No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Duane O'Malley — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SEVENTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED

1. DID THE SEVENTH CIRCUIT COURT OF APPEALS (CA7) VIOLATE CIRCUIT OPERATING RULE 6(b) WHEN FAILING TO REASSIGN THE **"SUCCESSIVE MOTION APPEAL"** PANEL **("C" - below)** UNDER **18-1617** TO THE **"ORIGINAL MOTION APPEAL"** UNDER **14-2711 ("B"- below)** AND, FAILURE TO ASSIGN THE **"ORIGINAL MOTION APPEAL" ("B"-below)** UNDER **14-2711** TO THE **"ORIGINAL DIRECT APPEAL"** PANEL UNDER **12-2771?**

2. WAS THE **"ORIGINAL DIRECT APPEAL" ("A"- below)** UNDER **12-2771** DEPRIVED OF THE [PIECES] OF NEWLY DISCOVERED EVIDENCE CONTAINED IN THE BONAFIDE CRIMINAL RULE 33(b)(1) MOTION FOR NEW TRIAL **(DOC. 172)**, FILED AT A **"CRITICAL STAGE"** OF THE **"CRIMINAL"** PROCEEDINGS **"WHILE THE DIRECT APPEAL REMAINED PENDING"** AND GOVERNED UNDER THE CONTROLLING PROVISIONS OF **"CRIMINAL RULE 37"**, ONLY TO FACE THE **IN TERROREM** ULTIMATUM OF THE DISTRICT COURT'S INVOKED **"JUDGE-MADE RULE"** RECHARACTERIZATION ORDER **(DOC. 196)?**

3. CAN A BONAFIDE CRIMINAL RULE 33(b)(1) MOTION FOR NEW TRIAL WITH NEWLY DISCOVERED EVIDENCE BE RECHARACTERIZED AS THAT OF A **"COLLATERAL"** §2255 **"WHILE THE DIRECT APPEAL REMAINED PENDING"?**

4. DID THE **"GENERAL REMAND"** ORDER BY THE **"ORIGINAL MOTION APPEAL" ("B"- below)** PANEL UNDER **14-2711 "LIMIT"** THE CLAIMS PETITIONER COULD RAISE IN THE REMANDED RULE 33 MOTION FOR NEW TRIAL?

5. DID THE **"SUCCESSIVE MOTION APPEAL" ("B"- below)** PANEL UNDER **18-1617** ARBITRARILY GRANT REASSIGNED APPOINTED APPELLATE COUNSEL'S **"ANDERS BRIEF"** WITHOUT ADDRESSING PRTITIONER'S **"PRO SE"** CLAIM THAT SAID COUNSEL STRAINED UNDER **CONFLICT** THROUGH DIAMETRICALLY OPPOSED POSITIONS?

II.

PREVIOUS APPEALS TAKEN

A. **ORIGINAL DIRECT APPEAL**: 12-2771, 739 F.3D 1001 (1-8-14), **Affirmed**

PANEL: Diane P. Wood, Chief Judge
Joel M. Flaum, Circuit Judge
John D. Tinder, Circuit Judge **(APPENDIX "M")**

NOTEWORTHY: "WHILE THE DIRECT APPEAL REMAINED PENDING", defendant filed a bonafide Criminal Rule 33(b)(1) motion for new trial with newly discovered evidence **(Doc. 172)**. Whereas, in the criminal context, criminal Rule 37 is used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33 (b)(1). See Notes of Advisory Committee, See also, **United States v. Cronic**, 466 U.S. 648, 667 n. 42 (1984). **Thus, the underlying issue.**

B. ORIGINAL MOTION APPEAL: 14-2711, 833 F.3d 810 (8-17-16), Remanded

PANEL: Diane P. Wood, Chief Judge
Richard A. Posner, Circuit Judge
Ilana Diamond Rovner, Circuit Judge (APPENDIX "I")

C. SUCCESSIVE MOTION APPEAL: 18-1617,

PANEL: Michael B. Brennan, Circuit Judge
Michael Y. Scudder, Circuit Judge
Amy J. St. Eve, Circuit Judge (APPENDIX "B")

III.

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition include: Michael J. Pinski and, James Mikrut (codefendant's)

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OPINIONS BELOW

1. The following opinion of the lower court has not been published:

   7th Circuit Court; February 27, 2019, 2019 U.S. App. LEXIS 5899, **Appendix "B"**

2. The following opinions of the lower courts have been published:

   7th District Court; March 6, 2018, 2018 U.S. Dist. LEXIS 36098, **Appendix "G"**
   7th District Court; March 2, 2017, 2017 U.S. Dist. LEXIS 29212, **Appendix "H"**
   7th Circuit Court; August 17, 2016, 833 F.3d 810, **Appendix "I"**
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   7th Circuit Court; January 8, 2014, 739 F.3d 1001, **Appendix "M"**
   7th District Court; June 19, 2013, 2013 U.S. Dist. LEXIS 85895, **Appendix "N"**

VIII.
JURISDICTION

On 7-23-19, Petitioner sought leave to extend time to file his Petition for Writ of Certiorari

On May 8, 2019, the Seventh Circuit Court of Appeals ("CA7") issued its "Notice of Issuance of Mandate" **(Appendix "A")**. On April 30, 2019, the CA7 Court issued its order denying defendant-appellant's "Petition for Rehearing en banc". **(Appendix "A").**

On February 27, 2019, the CA7 Court granted appointed appellate counsel's "Anders Brief" and "Dismissed" the Appeal. **(Appendix "B")**

IX.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Statute of conviction under **42 U.S.C. §7413(c)(1)** is Unconstitutionally Vague, as Applied to petitioner in which none of the requisite elements were given to the Jury or proven beyond a reasonable doubt. Whereas, the government would conduct a standardless sweep of the criminal statutory elements and thus, enforced the Statute in a **later** inconsistent **"Common Law"** prosecution.

The predicate National Emission Standards of Hazardous Air Pollutants; **"NESHAP - Work Practice"** regulations, **40 C.F.R. §61.145 et., al.,** were arbitrarily enforced

upon petitioner without the relevant **"Status"** as an **"Owner or Operator"** of the affected facility, nor a facility with an established **"Status"** of being **"Renovated"**. The government's success of conviction rested upon a redefined Jury Instruction, concealed evidence, prosecutorial misconduct and, ineffective assistance of counsel.

The affected facility was in violation of several preempted **"OSHA - Workplace"** regulations, **29 C.F.R. § 1910.1001 et., al, and 29 C.F.R. §1926.1101 et.,al.,** which are **"Commonly Known"** to persons with petitioner's **"Status"**.[13/]

The government's **earlier** State Civil Statutory enforcement of the same Clean Air Act ("CAA") offense would **"Dismiss"** petitioner, without his knowledge or Notice, from the **earlier** enforcement knowing petitioner did not meet the **"Status"** as either a **"Owner or Operator"** of the facility and, that the facility did not establish a **"Renovation"** and thus, the **later** inconsistent federal criminal enforcement Jury Instruction No. 23 claiming petitioner to be a **"Operator of a renovation Activity"** had duped the Jury.

In overt acts in furtherance, the government would "Invite Error" for the district court to invoke a **"Judge-Made Rule"**[1/] to recharacterize a bonafide Criminal Rule 33(b)(1) motion for a new trial with newly discovered evidence filed at a critical stage of the criminal proceedings **"while the direct appeal remained pending"** to be that of a **"Collateral"** §2255. The government knew this recharacterization would encroach and circumvent the controlling provisions of **"Criminal Rule 37"** which, in the Criminal Context, Criminal Rule 37 is used primarily if not exclusively for newly discovered evidence motion under Criminal Rule 33(b)(1).[6/]

Accordingly, petitioner's Fifth and Sixth Amendments of the U.S. Constitution were violated; the criminal Statute of conviction under 42 U.S.C. §7413(c)(1) is unconstitutionally vague, as applied to petitioner; the operation of Criminal Rule 33(b)(1) was defeated by a **"Judge-Made Rule"** rendering the controlling provisions and legislative intent of **"Criminal Rule 37"** useless.

CIRCUIT COURT RULE 6(b)

(a) **Remands from the Supreme Court.** A case remanded by the Supreme Court to this court for further proceedings will ordinarily be reassigned to the same panel that heard the case previously. If a member of that panel was a visiting judge and it is inconvenient for the visitor to participate further, that judge may be replaced by designation or by lot, as the chief judge directs.

(b) **Successive Appeals.** Briefs in a subsequent appeal in a case in which the court has heard an earlier appeal will be sent to the panel that heard the prior appeal. That panel will decide the successive appeal on the merits unless there is no overlap in the issues presented. When the subsequent appeal presents different issues but involves the same essential facts as the earlier appeal, the panel will decide the subsequent appeal unless it concludes that considerations of judicial economy do not support retaining the case. If the panel elects not to decide the new appeal, it will return the case for reassignment at random. If the original panel retains the successive appeal, it will notify the circuit executive whether oral argument is necessary. If oral argument is scheduled, any visiting judge will be replaced by a member of this court designated by lot. Cases that have been heard by the court en banc are outside the scope of this procedure, and successive appeals will be assigned at random unless the en banc court directs otherwise.

In O'Malley, there is an **overlap** in the issues presented consisting of a filed Criminal Rule 33(b)(1) motion for new trial with newly discovered evidence **(Doc. 172)** and that of a petition under a **"Collateral"** §2255. Thus, the **former** being filed at a **critical stage** of the **criminal** proceedings **"while the direct appeal remained pending"** and therefore, governed under the controlling provisions of **"Criminal Rule 37"**. The **latter** "collateral" §2255 was not an available remedy at that **critical stage** where a "collateral" §2255 cannot be used as a substitute for a direct appeal.[22/]

The district court's threat of recharacterization via **"Judge-Made Rule"**[1/] **(Doc. 196)**, at the invitation of the government **(Doc. 182)**, lacked disclosure of an opportunity to **"Contest the recharacterization". (Castro at 384)**

In **Castro**, the government argued that Castro's failure to appeal the 1994 recharacterization makes the recharacterization valid as a matter of **"Law of the Case"** (as in O'Malley at bar). And, according to the government, since the 1994 recharacterization is valid, the 1997 §2255 motion is Castro's second, not his first. The Supreme Court disagreed. finding that the point of a warning is to help the pro se litigant understand not only **(1)** whether he should withdraw or amend his motion, but also **(2)** whether he should **"contest the recharacterization"**, say, on appeal. The lack

of warning prevents his making an informed judgement as to both. The failure to appeal simply underscores the practical importance of providing the warning.

In O'Malley, the error is far more egregious as the recharacterization issued at that **critical stage** prevented the expansion of the record by counsel's deficient failure to **"contest the recharacterization"** and file the **"Notice of Appeal"**[10/] and, to consolidate the motion and newly discovered evidence with that of the direct appeal. Whereas, the [pieces] of new evidence was directly material to both the claims raised on direct and, would likely change the issues on appeal significantly depending on the Rule 33(b)(1) motion outcome. **(See Exhibit "A" at ¶6)**

RULE 33. NEW TRIAL

(a) **Defendant's Motion.** Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) **Time to File.**

(1) *Newly Discovered Evidence.* Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds.* Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

LAW AND ANALYSIS REGARDING
CRIMINAL RULE 33(b)(1) AND CRIMINAL RULE 37

As a general rule, "a timely appeal divests the district court of jurisdiction to reconsider its judgment until the case is remanded by the Court of Appeals." Dunham v. United States, 486 F.3d 931, 935 (6th Cir. 2007) (citation omitted). See also Fed. R. Crim. P. 33(b)(1) ("If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."). Pursuant to Federal Rule of Criminal Procedure 37, the court has three options for resolving Defendant's motion:

> (a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
>
> (1) defer considering the motion;
>
> (2) deny the motion, or
>
> (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.Fed. R. Crim. P. 37. See also United States v. Bravata, 305 F.R.D. 97 (E.D. Mich. 2015) ("In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1).").

X.

STATEMENT OF THE CASE

The **"Original Motion Appeal"** panel under **14-2711** issued a **General Remand** order that ruled the district court was to allow O'Malley to proceed under Rule 33 and, would express no opinion on the underlying merits of O'Malley's Motion. **(See Exhibit "K").** The order did **not "Limit"** O'Malley's Rule 33 motion solely to the claims raised under **(Doc. 209).** The logic of not limiting the claims was that if the **Later** Recharacterization order under **(Doc. 216)** regarding **(Doc. 209)** was **"Improper", a fortiori** the **Earlier** recharacterization order under **(Doc. 196)** regarding **(Doc. 172)** under a greater force of logic was **"Prohibited"** under the controlling provisions of **"Criminal Rule 37"** during that **"Critical Stage"** of the **"Criminal"** proceedings **"While the direct appeal remained pending"** and thus, **"Plain Error".**[3/]

In **United States v. Hayes**, 219 U.S. App. LEXIS 17554 (11th Cir. 6-12-19), the Circuit Court held that "Under the prior panel precedent rule, a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by us sitting en banc." **United States v. Archer**, 531 F.3d 1347, 1352 (11th Cir. 2008). There is no exception to the prior panel precedent rule for overlooked or misinterpretation precedent. **United States v. Fritts**, 841 F.3d 937, 942 (11th Cir. 2006). Likewise, a grant of certiorari does not change the law and is not a basis for relief, because we are required to apply our binding precedent **until the Supreme Court issues a decision that changes the law. Grissendaner v. Comm'r, GA. Dept. of Corr.,** 779 F.3d 1275, 1284 (11th Cir. 2015).

Accordingly, the prior panel precedent ruling by the **"Original Motion Appeal"** panel under **14-2711** was binding on the **"Successive Motion Appeal"** panel under **18-1617** and thus, the successive panel erred in granting re-appointed appellate counsel's **"Anders Brief"** that would exclude the former claims under **(Doc. 172).**

In essence, the **"Successive Motion Appeal"** panel under **18-1617** was lawfully bound to uphold the precedent of the **prior** ruling made by the **"Original Motion Appeal"** panel under **14-2711** that allowed petitioner to proceed under Rule 33. Nowhere in the

"General Remand" order did the panel **"Limit"** the claims in which petitioner could raise in the Rule 33. In fact, the district court on remand, would rule upon petitioner's request for clarification (**Exhibit "N"**) claiming it was **"Aware"** of the Seventh Circuit's remand order (**"Exhibit "O"**) and allowed petitioner to supplement the Rule 33 (**See Exhibits "P", "Q", "R" and "S"**)

Furthermore, it was the **"Original Direct Appeal"** under 12-2771 that would affirm the **"Common Law"** conviction of the Clean Air Act (CAA) offense under the **Later** federal criminal enforcement that was deprived of the newly discovered evidence (**See Exhibit "H" at pg. 11**) of the **Earlier** inconsistent State Civil **"Statutory"** enforcement of the same offense that had **"Dismissed"**[15/] petitioner without his knowledge or notice of being a named defendant and thus, had this **Earlier concealed** enforcement been known to defendant's defense at the **Later** criminal **"Common Law"** enforcement would have been challenged as **Judicial Estoppel**. Here, the **Earlier** State Civil **Statutory** enforcement had enforced federal law through its approved State Implementation Plan (SIP) that enforces federal law throught its stricter standards and earlier detection of hazardous air pollutants, which includes a **"Permit Program"**. See **United States v. Stergenics**, 2019 U.S. Dist LEXIS 38750 (7th dist. 3-11-19).

Petitioner argues he was **"Dismissed"** from the **Earlier** State Six Count Complaint (unbeknownst to him, and without Notice), as his **"Relevant Status"**[13/] under the predicate National Emission Standards of Hazardous Air Pollutants, **"NESHAP - Work Practice"**[14/] regulations, **40 C.F.R. §61.145** was neither an **"Owner or Operator"** of the affected facility. Moreso, that the affected facility did not maintain the **"Relevant Status"** of being **"Renovated"** and, the facility **"Owner and Operator"**, being codefendant, Michael J. Pinski (Pinski), who was the government's **Key Witness** and the government was **"Aware"** of Pinski's ongoing criminal activity with the Lacost family regarding Money Laundering, Unlawful gambling machines (stored in the Pinski owned and operated facility), Conversion, and Tax evasion, which was also **concealed** from defense counsel. For O'Malley's **"Relevant Status"**, See **Rehaif v. United States**, 139 S.Ct. 914 (1-11-19); **United States v. Hayes**, 219 U.S. App. LEXIS 17554 (11th Cir. 6-12-19).

GENERAL REMAND ORDER OF CONTROVERSY

On 8-17-16 under the **Original Motion Appeal** No. **14-2711 ("B"-Above)**, the Seventh Circuit Court of Appeals ("CA7") following Oral Argument on 5-19-16 (See **Exhibit "V"**) would issue a **"General Remand"** order **(Exhibit "K")** that is now the topic of controversy regarding the underlying unadjudged claims brought under a bonafide Criminal Rule 33(b)(1) motion for new trial under **(Doc. 172)**. Here, the order would direct the district court to allow defendant to proceed under Rule 33 and, expressed no opinion of the underlying claims of the motion. Pursuant the CA7 order of 10-7-15, the Court had appointed counsel of Ms. Vanessa Eisenmann of the Biskupic & Jacobs Law Office. **(See Exhibit "C")**.

On remand, the district court would initially allow defendant to supplement his Criminal Rule 33 motion **(See Exhibits "O", "P", "Q", "R", and "S")** with his previous raised claims as well as additional claims pursuant the **"General Remand"** order. Whereas, the remand orders standard of review lacked any **limitation** as to what claims defendant could raise in his criminal rule 33 motion. However, the district court at the eleventh hour would **recant** its position through an unexplained reason claiming it **"may have been inartful" (See Exhibit "V" at pg. 17)** allowing defendant to supplement his Rule 33 motion. This ruling ultimately resulted in the **"Successive Motion Appeal"** under **18-1617**, of which the different successive panel would reassign the same attorney, Ms. Eisenmann, who defendant proclaimed rendered ineffective assistance during the **"Original Motion Appeal"** under **14-2711**. Whereas, but for counsel's deficient failure to sort out the parameters of the bonafide Criminal Rule 33(b)(1) motion under **(Doc. 172)** and, **"Law of the Case doctrine"** regarding the **"Original Direct Appeal"** under **12-2771**, the General Remand order would contain **ambiguity** resulting in the district court's alleged **"Inartful"** ruling. Thus, affecting defendant's substantive rights; seriously affecting the fairness, integrity, and Public reputation of the Judicial proceedings; and worked a fundamental miscarriage of justice to a **actually innocent** defendant to the **"Statute"** of conviction enforced under a **"Common Law"** conviction at the **Later** federal criminal enforcement, of which the new evidence shows the govern-

ment **"dismissing"** defendant under the Earlier State Civil **"Statutory"** enforcement.

Accordingly, the **"Successive Motion Appeal"** Panel under **18-1617** would appoint counsel, Ms. Vanessa Eisenmann who had represented defendant under the **"Original Motion Appeal"** under **14-2711.** Ultimately, counsel would file an **"Anders Brief"** (over defendant's objection) and, the successive Panel would **"Dismiss"** the Appeal without consideration of defendant's invited Pro Se briefing on 2-27-19. The Pro Se brief would cite appointed counsel ineffective for misleading the **"Original Motion Appeal"** Panel **(17-2711)** on the **Standard of Review** creating **ambiguity** to the **"General Remand"** order of 8-17-16 as evident by Honorable Chief Judge James E. Shadid's recantation as being **"Inartful"** in allowing defendant to supplement his Rule 33 as the Remand order explicitly states to allow defendant to **proceed under Rule 33.**

As recognized in **United States v. Adams**, 746 F.3d 734, 744 (7th Cir. 2013);[5/] "a 'General Remand' may leave the parties and the district court to sort out the parameters of mandamus and the **law of the case doctrine**. As a result, this Court has faced several 'successive appeals' which focused mainly on the scope of the district court's authority on remand. See e.g. **United States v. Whitlow**, 740 F.3d 433, at 438-40; **United States v. Simms**, 721 F.3d 850, at 852; **United States v. White**, 406 F.3d 827 (7th Cir. 2005); **United States v. Young**, 66 F.3d 830, 835-37 (7th Cir. 1995); **United States v. Polland**, 56 F.3d 776 at 777-79."--"These cases illustrate the waste of judicial resources sometimes stemming from a General Remand". (Not to mention Defendant-O'Malley's liberty restrictions). "And it is an unnecessary waste given that Congress has authorized Appellate Court's, pursuant to 28 U.S.C. §2106, to 'issue general or limited remands to the district courts." **Young at 66 F.3d at 835.**

At bar, the **"Original Motion Appeal"** Panel under **14-2711** remand order of 8-17-16 did not explicate its rationale, for the **"Law of the Case"** turns on whether a court previously 'decide[d] upon a Rule of law' - which in the O'Malley case was decided on by the district court's **"Plain Error"** recharacterization order **(Doc. 196)** that had been **"Invited Error"** by the government under **(Doc. 182).**

Here, the **"Law of the Case"** would affirm the **"Common Law"** conviction under the **"Original Direct Appeal"** under **12-2771.**

The Law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their powers." Messenger v. Anderson, 225 U.S. 436, 444 (1912)(citations omitted). A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice." Arizona v. California, 103 S.Ct. 1382 (citations omitted). Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to decline jurisdiction. Most importantly, law of the case cannot bind this Court in reviewing decisions below. **A petition for writ of certiorari can expose the entire case to review.** Panama R. Co. v. Napier Shipping Co., 166 U.S. 280, 283-284 (1897). **Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review.** See Messenger, supra, at 444; Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 257-259 (1916)

Only the En Banc Court or the United States Supreme Court may overrule the decision of another Panel. United States v. Ferguson, 868 F.3d 514 (6th Cir. 2017).

A. SEQUENCE OF EVENTS

This case involves the unlawful removal, handling, and disposing of "Regulated" Asbestos Containing Materials" **("RACM")** (heat pipe insulation). Here, the government would play fast and loose by arbitrarily choosing to enforce the **"NESHAP - Work Practice"** regulations[14/] as opposed to the **"OSHA - Workplace"** regulations[16/] in the Construction Industry as the predicate regulation of the Clean Air Act **("CAA")** offense under an **Earlier** State Civil **"Statutory"** theory through its approved State Implementation Plan **("SIP")** and **"Permit Program"**. The approved SIP enforces federal law through its stricter standards and earlier detection of hazardous air pollutants. **See People of the State of Illinois ex rel v. Sterigenics, U.S. LLC**, 2019 U.S. Dist. LEXIS 38750 (7th dist. 3-11-19).[11/]

Unbeknown to petitioner and without any Notice, the State's Civil statutory enforcement would **"dismiss"**[15/] petitioner on the eve (10-5-09) of filing the Six Count complaint with the 21st Judicial Circuit, Kankakee, Illinois on 10-6-09 under Case No. 09-CH-475. The "filed" complaint was entitled: The People of the State of Illinois v. Dearborn Management, Inc and, State Bank of Herscher.[2/]

Parties to the "filed" civil complaint under 09-CH-475 involved: Michael J. Pinski **("Pinski")** as both **"Owner and Operator"** of the facility located at 197 S. West Street, Kankakee, Illinois **("facility")**. Here, Pinski Owned and Operated his closely held company's entitled: Dearborn Management, Inc. **("Dearborn")** who **"Owned"** the **"facility"** and, MJP Development, Inc. **("MJP")** who **"Operated"** the **"facility"**. The defendant, State Bank of Herscher, **("Bank")** held the mortgage of the "facility" where Vice President of the "Bank", David Rabideau, and Pinski held close relations in multiple business dealings.[***/ 7/]

[***/] Newly discovered evidence shows Pinski's later **"Extraordinary Cooperation Agreement"** pursuant **5k1.1** in the **later** federal criminal **"Common Law"** enforcement of the same CAA offense under **10-CR-20042** would allegedly lead to the arrest and conviction of David Rabideau for unlawful **"Kick-Back"** schemes under Case No. **12-CR-20038** in the Central District of Illinois **(See Pinski's Sentencing Transcripts of 1-14-13 under Case No. 10-CR-20042)**. Pinski's **extraordinary cooperation agreement** pursuant 5k1.1 would include Pinski's testimony before a federal grand jury on 12-1-09 against the **Lacost family** regarding **money laundering, unlawful gambling machines, conversion, and tax evasion,** of which the government was **"Aware"** of Pinski's involvement in same. **(See Pinski Sentencing transcript)**

The six count State Civil complaint would provide Pinski with **"Notice"** of having violated or being in violation (past and present tense) of the requirements or prohibitions of an applicable implementation plan and "Permit Program" pursuant **42 U.S.C. §7413(a).** And, the Administrator of the Illinois EPA **("IEPA")** would provide Pinski with an **"Opportunity to Confer"** with the Administrator of the IEPA who is the delegated authority for the U.S. EPA **(See Doc. 60, 60-1 under 10-CR-20042)** in accord with **42 U.S.C. §7413(a)(4).** Moreso, the Administrator via Civil Injunction provided Pinski with an **"Order"** having the status of law, to comply with the requirements and prohibitions of an applicable implementation plan and "Permit Program" pursuant **42 U.S.C. §7413(b).** None of which petitioner had received. The State would also arbitrarily choose to enforce the predicate **NESHAP** regulations as opposed to **OSHA** regulations, which has stricter standards that would include the **"Permit Program"** that Pinski was ultimately required - twice to obtain as both the "Owner and Operator" of his affected facility under the State **"Statutory"** enforcement.

In the year 2005, Pinski and his closely held company of "MJP" hired the Geocon Environment Survey Company **("Geocon")** to conduct a **"Thorough Inspection"** of the Pinski/Dearborn facility. Here, Pinski/MJP as the **"Operator"** of the facility was provided a copy of the Geocon 50-plus page phase one environment report **("Report")** that disclosed the presence, location, and quantity of **RACM** in the Pinski/Dearborn **"Workplace"** facility components. Specifically, contained in the heat pipe insulation. The "Report" would further provide Pinski with the appropriate "Permit Application Forms" and, disclosed the applicable implementation plans to comply with, e.g. the **"OSHA - Workplace"** regulations[16/] and, **"NESHAP - Work Practice"** regulations[14/], amongst others. Although Pinski being armed with this hazardous information, Pinski as both "Owner and Operator" deliberately failed to post **"Warning Signs"** in his affected Workplace facility pursuant **29 C.F.R. §1926.1101(k)(4-6).**

In the year 2009, on/about July, the Kankakee Fire Prevention Bureau, Captain Michael Casagrande **("Casagrande")** , had referred Pinski to O'Malley's owned and operated **"Fire Sprinkler Contracting Business"** in the "Construction Industry" entitled: Origin Fire Protection, Inc **("OFP")** to **"bid"** on the "converting" of the facility's "**Existing** inoperable wet-style fire sprinkler system to that of a operable dry-style system". This conversion merely required the installation of a dry-valve and air compressor in the basement of the facility where the water supply enters the build ing. As such, Capt. Casagrande or the Kankakee Fire Prevention Bureau did not require either O'Malley or OFP to obtain a **"Permit"** where no **"Renovation"** was established as that term is defined under the jurisdiction of Kankakee. More importantly, Pinski as both **"Owner"** and **"Operator"** of the facility never established with the City of Kankakee his facility **"Status"**[13/] of undergoing either a **"Demolition or Renovation"** as those terms are defined under **NESHAP**.[14/]

On July 23, 2009, O'Malley and his closely held company of OFP had entered into express written contract with Pinski and his closely held company of **"MJP"** as the **"Operator"** of the Pinski/Dearborn **"Owned"** facility for the "temporary conversion of the existing inoperable wet-style fire sprinkler system to that of a operable dry-style system" pursuant Kankakee Fire Code violations.

During the previous "walk-through" of the facility with Pinski and his employed supervisor, James Shultz **("Shultz")** and, O'Malley and O'Malley/OFP employed fire alarm supervisor, James Mikrut **("Mikrut")**, Pinski would **"Solicit"** O'Malley for some cheaper laborers to remove the heat pipe **"Insulation"** so Pinski could determine which of the heat pipes required removal and replacement so as to get the heating system operating. As such, the very reasoning for Pinski's hiring of O'Malley/OFP for the "conversion of the existing inoperable wet-style fire sprinkler system to be that of a operable dry-style system", was because the facility's heating system was inoperable where Pinksi/MJP had shut off the water supply to the facility's existing fire sprinkler system to prevent the static water in the system from freezing in the cold months.

This shut down of the existing fire sprinkler system was in violation of N.F.P.A fire Codes as well as Kankakee Fire Code ordinances that requires occupied facilities and those facility's containing storage shall maintain an "operable" fire sprinkler system.

At no time during the previous walk through or, at time O'Malley/OFP entering into express written contract as a **"Contractor bidding on work"** in the **"Construction Industry"** with Pinski/MJP as the facility **"Operator"**, was there any posted **"Warning Signs"**[17/] in the Pinski **"Owned"** Dearborn facility and, neither Pinski/MJP or Pinski/Dearborn as both "Owner" and "Operator" of the facility never disclosed or provided O'Malley/OFP as a **"Contractor bidding on work"**[18/] the Geocon Environmental **"Report"**.

The State in an **Earlier** "Statutory" Civil enforcement of the Clean Air Act ("CAA") offense under an approved State Implementation Plan ("SIP") and "Permit Program" would: **(1)** allow Pinski to stipulate under Count-Two of having failed to conduct a **"thorough inspection"** of his facility in violation of the predicate "NESHAP - Work Practice" regulation under **40 C.F.R. §61.145(a)** and, **(2)** falsely stipulate under Count-One that **"Pinski/Dearborn"** as **"Owner"** of the facility **hired** O'Malley/OFP as a fire sprinler contractor knowing **"Pinski/MJP"** as the **"Operator"** hired O'Malley/OFP. This was intentionally designed to conceal the fact that Pinski was also the "Operator" of his facility and thus, both "Owner and Operator" of his facility who was required to obtain a **"Permit"** prior to the commencement of a **"Renovation"** of his facility.

Pinski's first false stipulation was designed to play fast and loose with the court(s) that would **Later** involve the federal criminal **"Common Law"** enforcement under case no. 10-CR-20042, by perpetrating a fraud upon the court claiming Pinski had failed to comply with the predicate NESHAP - Work Practice regulation that requires "Owners or Operators" to conduct a "thorough inspection" of their facility **prior** to

the commencement of a **renovation**, of which the State's stricter standards under the approved SIP requirements and "permit program" mandates of Pinski.

Accordingly, prior to the commencement of a renovation of an affected facilty to undertake a "Work Practice governed under **NESHAP**", the building "Owner" under the terms of **"OSHA" - 29 C.F.R. §1926.1101(k)(1)(i)**, "often are the only and/or best sources of information concerning them." **See also** §1926.1101(k)(5)(i), (ii). Accordingly, Pinski, as the facility "Owner and Operator" is required to maintain a safe and healthy "workplace" under both the "OSHA" regulations and City of Kankakee Ordinances.

Pinski's second false stipulation would fraudulently conceal from the court the fact that it was **"Pinski/MJP"** as the **"Operator"** of the affected facility who had **hired** O'Malley/OFP's licensed fire sprinkler contracting business and not that of **Pinski/Dearborn** as the **"Owner"** of the affected facility. This false stipulation by Pinski was to conceal the fact that Pinski was both the **"Owner"** and **"Operator"** of his facility who possessed the Geocon environmental **"Report". (Exh."A" of Appendix "K").**

That not one of the government witnesses knew factually the heat pipe insulation contained "Regulated" Asbestos-Containing Material (RACM) except for the government's **"Key Witness"** and codefendant, Michael J. Pinski, (Pinski) who would not only enter into a guilty plea agreement, but a guilty plea containing an **"Extraordinary Cooperation Agreement"** pursuant to **5K1.1**. Further, Pinski, as both **Owner and Operator** of his affected facility containing the RACM, was the **only** person who possessed the 50-plus page Phase One Environmental Survey Report (Report) that disclosed the Implementation Plans and Permit programs the Owners or Operators were to follow and, disclosed the presence, location, and quantity of RACM in his affected facility. And, the government's witnesses were coached by the prosecution who's circumstantial testimony was to cover their own backsides and, defense counsel's cross examination was deficient at best.

Here, the **"Original Direct Appeal"** panel under 12-2771 was prevented from the expanded record of the **[pieces]** of newly discovered evidence brought under the bonafide criminal Rule 33(b)(1) motion **(Doc. 172)** at a **"critical stage"** of the **"criminal"** proceedings **"while the direct appeal remained pending"** and thus, controlled under the provisions of **"Criminal Rule 37"**. However, the government would **"Invite Error"**[4/] by encouraging the district court to invoke a **"Judge-Made Rule"**[1/] recharacterization by issuing a **"Castro Warning" (Doc. 182)**, that would exclude the warning of allowing the defendant to **"contest the recharacterization"** pursuant Castro at 384.

The district court's acceptance **(Doc. 196)** of the government's invitation **(Doc. 182)** would issue the Castro Warning providing defendant the **in terrorem** ultimatum to either withdraw the motion within 21-days or it would be recharacterized as that of a **"Collateral"** §2255 **(See Doc. 196, also under Appendix "N")**. Although the Castro Warning failed to admonish defendant he could **"Contest the Recharacterization"** by appealing the order, that defendant would have yet otherwise pursued as evident by subsequent proceedings, retained counsel's **(Doc. 194)** deficient failure to file the "Notice of Appeal" arises to the **"Presumption of Prejudice"** to an ineffective assistance of counsel claim at that **critical stage** of the **criminal** proceedings that the Supreme Court recently addressed under Garza v. Idaho, 139 S.Ct. 738 (2019); United States v. Cronic, 466 U.S. 648, 659 (1984).

Also, retained counsel's withdrawal of the motion **(Doc. 197)** was consistent with the district court's recharacterization order **(Doc. 196)**, that also arises to the **"Presumption of Prejudice"** where counsel's deficient performance by forestalling the criminal proceedings until the direct appeal under 12-2771 affirmed the **"Common Law"** conviction of the Clean Air Act (CAA) on 1-8-14, only to **"Abandon"** defendant and the Criminal Rule 33(b)(1) motion and its **[pieces]** of newly discovered evidence by withdrawing counsel's appearance on 2-11-14 under **(Doc. 206)**. As such, further supports why **Circuit Operating Rule 6(b)** should have been followed by assigning the **"Original Motion Appeal"** under 14-2711 to the **"Original Direct Appeal"** panel under

12-2771, where there was an **overlap** in the issues presented involving the same essential facts. And thus, the outcome of the direct would have been different and the **Common Law** enforcement and conviction would not stand as the **"Law of the Case".**

The error would only manifest when the **"Original Motion Appeal"** panel under 14-2711 would issue a **"General Remand"** order containing ambiguity as to whether or not the remand allowed O'Malley to proceed under a bonafide **"Criminal"** Rule 33 or as that of a **"Collateral"** Rule 33, which petitioner argues is an oxymoron that does not exist. The court's **in terrorem** ultimatum under **(Doc. 196)** failed to admonish that defendant could **contest the recharacterization**, which defendant would have yet otherwise pursued. Moreso, retained Rule 33 counsel **(Doc. 194)** knew or should have known to contest the recharacterization at that **critical stage** of the **criminal** proceedings by filing a **"Notice of Appeal"** and to consolidate with that of the direct appeal. Thus, preserving the **[pieces]** of newly discovered evidence in the record and review with that of the direct appeal. Like in Garza[10/], the defendant is not required to show he would prevail on the underlying issues where counsel's deficient failure to file the "Notice of Appeal" arises to the **"Presumption of Prejudice"** to an ineffective assistance of counsel claim during the **critical stage** of the **criminal** proceedings **"while the direct appeal remained pending". See United States v. Cronic**, 466 U.S. 648 (1984). Also, counsel's deficient failure to file the "Notice of Appeal" is exacerbated by counsel's **"Abandonment"** of the motion and defendant by forestalling the criminal proceedings after **withdrawing** the motion under **(Doc. 197)** only to further withdraw her appearance on 2-11-14 under **(Doc. 206)** immediately following the direct appeal **(12-2771)** affirming the **"Common Law"** conviction at the **"Law of the Case"** on 1-8-14.

B. RULE 33 FILINGS

** 1. **RULE 33 No. 1**, filed by trial counsel on 9-27-11 under **(Doc. 71)** prior to filing of **"Notice of Appeal"**. On 11-7-11 under **(Doc. 75)** the court denied the motion. And, on July 31, 2012 **(Doc. 123)** defendant filed his "Notice of Appeal" under Appeal No. **12-2771.**

** 2. **RULE 33(b)(1) No. 2**, motion for new trial with newly discovered evidence, filed Pro Se, on 2-19-13 under **(Doc. 172)** after filing the "Notice of Appeal" but, **"while the direct appeal remained pending"** under **12-2771.** Thus, a **"critical stage"** of the **"criminal"** proceedings.

On 2-25-13, the district court deferred the motion for a government response (See Criminal Rule 37(a)(1)).

On 3-25-13 under **(Doc. 182)** the government filed its response encouraging the court to invoke a **"Judge-Made Rule"**[1/] and issue a **"Castro Warning"** to recharacterize the motion to be that of a **"Collateral"** §2255 arguing defendant's issues to be classical claims that could only be addressed under "collateral" §2255.

On 6-17-13, retained counsel filed appearance **(Doc. 194)** and motion to stay **(Doc. 195).**

On 6-19-13 under **(Doc. 196)**, the district court accepted the government's position and invoked the **"Judge-Made Rule"** by issueing the **"Castro Warning"** that provided defendant the **in terrorem** ultimatum to either withdraw the motion within 21-days or the motion would be recharacterized as that of a **"Collateral"** §2255.

Over defendant adamant objection to counsel, counsel had withdrawn the motion on 6-26-13 **(Doc. 197)** only to forestall the criminal proceedings until the direct appeal **(12-2771)** affirmed the **"Common Law"** conviction as the **"Law of the Case"** on 1-8-14 and **"Abandon"** defendant and the criminal Rule 33(b)(1) motion on 2-11-14 under **(Doc. 206).** Here, counsel's deficient failure to file a **"Notice of Appeal"**[10/] contesting the recharacterization as **"Plain Error"**[3/] that was **"Invited Error"**[4/] by the government and, counsel's ultimate **"Abandonment"**[23/] of defendant and the Criminal Rule 33(b)(1) motion arises to the **"Presumption of Prejudice"** to an ineffective assistance

of counsel claim.[6/] See also, **United States v. Cronic**, 466 U.S. 648 (1984).

** **3. RULE 33 No. 3,** filed on 3-31-14 under **(Doc. 209)** immediately following counsel's **(Doc. 194)** withdrawal of appearance on 2-11-14 under **(Doc. 206)** where defendant "refiled" the Rule 33 motion and related back. Defendant would also attempt to **"Petition for Panel Rehearing or Rehearing En Banc"** filed on 1-30-14 **(Exhibit No. 2),** that the Seventh Circuit Court of Appeals ("CA7") would deny on 2-18-14 **(Exhibit No.3)** and, on 9-8-14 attempted to **"Recall the Mandate" (Exhibit No. 4),** that the CA7 Court would deny on 9-12-14 **(Exhibit No. 5).** And, following the remand under the **"Original Motion Appeal"** of **14-2711,** defendant motioned the CA7 Court on 2-15-17 again requesting the **"Recall of the Mandate"** of "Direct Appeal" (12-2771); 739 F.3d 1001 based on the CA7 Court's recent remand order under Appeal No. **14-2711**; 833 F.3d 810 where a fraud was perpetrated upon the Court. **(See Exhibit No. 6).** Here, the CA7 Court would return to defendant his motion with a copy of the **former** denial order dated 9-12-14 **(See Exhibit No. 5)** and never issue an order regarding the Motion to "Recall the Mandate" filed on 2-15-17 **(See Exhibit No. 6).**

Defendant further sought a Writ of Certiorari with the United States Supreme Court. **(See Appendix "J").**

C. CRIMINAL RULE 37 OPERATION

A similar Seventh District Court procedural ruling under **United States v. Patrick**, 2016 U.S. Dist. LEXIS 59933 (7th Dist. 5-5-16) pertains to a bonafide Criminal Rule 33 (b)(1) motion for new trial with newly discovered evidence filed at a **"critical stage"** **"While the direct appeal remained pending"**.

The court in Patrick, supra, stated:

> "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for new trial until the appellate court remands the case." See Fed. R. Crim. P. 33(b)(1).

Defendant-Patrick "therefore asks this (district) court to issue an 'indicative ruling' on his motion". Here, the district court would cite to an "Appellate Rule" under Fed. R. App. P. 12.1(a) as opposed to the district court's jurisdiction under **"Criminal Rule 37"** for a "indicative ruling" which requires:

> **(a)** Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the **court may:**
>
> **(1)** defer considering the motion;
>
> **(2)** deny the motion; or
>
> **(3)** state either that it would grant the motion if the Court of Appeals remands for that purpose **or** that the motion raises a substantive issue.

NOTE: It is the "Court's" function under §(a) to choose §(1)-(3) of which a **"Recharacterization"** of the motion via **"Judge-Made Rule"** [1/] is not an available provision of the Rule or intent of the Legislature. In O'Malley, the Criminal Rule 33(b)(1) motion **(Doc. 172)** raised a **"substantial 'Brady' issue"** and thus the [court] was required to comply with §(a)(3) and notify defendant so defendant could comply with Fed. R. App. P. 12.1(a).

> **(b)** Notice to the Court of Appeals. The **"movant"** must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 **[if]** the district court states that it would grant the motion **[or]** that the motion raises a substantial issue.

The Notes of Advisory Committee states:

> "In the criminal context, the committee anticipates that criminal rule 37 will be used primarily if not exclusively for newly discovered evidence motions under criminal rule 33(b)(1) (See **United States v. Cronic**, 466 U.S. 648, 667 n. 42 (1984))."

The Court in **Patrick** would confirm the government's position that "Rule 33 does not apply to defendants who plead guilty rather than going to trial." Citing, e.g. **United States v. Spaulding**, 802 F.3d 1110, 1125 n. 20 (10th Cir. 2015); **United States v. Strom**, 611 Fed. Appx. 148, 149 (4th Cir. 2015); **United States v. Graciani**, 61 F.3d 70, 78 (1st Cir. 1995)(citing **United States v. Collins**, 898 F.2d 104, 104 (9th Cir. 1990); **United States v. Lambert**, 603 F.2d 808, 809 (10th Cir. 1979); **Williams v. United States**, 290 F.2d 217, 218 (5th Cir. 1961)); see also **United States v. Chaney**, 538 Fed. Appx. 728, 729 (7th Cir. 1990)(citing **United States v. Lewis**, 921 F.2d 563, 564 (5th Cir. 1991)(explaining that Rule 33 is unavailable to defendants who plead guilty)).

Accordingly, the Court in Patrick, supra, in reliance upon the aforestated, held that "By its terms, Rule 33 applies only to cases in which a trial has occurred and the Rule 33 remedy is unavailable; citing, e.g., **Collins**, 898 F.2d at 104. In a footnote n. 1, defendant Patrick noted that "the Seventh Circuit has not addressed this issue in a published decision." However, the court stated that "it appears that every Circuit which has addressed the issue (plea v. trial) has concluded that Rule 33 may not be used by defendants who plead guilty. Here, O'Malley went to trial.

The point O'Malley submits is that the court's order of 5-5-16 states that defendant Patrick asked the district court to issue a "indicative ruling" on his motion pursuant Fed. R. App. P. 12.1(a). This, O'Malley argues, is incorrect as **"Criminal Rule 37"** is used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1). **See** Notes of Advisory Committee; **United States v. Cronic**, 466 U.S. 648, 667 n. 42 (1984). Here, Criminal Rule 37 operation is for the [court] to choose one of the three provisions the Legislature enacted under

Criminal Rule 37; e.g. **(1)** defer the motion; **(2)** deny the motion (which allows for an appeal and consolidation with the pending appeal); or **(3)** state either that it would grant the motion if the court of appeals remands for that purpose **[or]** that the motion raises a substantial issue.

Here, O'Malley argues that because his Criminal Rule 33(b)(1) motion was filed at a "Critical Stage" during the narrow window "**while the direct appeal remained pending**", that the district court's invoked "**Judge-Made Rule**"[1/] recharacterization order had encroached and circumvented the legislative intent of the provisions outlined under Criminal Rule 37(a)(1-3) in violation of the Seperation of Powers Clause that had: **(1)** affected defendant's substantive rights; **(2)** seriously affected the fairness, integrity, and public reputation of the judicial proceedings and **(3)** worked a fundamental miscarriage of justice to a yet otherwise "actually innocent" person under the Statute of conviction.

Defendant stands on the proposition that the district court's invocation of the "**Judge-Made Rule**" under **(Doc. 196)** was a "**Plain Error**" recharacterization order that was intentionally "**Invited Error**" by the prosecution under **(Doc. 182)**, who had prevailed on direct appeal **(12-2771)** by "**depriving the newly discovered evidence of serving any function**"[19/] and, securing a "**Common Law**" conviction as the "**Law of the Case**" on direct.

As opposed to defense counsel **(Doc. 194)** filing a "**Notice of Appeal**"[10/] that defendant would yet otherwise have pursued, as evident from defendant's subsequent filing, counsel's deficient failure to file a notice of appeal arises to the "Presumption of Prejudice" and is in contribution to the district court's "**Plain Error**"[3/] order under **(Doc. 196)** that was "**Invited Error**" [4/] under **(Doc. 182)**. Here, counsel would withdraw the motion **(Doc. 197)** only to forestall the "Criminal" proceedings under the direct appeal **(12-2771)** affirmed the **later** inconsistent "**Common Law**" enforcement and conviction as the "**Law of the Case**" on 1-8-14, 739 F.3d 1001, and then "**Abandon**" both the defendant and the Criminal Rule 33(b)(1) motion on 2-11-14 under **(Doc. 206)**.

Based on the prosecutions Invited Error **(Doc. 182)** reasoning regarding defendant's Criminal Rule 33(b)(1) motion **(Doc. 172)** and district court's Plain Error acceptance **(Doc. 196)**, as well as defense counsel's "Abandonment" **(Doc. 209)**; defendant, Pro Se, would reshape his claims and **[pieces]** of newly discovered evidence and "Refile" the Rule 33 motion **(Doc. 209)** and "relate back" to his initial Criminal Rule 33(b)(1) motion **(Doc. 172)** only to face the prosecution's successive invited error under **(Doc. 212)** and the district court's successive invoked "Judge-Made Rule" recharacterization order **(Doc. 216)**. However, this time defendant filed a motion pursuant Rule 51/52(b) that successive Chief Judge James E. Shadid would construe as a reconsideration request, and in a June 24, 2014 text only order, affirm predecessor Chief Judge Michael P. McCuskey's previous recharacterization order under **(Doc. 216)**. Defendant-O'Malley appealed under **14-2711** and the Court on 10-29-14 would **"Limit"** the appeal to the purported "Reconsideration Motion" **(i.e. Doc. 218)** **(See Exhibit "B")**. However, on 10-7-15, the Seventh Circuit Court of Appeals ("CA7") would, inter alia, vacate the 10-29-14 order and **"All Prior Decisions"** **(See Exhibit "C")**. See also; **Appendix "K"**.

D. CASTRO WARNING

Petitioner filed a bonafide criminal rule 33(b)(1) motion for new trial with newly discovered evidence **(Doc. 172)** at a **critical stage** of the **criminal** proceedings **"While the direct appeal remained pending"**. Here, at the encouragement of the prosecution **(Doc. 182)**, asked the court to invoke a **"Judge-Made Rule"**[1/] and recharacterize the motion as that of a **"Collateral"** §2255 by issuing a **"Castro Warning"** claiming O'Malley's issues were typical claims that could only be addressed under §2255.

The district court accepted the prosecution's invitation to error[4/] and invoked the "Judge-Made Rule" recharacterization order **(Doc. 196)** that petitioner argues was "Plain Error"[3/]. See 2013 U.S. Dist. LEXIS 85895 **(Appendix "N")** that stated:

> "(1) petitioner's motion will be construed by this court as a motion pursuant 28 U.S.C. §2255. Petitioner is allowed twenty-one (21) days from the date of this opinion to withdraw his motion if he does not want to proceed under 28 U.S.C. §2255 or to amend his motion to include every §2255 claim that he believes he has.
> (2) If petitioner does not withdraw his motion by the deadline in (1), the government is allowed 30 days from that date to file its response."

Here, defense counsel **(Doc. 194)** had withdrawn the motion **(Doc. 197)** as opposed to **"Contest the Recharacterization"** and filing a **"Notice of Appeal"** that petitioner would have otherwise pursued[10/] Counsel instead forestalled the Criminal Rule 33(b)(1) proceedings only to **"Abandon"**[23/] both petitioner and the motion on 2-11-14 **(Doc. 206)** immediately following the direct appeal (12-2771) affirming the **"Common Law"** enforcement and conviction as the **"Law of the Case"**. 739 F.3d 1001 (7th Cir. 1-8-14) **(See Appendix "M")**.

Petitioner argues the district court's "Plain Error" invoking of a "Judge-Made Rule" recharacterization order **(Doc. 196)** coupled with the prosecutions's "Invited Error" and, in contribution with defense counsel's withdrawing the motion as opposed to "contesting the recharacterization" by filing a **"Notice of Appeal"** that petitioner would have otherwise pursued, is far more egregious than that of the "failure to Warn" holding in Castro, supra.

The aforesaid combination of errors originated by the prosecutions invitation that petitioner argues was knowingly and intentionally designed to prevail on a **"Common Law"** enforcement and conviction as the **"Law of the Case"** affirmed on direct by preventing the expansion of the record with the newly discovered evidence via Criminal Rule 33(b)(1), which too date has yet to receive an evidentiary hearing.

That a bonafide Criminal Rule 33(b)(1) motion for new trial with newly discovered evidence filed at a critical stage of the criminal proceedings **"while the direct appeal remained pending"** is governed under the provisions and legislative intent of **"Criminal Rule 37"** and prohibited by an invoked **"Judge-Made Rule"** recharacterization. In the criminal context, the Advisory Committee anticipates that criminal rule 37 will be used primarily if not exclusively for newly discovered evidence motion under criminal rule 33(b)(1). **See** Notes of Advisory Committee; **United States v. Cronic**, 466 U.S. 648, 667 n. 42 (1984). Accordingly, the district court's invoked "Judge-Made Rule" recharacterization encroached and circumvented the provisions and legislative intent of "Criminal Rule 37" in violation of the Seperation of Powers Clause.

The egregious nature of the combination to the aforesaid errors worked a fundamental miscarriage of justice that has: **(1)** violated the Seperation of Powers Clause; **(2)** affected petitioner's substantive rights under the Firth and Sixth Amendments of the United States Constitution; **(3)** seriously affected the fairness, integrity, and Public Reputation of the Judicial proceedings; and **(4)** imprisoned an Actually Innocent person under the Statute of conviction.

In **Castro at 384**, the Ruling stated:

The Government argues that there is something special: Castro failed to appeal the 1994 recharacterization. According to the Government, that fact makes the 1994 recharacterization

[540 US 384]

valid as a matter of "law of the case." And, since the 1994 recharacterization is valid, the 1997 § 2255 motion is Castro's second, not his first.

We do not agree. No Circuit that has considered whether to treat a § 2255 motion as successive (based on a prior unwarned recharacterization) has found that the litigant's failure to challenge that recharacterization makes a difference. See Palmer, supra, at 1147; see also Henderson, 264 F.3d, at 711-712; Raineri, 233 F.3d, at 100; In re Shelton, supra, at 622. That is not surprising, for the very point of the warning is to help the pro se litigant understand not only (1) whether he should withdraw or amend his motion, but also (2) whether he should contest the recharacterization, say, on appeal. The "lack of warning" prevents his making an informed judgment in respect to the latter just as it does in respect to the former. Indeed, an unwarned pro se litigant's failure to appeal a recharacterization simply underscores the practical importance of providing the warning. Hence, an unwarned recharacterization cannot count as a § 2255 motion for purposes of the "second or successive" provision, whether the unwarned pro se litigant does, or does not, take an appeal.

The law of the case doctrine cannot pose an insurmountable obstacle to our reaching this conclusion. Assuming for argument's sake that the doctrine applies here, it simply "expresses" common judicial "practice"; it does not "limit" the courts' power. See Messenger v Anderson, 225 US 436, 444, 56 L Ed 1152, 32 S Ct 739 (1912) (Holmes, J.). It cannot prohibit a court from disregarding an earlier holding in an appropriate case which, for the reasons set forth, we find this case to be.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

[540 US 385]

Justice *Scalia,* with whom Justice *Thomas* joins, concurring in part and concurring in the judgment.

I concur in Parts I and II of the Court's opinion and in the judgment of the Court. I also agree that this Court's consideration of Castro's challenge to the status of his recharacterized motion is neither barred by nor necessarily resolved by the doctrine of law of the case.<*pg. 789>

I write separately because I disagree with the Court's laissez-faire attitude toward recharacterization. The Court promulgates a new procedure to be followed if the district court desires the recharacterized motion to count against the pro se litigant as a first 28 USC § 2255 [28 USCS § 2255] motion in later litigation. (This procedure, by the way, can be ignored with impunity by a court bent upon aiding pro se litigants at all costs; the only consequence will be that

the litigants' later § 2255 submissions cannot be deemed "second or successive.") The Court does not, however, place any limits on when recharacterization may occur, but to the contrary treats it as a routine practice which may be employed "to avoid an unnecessary dismissal," "to avoid inappropriately stringent application of formal labeling requirements," or "to create a better correspondence between the substance of a pro se motion's claim and its underlying legal basis." Ante, at 381-382, 157 L Ed 2d, at 786-787. The Court does not address whether Castro's motion filed under Federal Rule of Criminal Procedure 33 should have been recharacterized, and its discussion scrupulously avoids placing any limits on the circumstances in which district courts are permitted to recharacterize. That is particularly regrettable since the Court's new recharacterization procedure does not include an option for the pro se litigant to insist that the district court rule on his motion as filed; and gives scant indication of what might be a meritorious ground for contesting the recharacterization on appeal.

In my view, this approach gives too little regard to the exceptional nature of recharacterization within an adversarial

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system, and neglects the harm that may be caused pro se litigants even when courts do comply with the Court's newly minted procedure. The practice of judicial recharacterization of pro se litigants' motions is a mutation of the principle that the allegations of a pro se litigant's complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers." Haines v Kerner, 404 US 519, 520, 30 L Ed 2d 652, 92 S Ct 594 (1972) (per curiam). "Liberal construction" of pro se pleadings is merely an embellishment of the notice-pleading standard set forth in the Federal Rules of Civil Procedure, and thus is consistent with the general principle of American jurisprudence that "the party who brings a suit is master to decide what law he will rely upon." The Fair v Kohler Die & Specialty Co., 228 US 22, 25, 57 L Ed 716, 33 S Ct 410 (1913). Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.

Recharacterization is unlike "liberal construction," in that it requires a court deliberately to override the pro se litigant's choice of procedural vehicle for his claim. It is thus a paternalistic judicial exception to the principle of party self-determination, born of the belief that the "parties know better" assumption does not hold true for pro se prisoner litigants.

I am frankly not enamored of any departure from our traditional adversarial principles. It is not the job of a federal court to create a "better correspondence" between the substance of a claim and its underlying procedural basis. But if departure from traditional adversarial principles is to be allowed, it should <*pg. 790> certainly not occur in any situation where there is a risk that the patronized litigant will be harmed rather than assisted by the court's intervention. It is not just a matter of whether the litigant is more likely, or even much more likely, to be helped rather than harmed. For the overriding rule of judicial intervention must be "First, do no harm." The injustice caused by letting the litigant's

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own mistake lie is regrettable, but incomparably less than the injustice of producing prejudice through the court's intervention.

The risk of harming the litigant always exists when the court recharacterizes into a first § 2255 motion a claim that is procedurally or substantively deficient in the manner filed. The court essentially substitutes the litigant's ability to bring his merits claim now, for the litigant's later ability to bring the same claim (or any other claim), perhaps with stronger evidence. For the later § 2255 motion will then be burdened by the limitations on second or successive petitions imposed by the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat 1214. A pro se litigant whose non-§ 2255 motion is dismissed on procedural grounds and one whose recharacterized § 2255 claim is denied on the merits both end up as losers in their particular actions, but the loser on procedure is better off because he is not stuck with the consequences of a § 2255 motion that he never filed.

It would be an inadequate response to this concern to state that district courts should recharacterize into first § 2255 motions only when doing so is (1) procedurally necessary (2) to grant relief on the merits of the underlying claim. Ensuring that these conditions are met would often enmesh district courts in factand labor-intensive inquiries. It is an inefficient use of judicial resources to analyze the merits of every claim brought by means of a questionable procedural vehicle simply in order to determine whether to recharacterize-particularly in the common situation in which entitlement to relief turns on resolution of disputed facts. Moreover, even after that expenditure of effort the district court cannot be certain it is not prejudicing the litigant: the court of appeals may not agree with it on the merits of the claim.

In other words, even fully informed district courts that try their best not to harm pro se litigants by recharacterizing may nonetheless end up doing so because they cannot predict and protect against every possible adverse effect that may

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flow from recharacterization. But if district courts are unable to provide this sort of protection, they should not recharacterize into first § 2255 motions at all. This option is available under the Court's opinion, even though the opinion does not prescribe it.

The Court today relieves Castro of the consequences of the recharacterization (to wit, causing his current § 2255 motion to be dismissed as "second or successive") because he was not given the warning that its opinion prescribes. I reach the same result for a different reason. Even if one does not agree with me that, because of the risk involved, pleadings should never be recharacterized into first § 2255 motions, surely one must agree that running the risk is unjustified when there is nothing whatever to be gained by the recharacterization. That is the situation here. Castro's Rule 33 motion was valid as a procedural matter, and the <*pg. 791> claim it raised was no weaker on the merits when presented under Rule 33 than when presented under § 2255. The recharacterization was therefore unquestionably improper, and Castro should be relieved of its consequences.

Accordingly, I concur in the judgment of the Court.

Of further importance to petitioner's sequence of events and argument at bar, is Justice Scalia's, with whom Justice Thomas joined, concurring in part and concurring in the judgement is found at Castro at 385-86. Here, the Justice's recog-

nized that the court's promulgation of the Castro recharacterization does not place any limits on when recharacterization may occur, but to the contrary treats it as a routine practice which may be employed "to avoid unnecessary dismissal", to "avoid inappropriately stringent application of formal labeling requirements," or "to create a better correspondence between the substance of a pro se motions claim and its underlying legal basis." ante at 381-382, 157 L.Ed 2d at 786-787.

Here, and as further stated, "this approach gives too little regard to the exceptional nature of recharacterization within an adversarial system, and neglects the harm that may be caused pro se litigants even when court's newly minted procedure. The practice of judicial recharacterization of pro se litigant's complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers." **Haines v. Kerner**, 404 U.S. 519, 520 (1972)(per curiam).

Although petitioner initially filed the Criminal Rule 33(b)(1) motion **(Doc. 172)** on 2-19-13, Pro Se, and the district court had deferred the motion for a government response in a "Text Only Order" on 2-22-13 and thus, surpassed the summary dismissal stage and compliant with Criminal Rule 37(a)(1), the prosecutions **"Invited Error"** for the court to invoke the **"Judge-Made Rule"** recharacterization and issuance of a **"Castro Warning"** was the outset of the motions mutation that too date has prohibited petitioner's Constitutional Rights under the Fifth and Sixth Amendment's by the district court's violation of the Seperation of Powers Clause when invoking a "Judge-Made Rule" knowing **"Criminal Rule 37"** controlled the operation of Criminal Rule 33(b)(1).

The errors manifested from the district court's "Plain Error" recharacterization **(Doc. 196)** that was "Invited Error" by the prosecution **(Doc. 182)** and, contributed by retained counsel **(Doc. 194)** deficient failure to **"Contest the Recharacterization"** by filing the **"Notice of Appeal"** that petitioner would have otherwise pursued and, counsel's **"Abandonment"** of the motion and petitioner **(Doc. 206);** requires this Honorable Supreme Court's **"Supervisory Power"** to remand the case to the district court for a new trial consistent with the provisions and text of the **Statute** of conviction.

Moreso, to promulgate a new procedure or ADD to the existing that prohibits a district court's invoking of a **"Judge-Made Rule"** recharacterization of a bonafide Criminal Rule 33(b)(1) motion for new trial with newly discovered evidence filed at a **"critical stage"** of the **"criminal"** proceedings **"while the direct appeal remains pending"** and governed under the controlling provisions of **"Criminal Rule 37".**

E. ABANDONMENT

The district court's **"Plain Error"**[3/] recharacterization order **(Doc. 196)** came at a **critical stage** of the **criminal** proceedings **"while the direct appeal remained pending"**, where defendant filed on 2-19-13 under **(Doc. 172)** a bonafide Criminal Rule 33(b)(1) motion for new trial with newly discovered evidence raising substantial issues. For sake of argument, the district court would defer the motion for a government response in a Text Only Order dated 2-22-13 compliant with Criminal Rule 37(a)(1).

The government's response would **"Invite Error"**[4/] by encouraging the court to invoke a **"Judge-Made Rule"**[1/] and recharacterize the **"Criminal"** Rule 33(b)(1) motion to be that of a **"Collateral"** §2255 claiming the issues defendant raised could only be addressed under a collateral §2255.

The district court would accept the government's invitation under **(Doc. 196)** and issue a **"Castro Warning"** that would include an **in terrorem** ultimatum to either withdraw the motion within 21-days or it would be recharacterized as that of a "collateral" §2255. The order would further afford defendant the opportunity to amend the §2255 with all collateral issues. The order however, failed to provide defendant the opportunity to **"Contest the Recharacterization"**, Castro at 384.

Defense counsel **(Doc. 194)**, over defendant's adamant objection, had withdrawn the motion **(Doc. 197)** who knew or should have known the district court's invoked **"Judge-Made Rule"** recharacterization would encroach and circumvent the controlling provisions and legislative intent of **"Criminal Rule 37"** in violation of the Seperation of Powers Clause and, who knew or should have known to **"Contest the Recharacterization"** despite the district court's failure to include this admonishment in the **"Castro Warning"**. That but for counsel's deficient failure to file the **"Notice of Appeal"**[10/] that defendant would yet otherwise have pursued, as evident by subsequent pleadings involving the Rule 33 motion, the outcome of the direct appeal **(12-2771)** would have been different as the new evidence was directly material to both the claims raised and, to additional claims that were prevented from being raised due to a "premature" record on appeal. **(See Exhibit "A" at ¶6)**. More importantly, The **"Common Law"** conviction of the underlying **"Statute"** would not have become the **"Law of the Case"**. And, thus,

requiring the **"Recall of the Mandate"** of the **"Original Direct Appeal" (12-2771)**, 739 F.3d 1001 (7th Cir. 1-8-14), **(See Appendix "M")** and, the **"Original Motion Appeal" (14-2711)**, 833 F.3d 810 (7th Cir. 8-17-16), **(See Appendix "I")**. Defendant attempted to "Recall the Mandates", **See Exhibit No.s 4, 5 & 6.**

Defense counsel **(Doc. 194)** had withdrawn defendant's Criminal Rule 33(b)(1) motion under **(Doc. 197)** as opposed to "Contesting the Recharacterization" by filing a "Notice of Appeal" only to **forestall** the criminal proceedings until the direct appeal affirmed the **"Common Law"** conviction as the **"Law of the Case"** on 1-8-14 and then, **"Abandon"**[9/ 23/] both the defendant and the Criminal Rule 33(b)(1) motion by withdrawing her appearance on 2-11-14 under **(Doc. 206).**

The Seventh Circuit Court of Appeals ("CA7") is all to familiar with a attorney's **"Abandonment"**. For Example, and which is directly on point with petitioner's case at bar: **Bell v. United States**, 116 F.Supp. 3d 900, 905 (7th Dist. 2015) which states:

> "Where an attorney has abandoned the client altogether, however, the 'Strickland' test does not apply". A "petitioner who establishes that he was abandoned by counsel need not demonstrate that his appeal would have been successful". The Supreme Court has "held that the complete denial of counsel during a 'critical stage' of the judicial proceedings mandates a presumption of prejudice because 'the adversary process itself' has been rendered 'presumptively unreliable.'" **Roe v. Flores Ortega**, 528 U.S. 470, 483 (2000)(citing **United States v. Cronic**, 466 U.S. 648, 659 (1984), see also, **Smith v. Robbins**, 528 U.S. 259, 286 (2000); **Penson v. Ohio**, 488 U.S. 75, 88-89 (1988)).

Although Criminal Rule 33 motions are not available to those who choose to enter into guilty plea agreements, the Supreme Court recently extended the **"Presumption of Prejudice"** to a ineffective assistance of counsel claim in **Garza v. Idaho**, 139 S.Ct. 738 (2019)(citing **Roe v. Flores-Ortega**, 528 U.S. 470 (2000)) to those who enter into guilty plea agreements that contain **"Appeal Waiver"**). Also, the Ninth Circuit recently in **United States v. Fabian-Baltazar**, (No. 15-16115)(9th Cir. 7-30-19) held that

the **"presumption of Prejudice"** to a ineffective assistance of counsel claim further extends to those entering into a guilty plea agreement that contains an **"Appeal Waiver for collateral §2255".**

Defendant argues the contribution of errors equates to: **(1)** the district court's invoked **"Judge-Made Rule"** recharacterization order **(Doc. 196)** entered at a **critical stage** of the **criminal** proceedings **"while the direct appeal remained pending"** that encroached and circumvented the controlling provisions and legislative intent of **"Criminal Rule 37"** and thus, **"Plain Error"** in violation of **(a)** the Seperation of Powers Clause; **(b)** affected defendant's substantive rights under the Fifth and Sixth Amendments of the U.S. Constitution; **(c)** seriously affected the fairness, integrity, and Public Reputation of the Judicial proceedings; and **(d)** worked a fundamental miscarriage of justice to a yet otherwis "actually innocent" person of the **Statute of Conviction;**

(2) The government's **"Invited Error"**[4/] under **(Doc. 182)** knew a recharacterized **"Collateral"** §2255 cannot be used as a substitute for that of a direct appeal.[22/] **Johnson v. United States**, 2013 U.S. Dist LEXIS 56785 (AUSA Eugene Miller, 4-20-13). Also, the court's acceptance of the error **(Doc. 196)** allowed the government to prevail on direct by preventing the expansion of the record with the [pieces] of newly discovered evidence under **(Docs. 172, 183, 185, 186, 188 and 190** - collectively, **Doc. 172)**. As such the government prevailed by the direct appeal **(12-2771)** affirming the **"Common Law"** conviction as the **"Law of the Case"**, knowing the **[pieces]** of new evidence submitted under the bonafide Criminal Rule 33(b)(1) motion and its supplements would be deprived of serving any function. **(See Exhibit "H" at pg. 11).**

(3) Retained Rule 33(b)(1) counsel's **(Doc. 194)** withdrawal of the **(Doc. 172)** motion under **(Doc. 197)** as opposed to **"Contesting the Recharacterization"**[1/] by filing a **"Notice of Appeal"**[10/] that petitioner would have otherwise pursued, only to **"Abandon"**[23/] petitioner.

(4) Retained direct appeal counsel under **"Original Direct Appeal" (12-2771)**

deficient failure to raise Criminal Rule 33(b)(1) counsel **(Doc. 194)** ineffective for deficient failure to **"Contest the Recharacterization" (Doc. 196)** regarding **(Doc. 172)** by filing a **"Notice of Appeal"**[10/] and consolidating the existing **"Premature"** record **(See Exhibit "A" at ¶6)** with that of the Criminal Rule 33(b)(1) record and **[pieces] (See Exhibit "K")** of newly discoverd evidence. Thus, an **"Exceptional Case"** in raising an ineffective assistance of counsel claim on direct review.[24/]

(5) Appointed Appellate counsel under **"Original Motion Appeal" (14-2711)** deficient failure to argue retained Rule 33(b)(1) counsel's **(Doc. 194)** deficient failure to **"Contest the Recharacterization"** under **(Doc. 196)** regarding **(Doc. 172)** and filing of a **"Notice of Appeal"**[10/] and consolidate with that of the direct appeal but instead, argued the **Refiled** Rule 33 motion under **(Doc. 209)** that the district court had **"Recharacterized"** under **(Doc. 216)**, claiming the motion was a **"Specific - Nicer fit" (See Exhibit "H" at pg. 4, L.8-19)** as though there being an **"Overlap"** between the Criminal Rule 33 motion and its 3-year time limitation and that of a **"Collateral"** §2255 and its time restrictions under **A.E.D.P.A.** of 1-year. Based on this argument, the CA7 Court issued its **"General Remand"** order on 8-17-16. **(See Exhibit "K")**.

(6) Re-appointed Appellate Counsel under **"Successive Motion Appeal" (18-1617)** worked under a diametrically opposed position that would conflict with counsel's previous representation at the **"Original Motion Appeal"** under **14-2711** when failing to argue the district court's **Plain Error** reecharacterization order under **(Doc. 196)**.

F. EARLIER AND LATER ENFORCEMENTS

A. "EARLIER" STATE CIVIL "STATUTORY" ENFORCEMENT: (09-CH-475)

Unbeknown to defendant-O'Malley, the State of Illinois Attorney General's Office ("IAGO") on behalf of the Illinois EPA ("IEPA"), who is the delegated authority of the U.S. EPA, would on 10-6-09 file a six count Civil Complaint under Case No. 09-CH-475 in the 21st Judicial Circuit, Kankakee, Illinois entitled: **The People of the States of Illinois v. Dearborn Management, Inc., and State Bank of Herscher**. Here, Michael J. Pinski ("Pinski") owned and operated multiple Real Estate and Construction businesses. Two relevant businesses owned and operated by Pinski were: Dearborn Management, Inc ("Dearborn") and MJP Development ("MJP"). Pinski/Dearborn **"Owned"** the affected five storey facility located at 197 S. West Ave., Kankakee, Il. (hereafter - "Facility") and; Pinski/MJP **"Operated"** the facility.

In the year 2005, Pinski/MJP hired the Geocon Environmental Survey Company ("Geocon") to conduct a **"thorough inspection"** of his facility. Here, Geocon would provide Pinski/MJP with a 50-plus page phase one environmental report ("Report") that disclosed the presence, location, and quantity of **"Regulated"** Asbestos-Containing Material ("RACM") in the "facility". Said report would contain, inter alia, the applicable implementation plans to follow, i.e. **"NESHAP"** - Work Pracrice Regulations[14/] and **"OSHA"** - Workplace Regulations[16/] in the Construction Industry.

Duane O'Malley ("O'Malley"), owned and operated a licensed Fire Sprinkler Contracting business in the Construction Industry entitled: Origin Fire Protection, Inc. ("OFP").

On July 23, 2009, O'Malley/OFP entered into express written contract with Pinski/MJP as the "Operator" of the facility to correct certain fire code violations issued by the Kankakee Fire Prevention Bureau. Here, Captain Michael Casagrande would refer Pinski to O'Malley to obtain a bid on correcting the Code violations.

Unbeknown and without **"Notice"** to O'Malley or OFP, the IAGO on **10-5-09** in an email directed to attorney, Robert LeBeau, being Pinski/Dearborn legal counsel,

would advise counsel they were **"Dismissing"** O'Malley/OFP from the Six-Count Civil Complaint on the eve of "Filing" same with the 21st Judicial Circuit, Kankakee, IL. Here, Pinski would receive **"Notice"** of having violated or being in violation (past and present tense) of the requirements and prohibitions of an applicable implementation plan and **Permit** in accord with the **"Statutory"** enforcement under 42 U.S.C. § 7413(a) of the approved State Implementation Plan ("SIP") that enforces federal law through its stricter standards and earlier detection of hazardous air pollutants. Furthermore, Pinski was given the opportunity with his attorney to **"Confer"** with the Administrator in accord with 42 U.S.C. § 7413(a)(4) and, Pinski was provided a **"Consent Order"** having the statis of law to comply with the applicable implementation plan (NESHAP) and **Permit** pursuant 42 U.S.C. §7413(b). **(Appendix "K" @ Exhibit "A")**

B. "LATER" FEDERAL CRIMINAL "COMMON LAW" ENFORCEMENT: (10-CR-20042)

The **Later** federal **"Common Law"** criminal enforcement of the Clean Air Act ("CAA") under 42 U.S.C. §7413(c)(1) was **"Judicially Estopped"** by the **Earlier** inconsistent State Civil **"Statutory"** enforcement that had **"Dismissed"** O'Malley. However, the prosecutorial misconduct of concealing exculpatory evidence of the Earlier enforcement, suborn perjury, fraud upon the court, prepared circumstantial testimony by cooperating witnesses, Bribery of the government's key witness - Pinski, who the government was **"Aware"** of Pinski's involvement in other criminal activity at time, would all factor in to a **"fundamental miscarriage of justice"** to convict a yet otherwise **"Actually Innocent"** person under the legislative elements of the Statutory provisions of the CAA Statute, 42 U.S.C. §7413(c)(1).

Following O'Malley's federal "Common Law" criminal conviction, sentencing and imprisonment under 10-CR-20042, the government's key witness and codefendant, Pinski, would be sentenced six months later on 1-14-13. It was here that O'Malley would learn of Pinski's **"Extraordinary Cooperation Agreement"** pursuant to 5K1.1 and shortly therefrom obtain the newly discovered evidence that would include, inter alia, the

government's Earlier State Civil "Statutory" enforcement of the same CAA offense under 09-CH-475. This Earlier "Statutory" enforcement would provide Pinski, exclusively, with:

a) **"Notice"** of having violated or being in violation (past and present tense) of the requirements and prohibitions of an applicable implementation plan and **Permit.** 42 U.S.C. § 7413(a).

b) **"Consent Order"** having the statis of law to comply with the requirements and prohibitions of the applicable implementation plan and **Permit.** 42 U.S.C. 7413(b).

c) An opportunity to **"Confer"** with the Administrator on 9-30-09 pursuant 42 U.S.C. § 7413(a)(4).

Here, Pinski was required by the IEPA to comply with the "NESHAP" Work Practice Regulation under 40 CFR § 61.145, which requires "owners and Operators" of their affected facility to conduct a **"Thorough Inspection"** of the facility prior to the commencement of a Renovation or Demolition, §61.145(a). Although Pinski in the year 2005 did in fact have a "Thorough Inspection" of his facility and posessed the Geocon "Report" and thus, had full knowledge of the RACM in his facility, Pinski would fail to comply with the preempted **"OSHA"** - Workplace Regulations that required **"Warning Signs"** pursuant 29 CFR § 1926.1101(K)(4-6) or provide said "Report" to "Contractors bidding on work" in the Construction Industry pursuant § 1926.1101(K)(2)(i), (ii)(A).

On 2-19-13 under **(Doc. 172)**, defendant filed his bonafide Criminal Rule 33 (b)(1) motion for new trial with newly discovered evidence **"While the direct appeal (12-2771) remained pending"** and, several supplements thereto under **(Docs. 172, 183, 185, 186, 188 and 190)**, that raised five seperate and distinct claims.

Despite the insurmountable amount of ineffective assistance of counsel, in order for the prosecution to secure the Later Common Law criminal conviction, the prosecution's overt acts in furtherance in their response under **(Doc. 182)** would intentionally **"Invite Error"** for the court to invoke a **"Judge-Made Rule"**[1/] to rech-aracterize the Criminal Rule 33(b)(1) motion to be that of a **"Collateral"** §2255 by alleging defendant's claims to be classical claims that could only be addressed under a "Collateral" §2255. Here, the prosecution knew that a "Collateral" §2255

cannot be used as a substitute for a direct appeal, yet encouraged the court to rech-aracterize the criminal Rule 33(b)(1) motion knowing defendant's direct appeal remained pending under 12-2771. See **Johnson v. United States**, 2013 U.S. Dist. LEXIS 56785 (AUSA Eugene Miller, 4-20-13). The prosecutions intentional act of encouragement knew if accepted by the court would prevent these **[pieces]** of newly discovered evidence from being expanded into the record and consolidated with that of the direct appeal and, who would prevail through an affirmed **"Common Law"** conviction as **"Law of the Case".**

On 4-01-13, **(Doc. 188)** defendant would file his Reply to the government's Response and, on 6-17-13, retained Rule 33 counsel, Ms. Lisa Wood, had filed her appearance **(Doc. 194)** and "Motion to Stay" the proceedings **(Doc. 195).**

Furthermore, it would be the court, prosecution, and defendant's retained counsel, Ms. Lisa Wood, who all knew or should have known that in the Criminal context, Criminal Rule 37 is used primarily if not exclusively for newly discovered evidence motion under Criminal Rule 33(b)(1). **See** Notes of Advisory Committee. See also, **United States v. Cronic**, 466 U.S. 648, 667 n. 42 (1984).

Also, on 6-18-13, defendant's retained direct appeal attorney, Mr. Robert Ruth, would file a "Motion to Stay Appeal" under **(Doc. 37-2)** advising the Circuit Court that depending the outcome of the Criminal Rule 33(b)(1) motion, the issues on appeal would change **significantly (Doc. 37-2 at ¶6)(Exhibit "A")**

THE PLAIN ERROR. On 6-19-13 under **(Doc. 196)** the district court would accept the prosecution's **"Invited Error"** by invoking the **"Judge-Made Rule"**[1/] and enter a **in terrorem** ultimatum order that would recharacterize the "Criminal" Rule 33(b)(1) motion to be that of a "Collateral" §2255 if not withdrawn within 21-days. Here, the "Judge-Made Rule" would encroach and circumvent the Legislative intent of "Criminal Rule 37" in violation of the Seperation of Powers Clause and further, affected defendant's substantive rights as well as seriously affected the fairness, integrity, and public reputation of the Judicial proceedings causing a fundamental miscarriage of justice to a yet otherwise "actually innocent" person.

DELIBERATE SABOTAGE OR DEFICIENT PERFORMANCE? Only a evidentiary hearing can determine whether retained Rule 33(b)(1) counsel's performance of withdrawing the motion on 6-26-13 **(Doc. 197)** was a deliberate sabotage of the Criminal Rule 33 (b)(1) proceedings, or, "but for counsel's deficient failure to consult with defendant about an appeal that defendant would have yet otherwise timely appealed". However, counsel's performance was preceeded by the district court's **"Plain Error"** recharacterization through a **"Judge-Made Rule" (Doc. 196)** that was preceeded by the prosecution's **"Invited Error"** under **(Doc. 182)**, all of which ultimately resulted in a fundamental miscarriage of justice through an affirmed **"Law of the Case"** on direct appeal.

Furthermore, counsel's withdrawing of the motion only to forestall the criminal proceedings until the direct appeal affirmed the **"Common Law"** enforcement under the **"Law of the Case"** and then, **"Abandon"** both defendant and the Criminal Rule 33(b)(1) motion by withdrawing her appearance on 2-11-14 under **(Doc. 206)**. Thus, gives the strong appearance of sabotage and, both a **abandonment** and **failure to appeal** arises to a **"presumption of prejudice"**.

In **Roe v. Flores-Ortega**, 528 U.S. 470 (2000), the United States Supreme Court held that, as a matter of constitutional law, a defense attorney has a duty to consult with a client about an appeal either when a particular defendant reasonably demonstrated to the attorney that he was interested in appealing or when the circumstances are such that a rational defendant would want to appeal. The Court went on to hold that when an attorney violates this duty, a presumption of prejudice arises. The presumption of prejudice can also be found when an attorney outright abandons their client at a "critical stage" of the "criminal" proceedings such as when a direct appeal remains pending. **Cronic**, supra.

The Supreme Court in **Flores-Ortega**, supra, also held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed "with no further showing from the defendant of the merits of his underlying claims." **Id. at 484**.

In a recent United States Supreme Court ruling under Garza v. Idaho, 139 S.Ct 738 (2019), the Court was asked whether that rule applies even when the defendant has, in the course of pleading guilty, signed what is often called an "Appeal Waiver" that is, an agreement foregoing certain, but not all, possible appellate claims. The court held that the presumption of prejudice recognized in Flores-Ortega, supra, applies regardless of whether the defendant has signed an appeal waiver.

At bar, O'Malley exercised his constitutional rights to forego a Jury trial and base a defense upon the Legislative intent of the criminal **Statute** for which he was charged under **42 U.S.C. §7413(c)(1).** However, the prosecution had an ulterior motive in the prosecution of this **Later** criminal enforcement who would provide for a **"Extraordinary Cooperation Agreement"** pursuant **5k1.1** for codefendant, Pinski, while being fully **"aware"** of Pinski's ongoing criminal activity with the LaCost family involving Money Laundering, Unlawful Gambling machines, Conversion and, Tax evasion. Whereas, Pinski's "extraordinary cooperation agreement" would, inter alia, lead prosecution to the seizure of **$4.3 million dollars** in cash from the LaCost family. Moreso, as part of the agreement, Pinski would testify before a federal grand jury on 12-1-09 against the LaCost family.

Insofar as the **Earlier** State Civil **"Statutory"** enforcement under the same CAA offense, the prosecution would play fast and loose with the court by allowing Pinski, as both owner and operator of the facility, to falsely stipulate that he failed to conduct a **"thorough inspection"** of his facility in violation of the **NESHAP** work practice regulations, **40 CFR §61.145(a).** See Count two of the Six count Civil complaint under **09-CH-475.** Moreso, this falsehood would follow the preceeded stipulation under count one that alleged Pinski's closely held company of Dearborn Management, Inc (Dearborn) hired a fire sprinkler contractor in July of 2009 to correct the fire code violations regarding the facility, when in fact Pinski's company of MJP Development ("MJP") as **"Operator"** of the affected facility hired O'Malley/OFP in July of 2009. This exclusion was Material to the **Later** inconsistent federal criminal enforcement under the **"Common Law"** theory. It is these, inter alia,

false stipulations that would perpetrate a fraud upon the court(s) and lead to a fundamental miscarriage of justice.

At bar in the Later inconsistent criminal **Common Law** enforcement of the Clean Air Act ("CAA") offense under Case No. 10-CR-20042, O'Malley's **"STATUS"** was found to be that of a **"Operator of a Renovation Activity"** (See Jury Instruction No. 23, which was objected to by trial counsel) and, his knowledge of same was found by a **"Conscience Avoidance 'Ostrich' Jury Instruction"** No.___, that the Seventh Circuit Court of Appeals ("CA7") found that trial counsel **"Affirmatively failed to object"** to the instruction **"constituted waiver of the ability to raise this claim on appeal"**, citing, **United States v. Kirklin**, 727 F.3d 711, 716 (7th Cir. 2013) ... "Because O'Malley failed to object to the jury instruction[s] in question in the district court, we need not even reach the **'plain error'** review to which the district court's instructions would otherwise be subject: review that would nonetheless lead to the conclusion that the district court's instructions on scienter were proper."

Insofar as establishing that O'Malley was a **"Operator"**, the government would redefine the term "operator" from the government's **arbitrary** choice of enforceing the **"NESHAP - Work Practice"** regulations[14/] as opposed to the **"OSHA - Workplace"** regulations[16/]. Whereas, NESHAP requires the **Status** of "Owners or Operators" of their facility to conduct a **"Thorough Inspection"** of the facility **prior** to the commencement of a **"Renovation"**. See **40 C.F.R. § 61.145(a)**(of which O'Malley was not charged - however the **earlier** State Civil Statutory enforcement under 09-CH-475 at Count Six did include this predicate element).

The government never established in the later inconsistent criminal **"Common Law"** enforcement that the Pinski "Owned" and "Operated" facility was undergoing a **"Renovation"** as that term is defined pursuant the approved State Implementation Plan ("SIP") and **"Permit Program"**, that was earlier enforced under the State Civil **"Statutory"** provisions that required Pinski as both **"Owner"** and **"Operator"** of his affected facility to purchase and obtain the required **"Permit"** prior to the commencement of a **Renovation**. Here, Pinski was not once, but twice, required to purchase and obtain the "Permit"

when first hiring unlicensed and untrained persons, i.e. O'Malley and, second when hiring licensed and trained **Angel Abatement Company.** ("pieces" of the new evidence)

O'Malley stands on the proposition that the State's **earlier** Civil Statutory enforcement had **"Dismissed"** O'Malley knowing he was neither an "Owner" or "Operator" of Pinski's affected facility and, that Pinski failed to establish a **"Renovation"** through the required **"Permit Program"**. Furthermore, the earlier State Civil enforcement had enforced federal law through its approved SIP. This earlier enforcement had provided Pinski with: **"Notice"** of having violated or being in violation (Past and Present Tense) of an applicable implementation plan, and **"Permit"** pursuant to **42 U.S.C. §7413(a)**; opportunity to **"Confer"** with the Administrator pursuant **42 U.S.C. §7413(a)(4)**; and **"Order"**, having the Status of law to **Comply** with the Plan and Permit pursuant to **42 U.S.C. §7413(b)**. **None** of which O'Malley received in either the earlier or later enforcements. Accordingly, the CA7 Court would hold on direct that **"the 'Statutory' language of the Clean Air Act requires only general intent, especially in the context of asbestos"**, 739 F.3d at 1007. More importantly, Pinski's facility was in violation of multiple **"OSHA - Workplace"** regulations[16/], e.g. **"Warning Signs"**[17/] and **"disclosure of environmental report"**[18/].

It is true that the **"Statutory"** language of the Clean Air Act ("CAA") requires only "general intent" however, when the requisite "Statutory" elements are omitted, e.g. the **"Notice"; "Opportunity to confer";** and **"Order"** to comply with a Plan or Permit, the omission transgresses the "general intent" to that of a "Specific Intent" by a person with a heightened knowledge of asbestos or person having the **"Status"** of an **"Owner or Operator"** or the **"Status"** of the facility undergoing an established **"Renovation"**. Neither of which O'Malley sustained such a Status.

G. JUDICIAL ESTOPPEL

The [pieces] of new evidence under the bonafide Criminal Rule 33(b)(1) motion **(Docs. 172, et.,al)** would have further butressed the two raised claims on direct regarding **(A)** insufficiency of the evidence and, **(B)** district court's bias of defendant. First, the new evidence disclosed **(i)** the government's concealed Earlier inconsistent State Civil **"Statutory"** enforcement of the same offense that had dismissed defendant-O'Malley as being neither the **"Owner or Operator"** of the codefendant-Michael J. Pinski (Pinski) owned and operated affected facility. Moreso, this new evidence demonstrates the government's arbitrary and capricious Later federal criminal **"Common Law"** enforcement of the same offense by conducting a standardless sweep of the criminal statute and omission of requisit elements only to be replaced with a "conscience avoidance 'ostrich' jury instruction". Secondly, the district court's later expressed bias of defendant during codefendant-Pinski's sentencing on 1-14-13 by referring to O'Malley on several occassions as that of the **"Devil"**, which was several months following O'Malley's sentencing and incarceration on 7-25-12 and thus, new evidence as to the court's substantial bias.[7/]

The government's Later inconsistent federal criminal **"Common Law"** enforcement was **Judicially Estopped** by the government's Earlier State Civil **"Statutory"** enforcement of the same offense. When the doctrine of judicial estoppel is invoked against a party, the CA7 Court examines three factors: **"(i)** whether the party's positions in the two litigations are clearly inconsistent; **(ii)** whether the party successfully pursuaded a court to accept its earlier position; and **(iii)** whether the party would derive an unfair advantage if not judicially estopped." Wells v. Cokker, 707 F.3d 756, 760 (7th Cir. 2013). On at least one occassion, we have suggested that **State law, not federal Common law,** should apply when the judgement at issue was rendered by a State court. Janusz v. City of Chicago, 832 F.3d 770, 776 (7th Cir. 2016), see also Saecker v. Thorie, 234 F,3d 1010, 1014 (7th Cir. 2000).

Because the district court on remand from the **"Original Motion Appeal"** under **14-2711** would **recant** its position that allowed defendant to supplement his Rule 33 motion with the claims raised under **(Docs. 172, 183, 185, 186, 188, 190 and 265)** (**See Exhibits "P", "Q", "R" & "S"**) and, where the remand order of 8-17-16 (**Exhibit "K"**) expressing no opinion on the underlying claims and thus, did not **"Limit"** the claims defendant could raise, only to change that position at the eleventh hour by stating it **"may have been inartful"** when allowing defendant to supplement his motion with the additional claims (**See Exhibit "V" at pg. 17**) and, if defendant believed the remand order of 8-17-16 allowed him to supplement the motion, that defendant would have to take that up with the Seventh Circuit Court of Appeals ("CA7") (**See Exhibits "V" & "W"**). In the **"Successive Motion Appeal"** under **18-1617**, petitioner would raise this claim in his "Pro Se" brief in opposition of **"re-appointed"** appellate counsel's **"Anders Brief"**. However, Petitioners Pro Se claims fell upon deaf ears.

XI.

REASONS FOR GRANTING THE PETITION

Petitioner avers he presents compelling reasons for the granting of his petition for Writ of Certiorari as it concerns the operation of Criminal Statutes and Federal Rule of Criminal Procedure that has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's Supervisory Power. Here, the district court in the later **"Common Law"** enforcement would invoke a **"Judge-Made Rule"** at a **critical stage** of the **criminal** proceedings **"while the direct appeal remained pending"** that would encroach and circumvent the controlling provisions of **"Criminal Rule 37"** and thus, departed from the accepted and usual course of judicial proceedings in violation of the Seperation of Powers Clause, affecting petitioner's substantive rights; seriously affecting the fairness, integrity, and Public reputation of the judicial proceedings and, worked a fundamental miscarriage of justice to a yet otherwise Actually Innocent person under the **Statute** of conviction.

Furthermore, to exercise its Supervisory Power and bind the **"Successive Motion Appeal"** panel under **18-1617** in holding the prior **"Original Motion Appeal"** panel under **14-2711** ruling of 8-17-16 allowing petitioner to proceed unscathed under Criminal Rule 33 without limitation in raising substantial issues and presentation of all the **[pieces]** of newly discovered evidence. Here, petitioner contends that had Circuit Operating Rule 6(b) been followed and the **"Original Motion Appeal"** panel been reassigned to the **"Successive Motion Appeal"** under **18-1617**, the **General Remand"** order would have extracted the ambiguity as to what substantial issues and **[pieces]** of newly discovered evidence were allowed to be brought under the General Remand Order of 8-17-16 under **14-2711**. Including, the **"Recall of the Mandate"** of the direct appeal under **12-2771**.

Unfortunately for some unknown reason behind Honorable Chief Judge James E. Shadid order(s) following remand that allowed the supplementing of the Rule 33 motion **(See Exhibit's "P", "Q", "R", & "S")**, only to later claim he **"May have been Inartful"** in allowing the supplements **(See Exhibit "V" at pg. 17)** requires this Court's "Supervisory Power".

XII.

CONCLUSION

Wherefore Petitioner, Duane O'Malley, Pro Se, prays this Honorable Court grant him relief under Writ of Certiorari.

CERTIFICATION

Petitioner hereby certifies pursuant to 28 U.S.C. §1746 that the foregoing to be true and correct to the best of his knowledge and belief.

Duane O'Malley 8-20-19

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