

No. 19-7189

IN THE  
SUPREME COURT OF THE UNITED STATES

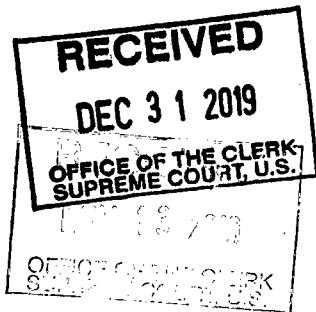
KEVIN DEWAYNE MOORE  
Petitioner

v

UNITED STATES OF AMERICA  
Respondent

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

PETITION FOR A WRIT OF CERTIORARI



QUESTIONS PRESENTED

- 1) Did the United States District Court (USDC) judge Reed Charles O'Connor abuse his discretion when he refused to recuse himself, in violation of the plain and concise language in 28 USC §§144 and/or 455, after Petitioner timely filed his recusal motion with supporting sworn and notarized affidavit?
- 2) Did the USDC judge show bias or prejudice, when the record shows his continued refusal to adjudicate the merits of the undenied facts and irrefuted documented evidence from the Department of Justice (DOJ); the Executive Office for United States Attorneys (EOUSA); the National Personal Records Center (NPRC), placed before the USDC judge-numerous times, that show that Petitioner's indictment(s) is/are invalid requiring dismissal with prejudice?
- 3) Was the assistant United States Attorney (AUSA) a duly appointed or authorized attorney for the government, during the relevant time period, when documented evidence shows she was not?; did the USDC judge show bias or prejudice by his continued refusal to adjudicate the merits of this claim-which he has never denied doing?
- 4) Did the AUSA violate Fed.R.Crim.P. (FRCrP) Rules 6(d)(1) and/or 7(c)(1)?; did the USDC judge show his bias or prejudice for his continued refusal to adjudicate the merits of this claim-which he has never denied doing?

PARTIES TO THE PROCEEDING

KEVIN DEWAYNE MOORE - Petitioner

UNITED STATES OF AMERICA - Respondent

REED CHARLES O'CONNOR - USDC judge

AISHA SALEEM - AUSA

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RELEVANT CONSTITUTIONAL ARTICLE STATEMENTS

Art II, §2, Cl 2:

"He shall have power..., shall appoint..., and ALL officers of the United States."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the denial by the United States Court of Appeals for the Fifth Circuit of Petitioner's Appeal of the United States District Court's denial of Petitioner's Motion to Recuse.

OPINIONS BELOW

- A) Documents from the Department of Justice (DOJ); Executive Office for United States Attorneys (EOUSA); National Personnel Records Center (NPRC), that have been presented to the United States District Court (USDC) judge. Presented as Appendix A.
- B) February 23, 2018 - USDC's denial of Petitioner's Motion to Recuse. Dkt 66. Presented as Appendix B.
- C) July 5, 2019 - United States Court of Appeals (USCA) for the Fifth Circuit's denial of Petitioner's Appeal. Presented as Appendix C.
- D) October 1, 2019 - USCA's denial of Petitioner's Petition for Panel Rehearing. Presented as Appendix D.

JURISDICTIONAL STATEMENT

The judgment of the USCA for the Fifth Circuit was entered on July 5, 2019. The USCA's denial of Petitioner's Fed.R.App.P. (FRAP) Rule 40, which tolled the time to file this Writ of Certiorari, was entered on October 1, 2019. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

REASONS FOR GRANTING THE WRIT

Petitioner, Kevin Moore (Mr Moore), timely filed his Motion to Recuse, with supporting sworn and notarized Affidavit. Fully complying with 28 USC §§144 and/or 455.

The USDC judge refused to recuse himself, thereby violating the plain and concise language in 28 USC §§144 and/or 455, and/or abusing his discretion, as well as the well established Fifth

Circuit and Supreme Court precedent, for recusal.

Petitioner filed his Recusal Motion to remove the USDC judge from any "current and future involvement" in his case. (Dkt 56, pgs 6-7). Petitioner has not and is not challenging the substance of any of the USDC judge's decisions or rulings. His recusal motion is based on the fact that the judge is continually refusing to adjudicate the merits of his claim. The judge has never denied this fact.

The factual claim presented and the USDC judge refuses to adjudicate, is that the assistant United States Attorney (AUSA), was not a duly appointed or authorized attorney for the government, during the relevant time period, thus, violating Fed.R.Crim.P. (FRCrP) Rules 6(d)(1) and 7(c)(1). Thereby, rendering Petitioner's indictment(s) invalid requiring dismissal with prejudice.

The USDC judge has never done anything more than to "restate" Petitioner's factual claim. The judge has never compelled the AUSA to defend herself-no statement-silence, she has not presented evidence that would overcome the evidence petitioner has presented.

Petitioner avers that the granting of this Writ will have immediate and far reaching implications beyond just petitioner. It will end the injustice that has fallen upon Petitioner as well as restore public confidence in the United States Court system.

Petitioner avers that the lower court(s) has/have departed from the normal or accepted course of judicial proceedings and their abuses or failures calls for the exercise of this Court's supervisory powers.

#### STATEMENT OF CASE

Petitioner, Kevin Moore (Mr Moore), filed his Motion to Recuse USDC judge Reed Charles O'Connor (O'Connor), because of O'Connor's continued refusal to adjudicate the merits of Mr Moore's factual claim, which shows that his indictment(s) is/are invalid requiring dismissal with prejudice.

The recusal motion is not based on the substance of any of O'Connor's rulings or decisions. It is based on the undenied fact that O'Connor has never adjudicated the merits of this claim. O'Connor has never denied this fact. Neither has the government,

in any of its responses/replies. O'Connor has never compelled the AUSA to defend herself-no statement, or to present evidence that would overcome the evidence Mr Moore has presented to O'Connor, and to this Court.

Mr Moore avers that he only wants O'Connor recused from any "current and future involvement" (Dkt 56, pgs 6-7), from the date the recusal motion was filed: October 26, 2015. (Dkt 56).

Thereby allowing another judge to be appointed/assigned to his case(s) to adjudicate the merits of the facts and evidence presented in: 1) case number: 3:07-CR-0125-O, dkt numbers: A) 187-filed on October 1, 2017; B) 189-filed on December 1, 2017; C) 191-filed on April 3, 2018; D) 192-filed on May 15, 2018; 2) case number: 3:11-CV-2540-O, dkt numbers: A) 58-filed on December 7, 2015; B) 61-filed on February 10, 2017.

Mr Moore avers that all of the above were filed **AFTER** the recusal motion was filed. These are what Mr Moore did not/does not want O'Connor involved in.

Because of Mr Moore's good faith attempts, to have O'Connor perform his judicial duty or obligation, O'Connor placed sanctions upon Mr Moore, instead of adjudicating the merits of this claim. **NO** finding of "bad faith" was found by O'Connor. (See 3:07-CR-0125-O, dkt numbers: 168, 172). These are the facts of the case. The record does not lie.

#### ARGUMENT

##### LEGAL STANDARD

"The denial of a motion to recuse is reviewed for abuse of discretion. MATASSARIN, 174 F 3d 549, 571 (5th Cir 1999)(citing *In Re BILLEDEAUX*, 972 F 2d 104, 106 (5th Cir 1992))." PATTERSON v MOBILE OIL CORP, 335 F 3d 476 (CA5 2003). "A judge abuses his discretion in denying recusal where a reasonable man, cognizant of the relevant circumstances surrounding [the] judge's failure to recuse, would harbor legitimate doubts about that judge's impartiality." ANRADE v CHOJNACKI, 338 F 3d 448, 454 (5th Cir 2003).

The Supreme Court's precedent sets forth an objective standard that **REQUIRES** recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." CAPERTON v MASSEY COAL CO, 556 US 868, 872 (2009)(quoting WITHROW v LARKIN,

I

A) Did O'Connor abuse his discretion when he refused to recuse himself, in violation of the plain and concise language in 28 USC §§144 and/or 455, after Petitioner timely filed his recusal motion, with supporting sworn and notarized affidavit?

Mr Moore avers that once he filed his motion to recuse, with the supporting affidavit, O'Connor had no other alternative except to recuse himself. Fifth Circuit and Supreme Court precedents are very clear and very well established on this. However, O'Connor violated the plain and concise language in 28 USC §§144 and/or 455, as well as both Fifth Circuit and Supreme Court precedents, when he refused to recuse himself. See: PHILLIPS v JOINT LEGISLATIVE COMM ON PERFORMANCE & EXPENDITURE REVIEW OF MISS, 637 F 2d 1014, 1019 (5th Cir 1981); REPUBLIC OF PANAMA v AM TABACCO CO, 217 F 3d 1478, 1491 (5th Cir 1997); RIPPO v BAKER, No 16-6316 (S Ct 3-6-17); AETNA LIFE INS CO v LAVOIE, 475 US 813, 825 (1986); WITHROW v LARKIN, 421 US 35, 47 (1975).

Mr Moore avers that the recusal motion was filed to remove O'Connor from any "current and future involvement," in his case(s), from the date the recusal motion was filed: October 26, 2015. (Dkt 56, pgs 6-7).

The recusal statute(s) were "never intended to enable a discontented litigant to oust a judge because of adverse rulings made,...but TO PREVENT HIS FUTURE ACTION IN A PENDING CASE." EX PARTE AMERICAN STEELE BARREL CO, 230 US 35, 44 (1913).

This is EXACTLY why Mr Moore filed his recusal motion-to prevent O'Connor's future involvement in his case(s). It was NOT based on O'Connor's denial of Mr Moore's 28 USC §2255, NOR was it based on any adverse rulings. IT IS BASED on O'Connor's continued refusal to adjudicate the merits of his factual claim.

II

B) Did O'Connor show bias or prejudice, when the record shows his continued refusal to adjudicate the merits of the undenied

facts and/or irrefuted documented evidence that shows petitioner's indictment(s) are invalid requiring dismissal with prejudice?

Mr Moore avers that he has presented facts-right out of the files and records of/in this case, that show that O'Connor has never adjudicated the merits of this claim, regarding Mr Moore's invalid indictment(s). Dkt 56, pgs 2-3; Appeal Brief (AB), pgs 4-6. Neither O'Connor or the government has ever denied this/these facts. These are the facts. The record does not lie.

Mr Moore avers that the documented evidence from the DOJ, the EOUSA and the NRPC, absolutely proves that the AUSA-Ms Aisha Saleem was NOT a duly appointed or authorized attorney for the government, during the relevant time period. Thereby, violating the plain and concise language in FRCrP Rules 6(d)(1) and 7(c)(1), thus rendering Mr Moore's indictment(s) invalid requiring dismissal with prejudice.

However, the record shows that O'Connor has continually refused to adjudicate the merits of this claim and has NEVER: i) mentioned the documented evidence presented; ii) compelled Saleem to issue a statement or present evidence-defend herself.

Mr Moore avers that the record is void of any judicial decisions or rulings on the merits of this claim. Therefore, the conclusory statements, by both O'Connor and the government, which attempts to claim that Mr Moore is basing his recusal motion on a decision or ruling, by O'Connor, cannot stand. No adjudication-no merits ruling to "base" his recusal motion on.

Mr Moore avers that the only logical reason for O'Connor's continued refusal to adjudicate this claim, is that he is bias or prejudice against Mr Moore, because he was convicted of a sex offense, and O'Connor does not want to grant relief to a sex offender.

Mr Moore avers that since the record is void of any adjudication of the merits of this claim, this Court should look at whether Mr Moore has complied with the language in 28 USC §§144 and/or 455; whether O'Connor's refusal to adjudicate this claim is a result of his bias or prejudice against Mr Moore. The record supports that O'Connor is bias or prejudice.

The goal of 28 USC §§144 and/or 455, is to "avoid even the appearance of impartiality." LILJEBERG v HEALTH SERVS ACQUISITION CORP,

486 US 847, 860 (1988). Thus, recusal may be required even though the judge is not actually partial. IN RE CONT'L AIRLINES CORP, 901 F 2d 1259, 1262 (5th Cir 1990).

### III

C) Was the assistant United States Attorney a duly appointed or authorized attorney for the government, during the relevant time period?; did the USDC judge show bias or prejudice by his continued refusal to adjudicate the merits of this factual claim?

Mr Moore avers that in order to be a duly appointed or authorized attorney for the government-a civil servant; an employee of the Executive Branch of the government; an employee of the Department of Justice, that person MUST or SHALL: i) be appointed in full compliance of the Appointment Clause, as required by U.S. Const Art II, §2, Cl 1, 2; ii) take an oath of office, as required by U.S. Const Art VI, Cl 3, 5 USC §3331, 28 USC §544.

Mr Moore avers that the documented evidence, presented in "Appendix A," clearly shows that the AUSA-Saleem, during the relevant time period,: i) was NOT appointed in compliance with U.S. Const ART II, §2, Cl 2; ii) has NOT taken an oath of office, as required by U.S. Const Art VI, Cl 3, 5 USC §3331, 28 USC §544. Furthermore, the evidence presented also shows that the DOJ has NO record of Saleem's claimed employment; NO record of Saleem participating in the Civil Servant Retirement Fund. (See Appendix A).

Mr Moore avers that Saleem was required to take an oath of office to faithfully execute her duties, 28 USC §544, and her failure to take this oath of office prevented her from being a proper representative of the government. FRCrP Rule 1(b). QUIEL v US, CV-16-01535-PHX-JAT (9th Cir 2011).

Mr Moore avers that the United States is NOT a party to Mr Moore's criminal proceeding, and the federal court had/has NO subject-matter jurisdiction, because the United States is not a party and because private citizens have no standing to claim alleged violations of federal criminal law. See: LINDA R S v RICHARD D, 410 US 614, 619 (1973); AB, pgs 5-6.

Furthermore, when a trial court rendered a judgment without subject-matter jurisdiction, a habeas court can provide relief. BOWEN v. JOHNSTON, 306 US 19, 23-24 (1939). The record shows that O'Connor REFUSED to do so, when this claim was presented to him, in Mr Moore's 28 USC §2255, and in subsequent motions.

There is good reason to think that those who have not sworn an oath cannot exercise significant authority, of the United States, see 14 OP ATTY GEN 406, 408 (1847)("[A] representative...does not become a member of the House until he takes the oath of office."). 15 OP ATTY GEN 280, 281 (1877)(similar). This Court certainly never treated a commission from the President as a wall ornement. See: e.g., MARBURY v MADISON, 5 US 137 (1803), noting the importance of an oath.

Mr Moore avers that not only has he provided proof that the AUSA was NOT a duly appointed or authorized attorney for the government, during the relevant time period, which the AUSA has never issued a statement or presented evidence contradicting/overcoming Mr Moore's facts/evidence, but the record shows O'Connor's bias or prejudice towards Mr Moore-in O'Connor's continued refusal to adjudicate the merits of this claim.

As a direct result of the AUSA's failure to comply with the U.S. Const and the United States Code (USC)-federal statutes/laws requirements, Mr Moore's indictment(s) are invalid requiring dismissal with prejudice; the USDC is/was without the subject-matter jurisdiction to entertain the prosecution of Mr Moore.

#### IV

- D) Did the assistant United States Attorney violate FRCrP Rules 6 (d)(1) and/or 7(c)(1)?; did the USDC judge show bias or prejudice for his continued refusal to adjudicate the merits of this claim?
  - 1) Fed.R.Crim.P. (FRCrP) Rule 6(d)(1) states: "While the grand jury is in session. The following persons may be present while the grand jury is in session: Attorney for the government."
  - 2) FRCrP Rule 7(c)(1) states: "The indictment...MUST be signed by an attorney for the government."

Mr Moore avers that the undenied facts and the irrefuted evidence, presented in Appendix A, clearly shows that the AUSA-Ms Aisha Saleem, was NOT a duly appointed or authorized attorney for the government, during the relevant time period, thereby, rendering Mr Moore's indictment(s) invalid requiring dismissal with prejudice.

1) Because of this fact, the AUSA was NOT authorized to be present while the grand jury was in session. The presence of an unauthorized person before the grand jury is grounds for quashing an indictment. *US v BRANIFF AIRWAYS*, 428 F Supp 579, 582-583 (W.D. Tex 1977); *LATHAM v US*, 226 F 420 (5th Cir 1915).

In establishing a *per se* rule for violation of the rule [6(d)(1)], the ~~Fifth~~ Circuit HELD:

"The right of a citizen to an investigation by a grand jury pursuant to the law of the land is invaded by the participation of an unauthorized person in such proceeding, be that participation great or small. It is not necessary that the participation should be corrupt, or that unfair means were used. If that person participating was unauthorized, it was unlawful."

The ~~Fifth~~ Circuit, in reaffirming this principle, in *US v ECHOLS*, 542 F 2d 948 (5th Cir 1976), HELD:

"By limiting those person who may be present before the grand jury, rule 6(d) serves the dual purpose of safeguarding the secrecy and privacy of the grand jury proceedings and of protecting the grand jurors from the possibility of undue influence or intimidation from unauthorized persons. To effectuate these purposes, courts generally have indicated that this rule should be strictly construed .... In *LATHAM*, this court held that the presence of an unauthorized person results in a *per se* invalidity of indictment. No showing of prejudice is required to quash an indictment secured with the presence of unauthorized persons in the grand jury room. 'Id., 951.'"

Mr Moore avers that not only was the AUSA an "unauthorized person in the grand jury room," she was the "unauthorized person" that secured Mr Moore's indictment(s). Therefore, according to the above ~~Fifth~~ Circuit precedent, his indictment(s) is/are invalid requiring dismissal with prejudice.

The above shows the USDC judge's failure to abide by ~~Fifth~~ Circuit precedent. Thereby, proving bias or prejudice.

"The requirements of rule 6(d) and 54, together with §544 of title 28 are clear and unequivocal and that means dismissal of the indictment." US v PIGNATIELLO, 582 F Supp 251, 254 (10th Cir 1984).

2) Mr Moore avers that the AUSA was NOT authorized to sign his indictment(s). However, she did sign it/them, in violation of the plain and concise language in FRCrP Rule 7(c)(1).

Since the documented evidence from the DOJ, EOUSA and the NPPC, presented in Appendix A, clearly proves that the AUSA does not have an Appointment Affidavit; has not taken an oath of office; the DOJ does not have any record of her claimed employment. (Appendix A).

Therefore, she is nothing more than a "private citizen," and is NOT authorized to bring criminal charges against Mr Moore. LINDA R S v RICHARD D, 410 US 614, 619 (1973); STROTHÉR v SHERROD, No 11-CV-273 Sec P (5th Cir 2011); NEU v TX BOARD OF PARDONS & PAROLES, No 4:09-CV-146-Y (5th Cir 2009); US v LI, No H-04-0130-01 (5th Cir 2007); FRCrP Rule 7(c)(1). See: AB, pgs 5-6).

Mr Moore avers that according to the above Fifth Circuit and/or Supreme Court precedent(s), his indictment(s) is/are invalid requiring dismissal with prejudice. Thereby, proving that the USDC judge has shown bias or prejudice, for his continued refusal to adjudicate the merits of this claim.

Art III demands that the courts rule on the merits of a defendant's claim. ARIZ CHRISTIAN TUITION ORG v WINN, 179 L Ed 2d 523, 531 (2011).

FRCrP Rule 7(c)(1) provides that the indictment(s) "SHALL be signed by an attorney for the government." Without the signature of an attorney for the government, there can be no criminal proceeding brought upon the indictment as the United States Court of Appeals (USCA) for the Fifth Circuit, in US v COX, 342 F 2d 167, 171-172 (CA5 1965), HELD: "As we conclude, the signature of the government attorney is necessary to the validity of the indictment." "Judges Tuttle, Jones, Brown and Wisdom join in the conclusion that the signature of the United States attorney is essential to the validity of an indictment."

Mr Moore avers that he has provided undenied facts and irrefuted documented evidence, proving that the AUSA, during the relevant time period, was NOT a duly appointed or authorized attorney for the

government. The record supports these facts. The record also shows that the USDC judge has: i) continually refused to adjudicate the merits of this claim; ii) never compelled the AUSA to defend herself, by issuing a statement or presenting evidence that would overcome the evidence Mr Moore has presented. Complete silence on this by the AUSA and the government and the DOJ.

The USDC judge and the government state that Mr Moore is challenging an adverse decision or ruling of the USDC judge. This is **NOT** true or even factual, as Mr Moore has stated he has not and is not challenging the substance of any ruling. See: (AB, pg 9; Reply Brief (RB), pgs 4-5.)

The government states that Mr Moore did not provide references to/in the record. This is also **NOT** true or factual, as Mr Moore did, in fact, provide numerous references to/in the record, that show that the USDC judge has continually refused to adjudicate the merits of this claim. The USDC judge has never denied this fact.

Mr Moore avers that within his recusal motion, dkt 56, his Appeal Brief, Reply Brief, and/or Petition for Panel Rehearing, he has provided facts, references to/in the record, and excerpts from the records, that conclusively show that the USDC judge has only ever "restated" Mr Moore's factual claim-NO merits ruling or decision. The USDC judge has never denied these facts. Thus showing his bias or prejudice towards Mr Moore.

To further show the bias or prejudice, Mr Moore filed his recusal motion on October 26, 2015, dkt 56. This sat on the USDC judge's desk/docket UNTIL THE SAME DAY Mr. Moore's Complaint of Judicial Misconduct was filed in the USCA for the Fifth Circuit; February 23, 2018. 2 YEARS and 4 MONTHS=28 MONTHS.

There was absolutely no reason why the USDC judge delayed in doing anything with that motion. By the USDC judge delaying UNTIL the Complaint was filed, shows that he intended to delay ruling on that recusal motion for an undetermined amount of additional time-day(s), Month(s), year(s), from when he denied it. This further shows his bias or prejudice towards Mr Moore.

"In any proceeding in which his partiality might reasonably be questioned." "In order to determine whether a court's impartiality is questioned, the objective inquiry is whether a well-informed,

thoughtful and objective observer would question the court's impartiality." REPUBLIC OF PANAMA v AM TABACCO CO, 217 F 3d 343, 345 (5th Cir 2000)(quoting TRUST CO v N.N.P., 104 F 3d 1478, 1491 (5th Cir 1997). Also see: AETNA LIFE INS CO, v LAVOIE, 475 US 813, 825 (1986); WITHROW v LARKIN, 421 US 35, 47 (1975); WILLIAMS v PENNSYLVANIA, 579 US \_\_\_, \_\_\_ (2016); RIPPO v BAKER, No 16-6316 (S Ct 3-6-17).

#### RELIEF REQUESTED

Mr Moore avers that he has proven all of the above, by the preponderence of the evidence, if not by absolute proof. Therefore, he is respectfully requesting that this Honorable Court: 1) dismiss his indictment(s), with prejudice; 2) order the lower court(s) to dismiss his indictment(s), with prejudice; or in the alternative: 3) recuse the USDC judge from his case(s); 4) order the lower court(s) to recuse the USDC judge; 5) grant the relief requested in his recusal motion and in his Appeal Brief and Reply Brief. As well as any and all other relief this Honorable Court deems need or necessary to correct the travisty or miscarriage of justice.

#### CONCLUSION

For any or all of the foregoing, Mr Moore prays that this Honorable Court grant the relief requested, or any and all other relief this Court deems needed or necessary.

Respectfully submitted

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