No. # 18-8229

IN THE

SUPREME COURT OF THE UNITED STATES

SAM CHINN

PETITIONER,

V.

D.ARTUS

RESPONDENT.

ON PETITONER FOR A WRIT OF CERTIORARI

FEDERAL NORTHER DISTRICT COURT OF NEW YORK (60[b] MOTION)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

POINT ONE

WHETHER THE DENIAL OF A RULE 60(b) MOTION, BY THE DISTRICT COURT, AND THE DENIAL OF A CERTIFICATE OF APPEALABILITY BY THE COURT OF APPEALS, WAS A ABUSE OF DISCRETION, WHEN THE 60(b) MOTION WAS ABOUT A JUDGE VIOLATING 28 U.S.C. § 455, FOR THE DISQUALIFICATION OF A JUDGE WHO HAD TAKEN ACTIONS TO REMOVE THE MAGISTRATE JUDGE PROCESS 28 U.S.C. §§ 636(b), AND FEDERAL RULE 8(b), IN A HABEAS CORPUS PROCESS, THAT WAS RAISED AS A ARTICLE III, § 2 VIOLATION, BECAUSE THE DISTRICT COURT JUDGE MAKING THE ORDER TO REMOVE THE MAGISTRATE JUDGE PROCESS 28 U.S.C. §§ 636(b) AND FEDERAL RULE 8(b) WAS THE PROSECUTING ASSISTANCE DISTRICT ATTORNEY ON THE STATE'S CASE? AND DOES THIS PROVIDE THIS COURT WITH THE AUTHORITY OF THE ORIGINAL MATTERS OF A HABEAS CORPUS PETITION?

POINT TWO

WHETHER THE DENIAL OF A RULE 60(b) MOTION, BY THE DISTRICT COURT, AND THE DENIAL OF A CERTIFICATE OF APPEALABILITY BY THE COURT OF APPEALS, WAS A ABUSE OF DISCRETION, WHEN THE 60(b) MOTION WAS ABOUT A JUDGE VIOLATION OF 28 U.S.C. § 455, THAT SHOULD HAVE BEEN SEEN AS A BREAKDOWN, STRUCTURAL DEFECT, OR ABUSE OF DISCRETION IN A HABEAS CORPUS PROCESS, THAT AMOUNT TO A ARTICLE III, § 2 VIOLATION, WHEN THE DISTRICT COURT JUDGE WAS THE PROSECUTING ATTORNEY ON THE STATE'S CASE, WHO MAKES A ORDER TO REMOVE THE MAGISTRATE JUDGE PROCESS 28 U.S.C. §§ 636(b) AND FEDERAL RULE 8(b), THAT WOULD HAVE ALLOWED THE PETITONER TO PRESENT ADDITIONAL INTERPRETATION AND APPLICATION OF THE FACTS AND LAWS, SURROUNDING THE WAIVER OF APPEAL RIGHTS ON A PLEA BY ONE CLAIMING INNOCENCE, FOR CONSTITUTIONAL CLAIMS, OR-AND FOR PRETRIAL DECISION TO BE REVIEWED, OR THAT THE WAIVER WAS NOT KNOWINGLY, INTELLIGENT, OR NOT VOLUNTARILY DONE AS REQUIRED BY THE CONSTITUTION, OR THAT THE PETITIONER WAS MISINFORMED BECAUSE THE COURT FOR THE PLEA STATED THAT CONSTITUTIONAL CLAIMS CANNOT BE WAIVED, AND IT SHOULD HAVE CREATED THE EXCEPTION FOR PRETRIAL DECISION TO BE REVIEWED?

POINT THREE

WHETHER THE PLEA ALLOCATE AS THE - ALLOCUTE - ALLOCATUR : AS PRESENTED BY THE COURT, PROVIDED THE PETITIONER ON THE PLEA THE EXCEPTION, THAT ALLOWS PRETRIAL DECISION TO BE REVIEWED, AND THE DENIAL OF REVIEW FOR THE PRETRIAL DECISION WAS A ABUSE OF DISCRETION THAT CAME ABOUT BECAUSE OF THE ARTICLE III, § 2 VIOLATION, BY THE DISTRICT COURT JUDGE WHO WAS THE PROSECUTING ATTORNEY ON THE STATE'S CASE?

LIST OF PARTIES

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

[x] 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:

District Attorney's Office of Onondaga County, in the City of Syracuse, of New York, as the prosecuting Attorney's Office.

At that time of Pretrial Proceedings and remedies in the lower State Court and Federal Court:

State's Pretrial:

Assistant District Attorney Glenn T. Suddaby, who is now the Northern District Court Judge, in the State of New York.

William J. Fitzpatrick, Head Onondaga County District Attorney.

Presented Arguments on State Level Remedies:

Victoria M. White, Senior Assistant District Attorney for Onondaga County
Criminal Courthouse, 4th Floor
505 South State Street
Syracuse, New York 13202

Federal Level Parties:

Party On Habeas Corpus:

D. Artus, Superintendent of New York State Attica Correctional Facility

Opposing Party as Attorney for All opposing Parties (counsel of record):

Priscilla Steward
Attorney General for New York State
28 Liberty Street
New York, New York 10005

Petitioner-Appellant-Applicant:

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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

[x] For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix "A" to the petition and is

[ ] reported at ___; or
[x] has been designated for publication but is not yet reported, or
[ ] is unpublished.

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

[ ] reported at ____; or
[x] has been designed for publication but is not yet reported; or
[ ] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 3rd day of May, two thousand eighteen.

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

[x] A timely petition for rehearing, rehearing en banc was denied by the United States Court of Appeals on the following date: 18th day of July, two thousand eighteen, and a copy of the order denying rehearing, rehearing en banc appears at Appendix "C".

The petitioner timely filed a petition for a writ of certiorari to this Court postmarked October 16, 2018, and was received by this Court October 24, 2018 by this Court's clerk. On December 3, 2018, the papers was returned to allow petitioner to correct errors and resubmit within 60 days of the letter dated December 3, 2018, in accordance with U.S.Sup.Ct. Rule 14.5.

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

STATEMENT FOR JURISDICTION

On May 3, 2018, the petitioner was denied a certificate of appealability by the Court of Appeals for the Second Circuit that was timely filed (Appendix "A"), that was filed against the Federal Northern District Court of New York, denial of a Federal Civil Procedure Rule § 60(b) motion on December 1, 2017 that was timely filed (Appendix "B"), and a application pursuant to Federal Rules of Appellate Procedure § 35 to the Court of Appeal Second Circuit requesting a en banc rehearing was denied on July 18, 2018 that was timely filed (Appendix "C"). And, the petitioner timely filed a petition for a writ of certiorari to this Court postmarked October 16, 2018, and it was received by this Court clerk on October 24, 2018. On December 3, 2018, the papers for a writ of certiorari was returned to allow petitioner to correct errors and resubmit within 60 days of the letter dated December 3, 2018, in accordance with U.S.Sup.Ct. Rule 14.5.

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

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

UNITED STATES CONSTITUTIION PROVISION INVOLVED

UNITED STATES SUPREME COURT STATUTORY RULES INVOLVED

UNITED STATES CODES OF STATUTORY PROVISIONS INVOLVED (U.S.C)

FEDERAL RULES OF PROCEDURES INVOLVLED

STATEMENT OF THE CASE

A. Introduction

1. This case is brought from the denial of a certificate of appealability by the Court of Appeals, Second Circuit, for a Federal Rule Civil Procedure 60(b) motion, that presented a true Article III, § 2 violation against the New York Northern District Court Judge or Judges for violation of 28 U.S.C. § 455, for disqualification of a Judge. Where the Northern District Court Judge Glenn T. Suddaby made a order terminating the process of 28 U.S.C. § 636(b) and Federal Rule 8(b). But Judge Suddaby was the prosecuting Assistant District Attorney in the herein State's case in the County of Onondaga, Syracuse New York. The case surrounds the rights to appellate review on constitutional claims, and decisions of the State court, on a guilty plea.

B. SUMMARY OF FACTS

2. On November 16, 1995, petitioner was arrested and accused of murdering two women. Petitioner was arraigned on November 17, 1995. Notice was filed by defense counsel and prosecutor to allow petitioner to testify before the grand jury. Preliminary hearing was scheduled for November 21, 1995. On November 21, 1995, indictment charging Second Degree Murder charge(s) was handed down. 48 days later defense counsel filed for discovery, bill of particular on January 8, 1996.

3. On January 17, 1996, prosecutor represented-resubmitted the case to the grand jury without the court's permission. On January 22, 1996, the People presented discovery material to defense counsel, but pages 98 through 127 was missing and the missing pages was from the Medical Examiner Office and Crime Lab Unit. On January 26, 1996, petitoner was arraigned on the New Indictment of two (2) counts of Murder in the First Degree, one (1) count of Murder in the Second Degree, and Possession of a Weapon in the Third Degree.

People filed Notice to seek the Death Penalty.

4. On October 22, and 23, 1996, all suppression hearings are held for Huntley, Wade, Statement/Confession, Probable Cause to Arrest, and Identification. Where it was demonstrated during the hearing that Police and other witnesses had lied or had been coached in their testimony. It had went to the point of police were claiming that petitoner made a statement to them, or had conversation with petitioner, that never took place. All motions and hearings was improperly adjudicated. On April 7, 1997, petitoner learned that defense counsel and prosecutor couldn't settle the record between them, surrounding the Judge's decision dismissing one count of First Degree Murder. And there was a full hearing on the grand jury panel selection process for the selection of jurors. On May 2, 1997, motions dates were set for the panel issue. But, petitoner was told that the other decisions was unfavorable, but was favorable on appeal.

5. On July 2, 1997, after the advise of defense counsel stating that everything was ready for appellate review, after discussions and arguments, we appeared before the court to proceed with the plea. At which time and off the record, one (1) of the three (3) attorneys that represented petitioner, approached the petitioner asking petitioner to sign a appeal waiver. At that point it turned into another argument about that is not what petitioner was told.

6. The Court Judge asked the other defense counsel who advised the petitioner that everything was ready for appeal, if he needed to use the Court's chambers. In chambers the petitoner expressed the fact that, if he has to waive appeal rights, the petitioner was not taking the plea. Upon further advise of not signing the waiver, petitioner informed counsel that if petitoner had to waive appeal rights, the petitoner was not taking the plea.

7. Appearing back before the court, the Judge on the record states:

> "You've had some discussion about this, Mr. Chinn, in chambers. And pursuant to certain case law, specifically, People versus Allen, and other cases detailing constitutional case and Court of Appeals Cases there are certain rights, sir, that one cannot waive. Those rights have been detailed to some degree in our case study. Your attorney I'm sure has talked to you about certain rights that you still have to appeal in this particular case. Certain constitutional issues that a defendant cannot waive. I leave it up to the higher courts to determine what that waiver encompass; but I want to let you know that it does not and cannot include all rights. But, very many rights will be giving up as part of this plea bargain right to appeal." (P. 3-4) (Appendix "K").

8. On July 23, 1997, petitioner is sentenced to a 25 to life and a natural life sentence, after a guilty plea, on one (1) count of Murder in the First Degree, and one (1) count of Murder in the First Degree (Penal Law § 125.25 and 125.27), under one indictment.

9. Then petitioner filed motions questioning the sufficiency of the appeal record, petitioner filed a pro se Criminal Procedure Law § 440.10 motion, challenging the ineffective assistance of pretrial counsels, prosecutorial misconduct, and judicial misconduct, where one of the arguments was about the court judge failing to make and file a decision and order on the suppression hearings. At which time the prosecutor implied that they have the decision. The Onondaga County Supreme Court denied the CPL § 440.10 relief on April 27, 2007. Appendix "J."

10. After petitoner attempts to try and obtain the complete pretrial records of the State court proceedings from the State courts, and a copy of the suppression decision, petitioner was more or less ordered to file his direct appeal, after the People filed motion to have the appeal dismissed. There attempt to dismiss the direct appeal was granted, unless it was perfected on or before the given date provided, but seven extension was granted, until the last extension was a final extension, while still attacking

the failure of the State, Prosecutor, or defense counsel for not providing the petitioner with a complete appeal record.

11. For the State's Direct Appeal, petitoner filed to the New York State Appellate Division, Fourth Department, raising all the suppression issues, along with numerous other misconduct by prosecutor, police, judiciary, and ineffective counsel. Upon the people filing the respondent's brief, the prosecutor attached a copy of the suppression decision to the end of their brief. Then petitioner raised a additional argument that the prosecutor undermined the appeal process, calling for additional relief. The petitioner was still relying on what the judge stated that supported the advise of defense counsel, and it was presented as a argument about the plea, as it was also raised in the Federal Habeas Corpus as well as:

> THE PLEA WAIVER, WAS NOT VOLUNTARILY, KNOWINGLY, OR INTELLIGENTLY DONE; WHAT THE JUDGE STATES DURING THE PLEA ALLOCATION, CANNOT BE ACCEPTED OR STATED AS A WAIVER OF APPEAL RIGHTS; AND THE PLEA WAS MADE AS A NECESSITY, BECAUSE OF CORRUPTION AND MISCONDUCT THAT TAKES PLACE DURING PRE-ARREST AND PRE-TRIAL STAGES, THAT NULLIFIED CONSTITUTIONAL OBJECTIONS AND RIGHTS TO A FAIR TRIAL, TO PREPARE A DEFENSE AGAINST THE STATE'S ALLEGATIONS, DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, AND THE PRESUMPTION OF INNOCENT, OF ONE WHO IS ACTUALLY INNOCENT; AND APPELLANT HAS A RIGHT TO APPELLATE REVIEW ON THE INTEGRITY OF THE PROCEEDINGS, PROCEDURES, AND PROCESSES USED, BASED UPON ERRORS THAT COULD NOT BE CURED BY PROSECUTOR, OR JUDGE, BECAUSE OF THE COURT'S RULINGS AND OPINIONS.

12. The petitioner repeated the facts from the plea allocute. In support of those facts as to what the Judge stated, and relying on Lefkowitz v Newsome, 420 US 285 (1975). Because, Lofkowitz has been recognized as a exception clause for the State of New York, for pleas that did not forfeit the accuse's right to appeal pretrial decisions. In addition, now adding also, Lugo v Artus, 2008 WL 312298, supporting the argument.

13. The New York State Appellate Division affirmed the conviction stating:

"we reject defendant's contention that his waiver of the rights to appeal as invalid. 'The record established that he knowingly, intelligently, and

voluntarily waived his right to appeal as condition of the plea bargain.'" The New York Appellate Division, Fourth Department erroneously affirmed the conviction on March 15, 2013, that amounted to a erroneous interpretation and application of the facts and law. The New York State Court of Appeals denied leave on July 31, 2013. Appendix "F" and "G."

C. FEDERAL LEVEL

14. For the one (1) year to file a Habeas Corpus Statute of Limitation: The New York State Court of Appeals denied leave on July 31, 2013 (Appendix "F,"), the 90 days to file certiorari ended on October 29, 2013, and the one (1) to submit the Habeas Corpus ended October 29, 2014. The petitoner timely filed a 28 U.S.C. § 2254, that was one (1) hundred and twenty-two (122) pages long habeas corpus petition to the Northern District of New York on October 14, 2014, making it two (2) weeks early then the one (1) year requirement.

15. Respondent filed a response to the petition, and petitioner was granted a extension to file a reply. On November 6, 2015, petitoner filed a reply, and also requested that the reply and the submitted petition and record be acted upon by a magistrate judge, in accordance with 28 U.S.C. §§ 636(b) and Federal Rule 8(b) for a proposed finding of facts and to provide a recommendation upon the issues as argued by the petitoner.

16. On February 11, 2016, the Chief District Court Judge Glenn T. Suddaby made a decision as a text order stating that:

> "... order that the referral to the assigned magistrate judge is hereby terminated and the case will be decided directly by the assigned District Judge."

Stating that it was "... authorized by Chief Judge Glenn t. Suddaby on 2/11/16." Appendix "L."

17. The New York Northern District Court erroneously (only) entertained the plea as a waiver of appeal rights, and erroneously entertained the

Brady/Fraud issue presented. Claiming that petitoner submitted no support on the Brady issue. The issue demonstrated that the prosecutor lied about the content of the withheld thirty (30) pages, by calling the withheld thirty (30) pages witness statements. When in fact, the withheld thirty (30) pages was test results of the evidence that was made by the Medical Examiner's Office and Crime Lab Unit.

18. The New York State Northern District Court determined that everything else was waived because of the plea and submitted a erroneous decision. Appendix "E." The Northern District denied a certificate of appealability, and the Court of Appeals denied a certificate of appealability on November 17, 2016. Appendix "D."

19. Petitoner filed a Federal Rule Civil Procedure, Rule 60(b) Motion. Petitioner presented to the New York District Court, A Rule 60(b) motion. The motion presented the only issue of:

> Whether The Integrity Of The Habeas Corpus Proceeding Was Violated, That Affected The United States Constitution, Article III, § 2, And Rights of Equality, Checks And Balance, A Independent Body, As A Disinterested Tribunal, The Protection Against Abuse Of Arbitrary Powers, And Due Process Of Law, When The Decision Now Has The Appearance Of Impropriety And Injustice-Ness, When Deviating From The Proper Design Of Law, When Judge Suddaby's Disorder Possibly Influenced The Improper Decision, When Abusing His Discretion Violating The Federal Rules Of Disqualification Under Section 455, Which Demonstrated Potential Actions Of Overlooking And Acted As A Guiding Influence In The Habeas's Proceedings?

20. The Chief District Court Judge Glenn T. Suddaby, was the Assistant District Attorney for Onondaga County of New York, on the herein case from 1995 to 1997 in the State Court proceedings. Judge Suddaby is the reason why the herein petitioner-applicant was requesting a change of venue. Because, Judge Suddaby, as the Assistant District Attorney was directly involved with (also other issues), the issues being raised on:

Intentinally Concealing And Withholding Thirty Pages Of Laboratory Reports

That Was The Labs Work Product For Discovery Material, And Then They Intentionally Lied About It's Content, By Calling The Pages Witness(es) Statements, To Bring About Another Set Of False Test Results, That Was Fraudulently Created. As argued in the original petition.

21. Secondly, explained that on November 6, 2015, the petitoner-applicant filed a reply to the respondent's response to the habeas corpus petition, requesting that the reply, petition and record be submitted in accordance with 28 U.S.C. § 636(b) and Federal Rule 8(b) for making of a proposed finding of facts and to provide a recommendation upon the issues as argued by the petioner.

22. Then on February 11, 2016, the Chief District Judge Suddaby made a decision as a text order stating:

> "... order that the referral to the assigned magistrate judge is hereby terminated and the case will be decided directly by the assigned District Judge."

Stating, that it was "... authorized by Chief Judge Glenn T. Suddaby on 2/11/16." Appendix "L."

23. Arguing that the order Judge Suddaby made demonstrates that he was overlooking the process and had a guiding influence on the habeas corpus proceedings. Because, if he didn't have anything to do with the habeas corpus process, why would he be even reviewing the petitioner's reply to the respondent's response. Specially, when the District Court Judge Judge Lawrence E. Kahn (LEK) stated in his decision and order denying the habeas corpus petition that:

> "Although Judge Suddaby is the Chief District Court Judge in the Northern District, he is not presiding over or involved in any manner with petitioner's habeas proceeding." Appendix "E," page 4.

24. Judge Suddaby was involved. The reply was dated November 6, 2015, Judge Suddaby's text order to terminate 28 U.S.C. §§ 636(b) and Federal Rule 8(b) was dated February 11, 2016. The petitoner's habeas corpus was decided by the District Court Judge Lawrence on June 15, 2016, and it was not

presented to a magistrate judge as requested. The petitioner argued the details of 28 U.S.C. § 455, as they should be applied and interpreted, and the Article III, § 2 concepts and principles for the Federal District Court. The Rule 60(b) motion was improperly recharacterized as a motion for reconsideration, and adjudicated as such, and denied. Appendix "B."

25. Petitioner requested certificate of appealability, from the Court of Appeals, Second Circuit for the Federal Rule of Civil Procedure, Rule 60(b) motion. First, it was demonstrated and explained was the injustice-ness cause by the recharacterization of the Federal Rule 60(b) motion, and the prejudice produced through the improper intervention of the motion. The risk and harm that litigants face when the court recharacterizes Federal Rule of Civil Procedure 60(b) motion, and when read with the appropriate benevolence, it could have only been seen as a true 60(b) motion.

26. Because, of the seriousness of the consequences set forth restrictive conditions that places the motion within a different set of legal categories for appellate review. That also creates burdens on litigants by the limitation that is imposed by Federal law. And, it was more harmful than anything, and was unjustified where there was nothing whatsoever that can be gained. Yet, the Court of Appeals even called it a 60(b) motion. Appendix "B," page 1; Appendix "A."

27. The District court failed to warn the litigant of the recharacterization and the consequence, and did not give litigant a opportunity to contest the recharacterization of the Federal Rule of Civil Procedure 60(b) motion. It was a improper interpretation and application of substantive statutory law, for judicial application in the process of analyzing the merits of such claims that could have had a greater consequence against courts judges in future cases to come within the categories, that

cannot be predicted or protected against from every possible adverse effect that will follow from such recharacterization.

28. Secondly, it was further demonstrated for a COA as to the abuse of discretion in the District Court, that it's decision on the Rule 60(b) motion as a reconsideration motion was clearly a erroneous assessment of the facts surrounding the order made by the judge who was the prosecutor surrounding the misconduct that was demonstrated before becoming a district court judge. When the improper order was telling the other judge what to do and what not to do, was a violation of 28 U.S.C. § 455 (adding, effecting petitioner's liberty interest).

29. As a matter of law, 28 U.S.C. § 455, disqualification implies and provides the "ineligible," "incapable," or "inability," "lack of sufficient," qualification, power, resources or capacity to perform any act due to the existence of the factors set out in the subdivision of the law that eliminated the unseen possibilities of partiality, biasness and prejudicial misconduct from becoming a subject of future challenges, or denial of rights or opportunities.

30. It showed that 28 U.S.C. § 455 rendered Judge's Suddaby's action in making the order to terminate the magistrate judge process improper, inappropriate and prejudice, and it denied the petitoner of due process and fundamental fairness of the law and substantive law of 28 U.S.C. §§ 636(b), and Federal Rule 8(b).

31. The reply petitioner sent to the other parties attorney gave them Notice of the request for the magistrate judge to provide a finding of facts and recommendation. They never respondent to it or rebutted the request. Consent can be inferred from the parties conduct during litigation. The improper order by Judge Suddaby cam about approximately three (3) months after

the reply, requesting the petition to be acted upon in accordance with the laws of Federal Magistrate Act of 1976 and 1979 § 636(b)(1)(B), that could only be determined or disputed by the parties attorney and not the court.

32. This misconduct can be classified as a Article III, § 2 violation that deprived petitioner of his valuable right to one full round of federal review under a habeas corpus, where there was special circumstance that would have allowed the petitoner to satisfy the higher standard required on the Federal Habeas Corpus Procedure and the deprivation of the right by the judge who was directly accused of misconduct before becoming a Federal District Court Judge, was a true ground for Federal Procedure Rule 60(b)(4) and/or (6) and that issue was brought appropriately in the remedy of the Rule 60(b), for the violation of 28 U.S.C. § 455.

33. The relevant Statute 28 U.S.C. § 455, is perfectly clear, on what is intending to promote justice, and to advance all existing rights, and to prevent the uses of arbitrary and capricious authority-power. 28 U.S.C. § 455, asserts its function, objection and purpose. The purpose asserted is requiring any Justice, Judge or Magistrate Judge of the Unite States to disqualify himself in any proceeding, in which his partialness might reasonably be questioned.

34. The phrase "any proceeding" is a direct statutory command asserted pertaining to: "any part of the sequence, as to the proceeding itself," because it would still allow undue influence to be asserted in the process, if not applied with this view. It still would be fundamentally unfair to allow such a judge to give direction, advise, opinion, or make a order to another judge, when the merits of the claims in the habeas petition are directed at that judge's misconduct and mischief before becoming a Federal Court Judge.

35. 28 U.S.C. § 455(b) gives even more clarity by asserting further: "He

shall also disqualify himself in the following circumstance," adding to what was already commanded, in accordance with 28 U.S.C. § 455(b)(1). 28 U.S.C. § 455(b)(1) commands further: (1) "where he has a personal bias or prejudice concerning a party, or personal knowledge of the disputed evidentiary facts concerning the proceeding."

36. What is stated is to avoid abuse against litigants, keeping it neutral with those statutory indicators. Personal bias, prejudice toward a party, and personal knowledge of the dispute. This automatically indicates bias and prejudice to the litigant when that judge does anything. It clearly established that Judge Suddaby should not have asserted any opinion, or gave advise, or made a order giving direction, like a command to the other judge, as to what to do and not to do, specially, terminating the magistrate judge process. Appendix "L."

37. 28 U.S.C. § 455(b)(3) commands even further: "where he has served in governmental employment, and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."

38. Judge Suddaby was the prosecuting counsel, who has expressed opinions, as to the merits that are in question concerning the merits of the claims raised, making this part of the statute more appropriate (with § 455[a]), clearly established that he had no authority to make a order removing a process that required consent of the litigating parties, or to be reviewing anything in the sequence of the process for the habeas's proceedings.

39. This violation and argument was perfect for the Federal Rule 60(b) motion. A COA was required, because the ruling on the 60(b) motion was arbitrary, capacious, unreasonable and erroneous view, of the application and interpretation of the laws under assessment on the important Federal Procedure

in question on, 28 U.S.C. §§ 455, 60(b)(4) and (6), that presented a direct Article III, § 2 violation.

40. Thirdly, COA was required for the Federal Rule 60(b) motion, on the erroneous view, assessment and application and interpretation of the motion facts, where the decision was totally incorrect, starting with the decision stating that petitioner argued that Suddaby failed to recuse himself under 28 U.S.C. § 455. Appendix "B," pages 2-3.

41. The 60(b) motion clearly argued, "when abusing his discretion violated Federal Rule of Disqualification under section 455." As a matter of law, Judge Suddaby should not have had any type of involvement at all according to § 455, because the statute eliminates, disable, prohibited, and disallowed any type of involvement by Judge Suddaby in any form and fashion. And, this required the granting of the certificate of appealability by the Court of Appeals. Appendix "M," para. 24; "N," page 3.

42. Fourth, for COA, it was argued that the decision of the District Court erroneously asserted that, "petitioner raised the same argument in his petition when he sought a 'change of venue.'" Contrary to that, it was totally two (2) different argument, that had nothing to do with the disqualification statute § 455. Because, petitioner was arguing "change of venue," to prevent abuse and arbitrary and capricious, overbearing powers. Because of the lack of a independent body, that the petitioner should have had a disinterested tribunal, and no judge was going to make a proper decision against Judge Suddaby's misconduct, that took place before he became a judge. Appendix "B," page 3; "M,".para. 25; "N," page 3.

43. Fifth, the COA argued the District Court applied a erroneous application and interpretation of 455, and the assessment and view of the facts, when asserting in it's decision that, "despite petitioner's contention,

the issuance of such a administrative order does not suggest Judge Suddaby was a 'guiding influence of the habeas corpus proceeding.'" Contrary to that, the administrative order was a "guiding influence" that "terminated the Magistrate Judge Process," and it directed the District Court Judge to making a ruling as to tell him what to do, and what not to do, and Suddaby should not have been allowed to effect the habeas process at all, specially, terminating the Federal Procedure §§ 636(b) and Federal Rule 8(b). See, Appendix "B," page 3; "M," para. 26; "N," page 4, 6, and 7.

44. Sixth, thing that the Certificate of Appealability application presented was that, the statute eliminated, disable, prohibited, and disallowed Judge Suddaby to act on anything, as a mandate. Statute § 455 provides the inability, lack of sufficient power, resources or capacity to perform any act in any proceeding or sequence of events in the habeas corpus judicial action, in which impartiality might reasonable be questioned, due to the existence of the critical factors defined in 28 U.S.C. § 455.

45. Arguing as a matter of law, rendered Judge Suddaby order was prejudice, improper, and inappropriate to terminate 28 U.S.C. §§ 636(b), and Federal Rule 8(b), for a magistrate judge process to provide a factual finding and a recommendation, were consent or no consent was required to come only from the parties attorney. Judge Suddaby was the subject of the misconduct being attacked, and should not have been allowed to provide a order, that amounted to being no consent for the requested Federal Procedure 636(b) and Federal Rule 8(b). Appendix "L;" "M," paras. 13, 15, and 28-29.

46. Seventh, the Certificate of Appealability went further, attacking the District Court's decision that stated, "... the extent that petitioner's motion is an attack on the court's prior resolution of this claim on substantive grounds, or an attack on the validity of his underlying

conviction, relief is denied 'as beyond the scope of Rule 60(b).'" It was erroneous, because there was no mention of any prior resolution or claims from the habeas petition, or facts being attacked, or anything for the validity or on substantive grounds raised. And, this also required the granting of a certificate of appealability by the Court of Appeals. Appendixes "B," page 3; "M," para., 30; and "N."

47. Eight, for the Certificate of Appealability, was the fact that the District Court erroneously asserted in it's decision that, "... to the extent petitioner alleges some defect in the proceeding, or that the court overlooked facts or laws that might have changed the outcome, those claims are without merits."

48. The declaration in support of the Federal Rule 60(b) motion, in paragraph 3, asserted the herein applicant seeks to rescind the final decision and order as a judgment. The motion never presented anything from the petition as a issue.

49. The Rule 60(b) motion only presented the one (1) issue-claim surrounding the violation of 28 U.S.C. § 455, as a Article III, § 2 violation and the motion never made an attack on the court's prior resolution of the claims, or an attack on the validity of the underlying conviction.

50. The Rule 60(b) motion raised for the violation of 28 U.S.C. § 455, and it's impact of the misconduct and mischief violated Article III, § 2 of the United States Constitution, and fundamental fairness. Based on petitioner being denied one full round of the habeas corpus reviewing process. And the Rule 60(b) motion was appropriate for the issue-claim raised, based on Rule 60(b)(4) and (6). The Northern District Court of New York, Court's decision was demonstrated to have been so erroneous that it required a Certificate of Appealability to be granted, and the Court of Appeals for the Second Circuit,

abused it's discretion, when it denied the Certificate of Appealability application as argued, and reviewed by the three (3) panel judges. Appendix "A;" "M."

51. Petitioner filed for a En Banc in the Court of Appeals for the Second Circuit in a timely manner. It was presented that the Court of Appeals three (3) judges failed to apply the "holding that a pro se litigant's papers are to be read with the appropriate benevolence, however inartfully they are plead, because a pro se complaint (application) are to be held to a lesser stringent standard than the formal pleading drafted by lawyers. It is necessary to maintain uniformity in the development of the law and in the administration of justice within the courts, referring to dealing with pro se litigants.

52. The application demonstrated the fact that the COA involved questions of exceptional importance, pertaining to petitoner's rights during the District Court proceeding for a habeas corpus, where a judge who as the prosecuting attorney on the State's case violated 28 U.S.C. § 455, to deny petitoner of his right under 28 U.S.C. § 636(b) and Federal Rule 8(b). So, that all petitioner's can receive a fair opportunity to litigate there claims in District Court and the Court of Appeals, without the mischiefs and misdeeds of the Courts, parties, and judges acting in a manner of protecting their State or their own Federal colleagues, while acting in the administration of justice.

53. Also, demonstrated that the COA application involved federal questions of exceptional importance, pertaining to judges, and the application and interpretation of federal rules and laws. Also, demonstrated the fact that the COA application showed a valid line of claims on the denial of constitutional rights, which give rise to a substantial constitutional federal question, and the constitutional violation, referring to the Article III, § 2

violation.

54. Where it was also demonstrated how the Court of Appeals improperly reviewed and interpreted the application. but, they abused their discretion, and it was also denied. Appendix "C;" "O."

55. So, the habeas corpus adjudication process turned into a abuse of discretion that amounted to usurpation of judicial powers. Because of the judge who was the prosecuting attorney terminated the petitioner liberty interest on the requested step/process of 28 U.S.C. §§ 636(b) and Federal Rule 8(b) (Appendix "L,"), it deprived the habeas petitioner of the opportunity to file a objection against a recommendation. Where petitoner would have been able to raise the issue of errors on misinformation by the court to support defense counsel's off the record advise that everything was ready for appellate review. And the plea allocate court judge on the record misinformed petitoner that constitutional claims cannot be waived, and the higher courts erred in not finding the waiver to be not knowing, not intelligent, and not voluntarily done on constitutional claims. Or:

56. The plea allocate as the - allocute - allocatur presented in the plea allocate, as argued and denied was a abuse of discretion, that deprived petitoner to have reviewed pretrial decisions. Because the plea can be seen as accepted, as relying on the judge saying/stating that constitutional claims cannot be waived, created the exception for the plea.

57. Because the court judge over heard the petitoner arguing in chambers about not being told about waiving appeal rights, the record went:

> "You've had some discussion about this Mr. Chinn, in chambers. And pursuant to certain case law, specially, People versus Allen, and other cases detailing constitutional cases and Court of Appeals cases, there are certain rights, sir, that one cannot waive. Those rights have been detailed to some degree in our case study. Your attorney I'm sure has talked to you about certain rights that you still have to appeal in this particular case. Certain constitutional issues that a defendant cannot waive. I leave it up to the higher court to determine what that waiver encompass; but I want to

let you know that it DOES NOT AND CANNOT include all rights. But, very many rights will be giving up as part of this plea bargain right to appeal. (P. 3-4); Appendix "K."

58. Its based on defense counsel's advise and the court saying that the "defendant cannot waive constitutional claims," that the petitoner went through with accepting the plea.

59. That is why petitoner argued on his direct appeal, and as it was presented in the Federal Habeas Corpus, relying on what the judge stated, presented:

> THE PLEA WAIVER, WAS NOT VOLUNTARILY, KNOWINGLY, INTELLIGENTLY DONE; WHAT THE JUDGE STATES DURING THE PLEA ALLOCATION, CANNOT BE ACCEPTED, OR STATED AS A WAIVER OF APPEAL RIGHTS; AND THE PLEA WAS MADE AS A NECESSITY, BECAUSE OF CORRUPTION AND MISCONDUCT THAT TAKES PLACE DURING PRE-ARREST AND PRETRIAL STAGES, THAT NULLIFIED CONSTITUTIONAL OBJECTIONS AND RIGHTS TO A FAIR TRIAL, TO PREPARE A DEFENSE AGAINST THE STATE'S ALLEGATIONS, DUE PROCESS OF THE LAW, EQUAL PROTECTION OF THE LAW, AND THE PRESUMPTION OF INNOCENT, OF ONE WHO IS ACTUALLY INNOCENT; AND APPELLANT HAS A RIGHT TO APPELLATE REVIEW ON THE INTEGRITY OF THE PROCEEDING, PROCEDURES AND PROCESS USED, BASED UPON ERRORS THAT COULD NOT BE CURED BY PROSECUTOR, OR JUDGE, BECAUSE OF THE COURT'S RULING AND OPINIONS.

60. The State appellate court had already abused it's discretion and denied the argument. Appendix "F," and "G."

61. On the Federal level, in the Federal Habeas Corpus (28 U.S.C. § 2254), the petitoner was not provided a full round on Habeas Corpus reviewing power. Judge Suddaby, who was the prosecuting attorney on the State level and at the time of the plea, now as the judge in Federal Court terminated 28 U.S.C. §§ 636(b) and Federal Rule 8(b).

62. Had the petitoner been provided the opportunity of a Magistrate Judge's factual findings and recommandation, the petitoner would have presented that the "waiver on constitutional claims" was not a sufficient, knowing, or intelligent act done, for any reasonable jurists to say or claim that petitoner waived his appeal rights and was not aware of the relevant

circumstance and likely consequences to come.

63. Because, during the plea allocate, the court judge characterized certain rights - certain constitutional issues that a defendant cannot waive in this particular case (Appendix "K"), as he explains the conditions of the "part of this plea bargain right to appeal," as if the petitoner cannot waive certain issues, as the consequence that was going to take place on appeal, and what the judge states was contrary to what the prosecutor was requesting.

64. The waiver of constitutional claims not only must be voluntary, but must be knowing, and a intelligent act done with sufficient awareness of the relevant circumstance and likely consequence to come. What the court judge stated, that certain constitutional issues that a defendant cannot waive in this particular case, is not sufficient awareness of the relevant circumstance and likely consequences to come for a waiver of constitutional claims. Making the waiver unconstitutional.

65. There was no waiver of appeal rights done according to the Due Process Clause, and none of the constitutional rights or privileges was stated or alleged to indicate a intentional relinquished or abandon during the plea, as the petitoner was relying on what the judge said at that point, that certain constitutional issues that a defendant cannot waive.

66. In a plea allocate, the waiver of constitutional rights not only must be voluntary, but must be knowing, and a intelligent act done with sufficient awareness of the relevant circumstance and likely potential sequence of the waiver. Brady v United States, 397 US 742, 90 S.Ct. 1463, 1469. For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privileges and it was not. Boykin v Alabama, 395 US 238, n.5, citing Johnson v Zerbst, 304 US 458 (1938).

67. In the alternative, on the other hand, it was also error for the judge

to misinform the petitoner about the availability of certain rights that a defendant still has to appeal in this particular case, as the judge puts it for this case, without clarifying what those rights was or what the court meant when making that statement that a defendant cannot waive constitutional claims, leaving it vague, stating it three (3) times, in three different ways, as:

> "certain rights, sir, that one cannot waive... Your attorney I'm sure has talked to you about certain rights that you still have to appeal in this particular case. Certain constitutional issues that a defendant cannot waive... I want to let you know that it does not and cannot include all rights...," Appendix "K,"

adding what the judge wanted the defendant to know, without providing clear details of what the judge was referring to.

68. Specially, when defense counsel had told the defendant that everything was ready for appellate review, and the court judge states: "Your attorney I'm sure has talked to you about certain rights that you still have..." Bousley v U.S., 523 US 614 (1998) (citing, U.S. v Timmreck, 441 US 780 (1979); Henderson v Morgan, 426 US 637, 644-646 (1976).

69. More importantly, specially when New York State has a exceptional standard to the general waiver rule that existed where the State law permitted a defendant to appeal claims of adverse pretrial rulings even though the defendant subsequently plead guilty.

70. Under New York old Code of Criminal Procedure 813-c was the statute that use to provide, "... the order denying a suppression motion may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction was predicated upon a plea of guilty.

71. What defense counsel advise the petitoner on, and what the judge stated made since to the petitoner by law, and the petitoner was relying on the advise of defense counsel and the court's statement. See, U.S. ex rel.

Newsome v Malcolm, 492 F.2d 116 (2d Cir. 1974), cert. granted, Lefkowitz v Newsome, 420 US 285 (1975); Bousley v U.S., 523 US 614 (1998) (citing, U.S. v Timmreck, 441 US 780 (1979); Henderson v Morgan, 426 US 637, 644-646 (1976).

72. The courts still sees that procedure by which constitutional issue, or suppression hearing and all court decision can be litigated without the necessity of going through the time and efforts of conducting a trial. As here, the plea was accepted by the petitoner with the clear understanding from what the judge stated, on constitutional issues/claims. See, Lugo v Artus, 2008 WL 312298.

73. Research has not turned up any other cases denying the availability of such exception for New York State, and the petitoner was relying on that case law that is not being accepted or followed in this case by the New York State Appellate Division, Fourth Department, and the Federal District Court of the Northern District, who should have followed it as well. Making both decisions erroneous, capricious, and arbitrary in use of their power, and a abuse of discretion because their more concerned about the flaws that will be revealed.

74. The flawed pre-trial proceeding and decision that bring about the injustice-mischief in the lower state courts adjudication process will unfold another set of facts and issues that the People don't want reviewed. And, it was the Northern District Court Judge Glenn T. Suddaby that was the prosecuting attorney, who created all the misconduct, who knows all the flaws first hand. And, if no law prevents the waiver, the final question is whether the defendant knowingly, and intelligently waived the rights to raise the claims on appeal. Class v U.S., 138 S.Ct. 798, 807-808 (2018). Yet, the misconduct and the abuse of the discretion that brings about the injusticeness against one who is actually innocent by the lower court must be reviewed.

75. The State Appellate Court, and the Federal Court has acted in a manner

that conflicts with the decision of the Unite States Court of Appeals and the United States Supreme Court (U.S. ex rel. Newsome v Malcolm, 492 F.2d 116 [2d Cir. 1974], cert. granted, Lefkowitz v Newsome, 420 US 285 [1975]; Lugo v Artus, 2008 WL 312298), and has so far departed from the accepted and usual course of judicial Federal Procedure 28 U.S.C. §§ 636(b) and Federal Rule 8(b), proceedings that would have allowed petitioner to present the fact of the right to have constitutional claims reviewed on the right to appeal, or the plea to be not knowingly, voluntary, and intelligently one the constitutional issues, as due process requires.

76. Specially, when petitioner was relying on what the judge stated, that a defendant cannot waive constitutional claims, and is why the petitioner allowed the guilty plea to proceed, with in mind that the suppression hearings and motion against the indictment would be all reviewed. U.S. ex rel. Newsome v Malcolm, 492 F.2d 116 (2d Cir. 1974); Lefkowitz v Newsome, 420 US 285 (1975); Lugo v Artus, 2008 WL 312298; U.S. v Ready, 82 F.3d 551 (2d Cir. 1996) (citing, Brady v United States, 397 US 742, 90 S.Ct. 1463, 1469; Boykin v Alabama, 395 US 238, n.5, citing Johnson v Zerbst, 304 US 458 (1938); Bousley v U.S., 523 US 614 (1998).

77. The New York Appellate Court, Federal District Court and the Court of Appeals for the Second Circuit, abused its discretion by failing to properly address the waiver, as argued for actually innocence, or the assertion of the judge, was as if, the Courts sanction such a departure and allowed the evil, as to call for an exercise of the United States Supreme Court's supervisory powers. Rules of the Supreme Court of the United States, Rule 10. And, even with the misinformed information by the hands of the court, or the judges created the appearance of the exception for guilty pleas to have pretrial decision reviewed, that left the petitioner to believe he reasonably had a

promise or showed a connection to the defendant's improper belief of the ability to appeal constitutional claim-issues. Waley v Johnston, 316 US 101, 62 S.Ct. 964 (1942).

78. Just as, the Onondaga County Supreme Court, the Appellate Division, and Federal Court, all abuse their discretion of adjudication, by failing to address the petitioner's claim of actual innocence, that could have also been brought under 28 U.S.C. §§ 636(b), and Federal Rule 8(b).

79. But, because Judge Glenn T. Suddaby violates 28 U.S.C. § 455, it was a abuse of his discretion and usurpation use of judicial powers when making the order that influence Judge Lawrence E. Kahn to terminate 28 U.S.C. §§ 636(b), and Federal Rule 8(b) (Appendix "L,"), that influenced the views of Judge Kahn decision-making powers, was also a abuse of his discretion and usurpation use of judicial powers that involved both judges. And, Mr. Suddaby was the prosecuting attorney on the herein case. Specially, when Judge Kahn committed fraud/perjury in the habeas corpus and the Rule 60(b) motion decision, to deny the habeas corpus and Federal Rule 60(b) motion, by stating that Judge Suddaby was not involved (Appendixes "B," page 3; "E," page 4; and "L."). And, it also established the Article III, § 2 violation, based on the abuse of their discretion and usurpation use of judicial powers, that was properly presented in the Federal Rule 60(b) motion. Williams v Pennsylvania, 136 S.Ct. 1899 (2016); Caperton v A.T. Massey Coal Co., 556 US 868 (2009).

80. And, the Court of Appeals for the Second Circuit abused its discretion, by failing to grant COA on the Rule 60(b) motion that was the appropriate remedy, yet applied ineffectively to the Article III, § 2 violation that was also a structural defect on the federal levels, and was clearly a abuse of court's discretionary and usurpation use of judicial powers, that now provides the Supreme Court of the United States jurisdiction

to allow petitioner to invoke its powers of authority to exercise it's discretionary powers, in aid of it's jurisdiction of review and appeal for the Rule 60(b) motion, as a necessity in accordance with 28 U.S.C. § 1651. Brecht v Abrahamson, 507 US 619 (1993); see also, Flanders v Meachum, 13 F.3d 600, 604-605 (2d Cir. 1994); Will v U.S., 389 US 90 (1967); La Buy v Howes Leather Company, 352 US 249, 77 S.Ct. 309, 314; Bankers Life & Cas. Co. v Holland, 346 US 379, 74 S.Ct. 145, 148 (1953); U.S. Alkali Export Ass'n v U.S., 325 US 196, 65 S.Ct. 1120 (1945); Ex parte U.S., 287 US 241 (1932).

81. The involuntarily, unknowingly, and unintelligently waiver was initially raised in the State Courts, and taken to the Federal District Court pursuant to 28 U.S.C. § 2254, and no one actually entertained the claim as raised under innocence and the unconstitutional invalid guilty plea could have been set aside on the habeas corpus, had the petitoner been provided a fair opportunity to provide such facts and arguments, whether or not it was challenged on appeal within the procedure 28 U.S.C. § 636(b), and Federal Rule 8(b). Bousley v U.S., 523 US 614, 626-627.

82. All other decisions by the United States Supreme Court that does not involved guilty pleas are not controlling on this issue. Bousley, 523 US., at 628. This Court has never held that the constitutionality of a guilty plea cannot be attacked unless it is first challenged on direct review. But, in the herein case it was presented in a State collateral motion, on direct appeal, and in the Federal Habeas Corpus, but it was not addressed or decided properly.

83. Moreover, as the facts of this case unfolds, it will demonstrate, such a holding not to allow a review in this Court would be unwise and would defeat the very purpose of the habeas corpus. Specially, when a layman who justifiable relied on incorrect advise from the court and counsel in deciding

to plead guilty to crimes that he didn't commit will ordinarily continue to assume that such advise was accurate during the time for taking the appeal, as was done herein. Or, that the decision that did not allow the exception of the promise to allow review of pretrial constitutional claims to be reviewed, should be treated as a nullity and the conviction based on such a plea should be voided. Bousley v U.S., 523 US 614, 629 (1998).

84. Petitoner was sentenced to a natural life sentence, based on Judge Glenn T. Suddaby's represented the State in the herein case, and participated in the capital case proceedings where he had formerly been the prosecutor of the approved request to seek a death sentence. No court has properly addressed the arguments as presented on the fraudulent misconduct during the Discovery procedure, and much, much more. While in the Federal Northern District Court for New York, the court failed to act in the designed manner of a Article III, § 2 court, which was clear abuse of discretion and usurpation use of judicial powers as well. Williams v Pennsylvania, 136 S.Ct. 1899, 1910 (2016); Will v U.S., 389 US 90 (1967); La Buy v Howes Leather Company, 352 US 249, 77 S.Ct. 309, 314; Bankers Life & Cas. Co. v Holland, 346 US 379, 74 S.Ct. 145, 148 (1953); U.S. Alkali Export Ass'n v U.S., 325 US 196, 65 S.Ct. 1120 (1945); Ex parte U.S., 287 US 241 (1932).

85. Article III serve two purposes: (1) to safeguard litigants rights to have claim decided before judges who are free from potential domination by other branches of government, and when the Northern District Court Judge Glenn T. Suddaby made the order telling the other judge to terminate the process 28 U.S.C. §§ 636(b) and Federal Rule 8(b), violating 28 U.S.C. § 455, that provides a safeguard, the litigation process was not free from potential domination of Suddaby's powers. And, (2) to protect the role of the independent judiciary within the constitutional scheme of tripartite

government. The mean concern in a petitioners' right to have his case heard by an Article III judge, is to be free from potential dominating, arbitrary, and capacious powers.

86. There is no higher duty of the constitutional Court system, to act on errors, neglect, or evil that has resulted in the deprivation of life or liberty, as a way to redress violation of the constitutional rights. Harris v Nelson, 394 US 286, 292, 89 S.Ct. 1082 (1969); Sanders v U.S., 373 US 1, 8, 83 S.Ct. 1068 (1963); Brown v Allen, 344 US 443, 73 S.Ct 397 (1953). And, its through "several doctrines" that has grown into the elaborated requirement that litigants has "standing" grounds to invoke the powers of the Federal Courts is so important, Allen v Wright, 468 US 737, 750 (1984), for redress, Whitmore v Arkansas, 495 US 149, 155 (1990); Friends of the Earch Inc., 528 US 167, 180-181 (2000).

87. Although, a biased judge can appear on any level of State or Federal, that amounts to a "structural defect," when striking at fundamental values that undermines the structural integrity of any proceeding. Specially, when reviewing another tribunal, while reviewing constitutional claims. Whether an exercise of power on detentions is "lawful" could meaningfully address itself, at least initially, if whether the complex of arrangements and process which previously determined the facts and applied the law validating detention was adequate to the task at hand. Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 449 (1963); Arizona v Fulminante, 111 S.Ct. 1242, 1258; In re Winship, 397 US 358 (1970); Evitts v Lucey, 469 US 387, 401 (1985).

88. Because, of the abuse of discretion and the Article III, § 2 violation has established the prior proceeding was inadequate, and can be seen as a structural defect as well, provides this Court with the ability to act under

28 U.S.C. §§ 451, 1254(1), 1651, 2241, and 2254, on a original matters of a habeas corpus, and also appellate jurisdiction on the Federal Rule of Civil Procedure, Rule 60(b) motion that the Court of Appeals failed to grant a Certificate of Appealability (COA) on the District Court's denial of the Rule 60(b) motion, was a abuse of it's discretion on a COA and the En Banc review application. Felker v Turpin, 518 US 651, 651-652, 658, 661-662, 116 S.Ct. 2333, 2334-2335 (1996); In re Davis, 130 S.Ct. 1 (2009); Lawrence v Florida, 549 US 327, 338-339, 127 S.Ct. 1079 (2007); Will v U.S., 389 90 (1967); La Buy v Howes Leather Company, 352 US 249, 77 S.Ct. 309, 314; Banker Life & Cas. Co. v Holland, 346 US 379, 74 S.Ct. 145, 148 (1953); U.S. Alkali export Ass'n v U.S., 325 US 196, 65 S.Ct. 1120 (1945); Ex parte U.S., 287 US 241 (1932).

REASON FOR GRANTING THE WRIT

REASON ONE:

89. The Northern District Court Judge Glenn T. Suddaby caused a unconscionable breakdown in the Federal Habeas Corpus process, and he was the prosecuting attorney on the State's direct case, who had personal caused the misconduct and mischiefs before becoming a federal court judge, and those was the claims being litigated in the federal habeas corpus proceeding.

90. So, any actions Glenn T. Suddaby takes on the habeas process violates 28 U.S.C. § 455, and Glenn T. Suddaby made a order influencing, as directing the District Court Judge Lawrence E. Kahn to make a decision and to terminate the process 28 U.S.C. §§ 636(b), and the Federal Rule 8(b), that the petitoner had requested. Appendix "L;" "P."

91. The reply petitioner sent to the parties attorney, had given them notice on the requested procedure for a Magistrate Judge, in accordance with the law of Federal Magistrate Act of 1976 and 1979, by requesting for a finding of facts and recommendation, were consent or no consent is required to come only from the parties attorney. And, the denial of 28 U.S.C. §§ 636(b), and the Federal Rule 8(b), for the magistrate judge's process was removed because of the order Judge Glenn T. Suddaby made, who was the prosecuting attorney on the State's case, and it brings about a violation of 28 U.S.C. § 455, that establishes a true Article III, § 2 violation that denied the petitoner of a fair opportunity to provide further litigation on claims of not waiving constitutional rights, to raise constitutional claims.

92. Or, being misinformed by the lower State court that constitutional claims cannot be waived, was a abuse of Glenn T. Suddaby's discretion that was intentionally done for bias reasons, with the use of usurpation of judicial powers, and the Court of Appeals for the Second Circuit should have granted a

Certificate of Appealability on the Federal Rule of Civil Procedure, Rule 60(b) motion (#17-4051), just for the Article III, § 2 violation alone.

93. Because, the Rule 60(b) motion, was appropriate for the Article III, § 2 violation, against the misconduct that took place on a habeas corpus, that can now be compared as a structural defect on a habeas corpus process. That now provides this Court with Appellate Jurisdiction on the Rule 60(b) motion and the Article III, § 2 violation, that also allows petitioner to invoke the powers of review and appeal, as a necessity pursuant to 28 U.S.C. § 1651, because of abuse of discretion and the use of usurpation of judicial powers, for the structural defect on the Federal level. Because, it denied petitioner of his liberty interest on a Rule 60(b) motion, about misconduct of a judge in a habeas corpus process, that removed a fair opportunity from the petitioner to prevent further litigation on constitutional claims. Brecht v Abrahamson, 507 US 619 (1993); La Buy v Howes Leather Company, 352 US 249, 77 S.Ct. 309, 314; Bankers Life & Cas. Co. v Holland, 346 US 379, 74 S.Ct. 145, 148 (1953); U.S. Alkali Export Ass'n v U.S., 325 196, 65 S.Ct. 1120 (1945); Ex parte U.S., 287 US 241 (1932).

REASON TWO:

94. This issue raised in the Rule 60(b) motion, was a true claim that was appropriate for the Rule 60(b) motion, that was improperly adjudicated on the merits of the violation of 28 U.S.C. § 455, that went against the petitoner's constitutional objection, and how it denied the petitioner's liberty interest of the law of: Rule 60(b), 28 U.S.C. § 455, and 28 U.S.C. § 636(b) and Rule 8(b), when the application and interpretation of the Federal Laws was dealt with improperly, that effected a habeas corpus process.

95. Because, the Rule 60(b) motion was improperly reviewed and

characterized as a reconsideration motion, and the District Court departed from the accepted usual course of judicial proceeding for a Rule 60(b) motion. Specially, when the application and interpretation of the laws and facts was so erroneously reviewed and assessed, only created further restraints on the petitioner's liberty interest.

96. It was a abuse of discretion and use of usurpation of judicial powers, even for the Court of Appeals, for there failure to grant Certificate of Appealability on the importance of the claims of federal questions on the law, and for a erroneous interpretation and application of Federal Laws for a Article III, § 2 violation.

97. The Northern District Court Judge actions, while reviewing the Rule 60(b) motion, was more like he departed from the accepted and usual course of judicial proceeding, in hoping of further restrictions on petitioner's efforts that would have effected Federal Judges in the federal system.

98. The petitioner had the right to petition the court and the right of access to the court should not have been restricted. The Rule 60(b) motion was directed at providing a greater protection while petitioning the Court. N.L.R.B., at 531, 122 S.Ct. 2397.

99. This should have been apparent in the application for a Certificate of Appealability to the Court of Appeals, from the erroneous decision as it was demonstrated for the Rule 60(b) motion, that should have warranted granting a Certificate of Appealability. Yet, it was as if the Court of Appeals sanctions such a departure of the District Court's improper application and improper interpretation of the Rule 60(b) motion and its facts, statutes and laws. And, the improper adjudication on the merits for a Article III, § 2 violation. When the Court of Appeals failed to grant Certificate of Appealability, it was a abuse of their discretion, specially on judicial

misconduct, even on the En Banc full panel review also. Harris v Nelson, 394 US 286, 292, 89 S.Ct. 1082 (1969), Sanders v U.S., 373 US 1, 8, 83 S.Ct. 1068 (1963); Brown v Allen, 344 US 443, 73 S.Ct. 397 (1953); Will v U.S., 389 US 90 (1967); La Buy v Howes Leather Company, 352 US 249, 77 S.Ct. 309, 314; Bankers Life & Cas. Co. v Holland, 346 US 379, 74 S.Ct. 145, 148 (1953); U.S. alkali Export Ass'n v U.S., 325 US 196, 65 S.Ct. 1120 (1945); Ex parte U.S., 287 US 241 (1932); Highmark Inc. v Allcare Health Mgmt. Sys. Inc., 134 S.Ct. 1744, 1748, n.2 (2014); Cooter & Gell v Hartmarx Corp., 496 US 384 (1990).

100. This provides this Court with Appellate Jurisdiction on the interpretation and application of federal laws. Be & Const. Co. v N.L.R.B., 536 US 516, 525, 122 S.Ct. 2390, 2396.

REASON THREE:

101. The Rule 60(b) motion dealt with the District Court Judge Glenn T. Suddaby, who was the prosecuting attorney on the direct case, while on the State level. The judge who was the prosecuting attorney made a order influencing the other Judge Lawrence Kahn to terminate the process 28 U.S.C. §§ 636(b) and Federal Rule 8(b), and it alone demonstrates a Article III, § 2 violation that creates exceptional circumstance. Where it was clear abuse of discretion and usurpation of judicial powers that entered into a habeas corpus process. Where a process was terminated, that would have provided petitioner the ability of establishing higher or different standard to be considered on constitutional error(s).

102. As here, dealt with a plea that did not waive constitutional rights/claims/issues, and if so, it was not a knowingly, it was not intelligently done, and it was not voluntarily done, by one who was actually innocent. The issues was already presented to the State Courts and was also

presented in the Federal District Court in accordance with 28 U.S.C. § 2254.

103. The terminated process of 28 U.S.C. §§ 636(b) and Federal Rule 8(b), was clearly a abuse of discretion and usurpation of judicial powers, that deprived petitoner of a fair opportunity to litigate claims. It effected the right to have one full round of litigation as requested in a Federal Habeas Corpus process under 28 U.S.C. § 2254. The framers of the United States Constitution decided that the habeas corpus, was a right of first importance, and made it part of the framework of the United States Constitution, as part of the principle contract of the law.

104. And, access to the Writ of Habeas Corpus is a necessity of it self, to determine the lawfulness of conduct and restraints. And, its from those principles that the judicial authorities is to consider petitions as presented for relief.

105. The scope of that review for the Court of Appeals role, is whether the standard and procedures used, as here, by the District Court, are lawfully applied, and interpreted, that allows them to review and correct the tribunals flaws in ways to construe and apply the statutes and allow what is also constitutionally required.

106. This would include some authority to assess the sufficiency of the tribunal's determinations. And, it has been the authority of Federal tribunals to supplement the record on review, even in a postconviction habeas setting. See, Townsend v Sain, 372 US 293, 313 (1963), overruled in part by Keeny v Tamayo-Reyes, 504 US 1, 5 (1992). There the opportunity was constitutionally required. The idea that it was necessary in the scope of habeas review in part depends upon the rigor of my earlier proceeding is in accords with the test for procedural adequacy under the due process context. See, Boumediene v Bush, 128 S.Ct. 2229, 2268 (2008).

107. The Due Process Clause of the Fourteenth Amendment has been the measure of determining the application and interpretation of Federal Habeas Corpus for rights, to provide efficacious in remedies for what society deem intolerable restraints, Fay v Noia, 372 US 391, 402 (1963) (overruled on other grounds by Coleman v Thompson, 501 US 722 (1991); where attaches fundamental fairness as the central concern for the Writ of Habeas Corpus, Strickland v Washington, 466 US 668, 897 (1984), violation of rights guaranteed that effects the Fourteenth Amendment, Cupp v Naughten, 414 US 141 (1973).

108. The Federal Court is to assure that prosecutorial misconduct in no way impermissible infringes rights of the Constitution, Donnelly v Dechristoforo, 416 US 637, 643 (1974), then the Due Process Clause is the standard that all misconducts is reviewed under, even for abuse of discretion.

109. How does the Court of Appeals for the Second Circuit fail to grant a Certificate of Appealability for misconduct by a Federal Judge, who was the prosecutor on the case, whose violation is a departure of 28 U.S.C. §455? The violation of § 455 was presented in the appropriate remedy for redress like a petition that is required under Federal Rule of Civil Procedure 60(b).

110. This violation of § 455 by the District Court Judge who was thee prosecuting attorney throughout the State's pretrial proceedings, made a order that influence Judge Kahn, by directing him on reviewing the Federal Habeas Corpus's petition to terminate the process request pursuant to Magistrate Judge Act of 1976 and 1979, § 636(b) and Federal Rule 8(b), that is provided for a petitioner's liberty interest. It provides litigants the opportunity to make objections to forthcoming decisions. It provides that consent was between the parties litigating, making the request a statutory right, if not contested by the litigating parties.

111. This can only be seen as a departure from the accepted and usual

course of Federal Judicial proceeding, that was deprived by the abuse of discretion and usurpation of judicial powers that effected the petitoner's liberty interest, that amounts to a Article III, § 2 violation.

112. And, it was as if the Court of Appeals for the Second Circuit sanctioned such a departure by the District Court with the denial of a Certificate of Appealability that was a abuse of it's discretion, on usurpation of judicial powers from misconduct on matters that was presented in the appropriate remedy for Federal Rule of Civil Procedure 60(b).

113. The abuse of discretion and usurpation of judicial powers provides this Court with Appellate Jurisdiction on the Federal Rule of Civil Procedure 60(b) motion, as a necessity, where the risk of denial for relief will produce injustice. U.S.Sup.Ct. Rule 10(a); 28 U.S.C. § 1651; Will v U.S., 389 US 90 (1967); La Buy v Howes Leather Company, 352 US 249, 77 S.Ct. 309, 314; Bankers Life & Cas. Co. v Holland, 346 US 379, 74 S.Ct. 145, 148 (1953); U.S. Alkali Export Ass'n v U.S., 325 US 196, 65 S.Ct. 1120 (1945); Ex parte U.S., 287 US 241 (1932); Highmark Inc. v Allcare Health Mgmt. Sys. Inc., 134 S.Ct. 1744, 1748, n.2 (2014); Cooter & Gell v Hartmarx Corp., 496 US 384 (1990); Liljeberg v Health Service Acquisition Corp., 486 US 847, 864 (1998) (citing, In re Murchison, 394 US 133, 136, 75 S.Ct. 623, 625 (1955).

114. Also, the petitioner is seeking relief for a redressable injury from a Article III, § 2 violation in a habeas corpus process, where the petitioner was denied his liberty interest by the departure of 28 U.S.C. §§ 455, and 636(b). That would have allowed a petitioner to present the law on the lower court stating that constitutional claims cannot waived. And, this is being done by one who is actually innocent on a plea, as to not knowing, not voluntarily, or not intelligently done, as required by the constitution of due process on the waiver of waiving appeal rights on constitutional claims, and

pretrial proceeding decisions.

115. This provides this Court with Appellate jurisdiction on the interpretation and application of Federal Laws, that prevented the petitoner from the proper remedy for the Article III, § 2 violation that prevented the fair opportunity to present such matters to a federal court. Be & Const. Co. v N.L.R.B., 536 US 516, 525, 122 S.Ct. 2390, 2396.

116. This should be appropriate as a necessity in invoking 28 U.S.C. § 1651, in support of this Court jurisdiction and powers of authority to exercise its discretionary powers of this Court Rule 20.1, 2 and 4(a), in aid of its jurisdiction of review and appeal for the purpose of 28 U.S.C. § 1254(1). Hohn v U.S., 524 US 236 (1998); Bousley v U.S., 523 US 614; U.S. v Denedo, 556 US 904 (2009); Murray v Carrier, 477 US 4781.

117. Furthermore, the petitioner is seeking to invoke this Courts powers and authority for the purpose of 28 U.S.C. §§ 481, and 1651 to invoke the procedure of 28 U.S.C. §§ 2241, and 2254, because of the Article III, § 2 violation, that now allows this Court to review an original matter of Habeas Corpus. Felker v Turpin, 518 US 651; In re Davis, 130 S.Ct. 1; Lawrence v Florida, 549 US 327.

CONCLUSION

The petition for a Writ of Certiorari should be granted, because of the Article III, § 2 violation.

Executed: January 25, 2019.

Respectfully Submitted,

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