses, 21 U.S.C. §§ 841(a),846. After arraignment, Wilson meandered through a succession of (5) court appointed counselors (Criminal Justice Act, 18 U.S.C. § 3006A)(CJA), for example:

Wilson requested for his first counsel to be relieved, **due to his lawyer's failure to investigate the facts pertaining to his case.** The district court [g]ranted petitioner's request. **See Appendix "O".**

Second counsel requested to be relieved just (26) days after being appointed. **See Appendix "P".**

Third counsel requested to be relieved, apprising the district court, **"I do not feel as if I can provide the attention the case demands during such a crucial stretch of time."** Wilson also moved to have third counsel relieved, **citing the lawyer's refusal**

to investigate the facts pertaining to his case. The district court [g]ranted both request. **See Appendix "Q".**

After eight months of representation, fourth counsel, Danielle Neroni (Neroni), requested to be relieved, citing-primarily, Wilson's recent arrest in a state homicide[1] **"there is an overlap in witnesses in the two cases so it makes sense that one attorney handle both matters. This office has no opposition to the substitution of Mr. Moynihan as counsel in the federal matter." See Appendix "R".**

Following Neroni's request for substitution of counsel, the district court held a Change of Counsel Hearing, on November 12, 2015. Thereto, Kenneth Moynihan (Moynihan) was appointed Wilson's fifth CJA counsel. Moynihan expounded, "I understand that it's trial ready. I'm prepared to jump in and be ready on January 11th as well." **(C.A. App. 75).** Later in the proceeding, the district court pronounced:

> "First of all, sir, with regard to your representation Ms. Neroni has been assigned. She has been working on your case for some time. And I know that she was preparing for trial in January and is ready to go. We extended your trial out at her request and your case has been pending for some time, **so I don't want to have**

---

[1]On October 22, 2015, Wilson was arraigned in Onondaga County Court [New York] pursuant to a sealed indictment, deriving from an April 2000 cold case homicide [N.Y.S.P.L. § 125.25(1)]. Mr. Kenneth Moynihan was subsequently appointed counsel. This state homicide prosecution relates directly to petitioner's **Vindictive Prosecution claim** discussed infra. Thereto, Wilson was also subjected to the impermissible Hobson's choice of choosing between unprepared [state] counsel and self-representation. Wilson chose the latter and attained a jury acquittal. See, Julie McMahon, How Syracuse inmate won his murder trial without a lawyer: 'That dummy showed us', Post-Standard (Syracuse N.Y.), Dec. 14, 2017, available at: **http://www.syracuse.com/crime/index.ssf/2017/12/how syracuse inmate won his murder trial without a lawyer that dummy showed us.html.**

any more adjournments; I would like to get it resolved." (C.A. App. 78)

Approximately two months later, at the January 5, 2016, Pretrial Conference, Moynihan informed the district court:

> "The second issue that I wanted to raise is that because I have been only involved in this case for seven weeks, and I know that when I took this case I indicated that I'd be ready for trial. It appears that now that I've spent well over a hundred hours on this matter, that there's just so much to this case, and that **Mr. Wilson deserves to have effective assistance of counsel, and I don't think that I could provide that at this time, January 11th." (C.A. App. 109-110)**

The pretrial conference record reflects, the district court [n]ever inquired into the reason "why" Moynihan was unprepared; electing instead--to admonish:

> "So sir, you know to try and say that you need more time is completely inappropriate, and more than a little disingenuous in this court's view." **(C.A. App. 111)**

Remaining steadfast, Moynihan replied:

> "I thank you, you Honor. **I apologize that the court feels that my request today or my statement that I'm not prepared for trial is disingenuous.** I think that at the time that I took this case, I thought that I would be ready and it just turns out that there's more to this than met the eye." **(C.A. App. 111)**

Again, the district court made no inquiry into "why" Moynihan was not prepared, admonishing further:

> "So for you now to do this is totally inappropriate, and as an officer of this court, sir, I'm warning you, that this type of conduct is more than a little out of line." **(C.A. App. 112)**

After quarreling with the district court to exercise his right to speak[2], Wilson was finally able to address the court:

> "I'm asking to be heard, your Honor. My lawyer, I have no

complaints, I have no complaints with his representation thus far because he's been diligent, **but he is not ready for trial.** I can see, **I'm ready,** I been studying this case..."
(C.A. App. 121)

When the district court made it clear that it was not granting a continuance, and trial would indeed begin on January 11, 2016, Wilson inveighed, **"Even though my lawyer's not ready...Wow."**
(C.A. App. 125)

Trial commenced with Moynihan proceeding as counsel. The jury was selected and opening arguments were taken. On the following day, before the government opened their case, Moynihan addressed the district court:

"Your Honor, after consultation with Mr. Wilson this morning, Mr. Wilson would like to terminate my representation and proceed pro se with standby counsel... **he feels that he knows the case better than I do, and I can't disagree with him,** but--and he is prepared."
See Appendix "J" (Faretta Inquiry Transcript, pg. 291)

Wilson seconded:

"Um, sir, I respectfully request to exercise my right...if you may recall during a preliminary conference prior to trial...during our colloquy, **I made a statement where I said that my lawyer is not ready for trial but I am,** and that was based upon the fact that I do know these, **I do know the facts and the particulars and the intricacies and the discrepancies and the multiple discrepancies in this case better than, better than my lawyer.** And I have no objection, I have no issue with his, with the progress that he has attempted to make with getting acclimated with the particulars of my case. **However, based upon the time constraints, he's not--he doesn't know them as well as me...and the last thing that I want to do as far as exercising my right in my pursuit for justice is to sit**

---

[2]When Wilson first attempted to **personally** exercise his right to be heard, by making an objection in open court, the district court characterized petitioner's affirmance as an outburst, and berated, "I'll have you shackled and removed from this courtroom."
(C.A. App. 88-89)

here at this desk and have, it's just like have a counsel just go through the motions, trying to represent me when I can actually represent me, myself."
(See Faretta Inq. Tr., pg. 292-293)

Without making any inquiry into the "circumstance" compelling Wilson's request for self-representation, i.e., **counsel's own admission of unpreparedness**, the district court allowed petitioner to proceed pro se. **See Faretta Inq. Tr., pg. 291-318.**

Wilson was convicted of one count of conspiracy to sell crack cocaine and heroin, and one count of possession of heroin with intent to sell, in violation of 21 U.S.C. §§ 841(a),846. On October 12, 2016, Wilson was sentenced to concurrent prison terms of 336 months for both counts.

On appeal, the Second Circuit affirmed Wilson's conviction and sentence. **See Appenix "A" (Summary Order).** The Circuit Court found petitioner's waiver of counsel to be **voluntary**, holding, "When Wilson waived his Sixth Amendment right, **he did not suggest that he was doing so because he felt coerced. Rather, Wilson insisted that he was ready for trial** and assured the court that he was 'very familiar with the process of the legal proceeding[s]', especially if Moynihan continued to advise him throughout the trial." **See Summary Order at 6.**

Shortly thereafter, Wilson filed a timely petition for rehearing. **See Appendix "B".** This petition for a writ of certiorari now follows.

B. **Preliminary Showing Made in Seeking Evidentiary Hearing(s)**

(1) False Statements and Material Omissions Relative to Necessity (18 U.S.C. §§ 2518(1)(c),(3)(c)) in All Wiretap Applications

Wilson submitted affidavts **(C.A. App. 38-45,50)** and reconsideration motions **(Record Doc. Nos. 314, 322; see also C.A. App. 1970-1972)** swearing that DEA SA Anthony Hart included false statements and material omissions relating to, inter alia, the investigative capabilities of two confidential informants, i.e., Willie Strong, Jr. **(First CS#5)** and Douglas Reid **(CS#4)**:

Willie Strong, Jr--First Confidential Source #5 (Misappropriation of DEA Label CS#5)

First Wilson **"pointed out"** to the Circuit Court **"specifically"** where affiant SA Hart **misappropriated** the DEA Label CS#5 between two different informants in wiretap applications:

First CS#5--See Wiretap Application for SUBJECT TELEPHONE #2 (1/28/14) para 58, n.6:

> "This belief is based on information provided to investigators in July 2013 by a confidential source **(hereinafter CS#5)**[6] ...
>
> [6]This Confidential source pled guilty to conspiracy to possess with the intent to distribute and to distribute one (1) kilogram or more of heroin in U.S. District Court in November 2011, after entering into plea and cooperation agreements with the Government. The source has provided information which he/she hopes will be considered at the time of his/her sentencing. To date, the source's information has led to the execution of search warrants which resulted in the seizure of drugs and guns; his/her information has led to the arrest and indictment of numerous individuals involved in sophisticated credit card fraud. In short, law enforcement has found this source's information to be both reliable and credible since his/her cooperation began in March 2011." **(C.A. App 32,43,48)**

Second CS#5--See Wiretap Application for SUBJECT TELEPHONES #3&#4 (3/27/14) para 38, n.6:

> "On March 19, 2014, Syracuse Police Department detectives interviewed a confidential source, **hereafter referred to as CS#5**[6] ...
>
> [6]CS#5 has previously been found to be reliable by the Syracuse Police Department and has been a registered informant with SPD since approximately 2009. CS#5's information has led to multiple arrest, the issuance of multiple search warrants due in part to his/her information, and the recovery of two (2) firearms. CS#5 has previously testified in a homicide trial and in a gun possession trial for state prosecutors. CS#5 has felony convictions for Criminal Possession of a Weapon in the Second Degree (2002) and Assault in the Second Degree (1999), as well as several misdemeanor convictions. CS#5 was arrested in late 2013 for Criminal Contempt in the Second Degree; CS#5 is providing information in exchange for favorable consideration on this matter. CS#5 is an admitted member of the Crips Gang but has known Derrick Wilson all of his/her life." **(C.A. App. 32,43,48)**

Accordingly, Wilson swore, "This work of deception by the government was designed to conceal the fact the 'First CS#5' is actually Willie Strong, Jr., a high ranking member of the organization that would alleviate the government's 'necessity' for a wiretap."**(C.A. App. 48)**

Douglas Reid CS#4--See Wiretap Application for SUBJECT TELEPHONE #2 para 17,18,20; **see also C.A. App. 1922-1923:**

> 17. On April 23, 2013, May 13, 2013, September 24, 2013 and October 16, 2013, the Syracuse Police Gang Task Force interviewed a confidential source; **hereafter referred to as CS#4...CS#4 is a self admitted gang member and is currently cooperating with authorities for future consideration of "pending narcotics" and "assault charges" as well as parole violations.** CS#4 has previously provided information to law enforcement and his/her information has never been found to be unreliable. Among other information, CS#4 stated the following based upon his/her personal observations and/or conversations with the individuals discussed below:

18. Jeffrey Dowdell is currently one of the leaders of the Lexington Avenue Midtown Assassins (LAMA) and is being **supplied** narcotics by known LAMA member Melvin "Moon" Williams.

...

20. **According to CS#4,** Williams makes bi-weekly trips to Syracuse by car, bringing about five (5) kilograms of crack cocaine with him per trip. CS#4 advised law enforcement that Williams uses trap/false compartments in his vehicles and he typically uses multiple vehicles to transport the narcotics. CS#4 referred to Williams as a "millionaire" and related that when he arrives in Syracuse, approximately 2.5 to 3 kilograms of cocaine powder are provided to Jeffrey Dowdell and known LAMA member Dwayne Handy. Handy gets a smaller portion of the cocaine than J. Dowdell. Both Handy and Z. Dowdell distribute the cocaine to coconspirators. Williams also supplies 2 kilograms of cocaine to someone on the south side of Syracuse.

SEE ALSO-- DEA 6 report, July 29, 2013 (by SA Hart) titled: "Intelligence Regarding suspected Lexington Avenue Midtown Assassins 'LAMA' Gang members", which **connects Douglas Reid, para 18;** Willie Strong Jr., para 2; and Derrick Wilson, para 1--**to a street gang known as "LAMA" (Record Doc. No. 414-6); see also Appendix "S" (DEA 6 report)**

SEE ALSO-- Government Witness List which list Douglas Reid as a witness for the government in the instant matter. **See Appendix "T" (Government Witness List)**

SEE ALSO-- Douglas Reid's, March 11, 2015, Sentencing Transripts (Onondaga County Court)**(Record Doc. No. 371),** which shows REID pled guilty to-and was sentenced for-controlled substance in the third degree **[pending narcotics]** and assault in the second degree **[assault charge], See Appenidx "U" (Reid's Sentencing Transcripts, pg. 18,21), and directly corresponds with CS#4 from SA Hart's Wiretap Application, supra.** Moreover, the County

Court ruled, it would run REID'S sentences concurrent "in the interest of justice", due to his "work and cooperation" **(Reid's Sent. Tr. pg. 20).** ADA Ferrante confirmed REID'S cooperation with federal authorities in the instant matter, "...Detective Mel Debottis, Detective Tim Galanaugh, **John Katko [former AUSA], and Carla Freidman [prosecuting AUSA]. The defendant is given the same deal as everybody else who cooperated in [t]his case and testified in front of the grand jury"(See Reid's Sent. Tr. pg. 5).** Lastly, in his plea for leniency to the county court REID also confirms his confidential informant status with respect to the instant matter. **Reid's Sent. Tr. pg. 5-12.**

Based upon the foregoing facts, occurrences and documentary proof Wilson submitted to the Second Circuit that Willie Strong, Jr. and Douglas Reid were confidential informants working for the government in this investigation-with strong ties to the hierarchy of the alleged drug organization, and SA Hart therefore made the following False Statements and Material Omissions:

False Statement #2[3]--See Wiretap Application for SUBJECT TELEPHONE #1 (9/19/13) para 78:

> **"None of the confidential sources has been able to infiltrate the organization's hierarchy..."**

SA Hart repeats this false statement in EVERY application he submitted, i.e., SUBJECT TELEPHONE #2 (1/28/14) para 87; SUBJECT TELEPHONE #3 (2/28/14) para 72; SUBJECT TELEPHONES #3&#4 (3/27/14) para 79; SUBJECT TELEPHONES #4&#5 (4/24/14) para 100; SUBJECT TELEPHONES #4&#5 (5/22/14) para 77.

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[3]False Statement #'s presented herein are in the same numerical sequence as submitted below, for sake of congruity.

False Statement #3--See Wiretap Application for SUBJECT TELEPHONE #1, para 58:

> "For example, as discussed above in para 35, following the arrest of **Willie STRONG, believed to be a LAMA member and coconspirator in the Wilson drug trafficking organization,** officers were unable to interview him as he was combative with the police...**STRONG has expressed no interest in speaking with law enforcement.**"

False Statement #4--See Wiretap Application for SUBJECT TELEPHONES #3&#4 (3/27/14) para 53:

> "The arrest and interview of other target subjects including CS#1, **CS#4**, and **CS#5**, discussed supra, as well as CS#2, CS#3 and SOI, discussed in my attached affidavit dated September 21, 2013, **have provided only limited information and do not identify the full scope of this cocaine, crack cocaine, and heroin trafficking organization.**"

False Statement #5--See Wiretap Application for SUBJECT TELEPHONE #1, para 73:

> "Consensually recorded conversations between WILSON and confidential sources have not, and could not uncover the full scope of the conspiracy because the targets of the investigation are expected to engage in conversations with coconspirators, whose identities and whereabouts are not yet known. **To the extent that such coconspirators are known, the persons who would be in a position to consensually record appear to have solid ties with the drug trafficking organization. Thus, there does not appear to be any realistic possibility that attempts to consensually record conversations would be effective...**"

SA Hart repeats this false statement in EVERY application he submitted, i.e., SUBJECT TELEPHONE #2 (1/28/14) para 82; SUBJECT TELEPONE #3 (2/28/14) para 67; SUBJECT TELEPHONES #3&#4 (3/27/14) para 74; SUBJECT TELEPHONES #4&#5 (4/24/14) para 95; SUBJECT TELEPHONES #4&#5 (5/22/14) para 72.

MATERIAL OMISSION:

STRONG and REID were both confidential sources-with strong ties to the hierarchy of the alleged drug organization-acting

as agents for the prosecution in obtaining information, evidence concerning the instant offenses, supplying it to the government; STRONG'S studio was a **"front business where narcotics are regularly distributed and members of LAMA routinely congregate" [Record Doc. No. 414-5, July 11, 2013, Pen Register Application, para 13]**; and **REID possessed knowledge of the organization's source of supply and distribution network. [See Wiretap App. for SUBJECT TELEPHONE #2, para 20, supra]. See also C.A. Doc. No. 123, Pro Se Supplemental Appellate Brief, pg. 43.**

The district court held that the government did not misappropriate DEA Label CS#5 between two separate informants, **See Appenix "I" (Omnibus Decison)**, and Wilson's reconsideration motions claiming REID was a confidential informant were untimely, and nevertheless without merit. **See Appendices "G","H" (Reconsideration Orders 2&1-respectively).**

(2) Fabrication of (35) Controlled Purchases of Narcotics & Syracuse Police Department (SPD) Chain of Custody Reports

Wilson submitted affidavits-his own, and affirmations-from defense counsel (Neroni), to the Circuit Court (and district court), swearing, affirming-and citing documentary proof that in SA Hart's Federal Complaint, he asserted (48) controlled purchases of narcotics were made from Wilson and his subordinate/ coconspirators, pursuant to this investigation, and the government's discovery disclosure was void of any material-whatsoever, to account for (35) asserted controlled purchases

(C.A. App. 26-27)(Record Doc. No. 186-1, Neoni's Mem. of Law).

Furthermore, on June 8, 2015, Neroni contacted AUSA Freedman, via email, requesting receipt and/or inspection of the missing drug evidence, and AUSA Freedman assured her that, **"All discovery was [already] provided on DVDs." See Appendix "V" (Email Conference); see also C.A. App. 1988-1989.** Accepting the government's word, on August 3, 2015, Wilson filed Omnibus Motions claiming, inter alia, law enforcement fabricated (35) controlled purchases by failing to disclose any material-whatsoever, regarding crimes that were allegedly made in furtherance of the charged conspiracy. **(Record Doc. Nos. 186-1,186-2).**

After assuring the defense that all discovery had been provided (June 8, 2015); **after** the district court's deadline for the government's discovery had passed (July 20, 2015)**(Record Doc. No. 168); and only after** Wilson filed a timely Omnibus motion (August 3, 2015), claiming law enforcement fabricated (35) controlled purchases-did AUSA Freedman come forward (on or about August 18, 2015) with **"SPD Chain of Custody Reports" (C.A. App. 1991-2020)**, purporting the documents to be **"material"** validating the contested controlled purchases. A week later, in her Omnibus Response (August 24, 2015), **AUSA Freedman averred that the government furnished the SPD Chain of Custody Reports "pursuant to its discovery obligations." (Record Doc. No. 199 at 37-38).** Neroni immediately affirmed to the district court:

> "On June 8, 2015, this office contacted Ms. Freedman with respect to concerns that this office may not have all of the Discovery and that of specific concern was the **missing 'drug evidence'. This office was assured that it was provided all Discovery on DVDs...**On or about August

> 18, 2015, this office was provided additional Discovery which included, among other things, 'Syracuse Police Department Chain of Custody Reports for drug exhibits seized following the controlled purchases from co-defendants Willie Strong, Jr., Zephaneea Dowdell, Tashawn Albert, and Jamal Harris'. This is exactly the information that had been requested in June 2015. Based upon the Government's response to requests for this information, this office relied upon the Discovery in its possession to submit its Omnibus Motion. It was not until almost two (2) weeks after this office submitted its Motion that it was provided crucial documentation... **As such, and given the Government did not comply with the Criminal Pretrial Scheduling Order (Doc. No. 168),** Defendant is moving to preclude any and all drug exhibits that were seized and that were not timely disclosed." **(Record Doc. No. 204 at 4-5, Neroni's Reply)**

Wilson also submitted a reply, moving for an evidentiary hearing to determine the authenticity of the **belated** SPD Chain of Custody Reports **(Record Doc. No. 204-1 at 2-3; see also C.A. App. 51-52).** The district court denied petitioner's claim(s) without a hearing, holding, "...coconspirators have admitted to every one of the thirty drug purchases they were involved in...Such admissions **imply** the existence of both the purchases and the informants that made them." **See Omnibus Decision at 5;** and the defense objections to the **belated** SPD Chain of Custody Reports were untimely because **"the Government has not had an opportunity to respond to it. As a result, this motion is denied without prejudice." See Omnibus Decision at 10. In light of the district court denying Wilson's "ninth motion", i.e., challenging the belated disclosure of the SPD Chain of Custody Reports, "without prejudice",** petitioner filed multiple reconsideration motions re-submitting this motion, and each time the district court ruled the motions were untimely, and nevertheless without merit. **See Reconsideration Order(s) 2&1-**

respectively. Wilson furnished the Circuit Court with the aforementioned sworn facts, occurrences and documentary proof, and was denied an evidentiary hearing.

(3) Vindictive Prosecution--Collusion Between Federal & State Prosecutors

On October 22, 2015, Wilson was arraigned on a sealed indictment, in Onondaga County Court, for a cold case homicide from April 2000 (People v. Derrick Wilson, Ind. No. 2015-0866-1). At arraignment Wilson clamored, **"The reason why I'm here is because these prosecutors are in collusion with federal prosecutors...they threatened me and told me if I filed my motions exposing the government corruption, they were going to charge me with these frivolous crimes." (Record Doc. No. 391, Ex. A).**

On February 8, 2016-five days after Wilson filed his Rule 29/33 Motions in the instant matter-petitioner received discovery in the state prosecution, i.e., **Syracuse Police report, showing on August 4 2015 (one day after Wilson submitted his Omnibus Motion in the instant matter),** AUSA Freedman convened, in her office, with Assistant District Attorney (ADA) Matthew Doran, SPD John Nolan, coconspirator Jamal Harris and his lawyer William Sullivan, to have a **"final meeting"** concerning HARRIS cooperation in association with the homicide. **(Record Doc. No. 391, Ex.B).**

Exercising due diligence, Wilson filed an Amended Rule 29/33 Motion-attaching thereto, Wilson's sworn statement at the October

22, 2015, state arraignment as Exhibit A, and the Syracuse Police report as Exhibit B-claiming federal prosecutors colluded with state prosecutors, in implementing a **vindictive prosecution,** in retaliation for petitioner filing his Omnibus Motions **(Record Doc. No. 391).** The district court denied the motion without a hearing holding that briefing was closed on the motion, and "Even if the Court considered the newly made arguments...the motion would still be denied." **See Appendix "E" (Reconsideration Order 3).**

Persistently, Wilson submitted [a]nother reconsideration motion, concerning inter alia, this same claim. This time Wilson incorporated the exhibits submitted in his **Record Doc. No. 391** filing, and [a]dded a personal affidavit swearing, **"In April 2015, my previous counsel Ms. Danielle Neroni, Esq., came to visit me at Albany Correctional Facility. During this consultation she informed me that she [Ms. Neroni] had a discussion with AUSA Freedman and Ms. Freedman advised her that if I filed my omnibus motion in federal court the District Attorney, in Onondaga County, will charge me with a homicide in state court...and Jamal Harris will testify against me regarding the homicide." (Record Doc. No. 414-4; see also C.A. App. 2112-2113)**

In tandem, the government argued **(Record Doc. No. 419 at 14),** and the district court agreed, **Wilson's claim did not include an affidavit from Neroni, and thus lacked merit. See Appendix "D" (Reconsideration Order 4 at 10).** Wilson submitted this same claim to the Second Circuit to no avail.

Moreover, subsequent to Wilson's sentencing but prior to his appellate submission, petitioner was finally able to procure

a sworn statement from Neroni, concerning this "threat". On September 19, 2017, at a Pre-Indictment Delay Hearing in the related state prosecution, Neroni testified:

> **"I recall just that I had a conversation with Ms. Freedman that there was an uncharged homicide and that if he entered a plea of guilty on the case in Federal Court that he wouldn't be charged with the homicide." (C.A. Doc. No. 96-6 at 17)**

Upon procurement of this testimony, and with due diligence, Wilson moved pursuant to Fed.R.App.P. 10(e), in the Second Circuit, to supplement the appellate record to include this transcript **(C.A. Doc. No. 96-2).** The Circuit Court denied this request. **See Appendix "C" (Supplement Record Order).**

All of the sworn statement of facts, occurrences and documentary proof cited supra, were presented to the Second Circuit in petitioner's Pro Se Brief **(C.A. Doc. No. 123)**, and Motion to Supplement **(C.A. Doc. No. 96)**-where noted, and the Circuit Court **denied** petitioner's **Franks and due process claims-without granting an evidentiary hearing. See Summary Order at 13.** The Circuit Court denied petitioner's request for a rehearing. **See Appendix "B".** As noted supra, this timely petition follows.

REASONS FOR GRANTING THE PETITION

SUUM CUIQUE TRIBUERE

The criminal process of the 21st century can take on the configuration of a labyrinth, puzzling some of the brightest officers of the court, and completely mystifying the layperson. To this effect, the criminal process is grounded in centuries of common law tradition, enabling the magnanimous jurist to chart our nation's course. At its core, is the Due Process of Law, which derives from ancient roots, i.e., **Suum Cuique Tribuere-"to render every person his due" (Roman Law)**, and the words "law of the land" used in the Magna Charta (English Law). The foundational intent and purpose of these guiding precepts are to guarantee that "no man shall be condemned in his person...without due notice and an [o]pportunity to be heard in his defense." **Holden v. Hardy, 169 U.S. 366,390 (1898). See also, Grannis v. Ordean, 234 U.S. 385,394 (1914); Powell v. Alabama, 287 U.S. 45,68-69 (1932)**("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by cousel.")

Bearing this purview in mind, it becomes readily apparent that the decision below contravenes a litany of Supreme Court precedent, begets inter-circuit conflicts, and uproots centuries of our natural and inherent principles of justice. For example: **(1)** In a civilized society, a citizen should never be subjected to the Hobson's choice, i.e., choosing between unprepared counsel and self-representation; which statistically appears to be a recurring dilemma for the indigent class in America. The Second

Circuit's reluctance to rectify the district court's deviation from the constitutional command of the Sixth Amendment's right to counsel, is at odds with **Johnson v. Zerbst, 304 U.S. 458 (1938), Faretta v. California, 422 U.S. 806 (1975),** and its progeny-especially in light of the district court's failure to make any inquiry-whatsoever, into one of the core elements of the waiver of counsel doctrine, i.e., **voluntariness.** Amplifying the Circuit Court's error is the fact that its decision begets conflict with at least (7) circuits-including its own; at a time when calcified uniformity amongst the circuits are necessary to counteract the nationwide epedemic, i.e., "constructive denial of counsel" being afforded to the indigent class.

(2) The opportunity to be heard in one's defense must inherently include pretrial defense(s). **See Fed.R.Crim.P. 12(b)(3); see also Jones v. United States, 362 U.S. 257,264 (1960); Jackson v. Denno, 378 U.S. 368,376-377 (1964); United States v. Wade, 388 U.S. 218 (1967); Franks v. Delaware, 438 U.S. 154 (1978).**

The underlying guidance of these cases are that once a substantial preliminary showing is made, the Fifth Amendment of the U.S. Constitution mandates an "[o]pportunity to be heard in his [pretrial] defense." **Grannis at 394.** The Second Circuit's refusal to grant petitioner's request for an evidentiary hearing, challenging the propriety of the methods employed by law enforcement and prosecutors contravenes (i) the legal axiom: Nemo est supra leges-"No one is above the laws"; (ii) the powerful dissent of Mr. Justice Brandeis in **Olmstead v. United States, 277 U.S. 438, 471-486 (1928);** and (iii) the guidance imparted in **Jones, Jackson,**

Wade, and Franks.

"One of our country's distinguished jurist has pointed out, 'The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law.'" **Miranda v. Arizona, 384 U.S. 436,480 (1966).** Accordingly, petitioner introspectively ponders aloud to the Court: What is the state/quality of our nation, if an American citizen, albeit a criminal defendant, is accused of a crime, marshalled in front of a magistrate, held without bail, and compelled to endure a complex criminal process, providing only pro forma appointment of counsel, with one systemic caveat-the government is beyond reproach?

I. Involuntary Waiver of Counsel--Hobson's Choice

A. The Decision Below is in Conflict with 80 Years of Supreme Court Precedent

In 1938, this Court held, "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of the trial court...This protecting duty imposes the 'serious and weighty responsibility' upon the trial judge of determining whether there is an intelligent and competent waiver of counsel", **Johnson at 465.** For 80 years, this Court has dogmatically refined the principles set forth in **Johnson. See, e.g., Von Moltke v. Gillies, 332 U.S. 708, 724 (1946)** ("to discharge this **duty** properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand."); **see also Faretta at 835.** Concomitantly, the waiver of counsel doctrine

emerged. **See Iowa v. Tovar, 541 U.S. 77,87-88 (2004)** ("the Constitution...does require that any waiver of the right to counsel be knowing, **voluntary** and intelligent")(citing **Johnson at 464).**

The logical corollary from **Johnson** and its progeny is: trial court has a "serious and weighty" duty to investigate the "particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused" to ensure that a defendant's waiver of counsel is "knowing, **voluntary** and intelligent".

A keen review of the **Faretta colloquy** shows the district court failed to make any inquiry-whatsoever to Moynihan or Wilson, concerning the **"circumstances"** underlying the **voluntariness** of Wilson's waiver of counsel, **see Faretta Inq. Tr. pg. 291-318,** notwithstanding, Moynihan's own admission that (i) he was not prepared for trial, (ii) did not think he could provide effective assistance of counsel at the scheduled trial date **(C.A. App. 109-110,111),** (iii) Wilson knew the [c]ase better than him, **see Faretta Inq. Tr. pg. 291;** and Wilson's protestations that (iv) Moynihan was not prepared for trial **(C.A. App. 121, 123,125); see also Faretta Inq. Tr. pg. 292-293;** (v) Wilson's expressed dilemma, **"he is not ready for trial...I'm ready" (C.A. App. 121),** and **"... my lawyer is not ready for trial but I am...the last thing that I want to do...is sit here at this desk and...have a counsel just go through the motions...when I can actually represent me, myself". See Faretta Inq. Tr. pg. 292-293.**

Accordingly, the Circuit Court's holding that Wilson voluntarily waived his Sixth Amendment right to counsel, contravenes 80 years

of Supreme Court precedent.

B. The Decision Below is in Conflict with at Least (7) Circuits- Including Its Own

Wilson argued below that he involuntary waived his right to counsel because he was subjected to an impermissible Hobson's choice, i.e., choosing between unprepared counsel and self-representation. The Second Circuit found otherwise, holding, "When Wilson waived his Sixth Amendment right, **he did not suggest that he was doing so because he felt coerced. Rather, Wilson insisted that he was ready for trial** and assured the court he was 'very familiar with the process of the legal proceeding[s]', especially if Moynihan continued to advise him throughout the trial." **See Summary Order at 6.**

As a threshold matter, to review the Circuit Court's decision in its proper light, petitioner recommends this Court to first purge the lower court's wholly erroneous finding, i.e., **"When Wilson waived his Sixth Amendment right, he did not [s]uggest that he was doing so because he felt coerced".** Wilson respectfully submits, the record cited herein refutes the Circuit Court's finding, and unequivocally shows the constitutional dilemma petitioner faced.

After purging this wholly erroneous finding, it becomes clear that the decision below is in **direct conflict** with **Pazden v. Maurer, 424 F.3d 303 (3d Cir. 2005), James v. Brigano, 470 F.3d 636 (6th Cir. 2006), Gilbert v. Lockhart, 930 F.2d 1356 (8th Cir. 1991); and conflicts in principle** with **Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976), United States v. Schmidt, 105 F.3d 82 (2d Cir. 1997),**

Wilks v. Israel, 627 F.2d 32 (7th Cir. 1980), Sanchez v. Mondragon, 858 F.2d 1462 (10th Cir. 1988).

In **Pazden**, the defendant's election to self-representation was preceded by his newly **appointed** trial counsel moving for a continuance, citing the government's untimely and piecemeal disclosure of discovery material, and failure to interview potential witnesses. The court denied trial counsel's request. **Pazden** felt he knew the facts of his case better than his lawyer, and was thus being compelled to choose between the "lesser of two evils". **Pazden at 308-309.** Under these **circumstances** the Third Circuit overturned **Pazden's** conviction, finding his waiver involuntary, holding, **"[a] choice between incompetent or unprepared counsel and appearing pro se is in essence no choice at all. The permissibility of the choice presented to the petitioner...depends on whether the 'alternative' to self-representation offered operated to deprive him of a fair trial." Pazden at 313 (quoting Wilks, 627 F.2d at 361).**

In **James**, prior to the commencement of trial, the defendant's recently **appointed** trial counsel moved for a continuance, affirming he was not prepared. The district court denied counsel's request. In turn, **James** declared, he wanted to fire his trial counsel-to wit, the judge instructed **James** not to engage in any further outburst, lest **James** be found in contempt, tried in abstentia or gagged. **James at 639 (compare n.2, supra).** Trial counsel moved to withdraw as counsel, on grounds that he could not properly represent **James** and get him a fair trial. Trial counsel's request was denied. Without conducting any inquiry into the reason for **James** request to have counsel relieved, the court asked **James** if he wanted to

represent himself or maintain trial counsel. James chose the former. Under these circumstances the Sixth Circuit affirmed the district court's grant of James habeas petition, holding,"the choice between unprepared counsel and self-representation is no choice at all." James at 643.

In Gilbert, "on the morning of the defendant's criminal trial, his public defender filed a motion for a continuance", Gilbert at 1357, affirming he needed more time to investigate the defendant's case. The trial court denied counsel's motion; which led to Gilbert requesting new counsel under the premise that his public defender was unprepared for trial. Trial court denied this request. Consequently, trial court gave Gilbert the option of proceeding pro se or with the public defender. Gilbert chose the former. Accordingly, the Eighth Circuit held, "We believe Gilbert was offered the 'Hobson's choice' of proceeding to trial with unprepared counsel or no counsel at all", Id. at 1369, and reversed Gilbert's conviction.

In Pazden, James, and Gilbert, each defendant's trial counsel-by their own estimations, informed the court that they were not prepared for trial, and were unable to provide their clients with effective representation--akin to Moynihan in the instant matter. The standard used by the Third, Sixth and Eighth Circuits in determining the "voluntariness" of a defendant's waiver of his right to counsel is whether defendant's "alternative" to self-representation is constitutionally offensive. Conversely, in the instant matter, the Second Circuit held, "Because Wilson told the district court that he was capable of adequately representing

himself, his case is very different from those in which courts have found defendant's waiver to be involuntary." Summary Order at 7.

Furthermore, the decision below conflicts in principle with four other Ciruits-including its own. See e.g., Maynard, 545 F.2d at 278 ("A criminal defendant may be asked, in the interest of orderly procedures, to choose between waiver and another course as long as the choice presented to him is not constitutionally offensive"); Schmidt, 105 F.3d at 89 ("trial court...may not compel defendant to proceed with incompetent counsel"); Wilks, 627 F.2d at 36 ("If a choice presented to petitioner is constitutionally offensive than the choice cannot be voluntary"); Sanchez, 858 F.2d at 1465 ("A choice 'between incompetent or unprepared counsel and appearing pro se' is 'a dilemma of constitutional magnitude'... The choice to proceed pro se cannot be voluntary in the constitutional sense when such a dilemmma exist").

Since its birth in Johnson, this Court has imperiously shaped and molded the core elements of the waiver of counsel doctrine, i.e., knowing, intelligent and voluntary, in a mosaic of decisions spanning eight decades. For example, a waiver is intelligent and competent when "made with eyes open", see Adams v. United States ex rel. McCann, 317 U.S. 269,279 (1942); and knowing when the defendant is made aware of the nature of the charges and advised of the dangers and disadvantages of proceeding pro se. Faretta at 835. And while it is true, that this Court has tacitly guided our nation with respect to the voluntariness-element of this doctrine, see Von Moltke, at 729; Williams v. Kaiser, 323 U.S. 471,474 (1945) ("a plea of guilty made by one who asked for counsel but could not

obtain one and who was 'incapable of adequately making his own defense' **stands on a [d]ifferent footing**"); **see also** **Moran v. Burbine**, **475 U.S. 412, 421 (1986)** ("relinquishment of right must have been **voluntary** in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception."); **Brady v. United States**, **397 U.S. 742,753 (1970)**; **Scheckloth v. Bustamonte**, **412 U.S. 218,223-225 (1973)**--from petitioner's research, it appears that this Court has not squarely adjudicated the question presented here, i.e., the Hobson's choice of choosing between unprepared counsel and self-representation.

Respectfully, a present-day proclamation from the High Court imparting instructive guidance to the lower courts for analyzing the **voluntariness** element of this doctrine, when courts are presented with the Hobson's choice will (i) embed the last mosaic in this eminent doctrine, (ii) align the Second Circuit with its sister circuits, and (iii) infuse emphasis in the trial courts to fully discharge their duty in safeguarding American citizens-especially the indigent class-Sixth Amendment right to counsel. Moreover, the following section spotlights the national crisis debilitating our nations' indigent defense systems.

C. Hobson's Choice-Elephant in the Room (National Epedemic)

On December 11, 2017, NBC News published an article titled, "Public Defenders Nationwide Say They're Overworked and Underfunded",[4]

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[4]**Link: https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111**

reporting on the dire state of our nation's indigent defense system(s). A variety of advocates were interviewed to provide an accurate depiction of the "actual" epedemic at hand: Director of Missouri's public defenders office, Michael Barret, resorted to unprecedented tactics to bring attention to this national crisis, by appointing Governor Jay Nixon to represent an indigent defendant, after Gov. Nixon vetoed a bill that would have capped public defenders' caseloads. James T. Dixon Jr., director of Louisiana's public defenders office, also commented on the need for a stronger indigent defense system. David Carroll, executive director of the Sixth Amendment Center stated, **"If you look at ABA reports going back to the 1980s, they've been calling it a crisis for 30 years now"**. And Patrick J. Nolan, director of the Criminal Justice Reform Project at the American Conservative Union Foundation denoted, **"When the public defender has hundreds of cases assigned to them, there's no way they can put the time and effort into what's required. It's a sham to say there was representation when its literally an assembly line."**

Today's epedemic is not novel; in fact, substandard levels of representation being afforded to the indigent class has plagued America's Criminal Justice System for ages. In 1963, Mr. Justice Brennan expounded, "Too few leaders of today's Bar show the same consciousness of their professional responsibility; a noble tradition seems to have been forgotten by far too many...**It is significant that in announcing a grant of almost three million to [i]mprove legal representation of indigents,** the Ford Foundation emphasized the importance of this particular function in the whole

spectrum of the lawyer's responsibility." **(See, The Criminal Prosecution: Sporting Event or Quest for Truth, Wash. U.L.Q. 279, 281 (1963)).**

A half century later, Mr. Justice Breyer recaptured the sentiments expressed by his predecessor, depicting the grim state of today's indigent defense system(s), **"defendants, rendered indigent, would fall back upon publicly paid counsel, including overworked and underpaid public defenders.** As the Department of Justice explains, **only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards." See Luis v. United States, 136 S. Ct. 1083, 1095 (2015).** Accordingly, the reasonable deduction from Mr. Justice Breyer's insight is that **73 percent of indigent defendants nationwide are suffering from constructive denials of constitutionally guaranteed assistance of counsel.**

Furthermore, even the United States government has conceded to the existence-and national breadth of this crisis, **see, e.g., "Statement(s) of Interest"**, submitted by the U.S. Department of Justice in civil proceedings, **Kimberly Hurrell-Harring v. State of New York, 15 N.Y.3d 8 (2010)**, and **Joseph Jerome Wilbur v. City of Mount Vernon, 2: 11-cv-01100-RSL, Doc. No. 322 (W.D. Wash 2013). See Appendix "W" (Statement of Interest).**

Pointedly, in **Hurell-Harring**, the New York Civil Liberties Union (NYCLU) initiated a class-action civil suit against the State of New York, claiming New York was **constructively denying indigent defendants their Sixth Amendment right to counsel.** Of particular interest, **the NYCLU identified (5) counties-including the county of**

jurisdiction for the instant matter (Onondaga County) were routinely failing to "investigate clients charges and defenses"; failing "to use expert witnesses to test the prosecutions case and support possible defenses; **complete breakdowns in attorney-client communication; and a lack of any meaningful advocacy on behalf of clients." See Statement of Interest pg. 7.**

In 2014, the State of New York reached a settlement agreement with the NYCLU, agreeing to invest 100 million in overhauling New York's Assigned Counsel programs. Unfortunately, notwithstanding this landmark agreement, on October 5, 2016, NYCLU staff attorney, Mariko Hirose lamented, **"The concern is with the provider's history in unwillingness to provide adequate defense services ...Things have not changed in [Onondaga] county."**[5]

The central concern underlying this crisis is that a particular class of American citizen's are routinely being deprived of their Sixth Amendment right to effective representation, due to the States' systemic failures. An array of jurist-from U.S. Supreme Court Justices to legislators, advocates and activist-have called for the overhaul of our nation's indigent defense system(s). Until this calling is answered-in application, American citizens, like petitioner, will continue to suffer from a **constructive denial of their Sixth Amendment right to counsel;** and methodically-even though for some unwittingly, be subjected to the

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[5]**Link: https://www.syracuse.com/crime/index.ssf/2016/10/many_more_syracuse-area_criminal_suspects_will_get_free_lawyer_starting_this_wee.html.**
or go to www.syracuse.com and search: Getting a free Onondaga Co. lawyer is now much easier for thousands

impermissible Hobson's choice. Thus, the time is ripe for this Court to take the inaugural step in safeguarding American citizens from representation that amounts to nothing more than an **"assembly line"**.

D. The Decision Below is Incorrect

As a purely legal matter, the Circuit Court's decision is clearly erroneous. As discussed supra, (i) trial court failed to conduct any inquiry-whatsoever, into the voluntariness element of the waiver of counsel doctrine, and (ii) the record unequivocally shows Wilson's **"reasoning"** for electing self-representation was coerced, i.e., choosing between unprepared counsel and proceeding pro se.

Furthermore, the decision below is replete with erroneous findings of fact, and petitioner would be remiss in his pursuit for justice if he did not bring these errors to the Court's attention:

First, the Circuit Court found, "Accordingly, the district court did not err in concluding that Wilson's waiver was voluntary." **Summary Order at 7.** Contrariwise, the record unequivocally evinces that the **district court's finding of voluntariness was ambiguous at best:**

> THE COURT: Well, certainly knowing.
>
> MR. COMMANDEUR: Maybe ill-advised.
>
> THE COURT: **Voluntary. Intelligent there's a very strong question about obviously.**
> **(See Faretta Inq. Tr. pg. 317)**

Second, the Circuit Court **blames** Wilson for his counsels' unpreparedness, because **"he fired his first lawyer, his next two resigned because their relationship with him deteriorated, and he replaced the fourth two months before trial, even after the court warned him that his date would not be moved again.** To hold that Wilson's waiver was involuntary in such **circumstances** would give future criminal defendants the ability to **'disrupt proceedings by demanding new counsel whenever he differs from his lawyer's strategic, legal, or ethical judgements about how to conduct a case.'" Summary Order at 7.** Contrariwise, the record below does not support the Circuit Court's conclusions, e.g.:

(i) Wilson **[r]equested** for his first and third counselors to be relieved amid allegations of both lawyers failing to investigate the facts pertaining to his case, and the district court **[g]ranted** Wilson's request. **See Appendices "O", "Q".**

(ii) Wilson's first, second, third and fourth counsel(s) all made **"conclusory"** assertions that the attorney-client relationship had deteriorated. **See Appendices "O", "P", "Q", "R".** [S]ince the district court made no inquiry into the nature of the deterioration-**can it be judiciously ruled out that the reason for the deteriorating relationship with first and third counsel derived from their failures to investigate;** second counsel's **"real" reason** for requesting substitution was the **"health issues"** he cited in his correspondence to the court; and that fourth counsel **was not prepared for trial, so she passed the case on to Moynihan?**

(iii) Trial court **never [w]arned** Wilson "that his trial date would not be moved again." Conversely, trial court **[p]referenced,**

"We extended your trial out **at her request** and your case has been pending for some time, **so I don't want to have any more adjournments; I would like to get it resolved." (C.A. App. 78)**

(iv) Aside from conclusory assertions, **Wilson's counsel(s) never expressed any discord to the district court regarding "strategic, legal, or ethical judgements about how to conduct a case."** In fact, Neroni, incorporated Wilson's "Omnibus Affidavit"-asserting fabrication of controlled purchases, false statements and material omissions in all wiretap applications-into her Omnibus Motion Mem. of Law **(Record Doc. Nos. 186-1,186-2)**; and Moynihan affirmed to the district court on the first day of trial, **"our defense in this case is that these controlled purchases did not take place, that Mr. Wilson did not sell Mr. Hayward four--on four occasions crack cocaine. To support that defense, vital to that defense is to show where the government, its agents, the police, the Syracuse police, whoever's responsible have fabricated other controlled purchases. That goes to the crux of [o]ur defense."**[6] **(C.A. App. 146)**

(v) Clearly, the district court nor the Circuit Court considered New York State's **concession in Hurrell-Harring**, that New York's Assigned Counsel programs (pointedly, Onondaga County) were routinely, constructively denying indigent defendants their Sixth Amendment right to counsel; the U.S. Dept. of Justice **"Statement(s)**

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[6]This statement by Moynihan **buttresses** petitioner's Hobson's choice dilemma, where Moynihan affirmed the following day, Wilson **"feels that he knows the [c]ase better than I do, and I can't disagree with him", Faretta Inq. Tr. pg. 291--compare with Wilson's affirmation, "I do know the facts...in this case better than, better than my lawyer." Faretta Inq. Tr. pg. 292.**

of Interest" submitted in Hurrell-Harring; Mr. Justices Brennan and Breyer's concerns regarding the quality of representation being afforded to the indigent class--when investigating the **circumstances** underlying Wilson's pro se election.

"It is hornbook law that '[w]hen an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court clearly has a responsibility to determine the reasons for defendant's dissatisfaction...'" **(Martel v. Clair, 565 U.S. 648, 182 L. Ed.2d 135,149 (2012);** "However, in the **total absence of any inquiry into the cause of [Wilson's] dissatisfaction with [counsel(s)], we have no way of knowing whether [Wilson] may have had some valid ground for seeking a substitution of counsel." United States v. Welty, 674 F.2d 185, 190 (3d Cir. 1981).**

Based upon the foregoing **undisputed facts and circumstances** it was **error** for the Circuit Court to **blame** Wilson for **[d]emanding** the quality of representation that the Sixth Amendment guarantees. Accordingly, the decision that petitioner voluntarily waived his right to counsel is equally erroneous.

II. The Decision Below is at Odds with the "Due Process Check" Embedded in Franks v. Delaware, 438 U.S. 154 (1978), and the "Core Concerns" in United States v. Giordano, 416 U.S. 505 (1974)

In one sweeping sentence, the Second Circuit denied Wilson's pro se request for a **Franks hearing,** holding, "We have considered Wilson's remaining arguments and find them to be without merit." **Summary Order at 13.** Wilson presented sworn statements of fact and

occurrences accompanied by documentary proof to the Circuit Court **"point[ing] out specifically the portion[s] of the warrant affidavit that is claimed to be false [with] a statement of supporting reasons", Franks at 171,** showing where SA Hart included false statements and material omissions in **all six** wiretap applications regarding, inter alia, the Necessity requirement, 18 U.S.C. §§ 2518(1)(c),(3)(c).

Wilson specifically pointed out four **(4) false statements** in SA Hart's wiretap applications **[False Statements #2,#3,#4,#5 supra]- and their correlation to SA Hart's material omissions, i.e., the connection to the hierarchy of the organization and investigative capabilities of CS#4-Douglas Reid, and First CS#5-Willie Strong, Jr.**

Wilson [e]xtrapolated to the Circuit Court that **STRONG was the First CS#5 by pointing out SA Hart's factual misappropriation of DEA Label CS#5 between two separate informants.** This **"misappropriation"** provides a suffice basis to support the permissible inference that SA Hart was attempting **"to conceal the fact the 'First CS#5' is actually Willie Strong, Jr., a high ranking member of the organization that would alleviate the government's 'necessity' for a wiretap." (C.A. App. 48)**

For **clarity,** the district court distorted petitioner's misappropriation claim, by holding, **"It is simply of no consequence that the [s]ame informant may be assigned a different identifying reference number by or for different investigative agencies." Summary Order at 5.**

In the district court's analysis there is only **one informant** being appropriated "identifier CS#5" by or for **multiple agencies,**

which would be permissible; **However, that is not petitioner's claim nor the showing he made. The facts show there is [o]ne investigative agency [DEA SA Hart] assigning DEA Label CS#5 to [d]ifferent informants in his wiretap applications-which is impermissible.**

Once the government furnished the defense with its Witness List, on December 14, 2015-**with Douglas Reid listed as a witness. See Appendix "T" (Government's Witness List)**, and Giglio[7] material, on December 28, 2015-**containing REID'S March 11, 2015, Onondaga County, Sentencing Transcripts (See Appendix "U")**, it became readily apparent that REID was CS#4 from SA Hart's wiretap applications.

STRONG and REID'S ties to the alleged hierarchy are clear from the government's evidentiary submissions, see, e.g., False Statement #3, supra, **"...Willie Strong, believed to be a LAMA member and coconspirator in the Wilson drug trafficking organization."** Moreover, STRONG pled guilty and was sentenced as a coconspirator in this matter. REID confessed to being a **self-admitted gang member" (See Wiretap Application for SUBJECT TELEPHONE #2, para 17, supra);** and **SA Hart connected REID to a "street gang known as LAMA" in his DEA 6 report (See Appendix "S").** It should also be duly noted that **REID confirmed his confidential informant status with respect to the instant matter in his March 11, 2015, Sentencing Tr. pg. 5-12.**

Realistically, with STRONG and REID'S strong ties to the hierarchy of this alleged organization **(cf. False Statement #2, supra)**, both could have easily been able to identify all members

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[7] Giglio v. United States, 405 U.S. 150 (1972)

of the conspiracy, source of supply, and methods of distribution by using normal investigative techniques, such as but not limited to, their personal knowledge, observations and use of consensually recorded conversations **(cf. False Statements #3,#4,#5 supra)**. Thus, for affiant SA Hart to include **false statements** pertaining to the very **material he omitted,** makes it crystal clear that his false statements were **deliberately** made, with the intention of misleading the authorizing judge regarding the government's **"necessity"** for a wiretap. **Franks at 171-172; Giordano at 527.**

Throughout the entirety of this proceeding the federal government has never admitted nor denied STRONG and/or REID'S confidential informant status; instead, the government remained reticent on this pointed claim. Furthermore, in their appellate briefing, the government provided a **perfunctory** response, **"As for the Wiretap Act's requirement of necessity, Wilson challenges... are insubstantial: wiretaps should be used only when 'normal investigative procedures' may not work, 18 U.S.C. § 2518(3)(c), so it should be of no surprise that each wiretap application asserted that the government's informants had not been able to provide enough evidence on their own." (C.A. Doc. No. 131 at 53).**

The government's **perfunctory** response does not dispel, refute- or even touch on, petitioner's pointed claim of affiant SA Hart including false statements and material omissions in his wiretap applications regarding the investigative capabilities of confidential informants. Accordingly, Wilson is entitled to an evidentiary hearing pursuant to the rubric of **Franks** and **Giordano**, to supress all wiretap evidence.[8]

III. Suppressing the Right to be Heard when Challenging Executive Conduct that "Shocks-the-Conscience" Fosters a Criminal Justice System in which the Government is Beyond Reproach

The Circuit Court's cursory denial of petitioner's pro se claims included the instant due process issue, i.e., **requesting an evidentiary hearing to determine whether the government engaged in conduct that "shocks-the-conscience".** City of Sacramento v. Lewis, **523 U.S. 833,847 (1998)** ("the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary or conscience shocking, in a constitutional sense'".)

Indubitably, Wilson's claim that (i) **law enforcement fabricated (35) controlled purchases of narcotics,** coupled with (ii) **the prosecutor's fabrication of SPD Chain of Custody Reports** to cover up law enforcement's stratagem, and (iii) **prosecutor's collusion with state prosecutors in charging petitioner with a vindictive state prosecution,** to penalize him for exercising his right to file motions and/or go to trial in the instant matter-constitutes **"a level of executive power as that which shocks the conscience."** Id., **at 846.**

Wilson submitted sworn statements of facts and occurrences-his own affidavits **(C.A. App. 26-28,50-53,1988-1989),** and an affirmation from his previous counsel-Neroni **(Record Doc. No. 204 at 4-5, discussed supra),** accompanied by documentary proof **(C.A. App. 1991-2020, SPD Chain of Custody Reports),** swearing the government **a)** furnished a discovery that was **devoid** of any material-whatsoever,

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[8]**Government Exhibits: 7A-7BB; 8A-8M; 9A-9L; 10A-10F; 11A-11W; 12**

to account for (35) controlled purchases, **b) assured the defense that there was no missing "drug evidence", c) only to produce belated "drug evidence", i.e., SPD Chain of Custody Reports in violation of discovery orders (Record Doc. Nos. 83,168), and d) after Wilson's timely Omnibus filing.**

Pursuant to this Court's instruction, **the defense was entitled to believe the government when it represented there was no missing drug evidence. See, Banks v. Dretke, 540 U.S. 668,693-694 (2004).** For the government to furnish the defense with the SPD Chain of Custody Reports **after** already averring such material did not exist, and in violation of discovery orders accentuates the auspice of Mr. Justice Stevens, **"Discovery...minimizes the risk that a judgement will be predicated on incomplete, misleading or even deliberately fabricated [evidence]", Taylor v. Illinois, 484 U.S. 400,411-412 (1988).** Clearly, Neroni's affirmation (and Wilson's affidavit) that the government produced SPD Chain of Custody Reports **in non-compliance** of discovery order(s) **"puts in issue"** the authenticity of these documents. **(emphasis added).**

Furthermore, even short-lived trial counsel **(Moynihan) expressed his disbelief** in the authenticity of the SPD Chain of Custody Reports, **"those reports are in a vacuum. As I understand how police reports work and physical evidence collection and controlled purchases happen, to simply have a report where Officer Metz goes to the desk and submits drug evidence in at the property desk with no paperwork to establish how he got it, where he got it from, or anything about that exhibit is preposterous." (C.A. App. 139)**

Also, it should be duly noted that it was not until **after**

Wilson's August 3, 2015, Omnibus filing that the state government commenced grand jury proceedings (September 2, 2015) in the **vindictively related** state homicide prosecution leading to petitioner's October 22, 2015, arrest in that matter. Wilson contended below that federal and state prosecutors convened on August 4, 2015-**one day after petitioner's Omnibus filing in the instant matter, and [c]olluded** in acting on AUSA Freedman's **"threat"** to charge Wilson with a state homicide **if he filed motions (Wilson's aff.-C.A. App 2112-2113) and/or decided to go to trial (Neron's sworn testimony-C.A. Doc. No. 96-6 at 17).**

The permissible threat that this Court upheld in **Bordenkircher v. Hayes, 434 U.S. 357,363 (1978)** due to the "give-and-take [nature] of plea bargaining"; "did not foreclose the possibility that a defendant might prove through objective evidence an **improper prosecutorial motive" (United States v. Goodwin, 457 U.S. 368,380, n.12 (1982).**

Based upon the foregoing Wilson submits he has made a substantial preliminary showing that the government engaged in conduct that "shocks-the-conscience" to invoke his Due Process right to a hearing.

CONCLUSION

Petitioner implores this Court to grant this writ of certiorari.

Dated this 11th day of October, 2018

Respectfully Submitted,

Derrick D. Wilson II