

19-5595
RECORD NO

ORIGINAL

In The
Supreme Court Of The United States

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JUL 18 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MARCEL MALACHOWSKI,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondant,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did The Denial of COA Violate Due Process Where The Second Circuit Court of Appeals Denied Effective And Meaningful Review As A Matter of Right When A Clear Claim of Ineffective Assistance of Counsel Was Deferred To Habeas Proceedings. The Claim Presented On Direct Appeal Was Grounded Upon Government Misrepresentations Based Upon The Use of False Evidence Which Influenced The Decision To Plead Guilty.
2. Was The Second Circuit Court of Appeals Unreasonable In It's Threshold Evaluation of Petitioner's Constitutional Claims Under The Fifth And Sixth Amendments Where The District Court Held No Hearing In Resolution of Motion Brought Under §2255.
3. Did The District Court Error In Denying Petitioner's Claim That Prosecutorial Misrepresentations (Use of False Evidence) And Agent Misconduct (Evidence Tampering) Rendered Plea Involuntary And Unknowing.

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STATUTES

- 28 U.S.C. § 1254(1)
- 28 U.S.C. § 2253(c)
- 28 U.S.C. § 2255

FEDERAL RULES

- Fed.R.Crim.P. Rule 11 (c)(1)
(b)(1)(I)

UNITED STATES CONSTITUTIONAL AMENDMENTS

FIFTH

SIXTH

In The
Supreme Court of The United States
2019

Marcel Malachowski,
Petitioner,
v.
United States of America,
Respondant,

On Petition For a Writ of Certiorari To The United States
Court of Appeals For The Second Circuit

The Due Process violations exhibited by the separate prosecutions are extraordinary. Resulting from a deliberate decision to delay a second indictment in order to achieve tactical measures. Review by the Supreme Court of The United States is necessary to correct not only egregious misapplication of settled law. But also, the lower courts demonstration of unwillingness to impugn their own standards.

Opinion Below

The Second Circuit Court of Appeals held that "[u]pon due consideration, it is hereby ordered that [] the appeal is DISMISSED because Appellant has not 'made a substantial showing of a denial of a constitutional right.'" 28 U.S.C. § 2253 (c); see also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). (A)

Jurisdictional Statement

This Court has jurisdiction to review the judgement of the Court of Appeals pursuant to 28 U.S.C. § 1254 (1). The Court of Appeals issued an order denying petitioner for certificate of appealability on December 19, 2018, the mandate

was issued on April 24, 2019. (A.1)

Constitutional and Statutory Provisions

The Constitutional provision involved is the Due Process Clause under the Fifth Amendment to the United States Constitution. The statutory provisions involve 28 U.S.C. § 2253(a), and §2255.

I.

STATEMENT OF THE CASE

Introduction

For nearly three years, the government withheld discovery while remaining absolute that in order to reach a plea agreement. Petitioner was required to stipulate to an enhancement to which he had maintained innocence.

A week before trial began, Petitioner moved for attorney Fred Rensch to be relieved because counsel had failed to share discovery materials, obtain materials to assist in defense, and operated under a conflict of interest. Several months leading up to trial, counsel ignored Petitioner's written requests that counsel inform the court of these issues.

On June 4, 2013, the first day of trial, Petitioner informed the court that he was in need of discovery material that was believed to have been withheld. Specifically asserting "serious Brady violations" with both matters. The government assured the District Court that all discovery had been disclosed. Later in the proceeding, Petitioner again attempted to pursue his discovery claim. But, the court stated that it would not hear anything further because the jury was ready.

On the second day of trial Petitioner pled guilty out of desperation as a result of previous experience (Utica proceeding), knowledge that he could not adequately defend himself without time to prepare, without counsel, and that counsel assigned to him utterly failed to examine discovery, or formulate a defense.

RELEVANT BACKGROUND

As a consequence of the government's bad faith and improprieties, Petitioner has been subject to two tainted prosecutions and is currently serving 178 months born from misconduct. (240 months adjusted for time already served). As a plethora of previously withheld material now reveals, the previous picture painted by the two separate prosecutions of the Petitioner has been altered dramatically worthy of consideration anew.

For starters, a cursory review of the Utica proceeding establishes that the co-operating informant jumped from agency to agency, four in total when several purported schemes to ensnare the Petitioner faltered. Numerous attempts that spanned 21 months, is how the investigation took the appearance of a multifaceted endeavor. Through the clever manipulation of both federal agents as well as the Petitioner. All while utilizing friendship, business partnership, and an investment of nearly a million dollars as a trap and leverage in order to manipulate a set of circumstances that led to a questionable arrest and later conviction.

During the course of trial, the government would concede that the Petitioner had not been previously investigated for, or much less had any involvement with firearms prior to the events created by the CI. In order to attain conviction, the prosecution would need to engage in highly questionable tactics in efforts to successfully prosecute the Petitioner.

Interestingly, in 2013', as a result of trial proceedings relative to the instant matter. Previously withheld evidence would reveal a bounty of material exculpatory in nature. Forensic evidence now establishes critical government evidence utilized at Petitioners' trial, provides that agents of the government deliberately tampered with recordings prior to submission as evidence.

Circumstances which involve lead DEA case agent Mike Murphy. Moreover, material also reveals three additional government co-operators directly involved in the

in the events on November 17, 2019', did not inculpate the Petitioner in anyway to the relevant charges.

Forensic evidence also establishes that lead ATF case agent Melanie Kopf, directly responsible for the circumstances surrounding evidence tampering, provided perjured trial testimony pertaining to government recordings.

As the record provides, both prosecutions are inextricably linked by the governments deliberate decision to delay a second indictment which led to two seperate prosecutions stemming from a single multi-agency investigation. As evidence suggests, the decision was premised upon unconstitutional conduct known to investigators. A second indictment occurred in 2010', relevant to the instant matter.

Proposed Plea Agreement

From indictment in 2010', through 2012', Petitioner and the government engaged in plea negotiations. Throughout this period, the government offered and had given the opportunity to plead guilty to Count One of the indictment, conspiracy to distribute and possess with intent to distribute more than a thousand kilograms of marijuanna in violation of 21 U.S.C. §§ 846 and 841 (b)(1) (A). The governments offer of a plea agreement to Count One, which carried a ten-year mandatory minimum sentence, was favorable to the Petitioner, because the top charge of the indictment, Count Three, carried a twenty-year mandatory minimum sentence.

However, a plea agreement was never realized and plea negotiations fell apart as a result of the governments' conditioning the plea agreement contain a 2pt enhancement for possession of a firearm in furtherance. Premised upon the fictitious claim that Petitioner had threatened co-defendant and co-operating witness Sean Herrmann at gun point. The government relentlessly insisted on the

stipulation when the claim was in fact, false, and the government knew or should have known the claim was concocted. Further adding that there exists no other evidence or corroboration implicating the Petitioner to such conduct at any time.

Ultimately, the government was forced to go to trial because they made an unreasonable demand upon Petitioner that was vindicated by the pre-sentence report. Counsel vividly recounted at sentencing that he and the Petitioner had had heated, "nose-to-nose, red faced" arguments over Petitioners' refusal to stipulate to threatening Herrmann with a gun.

[Petitioner] is right. He refused to make a deal because any deal offered by the government, prior to the date of trial, include[d] his having to admit that he placed a gun to the head of Sean Herrmann and he categorically denied this from the beginning.

Frankly, Judge, I trusted the governments' position and the governments' evidence and [Petitioner] and I had some nose-to-nose, red faced arguments at the Albany County jail as to whether or not he should be pleading guilty and he absolutely refused to do so if accepting the — the accusation or the allegation that he placed a gun to Herrmanns' head was going to be included, he would not do that.

He ultimately pleads guilty at trial, second day of trial. The pre-sentence report is done, and then [in] the presentence report the government backed away from that allegation. So we find ourselves in the nominal position here of where [Petitioner], who wanted to negotiate this case and plead guilty, was prevented from doing so by the governments' reluctance to give up on this point.

(Trans pg. 36-37)

To date, the government has not credibly disputed Petitioners' description of how plea negotiations fell apart. However, due to Brady/Giglio violations, the

injury to the Petitioner went beyond missing out on an opportunity to plead guilty, he was also deprived of his due process rights under the Fifth Amendment.

On May 21, 2013, two weeks before trial was set to begin, the government disclosed hundreds of pages of discovery material to defense counsel. The discovery packet included the DEA-6 report, written by case agent Mike Murphy, of Herrmanns' May 15, 2013, proffer in which he officially recanted his false gun claim. (Petitioner alleged in motion to vacate his guilty plea that he was not shown, nor did counsel tell him, of the recantation until after Petitioner pled guilty.) Evidence indicates that there is strong proof that the government knew even earlier than May 15, 2013, that Herrmann had made up the gun story. The government violated it's obligations under Brady by failing to alert Petitioner to the recantation of a crucial allegation by one of it's main witnesses against Petitioner. Receipt of the report evidencing Herrmanns' recantation would have been pivotal to Petitioners' decision whether or not to plead guilty had Petitioner received it prior to his guilty plea. During the pre-trial conference the district court had made inquiry into whether or not complete discovery had been turned over to the defense. What is not qualified was that, in view of newly appointed pro se status, whether Jenks material had been actually turned over to the Petitioner, which is was not. Moreover, during the Court's inquiry, the government nor trial counsel disclosed the pertinent fact that the government had issued a non-disclosure letter. Both the Court and the Petitioner were kept in the dark about this critical fact.

Although discovery had been provided to trial counsel, had counsel bothered to thoroughly review the material or conduct basic investigation into Herrmanns' claim in the early stages. Arguably, counsel would have been able to persuade the government to remove the possession of a firearm stipulation from the plea agreement. This was the stipulation that counsel had informed the Court that

he had fought with Petitioner to accept, thereby also confirming what the government had represented throughout the plea bargaining stage.

To make matters worse, there is the strong likelihood that Herrmann recanted at least a year earlier, on March 26, 2012, in an interview with Agent Murphy and AUSA Kelly. Noting that both representatives of the government interviewed Micheal Cook in early 2010, who throughout several debriefings not once corroborate Herrmanns' claim.

Herrmann first made the phony gun threat claim on February 20, 2009, long before he signed his co-operation agreement on February 12, 2012. At his proffer to the government on February 18, 2009, Herrmann claimed that following the seizure of marijuanna proceeds from him in 2007, by the DEA, Petitioner brought him to a barn and directed other individuals to repeatedly threaten to kill him with a firearm. Herrmann claimed that co-defendant Micheal Cook was present for the incident. During any of Cooks' proffers, especially noting February 28, 2013, Cook did not in anyway corroborate Herrmanns' claim, even when Cook recounted the 2007 seizure and subsequent events.

In DEA agent notes from Herrmanns' March 26, 2012, interview with case agent Murphy and AUSA Kelly, Herrmann again discussed the April 2007, cash seizure in detail but there was no mention in the notes of any gun threat.

Months after the March 26, 2012, interview, the government offered Petitioner the plea agreement to Count One of the indictment, conspiracy to distribute and possession with intent to distribute marijuanna in violation of 21 U.S.C. § 841 (b)(1)(B) with an enhancement for possession of a firearm in furtherance of the criminal activity pursuant to Guideline 2D1.1 (b)(1). Petitioner rejected that plea offer, pleading with the government to remove the firearm stipulation in order to come to an agreement. The government refused to remove the stipulation.

Motion For Counsel To Be Relieved

A week before trial was to begin in this case, Petitioner moved for attorney Rench to be relieved because Rench had failed to share discovery materials with him, obtain materials to assist in his defense, did not meet with Petitioner until just two weeks before trial to prepare for trial, counsel divulged defense strategy to the government, and counsels' application for employment with the very same U.S. Attorney's office months earlier demonstrated conflict of interest. It is important to note that the Petitioner was facing a likely life sentence if convicted on the CCE count, which speaks volumes to the lack of diligence demonstrated by counsel.

In specific regard to Rench, Petitioner had made at least two requests directly to counsel via correspondance to inform the Court of the perceived conflict, and acrimonious relationship months prior to trial. Petitioner having had two previous CJA attorneys' appointed during his case, made it unlikely the Court would consider the request made by Petitioner himself. Consequently, the District Court would not appoint another. Noting that the prior attorneys conduct was so egregious, that counsels' conduct had been recognized in other cases by the Second Circuit Court of Appeals, and the State Supreme Court Appellate Division. Whereby, both Courts disciplined the attorney receiving multiple suspensions.

Re-Assignment of Case

After three and a half years of proceedings, the Petitioners' case was re-assigned from the Honorable Judge Kahn, to the Honorable Judge McAvoy. NO request or notification was made to the defense, notwithstanding the length of time that had elapsed causing possible prejudice.

First Day of Trial

Conditioned by the experience of the Utica proceeding (government misconduct, witness perjury, etc...), combined with the mistrust developed from appointed counsel conduct, the Petitioner moved to be permitted to proceed pro se, *inter alia*, the grounds specified in the preceding paragraph. Petitioner informed the Court that he was in need of more discovery that he believed had been withheld, as well as specifically asserting "serious Brady violations." Petitioner asserted that he wished to resolve the case with the plea offer made by the government, but one stipulation required by the plea agreement was false; that Petitioner had threatened co-defendant Sean Herrmann with a gun.

Before denying the Petitioners' motion for additional time to prepare for trial, and for further discovery, notwithstanding, newly appointed pro se status. The Court directed the government to turn over previously withheld ATF reports part of the investigation and a subject of controversy raised in the Utica proceedings. Conducting a cursory review that evening resulted in the discovery of favorable material previously undisclosed relevant to both matters under Brady law.

Trial Day Two and Change of Plea Hearing

On the second day of trial, June 5, 2013, Petitioner arrived to court realizing that without discovery, or needed time to prepare, together presented little chance to adequately defend himself. Considering the options of proceeding through trial under these conditions seemed illogical and defeating. Especially facing the likely possibility of receiving a life sentence as a result of a guilty verdict to the CCE charge. Armed with the ATF reports, and conclusory evidence derived thereof, the Petitioner considered a second option of pleading while pursuing a downward departure based upon mitigating factors.

Alerting the Court to the possibility of entering a plea should certain conditions be met. The Court granted the Petitioner forty-five minutes to confer with stand-by counsel into the viability of this strategy. The strategy was discussed in detail, seeking advice that if a plea was entered, could the depart downward on mitigating circumstances. The Petitioner was not only led to believe that the Court had the authority to depart, but also the government agreed to a sentencing hearing prior to entry of the plea. The sentencing hearing was a determinative factor in the Petitioners' decision to plea. It would be at this hearing where the Petitioner intended to establish deliberate government misconduct, while evidencing legal argument of innocence relevant to the CCE statute.

After discussing the matter with standby counsel, whereby Rench identified the relevant section on mitigating factors located in the U.S.S.G. manual that counsel had brought with him. The Petitioner pled guilty to the indictment without a plea agreement.

Pro Se Motions to Withdraw Guilty Plea

In August 2013, two months after trial, Petitioner was provided withheld Jenks 3500 material. Petitioner moved to withdraw his guilty plea by pro se motions filed on September 3, 2013, October 28, 2013, and January 2, 2014, which were all denied. Noting, Petitioner called and notified Rench on June 6, 2013, of his desire to withdraw his plea to numerous counts. Also requesting counsel to notify both the Court and the government.

In Petitioners' September 3, 2013, motion to set aside his guilty plea, Petitioner alleged that although he wished to enter a plea agreement, he was unable to reach an agreement with the government. The only obstacle to an agreement, it was alleged that the government had insisted that the Petitioner

stipulate to a two-level guideline increase for co-defendant Sean Herrmanns' false claim that Petitioner had threatened him with a gun.

Petitioner explained that during plea negotiations, he had repeatedly denied the claim that he had threatened Herrmann with a gun. Petitioner explained that he had suggested that his veracity be tested by a polygraph examiner on the issue. While asserting that if not but for the governments' insistence that he stipulate to Herrmanns' false claim, he would have accepted the governments' plea agreement. Which included a plea to a single count, Count One. However, the governments' position was intractible, and consequently, the plea was rejected and ultimately pled guilty to the indictment.

As a means of disproving Herrmanns' false claim, it was requested that counsel make inquiry into whether any other co-defendants had corroborated Herrmanns' claim. Further requesting counsel to investigate issues pertaining to government witnesses in order to prepare for trial. In response, detailed in attorney correspondance, counsel claimed that he "knew of no way to investigate potential witnesses."

Petitioner explained in the motion that after his guilty plea, Rench provided him with DEA-6 statements that demonstrated that Herrmanns' claim was false, and that Herrmann had recanted his claim in an interview with the government prior to Petitioners' guilty plea. In his May 15, 2013, proffer, Herrmann recanted his story that Petitioner threatened him with a gun and confirmed that, "no one put a gun to [his] head."

Petitioner alleged that Herrmanns' false claim forced him to reject the governments' plea offer to Count One, having pled guilty to the indictment was subject to a twenty-year statutory mandatory minimum sentence for Count Three, which charged continual criminal enterprise. Petitioner argued that as a result of the governments' adoption of Herrmanns' false claim as fact, he faced a

a mandatory minimum that carried double the sentence of what he would have faced had the government not insisted that Herrmanns' false claim was true.

Arguably, with the changes in recent years, scoring would have resulted to include the drugs minus to adjustment to the drug quantity table. Thereby reducing the Petitioners' sentence even further, considering that the Court applied the low end of the guidelines. The Petitioner would have been ultimately subject to a guideline range of 135-165 months, providing a potential sentence disparity of 105 months.

January 2, 2014', Pro Se Motion

In his final motion, Petitioner alleged, that it was not until his interview with the Probation Officer that he learned that there was a twenty-year mandatory minimum sentence for the CCE from which the District Court was not permitted to depart.

Petitioner did not know that there was a mandatory minimum penalty applicable to his guilty plea until after his decision to plead guilty, which divested the Court of authority to depart absent a letter issued by the government for assistance. It was the Petitioners' understanding that the Court "depart [] if warranted... based upon mitigating factors," and that there was no truly mandatory minimum sentence. Petitioner alleged in his motion, that had he been fully informed, he "would have elected to proceed to trial on the CCE Count."

January 3, Text Order

In response to Petitioners' motion filed on January 2, 2014, the District Court issued a text order on January 3, 2014, stating that, *inter alia*, the motion for "substantive relief from Petitioners' conviction" was denied. The Court referenced three prior orders that the Court had issued in the case that addressed other grounds for relief, but those prior orders did not address

Petitioners' claim that he was not informed that the CCE count carried a twenty-year mandatory minimum sentence of imprisonment. As a result, the District Court never addressed Petitioners' claim that he was misinformed as to the mandatory minimum term of imprisonment and the statutory requirements for the CCE charge.

Sentencing

On September 17, 2013, the District Court re-appointed Rench and modified counsels' representation from stand-by counsel to counsel of record. Petitioner made the request for appointment of counsel to assist with sentencing because the Albany County jail had removed the federal law resources from its' library.

On January 7, 2014, Petitioner appeared at sentencing proceedings held before Judge McAvoy, represented by Fred Rench. Rench requested that the District Court "depart" from the mandatory minimum sentence;

I've got a secondary point which [Petitioner] asked me to add and that's' the Court depart from a mandatory minimum sentence in this case and my reasons for the departure below the mandatory minimum, I should say [Petitioners'] reason for the departure below the mandatory minimum are set forth in sequence in the pre-sentence report. Excuse me. In my sentencing memorandum and I need not go through them.

The district Court responded that the Court could not depart.

Pursuant to Guideline § 5G1.3(b)(1), the District Court adjusted Petitioners' 240-month sentence to credit the 62 months imprisonment that Petitioner had already served. Consequently on Counts 3, 5 through 13 and 16 through 24 of the superceding indictment, the Court sentenced Petitioner to 178 months' imprisonment to run concurrently to his prior term. A \$1900 special assessment was made and Petitioner forfeited his interest in all property listed in the preliminary order of forfeiture.

Court of Appeals

On September 9, 2015, a panel of the Court issued a summary order affirming Petitioners' conviction. On appeal, the panel exercised it's baseline aversion to reviewing ineffective assistance of counsel claims on direct. Appellate counsel Robin C. Smith, raised significant issue that upon re-appointment counsel was ineffective for failing to withdraw Petitioners' plea relevant to the fictitious Herrmann claim.

On February 17, 2016, the Court of Appeals denied petition for panel re-hearing, hearing en banc.

Pro Se Motion Brought Under § 2255

The Petitioners' brief asserted the following issues: (I) ineffective assistance of counsel(s) and a decision by the Court denying a request for a fourth resulted in a denial of a constitutional right to counsel under the Sixth Amendment; (II) substantial Brady violations establish due process violations under the Fifth Amendment; (III) Petitioners' plea was improperly influenced and coersed in violation of the due process clause under the Fifth Amendment, and; (IV) ineffective of appellate counsel established further violation under the Sixth Amendment.

On June 11, 2018, the District Court denied the Petitioners' motion in it's entirety. Holding that "because Petitioners' § 2255 motion is denied without the need for a hearing, Petitioners' motion to conduct discovery is denied as moot. The Court also found that the "Petitioner fails to present viable issues upon which reasonable jurists coule debate.," thereby denying Certificate of Appealability pursuant to 28 U.S.C. § 2253.

Petition For COA & Motion For Reconsideration

The Second Circuit Court of Appeals was provided notice that on August 27, 2018, Petitioner was placed in administrative segregation (S.H.U.) to await transfer. As result of suffering an unprovoked attack by four inmates. Placement in the S.H.U., for nearly one hundred days severly limited access to needed legal resources. During the pendency of appeals for COA, Petitioner was only given six hours of access to the electronic library, and was only twice granted access to personal legal material placed in storage. Arguably, these circumstances severly hampered preparation of requests for COA. Directly causing Petitioner to overlook critical controlling law, and legal principles.

II. REASONS FOR GRANTING THE WRIT

Brought under §2255 motion, Petitioner argued that because the Second Circuit Court of Appeals exercised it's baseline aversion to reviewing an ineffective assistance of counsel claim on direct. Therefore, establishes any issue that has some merit is considerably stronger and more likely to succeed. In turn demonstrating appellate counsel's performance fell below an objective standard of reasonableness in opting not to pursue Brady issues, supported by compelling evidence that warranted review on direct. Petitioner was prejudiced by counsel's performance "because requests for habeas relief are in tension with society's strong interest in finality of criminal convictions, the courts have established rules to make it more difficult for a defendant to upset a conviction by collateral as opposed to direct attack." Ciak v. United States, 59 F.3d 296, 301 (2d Cir. 1995)

Alternatively, Petitioner's due process rights were violated by the Second Circuit's denial of COA, when it had deferred review of the claim counsel was ineffective for failing to withdraw plea upon re-appointment. Petitioner argued that under motion for reconsideration, COA should have been granted because where on the first appeal as a matter of right, an issue of ineffective assistance

is deferred to habeas proceedings. Then subsequent denial of review of that issue is not adjudicated in accord with due process of law.

POINT I

THE DENIAL OF COA ON THE ISSUE COUNSEL
WAS INEFFECTIVE FOR FAILING TO WITHDRAW
PETITIONER'S PLEA UPON RE-APPOINTMENT
VIOLATED DUE PROCESS.

On direct the Second Circuit Court of Appeals held that, "[Petitioner's] claim that counsel was ineffective for failing to withdraw his guilty plea [] is not cognizable on direct appeal." citing Massaro v. United States, 538 U.S. 500, 504 (2003)("In most cases a motion brought under §2255 is preferable to direct appeal for deciding claims of ineffective assistance."); United States v. Morris, 350 F.3d 32, 39 (2d Cir. 2003)(highlighting this Circuit's "baseline aversion to resolving ineffective claims on direct review)(internal quotation marks omitted)

Argument Presented On Direct

Appellate counsel argued that "[t]he Government's requirement that [Petitioner] stipulate to a two level guideline increase based upon possession of a firearm in furtherance of the conspiracy under U.S.S.G § 2D1.D1.1 (b)(1) for the false claim that [Petitioner] allegedly threatened co-defendant Sean Herrmann with a gun, violated [Petitioner's] rights under the Due Process Clause. Alternatively, counsel was ineffective for failing to move to withdraw [Petitioner's] guilty plea on this ground." (See 14-023-cr, Br. pg.36-49)

At sentencing, counsel confirmed "from the onset of the case, [Petitioner] wished to plead guilty, but refused to stipulate to threatening Herrmann with a gun, because [he] insisted the allegation was false. Rench admitted that he had adopted, as truth, the government's position that the two-level enhancement for possession of a firearm in furtherance of the conspiracy was proper, and

that as a consequence, he and Petitioner had had "some nose-to-nose, red faced arguments at the Albany County Jail as to whether or not he should be pleading guilty (A. 222-223)." (quoting App.Br. pg.37)

"[Petitioner] appended to his pro se motion to withdraw his guilty plea, the DEA-6 reports and notes that he received after his guilty plea, which demonstrated Herrmann's false claim. (A. 135-145) (Noting, Petitioner cited Leka v. Portuondo, 257 F.3d 89 (2d Cir.2001) (precedent which establishes violation under Brady attributable to knowledge of agents involved in the investigation) Appellate counsel also argued that further written notes of Herrmann's interview occurring on March 26, 2012, "raised serious question as to whether Herrmann recanted his story even earlier.

As a result of Herrmann's lie, and government conduct when it knew or should have known the claim was false, deprived Petitioner of the opportunity to plead guilty to Count One of the indictment.

Claim Fortified Under §2255

Petitioner presented additional grounds to which established counsel was ineffective for failing to withdraw plea upon re-appointment.

Counsel Was Aware of Rule 11 Violation

Providing fair and just reason to withdraw Petitioner's guilty plea, counsel was fully aware that the plea had been entered in violation of Rule 11 (c)(1). Entered while under the misinformed belief, that the court had authority to depart below the minimum sentence. During the change of plea hearing, while in a stand-by capacity, counsel not only influenced the misinformed belief, but remained mute while the error occurred.

Counsel's knowledge can be implied from "extensive conversation...[], culminating in a discussion just a few moments ago, perhaps the last hour...,"

where Petitioner consulted with Rench. (Change of Plea Trans. pg.36, ln 25-26) The misinformed belief should have been corrected by counsel or the court. Furthermore, under Rule 11, it is up to the court to determine whether the Petitioner understood the statutory restrictions. (See also; Point II, pg's 31-36)

Counsel Was Also Aware of Further Discovery Issues

An examination of both appointed counsels, Rench and Castillo would indisputably provide that Petitioner had adamantly asserted innocence to the Utica convictions, Herrmann's claim, and the CCE charge.

In addition to Herrmann's recantation contained in the withheld reports, establishing a Fifth Amendment claim. In a letter dated June 7, 2013, to Petitioner, Rench declared that, "upon returning to my office on June 6, 2013, (day after plea), I noticed a number of email messages directed to me from AUSA Dan Gardner. As I recall, much of the information was sent to me by Mr. Gardner at your request. I now enclose these materials herewith as I believe they may bear upon your Utica case and ultimately, upon the Albany case." (219 pg's of Jenks material that had been withheld from pro se litigant) Counsel's statement confirms that in his own view that withheld information contained value to both matters.

Fifth Amendment Claim Demonstrated Ineffective Assistance of Both Trial And Appellate Counsel

Petitioner detailed that both, Rench and prosecutors withheld information that a non-disclose letter had been issued. Asserting that the government circumvented due process by issuing it's own protective order with trial counsel. Effectively leaving disclosure in the hands of appointed counsel, whom admitted sympathies to the government had already prejudiced the Petitioner. In the letter the government instructed counsel that if upon evaluation there was information that Rench felt needed to be disclosed, counsel was to inform the government so

that an order could be sought from the court. Fed.R.Crim.P. 16, does not create a government privilege to issue a non-disclosure of evidence. Under this rule the district court must determine whether material is discoverable. See United States v. Stewart, 590 F.3d 93 (2d Cir. 2008). At no time did the government make formal request to the court in order to restrict disclosure of Jenks 3500 material. At the same time, the prosecution was not forthright, nor forthcoming in their discovery obligations. In the same vein, non-disclosure of crucial material violated due process rights. An issue that should have been arguably brought forth on direct.

In view of pro se status the district court did not qualify that Jenks material had been provided to Petitioner. In resolution of this issue pre-trial, the court assumed that counsel had shared discovery with the Petitioner. While being effectively denied reasonable opportunity to review discovery, Petitioner also asserted that the court "unreasonably and arbitrarily" denied a continuance in view of newly appointed pro se status. citing Morris v. Slappy, 461 U.S. 1, 11 103 S.Ct. 1610, 75 L.Ed. 2d (1983)(denial of continuance may violate a defendant's due process rights to a fair trial and present a defense.)

The provision of withheld material was described under §2255 motion as "Brady material identified on it's face." (§2255 pg's 25-34) Transcripts of recorded calls between two government witnesses lend to directly undercut a critical element required by the CCE count. The value of the withheld material had been thoroughly detailed by appellate counsel brought under motion for an indicative ruling (see Dkt 725), and previous petition for writ of certiorari (see pg's 12-27). Petitioner asserted that counsel was ineffective for not pursuing this issue that was significantly stronger than an issue that the Second Circuit would decline to review on direct. Counsel knew or should have known of the court's aversion to reviewing ineffective assistance claims on direct.

Under his Brady v. Maryland, *infra.*, claim, Petitioner asserted that because there is no physical evidence meeting the burden of proof in order to establish needed elements required by the CCE count. These circumstances establish that the government would be reliant on witness testimony in order to meet the burden of proof. As such, the value of withheld impeachment material increases in evaluation of constitutional claims. See Bagley, *infra.*; United States v. Wong, 78 F.3d 73, 79 (2d Cir. 1996) ("Evidence of impeachment material...where the likely impact on the witness's credibility would have undermined a crucial element of prosecutions case.")

Forensic evidence, Herrmann's fabrication, and the litany of impeachment material further available through the withheld proffers would have thoroughly undermined the credibility of key government witnesses. Having detailed the challenged credibilty of DEA agent Murphy and Sean Herrmann, evidence exists that another key government witness (Selena Hopper) conspired in an attempt to defraud a bank out of one hundred and fifty thousand dollars while "co-operating." Furthermore, this same witness had engaged in an inappropriate intimate relationship with a DEA agent during the relative time period.

Utilized in combination with material evidencing that both Cook and Herrmann worked independantly of the Petitioner (establishing a buyer/seller relationship), skilled counsel would have been able to instill reasonable doubt into the minds of a jury. Creating a reasonable probability that the outcome of the proceedings would have been different. See United States v. Nelson, 2014 U.S. Dist. LEXIS 77008 (A plea can be rendered legally involuntary by government misrepresentation) "Because the prosecution suppressed exculpatory evidence before [Petitioner] pled guilty, [Petitioner's] due process rights were violated to his prejudice and his guilty plea was not voluntary and knowing." See Nelson, 2013 U.S. Dist. LEXIS 153420, 2013 WL 5778318 at *9; United States v. Avellino, 136 F.3d 249

Prosecutorial And Agent Conduct Demonstrate
The Denial of A Constitutional Right

In pursuit of COA, the Petitioner contends that support is found under United States v. Fisher, 2013 U.S. App. LEXIS 6515 (4th Cir. Md., April 1, 2013) Where the district court granted defendant's motion for certificate of appealability as to his Sixth Amendment ineffective assistance of counsel claim. Thereafter, the Fourth Circuit Court of Appeals granted Defendant's motion to expand the certificate of appealability to include the issue of whether the belated disclosure of [police] misconduct rendered defendant's plea invalid under the Due Process Clause.

The Fourth Circuit Court of Appeals reversed the lower court's denial of habeas relief hinging it's decision on egregious impermissible conduct (misrepresentation) antedat[ing] the entry of plea and because the misconduct influenced the decision to plead guilty or, put another way, it was material to that choice. Supported by the United States Supreme Court holding that government misrepresentations constitute impermissible conduct. Fisher, at 2 (quotations and citations omitted)

Petitioner argues that the circumstances presented by his case provide a stronger argument for COA, than those found under Fisher. First, Petitioner filed several pro se motions to withdraw his plea well in advance of sentencing. Furthermore, withheld material actually strikes at a critical element required by the CCE count. While also presenting additional support that Petitioner was not fully aware of the consequences of his plea.

However, like Fisher, the Petitioner's case presents extraordinary circumstances. Where law enforcement officers responsible for the investigation that led to arrest and guilty plea have committed unconscionable acts. In comparison,

DEA agent Murphy knew or should have known Herrmann's claim was false. Moreover, grand jury testimony along with withheld reports provide Murphy's presence and participation in the arrest of Petitioner on November 17, 2008, relevant to the Utica prosecution.

Forensic evidence now provides that critical bodywire recording exculpating the Petitioner to the gun possession charges was tampered with at 6:41pm on that day. Occuring approximately fourteen minutes after the arrest while at the scene. Working closely alongside ATF agent Kopf, it is possible that agent Murphy could have been responsible for deliberatley tampering with exculpatory evidence. By doing so, would have provided ATF agent's with deniable plausibility. Agent Murphy stood in the best position to influence prosecutor's to delay a second indictment to the marijuana offenses. However, whether or not agent Murphy was actually responsible is not a determinantive factor under the cited precedent found under Fisher, but is still important for consideration.

The Defendant in Fisher, essentially argued that his plea was constitutionally infirm for two district reasons: (1) underlying pre-plea misconduct rendered his plea involuntary under Brady v. United States, 397 U.S. 724, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970); and (2) the government failed to meet it's evidentiary disclosure obligations under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). Id. In view of precedent found under Harris v. Kerner, 404 U.S. 519, 520 (1972), Petitioner's pro se motions submissions should have been read to construe the strongest argument. A claim under Brady v. Maryland, had been articulated, and it had been argued that the government misrepresented not only Herrmann's ficticious claim, but also that all discovery had been turned over. Which it had not as evidenced by the record in violation of due process.

"The long standing test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the

alternative courses of action open to the defendant." Hill v. Lockart, 474 U.S. 52, 56 106 S.Ct. 366, 88 L.Ed. 2d (1985)(citations and quotations omitted) To set aside a plea as involuntary, [Petitioner] first must show that impermissible government conduct occurred. Brady v. United States, 397 U.S. at 755. But Brady v. United States, does not limit government misrepresentations to prosecutorial promises designed to elicit a guilty plea. Consequently, the First Circuit has held that the government may not make "plain []" and "inexcusable" misrepresentations not anchored to any permissible litigation strategy. Ferrara, 456 F.3d at 293. The First Circuit held that the affirmative misstatements "plainly and inexcusably misrepresented the true state of affairs" and constituted "blatant misconduct" that was "sufficient to ground the petitioner's claim that his guilty plea was involuntary." Id. (citation omitted) quoting Fisher at 5.

Similarly, even defense counsel's misrepresentations can undermine the validity of a plea. Tollett v. Henderson, 411 U.S. 258, 266-67, 93 S.Ct. 1602, 36 L.Ed 2d 235 (1973), see also; Stader v. Garrison, 611 F.2d 61 (4th Cir. 1979) (when [] grossly misinformed by [an attorney], and reli[ant] upon that misinformation, [Petitioner] is deprived of his constitutional right to counsel.) When the erroneous advice induces a plea, permitting him to start over again is the imperative remedy for the constitutional deprivation." Id. at 55. quoting Fisher at 6.

Like Fisher, this is not a case where [Petitioner] sought to withdraw his plea "merely because he discovered long after the plea ha[d] been accepted that his calculus misapprehended the quality of the [government's] case or the likely penalties attached to alternative courses of action." Brady v. United States, 397 U.S. at 757. Rather, Petitioner's misapprehension stemmed from affirmative government misrepresentations that "strikes at the integrity of the prosecution as a whole." See Ferrara, 456 F.3d at 291 (stating that it is only when a

defendant's misapprehension of the strength of the government's case "results from some particular pernicious form of impermissible conduct that due process concerns are implicated." (citations omitted) quoting Fisher, at 6. Similarly, counsel believed the government's case to be strong, and argued with Petitioner to enter a plea. See also Correale, 479 F.2d 947 (stating that prosecutorial misrepresentation, though made in good faith, are not acceptable.)

Presenting a compelling argument similar to Fisher, establishing a "reasonable probability that, but for the misconduct, [Petitioner] would not have pleaded guilty and would have insisted on going to trial." Ferrara, 456 F.3d at 29 (citations omitted) Petitioner had already insisted on proceeding to trial despite the overwhelming circumstances that existed. It would also be reasonable to conclude that, at a minimum a plea to a significantly lower sentence would have been pursued.

Like Fisher, had discovery been provided in time for effective use, a competent attorney would have advised Petitioner that a key consideration in deciding whether to enter a guilty plea or proceed to trial was the role DEA agent Murphy's credibility would play at trial. In addition to the credibility of key government witness Sean Herrmann. Further similarity exists where the district court held that "the purportedly edited audiotapes in NDNY 08-CR-701 (DNH), if discovered would have provided, [], impeachment material in the instant case." (D&O pg.25) See also United States v. Bagley, 473 U.S. 667 (1985) ("when reliability of a given witness may well be determinative of guilt or innocence, non-disclosure falls within general rule of Brady.") The district court has never considered the impact of impermissible conduct under the aforementioned standards. Nor has the court considered the likely outcome had the misconduct been discovered prior to Petitioner's plea.

The similarly situated egregious circumstances, establish that Petitioner was

"deceived into making the plea, and government deceptions prevented his act from being a true act of volition." Lassiler v. Turner, 423 F.2d 897, 900 (4th Cir. 1970)

Granting the writ would support the important interest of deterring police misconduct. If a defendant cannot challenge the validity of a plea on subsequently discovered police misconduct, officers may be more likely to engage in such conduct, as well as more likely to conceal it to help elicit guilty pleas. Petitioner should not be penalized because he did not discover agent misconduct earlier.

To allow Petitioner's guilty plea to stand in view of such misconduct through two prosecutions undermines public confidence in the judicial system. When agents do not conduct themselves with truth, public confidence in the fair administration of criminal justice inevitably is eroded." United States v. Gribben, 984 F.2d 47, 48 (2d Cir. 1993) accord Fisher.

POINT II

THE SECOND CIRCUIT COURT OF APPEALS WAS UNREASONABLE IN IT'S THRESHOLD EVALUATION OF PETITIONER'S CONSTITUTIONAL CLAIMS UNDER UNDER THE SIXTH AMENDMENT WHERE THE DISTRICT COURT HELD NO HEARING

"The COA determination...requires an overview of the claims in a habeas petition and an general assessment of their merits." Miller-El, supra. At the COA stage, the only question is whether the district court's resolution of constitutional claims or that jurists of reason could conclude the issues presented are adequate to proceed further." See Buck v. Davis, 2017 LEXIS 1429.

A. The District Court Was Required To Hold An Evidentiary Hearing.

Under 28 U.S.C. §2255, when a [Petitioner] alleges facts that, if proven, would entitle him to relief..., the district court is required to grant a hearing to "determine the issue and make findings of fact and conclusions of law with

respect thereto" unless "the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. §2255(b). See e.g. Harris v. Nelson, 394 U.S. 286, 300 (1969)([Petitioner] must provide specific allegations that provide "reason to believe that...,if the facts are fully developed, be able to demonstrate that...he is entitled to relief.)

The district court, in determining whether summary dismissal is appropriate, is not permitted to make findings of controverted issues of fact without a hearing. See United States v. Haymen, 342 U.S. 208, 219-20, 72 S.Ct. 263, 96 L.Ed 232 (1952); Puglisi v. United States, 566 F.3d 209 (2d Cir. 2019)("The Court must determine whether, viewing the evidentiary proffers, where credible, and record in light most favorable to the Petitioner. The [Petitioner] who has the burden, may be able to establish at a hearing a prima facie case for relief. If material facts are in dispute, a hearing should usually be held, and relevant findings of fact be made."); Armienti v. United States, 313 F.3d 807, 810 (2d Cir. 2012)(remanding for a hearing where appellant alleged several specific instances of attorney deficiencies that were product of specific conflict of interest.)

1. Petitioner Demonstrated Counsel Laboured Under A Conflict Of Interest Through All Stages of Proceedings.

a.) Counsel's Sworn Admissions- Under a threshold evaluation, Rench's open declaration that counsel "trusted the government's position and evidence and [Petitioner] and I had some nose-to-nose, red faced arguments...as to whether or not he should be pleading guilty and he refused to do so if accepting the-- the accusation or allegation that he placed a gun to Herrmann's head was going to be included, he would not do that." (See Sent. Tran. pg. 36-37) This statement provides that counsel's sympathies and support of the government existed pre-trial through sentencing (while also demonstrating that Herrmann's

fictitious claim prejudiced counsel's view of Petitioner affecting performance.)

Furthermore, this statement provides that "an actual conflict of interest exist[ed] where, during the course of representation, the attorney's and [Petitioner's] interest diverge with respect to a material factual or legal issue or to a course of action." See Armienti, *supra*.; United States v. Cronic, 466 U.S. 648 (1984) ("A defense attorney who abandons his duty and loyalty to his client and effectively joins the [government] in efforts to attain conviction [or] sentence suffers from an obvious conflict of interest.") The Sixth Amendment right to counsel to include conflict free representation is well settled. See also; Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed 2d 220 (1981); Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed 2d 333 (1980), and; Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978)

b.) Counsel Argued Contrary Positions To That of Petitioner In Favor of The Government.

Further evidencing counsel's affliction, Rench argued that, "I think out of a sense of economy, and the government knew of [Petitioner's] identity as they were proceeding with--the Utica case, they would have prosecuted him at the same time. I don't believe that the government intentionally seperated these prosecutions in an attempt to maliciously prosecute [Petitioner]. I think they did not know or perhaps the Utica case had gotten so far advanced they could'nt combine them." Counsel's statement directly in support of the prosecution violates jurisprudence under the Sixth Amendment. Not only are counsel's claims categorically contradicted by the record (see §2255 pg.17-19), but evidence tampering and bad faith conduct exhibited by the use of false evidence in attempts to convict Petitioner demonstrate counsel abandoned his client.

Under §2255 motion, Petitioner asserted that prejudice should be presumed in view of counsel's statements made at sentencing. See also; Strickland,

("where the impairment of rights maybe so easily identifiable, and resulting prejudice so likely, that prejudice must be presumed.) Id. at 692. Explaining that prejudice is presumed in the case of actual or constructive denial of counsel, or when counsel is burdened actual conflict. Counsel's statement's also provide that prejudice should be presumed because "counsel entirely failed to subject the prosecution's case [2pt enhancement and CCE count] to meaningful adversarial testing." Cronic, supra.

c.) Counsel Applied For Position At U.S. Attorney's Office.

Also detailed was that Rench had recently applied for a position with the same U.S. Attorney's office prosecuting this case. Although application was made only a few months prior to appointment, these circumstances raise significant question in view of counsel's admitted sympathies to the prosecution. Which directly attributed to the acrimonious relationship, and request to relieve counsel prior to trial. See Phillips v. Smith, 632 F.2d 1019 (1980)(application for employment to U.S. Attorney's office as an investigator creates conflict of interest.) Rench cannot claim that through counsel's appointment that, there was no thought to the possibility of recognition and hopes of gaining favor in possible consideration.

i.) Counsel ignored Petitioner's specific requests to inform the court of the conflict issue that arose from his application. In letter's dated March 9, 2013, and March 26, 2013, addressed to counsel, Petitioner detailed the following: "I hope you make the request...After having a few months to consider your conduct [and] application. I feel it's your obligation to pursue a remedy with the court." In the March 26, letter, Petitioner declared, "why did you wait until after the attempted plea to inform me of your application to the U.S. Attorney's office. [] I tell you my trust level is at zero even less based on history and experience." See Rivas v. Fischer, 687 F.3d 514, 539 (2d Cir. 2012)(noting that abandonment

could be found if attorney "ignored and contravened [Petitioner's] express instructions")

d.) Material Facts Were In Dispute Plain From The Record

Evidenced by counsel's affirmation provided in response to appellate counsel's ineffective assistance of counsel claims brought under motion for an indicative ruling, the affirmation contained material facts that were in dispute. Not only in view of the record, but more importantly, Petitioner's own affirmation and response provided as part of his §2255 motion. The district court utilized counsel's affirmation in determining Petitioner's constitutional claims. Rench's veracity was effectively challenged by counsel's own case file (correspondance), and evidence available from the record.

For example, counsel claimed that during a meeting on May 31, 2013, "[Petitioner] appeared to be uninterested in preparing for trial or discussing Jenks material. I asked him what witnesses he intended to call so that I could arrange for their appearances. He indicated he intended to call up to eight currently incarsurated witnesses on his behalf, but refused to provide their names." (See Affirm. pt.10) Evidenced by letter dated May 30, 2013, identifying Rench's handwriting in the left column (delivered by hand) details an exact list of names provided to counsel. Of which, half were actually law enforcement, the rest included individuals involved in the case. Counsel's veracity is further challenged by an email that Rench sent to AUSA Gardner on the same day containing a partial list of the names that were provided. (See Email dated May 30, 2013)

e.) The District Court Was Provided Sufficient Appraisal To Warrant Hearing

Under Habeas review, counsel's admission along with evidence that was clear from the record, provided the district court with sufficient appraisal of the asserted conflict. Thereby, obliging the court to conduct inquiry into the

Petitioner's claim. The Second Circuit Court of Appeals had held that, "where the district court fail[ed] to make such an inquiry," constitutes this "to be reversable error." See United States v. Williams, 372 F.3d 96 (2d Cir.2004)

Reasonable Jurists Could Debate In View Of Court Error

In response to the Petitioner's claim, the district court held, "[t]he asserted basis for the alleged 'conflict of interest' and 'breach of loyalty' were addressed by the Court at the June 4, 2013, pre-trial conference and found not to be improper." citing Dkt 637, ln 3-5 (see D&O, pg.27)

In view of the aforementioned judicial precedent involving a conflict of interest claim, properly instructed jurists could debate whether the district court's resolution of Petitioner's claim was plainly wrong or deserved encouragement to proceed further. Petitioner points to the district court's error, whereby, in view of Rench's admissions makes the impairment so easily identifiable that the Court of Appeals should have granted COA. Petitioner also points to manifest error, in not only the court's reliance on a previous determination (undermined by trial counsel's own statements) in resolution of this claim. But also, by the court plainly refusing to aknowledge and consider evidence clearly establishing counsel represented conflicting interests to that of the Petitioner.

2. Ineffective Assistance of Appellate Counsel Pertaining To Rule 11 Violation

In order to be granted COA on this issue, Petitioner was required to demonstrate through a threshold evalution that jurists of reason would find the district court's resolution debatable or wrong. See Slack v. McDaniels, 529 U.S. 473, 478 (2000)

District Court's Resolution of Petitioner's Claim

In response to this claim, the court held that the Second Circuit's decision

(direct appeal) "foreclosed [Petitioner's] Rule 11 challenges." And, therefore did not consider the critical facts and procedural error omitted by appellate counsel in violation of due process.

The crux of Petitioner's argument challenges counsel's performance on direct appeal, and not the ruling itself. Arguing that, it is plainly erroneous for the district court to foreclose the ineffective assistance of counsel claim from being considered. The Second Circuit should have granted COA in view of the lower court error. An overview evaluation demonstrates that the claim has some merit.

Procedural Error Identified

Rule 11(c)(1), instructs that "[t]he court must not participate in [plea] discussions." Judicial involvement in plea discussions, if discovered, demands automatic vacator without regard to case specific circumstances. When the district court asked the government, particularly AUSA Gardner to deliver part of the colloquy by stating the maximum and minimum penalties involved violated this rule. Acting in part as judge, the prosecutor only moments before had taken part in plea negotiations where a determinitive factor had been agreed upon prior to entry of the Petitioner's plea. There also exists a second reason which causes to jeopardize the integrity of the Rule 11 process. Asserting that despite it's good intentions, the court's plain error affected Petitioner's substantial rights and violated the fundamental fairness of the judicial process in view of the following facts and argument.

a.) Mr. Gardner was in a unique position, holding specific knowledge of the underlying premise to which the Petitioner entered his plea. Whether the knowledge was derived from plea negotiations occurring minutes before, or by overhearing open discussions while in close proximity to counsel and Petitioner.

Acting in part as judge, while having taken part in plea negotiations after the ATF reports had been disclosed is problematic for the following reasons.

Acting in place of the judge, put the prosecutor in a unique position to deliberately avoid delivering any statutory language that would have alerted the Petitioner to the restrictions. Thereby, compromised the integrity of Rule 11 proceedings, but also, causing improper influence over the plea. Petitioner also pointed to precedent found under Puckett v. United States, 566 U.S. 129 S.Ct. 1423, 173 L.Ed. 266 (2009)

Although a variant is presented by these circumstances, Puckett speaks to "sandbagging," by "...remaining silent [] about an error if [case is not in favor]." Id. At the point where AUSA Gardner delivered the critical portion of the colloquy, the prosecutor was aware of the damaging material, *inter alia*, revealed by the previously withheld ATF reports.

Further Omissions Caused Prejudice

b.) Whether deliberate, or inadvertant, a distinct difference and variance in procedure occurs when the district court itself clearly warns that the advisory guidelines, "mandatory minimums" are "restricted based on the statutory minimums that may apply and that being 20 years." See United States v. Derrekk Carr, 14-CR-126 (TJM)(pg.16-20) Despite being similarly situated to Carr, Petitioner's plea colloquy was void of any statutory language.

Under appellate counsel's argument, the Second Circuit interpreted the claim to mean that "because the prosecutor did not explicitly use the word "minimum" [Petitioner's] plea was neither knowing or voluntary." (See Doc 123-1, pg.3 at 1-3) By citing the differential treatment, the Second Circuit

was required to consider the violation under the equal protection clause. The variance is exactly what the strict adherence standard is designed to prevent.

c.) There is ample evidence available from the record that supports the

conclusion that, had the Petitioner been properly informed of the statutory restrictions he would not have pled to the CCE count and proceeded on with trial. In support of this claim, while also confirming his misinformed belief, the record reflects that the plea was conditioned upon a sentencing hearing. A sentencing hearing to which AUSA Garnder had agreed to during plea negotiations prior to the change of plea hearing. Which had directly influenced the Petitioner's plea in violation of Rule 11. Further inference can be drawn from the following declaration:

"Your Honor, I'm prepared to plead guilty today. I would like to state on the record that I intend to request a sentencing hearing in this case. It is my understanding that the Government will not object to me calling witnesses in the hearing, including Agent Murphy, Michael Cook, and Sean Hermann, and I will be reasonably allowed latitude while examining these witnesses at the hearing."

(Change of Plea Tans. pg.34-35)

As detailed before both lower courts, it was Petitioner's intention to earn a downward departure by evidencing government misconduct, and by disproving a critical element required by the CCE count.

c.) Appellate counsel also critically omitted the direct influence of standby counsel contributing to the Petitioner's misinformed belief. The belief that the court had the authority to depart below the mandatory minimum sentence.

The district court held that "there is no evidence in the record that Mr. Rench stated anything at the plea proceeding that would have led Petitioner to believe he could be sentenced below the statutory minimum without a §3553 (e) motion." (D&O pg.28) The district court's ruling provides sufficient grounds that an evidentiary hearing should have been granted in order to determine exactly what counsel had advised and discussed in the moments

before the change of plea hearing. Providing further support under this argument, appellate counsel asserted that because Rench himself had requested that the court depart from the statutory minimum evidenced ineffective assistance of counsel. Because, either counsel should have advised the Petitioner that the request was simply not possibly due to the statutory restrictions, or that, counsel was himself mistaken that the court had the authority to depart. It would have been a breach of ethics for counsel to influence the Petitioner that the request was a viable strategy knowing that it was simply not feasable.

d.) Under §2255 motion, Petitioner asserted that the Second Circuit's holding relative to Rule 11 violates due process. On direct, the Court held, "in the context of the prosecutor's statement, 'mandatory' clearly modified '20 years.'" citing United States v. Cook, 722 F.3d 477, 482 (2d Cir.2013) (applying that "[t]he most logical understanding of the plea colloquy at issue foreclosed [Petitioner's] Rule 11 challenge.")(Doc 123-1, pg.3) The Petitioner asserts that the expansion of Rule 11 requirements under subsection (b)(1)(I), where the district court was obligated to determine whether Petitioner understood that statutory restrictions that applied to the mandatory minimum penalty. Therefore, is not satisfied by the "most logical understanding" standard. The use of "mandatory" in no way or means adequately warned the Petitioner of the statutory restrictions, or that he should have logically understood the consequences that resulted thereof.

The standard employed by the appellate court is also problematic because individuals (defendants) apply the calculus of logic in variant methods and understanding. Certainly not always arriving to similar and consistent results. Leaving individual interpretation of possible penalties and jurisprudence to broad to conform with Rule 11 requirements to be considered fair under the administration of justice. A case in point evidencing the difference in

application of logic is provided by a controversial issue relevant to Petitioner's preceeding prosecution (08-CR-701 DNH).

By utilizing scientific data provided, through analysis of evidence, and plain common sense, it would be reasonable to conclude that a very large percentage of the population would agree that logic provides that agents tampered with evidence recordings. However, despite being faced with the same set of variables, the prosecutor in that case reaches a different conclusion. Stating that, "for the [Petitioner's] ...theory to hold water--defies common sense and logic." (Dkt 147 pg.5) The prosecutor continues to make this representation, notwithstanding, forensic evidence providing otherwise.

e.) However, the Petitioner also argued that applying logic in the context extended by the Second Circuit still warrants relief in view of the record.

Distinct differences exist between the two cases at bar relevant to the Rule 11 issue presented. In Cook, the court addressed a Rule 11 issue as it pertained to a written plea agreement, negotiatied by a retained attorney. Where it was determined that "the district court properly addressed the waiver provision [found in the agreement itself] during the colloquy...there was no realistic possibility that defendant might have misunderstood the nature or source of waiver." Id.

In view of the context as read in Cook, applying the same standard to the Petitioner's colloquy, leaves a logical possibility that Petitioner may have misunderstood the minimum penalties in violation of Rule 11.

Court: "please advice [Petitioner] and the Court what the maximum or any minimum penalty would be for the count involved."

Mr. Gardner:"...count three, the continuing criminal enterprize, the

maximum term of imprisonment is a mandatory 20 years, up to life."

(Sent.Trans pg.31-32)

Not only does the record provide that the allocution is void of statutory language or the restrictions involved, but also the prosecutor's delivery is contextually incorrect. However, the critical portion of the colloquy that provides the possibility for misunderstanding immediately follows the stated possible penalty. Where the Court itself states:

Court: "Okay, also, under and pursuant to certain sentencing Guidelines adopted by the United States that used to be mandatory but are no longer mandatory...,[], but sometimes the Court can sentence you above the guidelines or below the guidelines or even outside the guidelines, depending on the facts, the circumstances and the laws that are presented to the Court at or about the time of sentencing."

(Sent.Trans. pg.33)

Had appellate counsel clearly pointed to the absense of statutory language and restrictions that applied. Would have clearly evidenced a reasonable probability for misunderstanding and therefore firmly evidenced the Rule 11 violation. Applying logic to the Court's statement that immediately followed the "modif[er]," stating, "...are no longer mandatory," and "depending upon the facts," and "circumstances," confirmed in at least the Petitioner's mind that the Court had authority to depart downward.

In short, Petitioner argues that "the district court error had an effect on his decision to plead guilty." See United States v. Harrison, 241 F.3d 289, 293 (2d Cir. 2001). The Petitioner's pro se status added to the district court's responsibility to ensure that he properly understood the nature of the consequences of the plea. See e.g. United States v. Lloyd, 901 F.3d 111 (2d Cir. 2018)

("...judges must be alert to ways that go beyond rote recitals, in order to make sure the [Petitioner's] waiver of rights is truly knowing and voluntary."), and; United States v. Pattee, 820 F.3d 496 (2d Cir. 2016) ("Prosecutors and defense attorney's also have an obligation to make sure [Rule 11] is followed. [And] that a plea is in their best interests is properly entered.")

III. CONCLUSION

The facts and circumstances that make up the prosecutions of the Petitioner would be seemingly unbelievable if not grounded upon actual evidence. With the pinnacle of constitutional violation being that agents involved in the investigation have deliberately tampered with evidence. In order to convict the Petitioner of crimes that he was known to be otherwise innocent. The amount of errors have gone beyond a tolerable level to be considered non-harmless. Through no fault of his own, the Petitioner was represented by attorney's who did not appreciate their professional responsibilities. The record establishes that the district court did not proceed in conformity with §2255 when controverted issues of fact were passed over without granting a hearing. Because, the Second Circuit Court of Appeals failed in it's duty to correct the district court's error, thereby, compounded both structural and jurisdictional error.

WHEREFORE, for the reasons set forth herein, the Petitioner respectfully requests that petition for certiorari be granted.

Date: July 6, 2019.

Respectfully Submitted,

Marcel Malachowski, Pro Se

15287-052