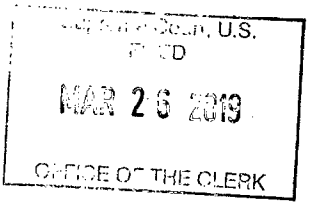
18-9169 ORIGINAL

No. _____




IN THE

SUPREME COURT OF THE UNITED STATES

ANDRE MCDANIELS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANDRE MCDANIELS
(Your Name)

POST OFFICE BOX 26020
(Address)

Beaumont, Texas 77720
(City, State, Zip Code)

None
(Phone Number)

## LIST OF PARTIES

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

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

## QUESTION(S) PRESENTED

I. Does a Pro-Se Petitioner forfeit his right to the protection of the Constitution when he is granted a C.O.A. on the merits of his case, then not given the opportunity to have the merits of his case heard, that involve serious 5th Amendment violation of Due Process and 6th Amendment violation of Assistance of Counsel, when his timely appeal of his 2255 & 59 (e) was reduced by the Court to only one issue of the 59 (e), when it is clear through a very diligent effort that the Petitioner intend to appeal his entire case?

II. If a Federal District Court Judge instructs the Court Reporter to order a copy of the Court transcripts, for the purpose of evidence in any future proceeding, are these transcripts sufficent as "Independent INDICIA" since they are a sworn copy from a reliable third party which is the Court Reporter and Officer of the Court?

III. Does the Court Of Appeals have jurisdiction to rule on the merits of a case, when an appellant files a motion to reconsider under rule 59(e) and is denied on the merits by the District Court, given a C.O.A. by the Court Of Appeals on those merits, to then be denied an appellate review for want of jurisdiction and not the merits?

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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 _____ to the petition and is

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[X] is unpublished.

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

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

[ ] For cases from **state courts:**

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

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

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

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

## JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was OCTOBER 26, 2018.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 12/28/2018, and a copy of the order denying rehearing appears at Appendix E.

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

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

[ ] For cases from **state courts:**

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

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

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

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 2 of the U.S Constitution

Habeas Corpus

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or invasion the safety may require it.

Rule 4(a)(4)(A)(iv), Federal Rules of Appellate Procedure

> if a party filies in the District Court any of the following motions under the Federal Rules of Civil Procedure--and does so within the time allowed by those rules-- the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: (iv) to alter or amend judgement under rule 59.

## STATEMENT OF THE CASE

McDaniels is currently serving a ninety-six (96) month and a consecutive seventy-eight (78) month sentence with a 11(C)(1)(c) agreement, that one charge would not be used to affect the statutory or guideline range of punishment at sentencing. Because the government misrepresented the terms of the plea agreement, broke thier promise, and in fact did use one case to affect the other, a violation of due process has occured.

The Court issued McDaniels a certificate of appelability(COA) on September 1, 2017 stating:

> **McDaniels has made the necessary showing** as to the issues(1) whether the government promised that his guilty plea in USDC No. 4:09-CR-453-5 would not affect his statutory or guideline ranges in the instant case, (2) whether, if such a promise was made, the government breached it, (3) whether his trial attorney rendered ineffective assistance by failing to object to any such breach, and (4) whether the district court erred by dismissing the foregoing claims without first conducting an evidentiary hearing.

Precedent in the Fifth Circuit is similar to most federal circuits regarding a timely notice of appeal, when the finalization of certain motions trigger rule 4(a)(4)(A)(iv) provisions of restting the time to file a notice of appeal to after the exhaustion of those motions. According to this rule McDaniels filed a timely "notice of appeal".

The Supreme Court has made it clear that McDaniels's dillgent effort to appeal the merits of his case was timely, and is sufficient for appellate review of these merits.

## REASONS FOR GRANTING THE PETITION

### McDANIELS'S TIMELY APPEAL OF HIS 28 U.S.C § 2255

The Supreme Court, in Foman v. Davis, 371 U.S. 178, 181-82, 83 S Ct. 227, 229-30, 9 L. Ed. 2d 222 (1962), states: The requirements of the rules of procedure should be liberally construed and that "mere technicality" should not stand in the way of consideration of a case on its merits. Thus, if a litigant files papers in a fashion that is technically at variance with the letter of procedural rule, a court may nevertheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires".

The Fifth Circuit Court Of Appeals, in Meyer v. Canal, 614 Fed. Appx. 719: (5th Cir. 2015), states: "We have previously indicated that we will forgive "technical" errors made in a notice of appeal. See Lockett v. Anderson, 230 F. 3d. 695 700 (5th Cir. 2000). When, for instance, "a motion for reconsideration has been denied, and the appelant appeals only the denial of this 59 motion... we can infer that the party meant to appeal the adverse underlying judgement." Id.; see United States v. O'Keefe, 128 F. 3d. 885, 890 (5th Cir. 1997)(explaining) that a mistake on a notice of appeal does not bar this Court from exercising jurisdiction where intent of the appealing party is discernable and there is nò prejudice to the other party".

**I. Supporting Facts**

1. On November 6, 2014, McDaniels timely filed a motion to vacate under 28 U.S.C. § 2255 seeking relief, on constitutional grounds concerning his 5th Amendment due process violations, where he was caused to enter a plea in violation of Boykin v. Alabama, 395 U.S. 238, 89 S Ct. 1709, 23 L. Ed. 2d 274 (1964), and violations of Appellant's 6th Amendment right to effective assistance of counsel.

2. On December 22, 2015, McDaniels's 28 U.S.C. § 2255 was denied without an evidentiary hearing.

3. On January 14, 2016, McDaniels timely filed a motion to reconsider under Rule 59(e) of the Federal Court Rules, citing his 5th and 6th Amendment violations, and not being given an evidentiary hearing.

4. On March 29, 2016, McDaniels filed a Memorandum Of Points and Authorities In Support Of 59(e) Motion, along with a sworn Declaration, to further support the merits of his 5th and 6th Amendment violations.

5. On July 15, 2016, McDaniels's 59(e) motion was denied, with a motion that fully briefed the merits of McDaniels's 5th and 6th Amendment violations.

6. On July 25, 2016, McDaniels timely filed an appeal "of the motion signed by Judge Rosenthal on July 15, 2016".

Shortly after July 15, 2016, when McDaniels became aware of the denial of his 59(e) motion, McDaniels wanted to ensure that he timely appealed the matter to preserve his right to have his claims heard on the merits by the higher Courts. It was at that time, that McDaniels came aware that he had three options. 1) appeal only his §2255, 2) appeal only his 59(e), or 3) appeal his 59(e) & § 2255 jointly.

Understanding the options available to hi, McDaniels did not want to cause confusion concerning his intent to appeal his case as a whole, and informed the Court that he was appealing " the judgement signed by Judge Rosenthal on July 15, 2016". Because the July 15, 2016 Opinion and judgement contained all the merits of McDaniels's claims, it was McDaniels belief and understanding that when he appealed the judgement signed by Judge Rosenthal on July 15, 2016 he was in fact also appealing the judgement from Judge Rosenthal from December 22, 2015 (the denial of his §2255), evidentiary hearing, and COA.

McDaniels belief that when he appealed the judgement signed by Judge Rosenthal on July 15, 2016 (59(e), that he was in fact appealing his case as a whole, stems from his understanding and the rules of a motion for reconsideration pursuant to Fed. R. Civ. P. 59(e), and Fed.

R. App. P. 4(a)(4)(A)(iv).

Fed. R. App. P. 4(a)(4)(A)(iv) states:

> if a party files in the District Court any of the following motions under the Federal Rules of Civil Procedures--and does so within the time allowed by those rules--the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: (iv) to alter or amend judgement under Rule 59.

Because the 59(e) motion is for the Court to revisit its previous ruling, and stops the time to appeal the initial judgement in the matter , McDaniels reasonably assumed that when he appealed the denial of the 59(e) he was appealing the denial of his § 2255 also, since the time to appeal his § 2255 did not start to run until July 15, 2016.

**II. Standard Of Review**

If a party appeals from the denial of a Rule 59(e) motion that is soley a motion to reconsider a judgement on its merits, de novo review is appropriate because, interpreting the notice of appeal liberally, "it is clear that the appealing party intended to appeal the entire case." Trust Comany Bank, 950 F. 2d at 1148 (citing Osterberger v. Relocation Realty Service Corp., 921 F. 2d. 72, 73 (5th Cir. 1991). To find otherwise would be to significantly affect the appeal by employing an abuse of discretion standard, as opposed to a de novo standard which is proper when reviewing an issue of law. See 950. F. 2d. at 1147 n.5.

McDaniels's Rule 59(e) motion to reconsider, along with McDaniels Points And Authorities In Support Of 59(e) Motion, asked the Disrtict Court Judge to reconsider its decision, in that the Government breached & misrepresented the plea agreement therefor causing a fifth amendment due process violation, that counsel was ineffective for not objecting to the breach & misrepresentation causing a sixth amendment violation, and for dissmissing his § 2255 without an evidentiary hearing. The facts underlying these issues were undisputed. Thus, it is clear that McDaniels, although nominally appealing the denial of the motion to reconsider, intended to appeal the merits of the underlying judgement. Accordingly, de novo review is proper.

## McDANIELS IS ENTITLED TO AN EVIDENTIARY HEARING

**I. Independent Indicia**

With respect to an evidentiary hearing, a court should hold a

hearing and make findings of fact, unless the motion, the files, and records of the case conclusively show that the defendant is entitled to no relief, under 28 U.S.C. § 2255(b).

When the defendant provides "independent indicia" of the likely merits of his allegations he is entitled to an evidentiary hearing on the issues. United States v. Fuller, 769 F. 2d. 1095, 1099 (5th Cir. 1985). Independent indicia may be, but is not limited to, an affidavit from a reliable third party.

The Black Law Dictionary defines "independent indicia" as:

> Signs: Indications not subject to the control or influence of another.

McDaniels has provided independent indicia to support his understanding, of the oral modification of the plea agreement, which clearly assured him, that pleading guilty in case no.4:09-Cr-453-5 would not affect the statutory or guideline range of punishment in case no. 4:12-Cr-167-1. McDaniels and his attorney, asked the District Court to make available the necessary evidence(independent indicia) to support the oral modification made in open court, by AUSA Sherri Zack, that the agreed upon terms of McDaniels pleading guilty in case no. 4:09-Cr-453-5 would not affect the statutory or guideline range of punishment in case no. 4:12-Cr-167-1. At the request, of McDaniels and his attorney, the Court made the independent indicia available that was necessary to support McDaniels's facts of the terms of the plea that was orally modified.

a) McDaniels attorney made a request, from the Court, for a copy of the transcript from the September 13, 2012 rearrainment to be able to verify the **fact** that the Court ordered the AUSA to put into writing that case no. 4:09-Cr-453-5 would not affect case no. 4:12-Cr-167-1, with the transcript "for the purpose of the future proceedings"(independent indicia). In response to McDaniels's attorneys request the Court stated:

   **"I want you to do that because we're all operating, we have a consensus".**
   (see January 7, 2013 sentencing transcript Pg.13 lines 2-8)

b) Mcdaniels made a request, from the Court, for a copy of the transcripts from the September 13, 2012 rearrainment and the January 7, 2013 sentencing, because he was concerned about having a record of the promises made to him that case no. 4:09-Cr-453-5 would not affect the statutory of guideline range of punishment in case no. 4:12-Cr-167-1, in case he needed them, for a problem in the future, because the AUSA had failed to put the promises in writing as they assured the Court they would. In response to McDaniels's request the Court stated:

**"We'll get the plea of guilty. We'll get todays hearing"**(independent indicia). (see January 7, 2013 sentencing transcript Pg.19 line 24-25, Pg. 20 line 1-6, Pg.20 line 25, and Pg. 21 line 1)

c) McDaniels has presented, to this Court, independent indicia that supports his merits. McDaniels has presented independent indicia from four reliable people. 1) Kathy Metzger(September 4, 2012 Court Reporter), 2) Mayra Malone(September 13, 2012 Court Reporter), 3) Anita Manley(January 7, 2013 Court Reporter), and 4) Johnny Sanchez(June 26, 2013 Court Reporter). Not only are these people a reliable third party, but they are also Officers of the Court, they signed their signature certifying that the transcripts are to the best of their ability, and the only other eyewitnesses that were neutral September 4, 2012, September 13, 2012, January 7, 2013, and June 26, 2013, other than the District Court Judge. As an indigent inmate, in Federal Prison, McDaniels has presented the only independent indicia he has available. This was given to him, from the Court, to be used as **"independent indicia"**(see January sentencing transcript Pg. 21 line 12-18). McDaniels is not a private investigator with the experience to obtain an affidavit from the AUSA, or his attorney, especially when the 5th & 6th Amendment violations McDaniels is claiming are against them. For McDaniels to be denied relief because he's being required to obtain these affidavits, would be prejudicial and a miscarriage of justice, because it would be placing an unattainable responsibility on McDaniels.

**II. Supporting Facts**

McDaniels insist that the Government induced his plea by making false promises, misrepresentations, coercion, and breach. This violates the Supreme Courts ruling in Boykin v. Alabama, 395 U.S. 238, 89 S Ct. 1709, 23 L.Ed. 2d 274 (1964), as well as Santobello v. New York, 404 U.S. 257, 262, 92 S Ct. 495, 30 L. Ed. 2d 427 (1971).

The law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only allege, not prove, reasonably specific, non-conclusory facts that, if true, would entitle him relief. Aaron v. United States, 291 F.3d 708, 715 n.6 (11th Cir. 2002).

Indeed, it is clear that there was an oral modification to the plea agreement. This Court has made it clear in United States v. Cervantes, 132 F. 3d at 1110, that nevertheless, a defendant may seek collateral relief based on an alleged promise, though inconsistent with his statement in open court, by proving (1) the exact terms of the alleged promise, (2) exactly when, where, and by whom the promise was made, and (3) the precise identity of an eyewitness to the promise. McDaniels has carried that burden. McDaniels has also provided the Court with "independent indicia", from Mayra Malone(the Court Reporter on September 13, 2012), exhibit #4 in McDaniels Appeal Appendix, that clearly supports:

1) McDaniels's guilty plea in case no. 4:09-Cr-453-5 would not affect his statutory or guideline range of punishment in case no. 4:12-Cr-167-1.
2) Federal prosecutor, AUSA John Jocher, promised McDaniels's attorney in the week prior to rearrainment in case no. 4:09-Cr-453-5, and McDaniels's attorney then promised McDaniels at rearrainment on September 13, 2012 and at sentencing on January 7, 2013, both in open court.
3) Federal prosecutor, AUSA Sherri Zack, confirmed this promise, to District Court Judge Hughes, at both the rearrainment on September 13, 2012, and sentencing on January 7, 2013.

(see September 13, 2012 rearrainment transcript Pg.13 line 15-25 and January 7, 2013 sentencing transcript Pg.10 line 15-25 & Pg. 11 line 1-9)

Under 28 U.S.C. § 2255(b) an evidentiary hearing must be held on a motion to vacate "unless the motion, files, and record of the case conclusivly show that the prisoner is entitled to no relief".

Here, relief is warranted. McDaniels has clearly carried the burden placed upon him in Cervantes, and has given the Court suffi-

cient independent indicia in support of his facts.

There was an obvious oral modification of McDaniels's plea agreement on September 12, 2012, as supported by the.record, which originated on September 4, 2012. McDaniels has provided the Court with "independent indicia", from Kathy Metzger(the Court Reporter on September 4, 2012, exhibit #3 in McDaniels Appeal Appendix, that supports:

1) September 4, 2012, McDaniels was scheduled for a rearrainment. The rearrainment was postponed because of conflict found by McDaniels within the written plea agreement.

a) McDaniels swears, under the penalty of perjury, he would not have plead guilty to the written plea agreement without inducement from the government promises, that orally modified the plea agreement. (see Sept, 4, 2012 Tr. Pg. 1-4)

McDaniels has provided the Court with "independent indicia", from Marya Malone(the Court Reporter on September 13, 2012), exhibit #4 in McDaniels Appeal Appendix, that clearly supports:

2) September 13, 2012, McDaniels was scheduled for the postponed rearrainment. During the rearrainment McDaniels attorney promised McDaniels that, if he plead guilty, that case no. 4:09-Cr-453-5 would not impact the statutory or guigline range of punishment in case no. 4:12-Cr-167-1. The Ausa in case no. 4:12-Cr-167-1, concurred with McDaniels's attorney, that he agreed with him, that one case wouldn't impact the other. The Court gave the AUSA in case no. 4:09-Cr-453-5 a Court order, to get the oral promises in writing with "no equivocations", and the AUSA gave a verbal assurance that it would be done.

a) It can not be refuted that the government failed to obide by the District Courts order to **"get it to whoever that lawyer is, immediately, in writing, with no equivocations."**. (see September 13, 2012 rearrainment transcript Pg.14 line 4-5) By failing to adduce the oral plea into writing, when McDaniels went into sentencing on June 26, 2013 for the related case no. 4:12-Cr-167-1, almost a year later, McDaniels attorneys and the AUSAs had literally forgotten the oral modification in which detailed the promises made to McDaniels regarding his sentencing that induced his plea of guilt.

In support of this allegation McDaniels directs the Courts attention to the sentencing transcripts from case no. 4:12-Cr-167-1, where both AUSA sherri Zack(case no. 4:09-Cr-453-5 prosecutor) and AUSA John Jocher(case no. 4:12-Cr-167-1 prosecutor) are present, in open court, on June 26, 2013. It was at this time that AUSA Sherri Zack had a duty to inform and remind AUSA John Jocher of what the agreement was between all parties.

(a-1) The agreed upon terms, of the guilty plea and sentencing, that McDaniels would recieve between the 1st prosecutor AUSA Sherri Zack (the prosecutor in the controlling case no. 4:09-Cr-453-5), and the 2nd prosecutor John Jocher (the prosecutor in the related case no. 4:12-Cr-167-1).

(a-2) The agreed upon terms, of the guilty plea and sentencing, that McDaniels would recieve between McDaniels's attorneys Nathan Mays(controlling case) & Thomas Glenn(related case) and the prosecutor, AUSA Sherri Zack(controlling case) & AUSA John Jocher(related case).

(a-3) The understanding and agreement between McDaniels, and the AUSA's Sherri Zack & John Jocher, and McDaniels's attorneys Nathan Mays & Thomas Glenn.

The record clearly supports that the government reassured the Court, and McDaniels, that case no. 4:09-Cr-453-5 would not impact case no. 4:12-Cr-167-1.

b) It is undisputed that the District Court stated, not stressed (as this Court assumed from the transcript), "but I do not intend that to be in any way a suggestion of what Judge Rosenthal thinks.

**However**, a closer look at the record will show that, the Court was not speaking to McDaniels, as suggested in McDaniels's appeal denial, but rather the Court was speaking to AUSA Sherri Zack. This statement was made directly after the Court ordered the AUSA to **"get it to whoever that lawyer is, immediately, in writing, with no equivocations"**. Which supports McDaniels's understanding of the plea to this Court, as supported by the statementa as a whole; that the government agreed to have, put into writing, that case no. 4:09-Cr-453-5 would not impact

the statutory or guideline range of punishment in case no. 4:12-Cr-167-1, and by doing so whatever sentence Judge Rosenthal would give would be up to her **without** the use of case no. 4:09-Cr-453-5 to enhance case no. 4:12-Cr-167-1. (see September 13, 2012 Tr. Pg. 12-14)

McDaniels has provided the Court with "independent indicia", from Anita Manley(the Court Reporter on January 7, 2013), exhibit #5 in McDaniels Appeal Appendix, that clearly supports:

3) On January 7, 2013, McDaniels was scheduled for sentencing in case no. 4:09-Cr-453-5. McDaniels attorney immediately re-informed the Court about the confusion during the September 13, 2012 rearrainment, which the Court ordered the AUSA to put the promises in the plea agreement into writing. The AUSA confessed to failing to do so, but **assured** the Court that the agreed upon terms with McDaniels's attorney were still accurate and valid. The Court placed a request for a copy of the September 13, 2012 rearrainment and a copy of the January 7, 2013 sentenceing, for McDaniels's attorney, to give to McDaniels as **proof** of the oral modification of the plea agreement. McDaniels was sentenced in case no. 4:09-Cr-453-5.

a) McDaniels's attorney verified, with the Court, the oral modification of the plea agreement, that if McDaniels plead guilty in the controlling case, it would not affect the statutory or guideline range of punishment in the related case. To further ensure McDaniels and the Court that his statement was in fact accurate, McDaniels's attorney stated **"I've given him that advice, and I stand by it"**. (see January 7, 2013 sentencing transcript Pg.10 line 23-24)

b) AUSA, Sherri Zack, admitted to the Court, that the goverment failed to put the oral modification of the plea agreement into writing, and stated in open court **"But I agree with what Mr. Mays(McDaniels attorney) is saying, that the case, this does not affect the other one."**. (see January 7, 2013 sentencing transcript Pg.11 line 8-9)

c) Because the AUSA failed to abide by its verbal assurance, made in open court, to put the oral modifications in writing, as they assured the Court and McDaniels they would, McDaniels's attorney made a request, from the Court, for a copy of the transcript from the September 13, 2012 rearrainment to verify

the fact that the Court ordered the AUSA to put into writing that case no. 4:09-Cr-453-5 would not affect case no. 4:12-Cr-167-1, with the transcript **"for the purpose of the future proceedings"**(indepedent indicia). In response to McDaniels's attorney the Court Stated **"I want you to do that because we're all operating, we have a consensus"**. (see January 7, 2013 sentencing transcript Pg.13 line 2-8)

d) McDaniels made a request from the Court. The request was for a copy of the transcript from September 13, 2012 rearrainment and January 7, 2013 sentencing(independent indicia). The request was made because the AUSA had failed to get the oral modification in writing as they assured the Court they would. McDaniels was concerned that he needed a record for any future problems, that would prove that a promise was made to him, that case no. 4:09-Cr-453-5 would not affect case no. 4:12-Cr-167-1. In response to McDaniels request the Court stated **"We'll get the plea of guilty. We'll get today's hearing"**. (see January 7, 2013 sentencing transcript Pg.19 line 24-25, Pg.20 line 1-6, Pg.20 line 25, and Pg.21 line 1)

This gave McDaniels the belief that there was no way the terms of the oral modification were not part of the plea agreement, because Mr. Mays(attorney), Sherri Zack(AUSA), and Judge Hughes(District Court Judge) all agreed. The Court further stated **"So, we're not trying to sandbag you. He's only punished here. I don't mean for you to be punished in Iowa State Court because of what you did here. We're concluding this"**. (see January 7, 2013 sentencing transcript Pg.13 line 12-15)

On good faith, McDaniels believed that by all the Officers of the Court stating the same thing, that the terms of the oral modification to the plea agreement, also were the same.

McDaniels has provided the Court with "independent indicia", from Johnny Sanchez(the Court Reporter on June 26, 2013), exhibit #6 in McDaniels's Appeal Appendix, that clearly supports:

4) On June 26, 2013, McDaniels was scheduled for sentencing in case no. 4:12-Cr-167-1. The P.S.I. report recommended an enhancement in case no. 4:12-Cr_167-1, to run concurrently to case no. 4:09-Cr-453-5. The AUSA violated the terms of the oral modification, in case no. 4:09-Cr-453-5, by advocating for the enhancment in case no. 4:12-Cr-167-1, to run consecutivly to case 4:09-Cr-453-5. McDaniels's attorney, Mr. Glenn,

did not object, when he was aware of the violation. Because of the enhancment McDaniels was consequently sentenced to a base offense level of 30 instead of 14, which dropped to a 27 instead of 11, which was 78 to 97 months instead of 10 to 16 months.

a) AUSA, John Jocher, concurred with McDaniels's attorneys, Mr. Mays and Mr. Glenn, and AUSA Sherri Zack that by having McDaniels plead guilty in case no. 4:09-Cr-453-5 that it would not impact the guideline or statutory range of punishment in case no. 4:12-Cr-167-1. Because the AUSAs failed to put the oral modification into writing as they assured the Court, and because sentencing was nearly a year later, AUSA John Jocher had forgotten about the oral agreement made to McDaniels. AUSA John Jocher then advocated for the Court to, run consecutivly, enhancement 2X3.1. **It is undisputable, by advocating to do this, it caused case no. 4:09-Cr-453-5 to impact the guideline range of punishment in case no. 4:12-Cr-167-1.**

b) McDaniels attorney, Thomas Glenn, had been consulted by AUSA Sherri Zack that McDaniels pleading guilty in case no. 4:09-Cr-453-5 would not affect sentencing in case no. 4:12-Cr-167-1. (see September rearrainment transcript Pg.13 line 19-20) During sentencing Mr Glenn had the opportunity to object to the governments false promises, misrepresentations, coercion, and breach, concerning the oral modification of the plea agreement, but did not. This caused McDaniels to be prejudiced by not re cieveing the promises made to him in exchange for him pleading guilty in both cases.

**III. Prejudice**

McDaniels was prejudiced by the factors placed into his sentencing when the agreed upon terms of the oral modification to the plea agreement, between all parties in open court, was that if McDaniels agreed to plea guilty in both cases that case no. 4:09-Cr-453-5 would not affect the statutory or guideline range of punishment in case no. 4:12-Cr-167-1, **but it is undisputable that it did.**

The Federal Guideline is made up of two components:

1) The base offense level, and 2) The criminal history points

For the controlling case to not impact the related case, it is a <u>fact</u> that the base offense level **nor** the criminal history points from the controlling case, can be used to enhance the sentence of the related case. Thus, for McDaniels's controlling case no. 4:09-Cr-453-5,

to not affect McDaniels's related case no. 4:12-Cr-167-1, there is absolutly no way that an enhancement like 2X3.1 can be used. Enhancement 2X3.1 calls for the related case to acquire the base offense level of the controlling case, which would automatically impact the guideline range of punishment in the related case.

a) The base offense level of case no. 4:12-Cr-167-1, alone, is base offense level 14. McDaniels's criminal history points is category 2. without losing any points for excepting responsibility the sentencing guideline calls for 18-24 months.

b) When 2 points are lost from the base offense level, for excepting responsibility, the base offense level drops to 11, with a criminal history category 2. The sentencing guideline calls for 10-16 months

c) Even if you consider case no. 4:09-Cr-453-5 as a conviction, and make the criminal history category 3 with a base offense of 11, the sentencing guideline would call for 12-18 months.

For the government to induce a plea of guilt, by using false promise, misrepresentations, coercion, breach, and then advocate for a 16 level increase, in McDaniels's base offense level, is not only prejudicial but also a miscarriage of justice because of the 5th Amendment violation of due process that is involved. According to this circuit, in United States v. Munoz, 408 F.3d 222 (5th Cir. 2005), McDaniels should recieve specific performance. The case should be remanded back to the District Court for reassignment to a different judge and resentencing.

## Conclusion

"McDaniels did not waive his right to appeal his §2255". McDaniels timely filed a notice of appeal on his § 2255 after the denial of his 59(e)(motion for reconsideration) on July 25, 2016.

When the District Court denied McDaniels's motion for reconsideration, on the merits of his case, McDaniels sought timely appellate review of his claims in this Court.

Fed. R. App. P. 4(a)(4)(A)(iv) makes the time to file an appeal

run from the entry of the order disposing of the 59(e). In McDaniels case, that date was July 15, 2016. McDaniels filed his notice of appeal on July 25, 2016 which is only 10 days later, which makes his filinf timely.

As credibly supported by the record, and the standard of review of the Fifth Circuit Court of Appeals, it can not be disputed, when McDaniels appealed his motion for reconsideration of his § 2255, he in fact was appealing the adverse underlying judgement of his §2255 on December 22, 2015. Because McDaniels did timely appeal his § 2255, McDaniels is entitled to have this Court hear his claims on the merits.

The conflict, surrounding the sentence to be had, in exchange for pleading guilty in both cases, is without question confusing, coercion and misrepresentation by the AUSA's, and warrants an evidentiary hearing.

The conflict surrounding McDaniels plea and sentence is a direct cause from the AUSA not putting the oral modifications into writing as they assured, the Court, McDaniels's attorneys, and McDaniels they would.

The understanding of the plea was made in open court and agreed upon by all parties before Judge Hughes. To ensure that there would be no misunerstanding regarding the responsibility of McDaniels and the promises expected, based on the fulfillment of McDaniels responsibility, the Court ordered that the oral modification be put into writing immediately, to preserve the factual bases of the contrct between all parties.

An evidentiary hearing is warranted to bring out the following testimony:

Mr. Mays(attorney) and Sherri Zack(AUSA), will testify that they promised McDaniels, in open court, that if he plead guilty to case no. 4:09-Cr-453-5 it would not affect case no. 4:12-Cr-167-1. They also will testify that they had informed John Jocher(AUSA) of the agreement

made with McDaniels and John Jocher completly agreed with the terms.

Sherri Zack(AUSA) will testify that she promised mCdaniels, and the Court, that the oral modification to the\plea would be put into writing. She will also testify that she had consulted John Jocher and Thomas Glenn(attorney) about case no. 4:09-Cr-453-5 not affecting case no. 4:12-Cr-167-1 if McDaniels plead guilty in both cases.

John Jocher will testify that he concurred with Mr. Mays about case no. 4:09-Cr-453-5 not affecting case no. 4:12-Cr-167-1.

Thomas Glenn will testify that he was consulted by Sherri Zack about the oral modification made to McDaniels.

The record of an evidentiary hearing would clearly support, either the AUSA's reneged, forgot, or misrepresented the terms of the plea to McDaniels. An evidentiary hearing is warranted.

Admittedly the case presents serious concerns regarding the knowing and voluntariness of McDaniels plea and sentencing, due to the conflicting postions taken by the AUSA's from one court to another, as credibly supported in the record. In the interest of Justice and protecting McDaniels's 5th & 6th Amendment right, with respect to his guilty plea, and right to effective assistance of counsel, McDaniels respectfully request this Court, order an evidentiary hearing on the merits of the claims, and allow the appeal to go forward.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andre McDaniels

Date: MARCH 26 2019