No. _____

In The

Supreme Court of the United States

LEO CHADWICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether A Judge' Statements Demonstrating Extreme Bias Against Pit Bull Owners as a Class And Advocating the Elimination of Anyone Involved in Dogfighting Requires Recusal On Constitutional Or Statutory Grounds in an Animal Fighting Case.

II. Whether a Trial Court's Failure to Enquire Whether the Defendant Read and Discussed A Pre-Sentence Report with his Attorney In Violation of Fed. R. Crim. P. 32(i)(1)(A) Requires Resentencing Under a Bright Line Rule When Prejudice to a Criminal Defendant Results.

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The order appealed from is the Judgment located at the CM/ECF Docket of the Fourth Circuit Case No. 17-4770, Docket Entry No. 119. (Appendix A).

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeals on December 12, 2019, in a direct appeal of a sentence imposed against Petitioner Leo Chadwick in the United States District Court for the Eastern District of North Carolina for criminal violations of the Animal Welfare Act, 7 U.S.C. § 2156(a)(1), 7 U.S.C. § 2156(b) and 18 U.S.C. §§ 49 and 371. Accordingly, this Court has jurisdiction over this petition for writ of certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

STATEMENT OF THE CASE

Procedural History

On October 5, 2016, a grand jury in the Eastern District of North Carolina returned a multiple count indictment charging Leo Chadwick and four other codefendants, Lewis Andrews (Andrews), Cedric Cook (Cook), Aaron Richardson (Richardson) and Ronnie Thompson (Thompson). Count 1 charged all five with violating the Animal Welfare Act between October 2015 and November 21, 2016, in

violation of 7 U.S.C. §§ 2156(a)(1), 2156(b) and 18 U.S.C. §§ 49 and 371. The remaining counts charged Andrews, Cook and Thompson with sponsoring and exhibiting animals in an animal fighting venture; all five defendants with attending an animal fighting venture; all defendants except Cook with aid and abet and/or possess train, transport and deliver animal in animal fighting venture. The indictment also charged Andrews with conspiracy to possess with intent to distribute controlled substances and aid and abet and distributing cocaine, cocaine base and heroin. J.A. 52-70.[1]

On January 24, 2017, the government filed a superseding indictment. Count 1 charged all five with violating the Animal Welfare Act as in the original indictment but changed the end date of the alleged conspiracy to December 6, 2016. The remaining superseding counts, statutes, dates and allegations appear in the table below.

Crime	**Statute**	**Appellant**	**Date & (Count #)**
Sponsor/exhibit animals in fighting venture	7 U.S.C § 2156(a)(1), 18 U.S.C. § 2	Andrews Cook Thompson	12/19/15 (2) 12/19/15 (2) 1/2/16 (4) 2/6/16 (6)
Attend Animal Fighting Venture	7 U.S.C § 2156(a)(2)(A)	Andrews Chadwick Cook Richardson Thompson	12/19/15 (3) 2/6/16 (8) 3/12/16 (11) 12/19/15 (3) 12/19/15 (3) 3/12/16 (11) 12/19/15 (3) 1/2/16 (5) 2/6/16 (8) 3/12/16 (11)

[1] Citations to the record in this Petition for Certiorari are to the Joint Appendix which was filed in the Fourth Circuit Court of Appeals below.

Crime	**Statute**	**Appellant**	**Date & (Count #)**
Possess, train & deliver animal in fighting venture	7 U.S.C § 2156(b), 18 U.S.C. § 2	Andrews Chadwick Cook Richardson Thompson	2/18/16 (9) 12/6/16 (18) 2/6/16 (7) 3/12/16 (10) 12/6/16 (19) 12/6/16 (21) 2/18/16 (9) 12/6/16 (20) 2/6/16 (7) 3/12/16 (10)
Conspiracy to possess with intent to distribute controlled substances	21 U.S.C. §§ 841 and 846	Andrews	Between Oct 2015 and 1/24/17 (12)
Distributing 28 grams or more of a mixture of cocaine and cocaine base	21 U.S.C. § 841(a) and 18 U.S.C. § 2	Andrews	10/27/15 (13)
Distributing a detectable amount of a mixture of cocaine and cocaine base	*Id.*	Andrews	10/29/15 (14)
Distributing a quantity of heroin	*Id.*	Andrews	11/25/15 (15)

See J.A. 71-92.

On May 30, 2017, pursuant to a written plea agreement, Mr. Chadwick entered a plea of guilty to counts One and Ten of the Superseding Indictment. Count One charged Conspiracy to Violate the Animal Welfare Act by 1), knowingly sponsoring and exhibiting an animal in an animal fighting venture, in and affecting interstate commerce, in violation of Title 7, United States Code, Section 2156(a)(1) and Title 18, United States Code, Section 49; and 2), knowingly buying, selling, delivering,

possessing, training, and transporting an animal for participation in an animal fighting venture, in and affecting interstate commerce, in violation of Title 7, United States Code, Section 2156(b) and Title 18, United States Code, Section 49. Count Ten charged Mr. Chadwick with possessing, training, transporting and delivering an animal in an animal fighting venture, in violation of 7 U.S.C. § 2156(b); and Aiding & Abetting the same in violation of 18 U.S.C. § 2. J.A. 71-92.

On December 1, 2017, Mr. Chadwick was sentenced to 60 months to run concurrent on the two counts he pled guilty to, three years supervised release, and a fine in the amount of $25,000 with a $200.00 special assessment.

On December 13, 2017, trial counsel for Mr. Chadwick filed a timely notice of appeal of Mr. Chadwick's sentence. Four of Mr. Chadwick's codefendants also filed notices of appeal, and the five appeals were consolidated on appeal.

After oral argument has conducted, the Fourth Circuit Court of Appeals entered a judgment and order on December 12, 2019 upholding the sentence of Mr. Chadwick and his four co-defendants. Mr. Chadwick requested that the undersigned file this petition for certiorari.

Facts

During the hearing of one of Mr. Chadwick's codefendants, Mr. Andrews, the trial judge asked his counsel "[Do] you want me to get out of the case and give it to one of the other judges?" J.A. 169. Defense counsel declined to request that the judge recuse himself. J.A. 169. After concluding that the district court would not go forward with the guilty plea at that time, the judge stated, "I'll take, see about re-

setting (the arraignment and plea hearing) or having someone else do it. I don't know which." J.A. 170. The following month, the district court accepted Andrews' guilty pleas, with no further mention of recusal or assignment to another judge. J.A. 172-83.

Each defendant subsequently entered a guilty plea to some or all of the counts of the superseding indictment, Cook on April 4, 2007 without a plea agreement, J.A. 92; Thompson and Chadwick on May 30, 2017, J.A. 35, 113; Richardson on June 7, 2017. J.A. 128.

Prior to their respective sentencing hearings, the government filed a Motion for Upward Departure and/or Variance as to most of the Defendants, including Mr. Chadwick. See J.A. 195-416 (Chadwick); J.A. 417-620 (Cook); J.A. 621-817 (Richardson); J.A. 1032 (Thompson).

On December 1, 2017, the district court sentenced defendants Chadwick, Cook and Richardson, in that order. J.A. 818-928 (first sentencing hearing). The district court made numerous comments at various times throughout the hearing illustrating its deep-seated antagonism towards not only dog fighting, but also the pit bull breed. In addition, the district court made a number of generic statements concerning the class of defendants or individuals who might be involved in this activity, referring to them categorically as mentally ill, barbaric, belonging in the stone age, and deserving of elimination from the world. Id.

For example, when Chadwick's counsel requested a sentence within the recommended guideline range, the district court immediately responded **"[e]ither**

the dogs have to be eliminated from the world or the people who fight the dogs or both, but there needs to be an intervention by the law and it's going to start here ..." (emphasis added). J.A. 892.

During this hearing, the government called James Keller, a Jacksonville Police Officer assigned to an FBI Safe Streets Task Force. J.A. 823. As Keller explained how objects in yards help investigators to locate dogfight training, the district court interrupted: "The first thing you look for is what kind of dog it is. You don't find Dachshunds and Poodles with someone having 250 of them and having them chained outside – I mean, the first indicator to you is that they're only involved with pit bulls, right?" J.A. 825. When Keller stated that other breeds also fight, but that in the Eastern District of North Carolina, the breed typically fighting is pit bulls, the court opined, "[W]hen some guy is walking down Main Street with a pit bull on the leash, your suspicions automatically get engaged." J.A. 826.

Keller continued to testify about fights attended by an informant and described the yards where dogs were seized. The district court asked: "Are the dogs violent or aggressive towards their owners?" J.A. 840. Keller explained the dogs were only aggressive toward other dogs, as a result of their breeding, but added that some also owners kept dogs aggressive toward humans as guard dogs, to protect their investment. J.A. 841.

Shortly thereafter and during Keller's testimony, the district court said: "We know from antidotes, (sic) not part of this case but part of the facts or folklore you can take into judicial notice, that if a child might wander into an unprotected area that

sometimes a child is mauled and killed by pit bulls." J.A. 842. Keller explained this aspect had more to do with size than aggression to humans. J.A. 842. The district court continued, "Okay. These drug dealers that have nothing but pit bulls hanging around their house, they're there to keep them aggressive toward humans, aren't they?" J.A. 842. After Keller agreed, the district court continued: "That is the whole idea. It's like you're protecting your stash by having pit bulls." J.A. 843.

Keller then told an anecdote based on the Michael Vick case:

> They have the pit bull and they like that for several different reasons.... after Michael Vick was sentenced for dog fighting, that's when they said it turned and was more of a thuggish sport, in his words, and that's when it kind of came to the forefront the drug dealers would have those dogs to protect the stash because they have the stronger jaws, they have the – where they bite and don't let go, kind of like a snapping turtle almost I describe it, but that is the reason behind why they have them. J.A. 843.

Keller continued to describe items seized from Chadwick's property. The prosecutor then showed Keller a photograph marked Sentencing Exhibit E, and Keller described it: "This is the ceremonial trophy like break stick or bite stick." When the prosecutor inquired about the writing on the stick, Keller replied:

> It is dated August 15, 2015. It reads, big dog – something I can't read – good luck. And then if you flip it over, it's signed by subjects we know to be dog fighters and people that are regarded in high statue (sic) of the dog fighting community, such as Tom Garner, Harry Hargrove, Brian Lupes and there is a couple other names on the back.

J.A. 846. The prosecutor showed the photograph to the district court, then asked Keller the significance of the date on the photograph. Keller stated, "Earlier that year Mr. Hargrove was released following his prison sentence to the BOP for dog fighting. J.A. 846. The prosecutor followed up, "So it appears that Mr. Chadwick at

some point got this break stick signed by Mr. Hargrove after he had been released from federal prison?" J.A. 847. Keller replied, "Yes."

The prosecutor then elicited evidence from Keller about Richardson's property search and seizure and played a video of one of the seized pit bulls attacking a stuffed animal replica of a Labrador. J.A. 858. The district court inquired: "So when you're in a city where people have dogs and don't have open fields to run in, and you take your nice pet to the dog park and your neighbor, the defendant, shows up with his pit bull, this is what happens?" J.A. 858. When the witness replied, "yes, sir," the prosecutor inquired, "Did you find it was common that these defendants would take their dogs to a neighborhood dog run?" J.A. 858. Keller tried to answer, "No. they typically keep all their dogs –" but the court interrupted: "[t]hey're hiding them because they're criminal dogs." J.A. 858.

After the government had presented its evidence, the district court turned to Chadwick's sentencing. When Chadwick's counsel pointed out in argument that he had owned a Collie as a child, the district court inquired, "[h]ow did he become perverted into becoming involved with this breed, that in all candor and rationality shouldn't exist?" J.A. 888. When counsel said Chadwick had been introduced to the breed in North Carolina 16 years earlier, the district court noted:

> From what we have seen, the breed, as it's abused, is barbaric, the activities are inhumane, they're lacking any empathy. It's an assault on the traditional value system of a person and their dog. It couldn't be more at war with civil society than virtually anything I can think of.

J.A. 888-89.

Chadwick's counsel attempted to distinguish his case from that of Harry Hargrove and others, pointing out that counsel was familiar with other cases where this judge had sentenced others for dog fighting. He asked the district court to sentence within the recommended guideline range. J.A. 891. The district court immediately responded, "[e]ither the dogs have to be eliminated from the world or the people who fight the dogs or both, but there needs to be an intervention by the law and it's going to start here ..." J.A. 892.

The government brought up Harry Hargrove again in response to Chadwick's sentencing argument:

> But what's most interesting to me here is that we found that ornamental break stick on his property that was signed by Harry Hargrove – who your Honor sentenced to 60 months – signed after Mr. Hargrove had been released from federal prison. J.A. 894.

During the government's argument concerning Chadwick's sentence, the district court could not contain itself from repeatedly expressing its opinion, not about Chadwick's individualized role in the offense, but about the trial court's view of dog fighting, the pit bull breed, and its assumptions and characterizations of people involved in dog fighting as a whole.

The district court first interrupted the government saying:

> It's the antithesis of having a relationship with your pet. You have, in nature, a fiduciary obligation to things and parts of creation that are inferior to man and this is just the most shocking abuse of that. It's barbaric. It's where people were, I'm assuming, in the stone age. And here we are in the 21st century in the richest and most educated and the most civil country in the world and in the darkness of night and the hidden corners, we have conduct like this and behavior like this. If the Government doesn't stand for anything, it stands for eradicating this sort of behavior.

J.A. 895.

A few moments later, the prosecutor stated pit bulls were bred for loyalty to their owners. "They fight for their owners to the death. And that's taking advantage of what is otherwise a good aspect of them. J.A. 895. The district court responded:

> There is no good aspect to them in my opinion**. I think the breed needs to be reduced and eliminated.** It's a danger to society. You need to look at an animal in a benign and secure way and you can't do that with this breed because of what people have done. People took God's work and distorted it by repeatedly breeding these dogs to kill.

J.A. 895-96 (emphasis added). The prosecutor attempted to respond: "I'm sure the ASPCA would disagree Your Honor but I think that dogs –" but the district court interrupted, "Then they're nearsighted if they disagree." J.A. 896. After the prosecutor reiterated that one seized dog had torn the head off a toddler doll in a behavioral test, the court stated:

> And these things happen. I mean occasionally unfortunately, you'll read in the press that some child wandered into the access of a pit bull and was killed. Murdered. And it would be murder on the head of the owner or the handler or the person that – who claimed to be with that dog. There is no doubt about it. It's no different than firing a gun.

J.A. 896.

Later, in the government's argument, the district court cut off the prosecutor in mid-sentence, interjecting: "Participation in this is a manifestation of some form of mental illness. If you treat animals in a barbaric and cruel and torturous way, then there is something wrong with you." J.A. 897.

The prosecutor then attempted to continue the argument but was not able to complete her first sentence before the district court again interjected: "Kids who torture dogs and cats when they're ten years old have a problem when they grow up and we see them in the criminal justice system." J.A. 897.

Without asking Chadwick whether he had read or understood the pre- sentence report, without making any specific findings of fact adopting the Pre-Sentence report, and without advising Chadwick of his right to appeal the sentence, the district court sentenced him to 60 months, varying upward from his 12 to 18 month guideline range. J.A. 818-898. In announcing this sentence, the district court stated:

> I'll give him a five-year sentence, not a ten-year sentence because that's what you asked for. And you probably are better able to defend that, which he's fortunate to get, but there is no question that the forecast of adequate punishment for what you did and what you stand for is at least the maximum statutory punishment. There is no doubt about that.

J.A. 898.

The district court then moved to Richardson. Again, the district court did not ask if Richardson had read or understood the PSR, did not make any specific findings of fact adopting the PSR or advise him of his appellate rights. J.A. 899-914. In response to Richardson's argument that the facts of this case are not more extraordinarily cruel than other dog fighting ventures, the district court made an observation not tethered to the facts in Richardson's case:

> It is inhumane and there is no societal tolerance for dog fighting and, quote (sic), the dog fighting industry and the undercurrent and the criminality of it. It isn't something that is benign. It's something that is malignant and it needs to be eradicated in society. Dog fighting is not an activity. That's not like, okay, I play tennis and sometimes I jog, but I also dog fight.

J.A. 903.

Richardson clarified his argument: while dog fighting is barbaric, his case did not contain some extraordinary cruelty beyond what normally accompanies a dog fighting venture. The district court stated:

> I think there is. I think – and I have listed it in the previous sentencing and I'll incorporate that by reference here; and I will tell you that managing somewhere between 12 and 40 or so dogs and having them chained and having them positioned where they can barely get – reach each other and maintain their hostility. And all of the things that were demonstrated here by the Government today show that this is an antisocial personality behavior, that it's dangerous, it's criminal, it's brutal, it lacks in any decency. Crimes are attacks on society, but some of them have sort of a perverted or warped rationale behind them like, okay, a person sells crack cocaine or they sell marijuana or they steal a car. I mean, usually there is a financial motive or reasoning involved in that. Or you could say, well, it was very bad for society, it was bad judgment. It was antisocial. But looking at it in a certain way you can say, well, maybe that's why he did it, but there is no reason or tolerance for this. There just isn't any. I mean, it's savage.

J.A. 903-04.

Richardson's counsel then continued with his argument and addressed factors such as his criminal history, his drug activities as a teenager, his high level of family support, and his unlikelihood to recidivate. J.A. 904-07. Richardson's counsel closed by saying "So at the end of the day, Your Honor, we ask you to recognize the shades and hues of criminal conduct that this statute encompasses. Punish him for what he did, but punish him fairly." J.A. 907-08.

In response, the district court remarked: "I'll consider more than a five-year sentence for this defendant based on his presentation." J.A. 908. After the government's argument, the district court varied upward to sentence Richardson to 96 months imprisonment. J.A. 914.

At no time during Richardson's sentencing hearing did the district court ask him whether he had read or understood the pre-sentence report (PSR) or advise him of his right to appeal his sentence. J.A. 899-914. The only specific finding the district

court made with respect to the PSR was that the criminal history stated therein "grossly under-represents his life of criminal behavior." J.A. 913. The district court also stated at the beginning of the hearing that the guideline range calculated by the PSR was 12 to 18 months. J.A. 899.

In the final sentencing hearing that afternoon, the district court interrupted Cook's counsel with the question: "Are my attitudes the outlier or are their attitudes the outlier?" J.A. 918. The district court then followed up:

> We live in 21st Century America. It's almost 2018. We're a civilized state and community and, I mean, do you think most people that you know and that I know would even grasp the shock and outrage of what goes on? I mean, if you went to the Rotary Club and did a program on this, they would all say, well, you're making that up.

J.A. 918. Immediately after, the district court stated:

> Do they not get it? Is there an element of society that is so out of tune with the value system in America, not only that we project and fantasize about in terms of a wonderful country, but that really exists. If you went to Walmart in Elizabeth City or Walmart in Tarboro, a big Walmart, and you took a survey, have you ever been in a dog fight, have you ever seen a dog fight, do you what a dog fight is, have you ever seen activities like this, did you know that there were 150 dogs seized in your community and euthanized because of this? I'm hoping that most people would look at you like you were crazy. What kind of a poll is this?

The district court sentenced Cook to 45 months, without ever inquiring of him whether he had read his PSR and consulted his attorney concerning it, without discussing a guidelines calculation of any type, and without advising Cook of his rights to appeal. J.A. 919-25.

The district court entered written judgments varying upward from the guidelines in each case. The judgments sentence Cook to 45 months imprisonment,

Chadwick to 60 months imprisonment and Richardson to 96 months imprisonment. J.A. 994, 986, 1002.

The district court sentenced Thompson and Andrews on December 22, 2017. The government again presented Keller to testify. Keller provided much of the same information he had provided in the first sentencing hearing, adding information relevant to Andrews drug charge. J.A. 1075-78. Keller also testified that some evidence came from social media, items Andrews had posted to his Facebook page. J.A. 1078.

Later in the hearing, the prosecutor showed behavior videos made by the ASPCA showing dogs owned by Andrews and Thompson showing aggressive behavior. J.A. 1091, 1101. After the second video, the district court asked Keller, "So when you're walking your poodle down Park Avenue and the defendant is walking his friendly Pit Bull down and your dogs cross, this is what happens?" J.A. 1101.

The government presented no evidence that appellants ever walked any of their dogs in dog parks, cities or the like. The evidence presented to the district court showed that each man kept his dogs securely in the rural areas where he lived. Andrews was sentenced to 108 months, the top of his guidelines range, and Thompson received 48 months, an upward variance.

On appeal, all of the defendants argued that the trial judge's statements evidenced a bias requiring him to recuse himself and that each of their sentences were procedurally and substantively unreasonable.

The Fourth Circuit considered the Defendants' recusal argument under both a constitutional and a statutory analyses.

The Fourth Circuit first held that the remarks of the trial judge did not rise to the level required for recusal under the Due Process Clause, in which "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Ex. A at 9 (quoting Rippo v. Baker, 137 S. Ct. 905, 907 (2017); Withrow v. Larkin, 421 U.S. 35, 47 (1975).

The Fourth Circuit then held that the trial judge's remarks did not require recusal under 28 U.S.C. §§ 455(a) and 455(b)(1) because, in the Fourth Circuit's opinion, they did not "display a deep-seated . . . antagonism that would make fair judgment impossible." Ex. A at 12.

The Fourth Circuit then summarily rejected Mr. Chadwicks' procedural and substantive arguments concerning his sentencing without specifically discussing several of them. See Ex. A at 15-18.

This petition follows.

REASONS CERTIORARI SHOULD BE GRANTED

I. The Court Should Grant Certiorari to Clarify that A Judge' Statements Demonstrating Extreme Bias Against Pit Bull Owners as a Class And Advocating the Elimination of Anyone Involved in Dogfighting Requires Recusal On Constitutional And Statutory Grounds in an Animal Fighting Case.

An objective standard requires recusal when the likelihood of bias on the part of the judge is "too high to be constitutionally tolerable." Williams v. Pennsylvania, 136 S. Ct. 1899, 1903 (2016) (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009)).

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law."

In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (quoting Tumey v. Ohio, 273 U.S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749 (1927)) (omission in original).

Under the Court's Due Process Clause precedents, recusal is required when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Rippo v. Baker, 137 S. Ct. 905, 907 (2017) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

The Fourth Circuit quoted the Court's statement that the determining factor for constitutionally mandated recusal is "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) (internal quotation marks omitted) (quoting Caperton, 556 U.S. at 881). An unconstitutional failure to recuse is structural error and thus not amenable to harmless-error review. Williams, 136 S. Ct. at 1909–10.

Seizing on the distinction between actual subjective judicial bias stated on the record and the question of unconstitutional bias, the Fourth Circuit stated:

> Simply put, an extraordinary situation is not before us. For one, no constitutional potential for bias exists. There was no actual or apparent financial interest between the parties and the sentencing judge; the sentencing judge had no financial stake in the outcomes of these cases. Nor did the judge participate in the accusatory process by, say, acting as a one-person grand jury. Cf. In re Murchison, 349 U.S. at 136. And, given the vivid photos, videos, and testimony about dogfighting, the judge's remarks are better characterized as "expressions of impatience, dissatisfaction, annoyance, and even anger," see Liteky v. United States, 510 U.S. 540, 555–56 (1994), rather than an indication that the judge is embroiled in a running, bitter controversy with Defendants, cf. Mayberry, 400 U.S. at 465. Further still, the average judge in a position such as this—that is, selected to preside over a multiple-defendant sentencing, exposed to perturbing evidence in the course of so presiding, yet having no connections to Defendants otherwise—is objectively likely to be neutral. All told, the sentencing judge's conduct below—injudicious though it was—did not amount to an extraordinary situation that constitutes a violation of due process.

Ex. A at 10-11.

Thus, the appellate court below downplayed the public display, nature, and pervasiveness of the trial judge's actual bias and prejudice which he openly and publicly demonstrated through repeated and sustained outbursts in the record. Under the Fourth Circuit's view of the law, no actual statements of bias and prejudice by a judicial officer against a category of people can ever rise to the level of unconstitutional bias. The Court should grant certiorari to affirmatively reject this proposition.

The Fourth Circuit ignored the fact that, as shown above, the trial judge's remarks were not limited to the specifics of this crime, or even the nature of the crime of dogfighting in and itself. Rather, they went beyond the actual crime charged to an entire class of pets and their owners, as well as advocating that individuals involved in dogfighting be "eliminated" from the world.

Thus, this is case, unlike the Court's prior decisions cited by the Fourth Circuit, where actual extreme bias against a class of individuals, i.e. pit bull owners, was shown by the trial judge, and this bias colored the entire proceedings. Owning a pit bull per se is not against federal law. Nevertheless, the trial judge, in the context of sentencing Chadwick and his codefendants for their specific crimes, felt it germane to the sentencing proceedings to discuss his views about a wider class of individuals, i.e. pit bull owners in general, who were all running around in society irresponsibly with "criminal dogs." The appellate court below sidestepped the question of the actual bias shown by the trial judge against a lawful class of individuals by analyzing this Court's precedents which did not address this specific situation.

Further, the statements made by the trial court in this case could literally be construed as advocating genocide against people involved with dog fighting. If these facts does not show actual unconstitutional bias, it is difficult to see what would. The Court should grant certioriari to clarify that actual statements of pervasive bias against a class of individuals can in fact require a judge to recuse himself under the due process clause of the Fifth Amendment.

Similarly, the Court should also grant certiorari to clarify that such prejudicial statements of bias against classes of individuals mandate recusal under 28 U.S.C. § 455. That statute requires that federal judges recuse themselves when their impartiality "might reasonably be questioned." It states in relevant part:

§ 455 Disqualification of justice, judge or magistrate [magistrate judge]

> (a) Any justice, judge or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned,
>
> (b) He shall also disqualify himself in the following circumstances:
>
> 1) Where he has a personal bias or prejudice concerning a party....

28 U.S.C. §§ 455(a); (b)(1).

"In 1974, Congress amended the Judicial Code 'to broaden and clarify the grounds for judicial disqualification.'" Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 849 (1988). Liljeberg affirmed the Fifth Circuit, which had held that a violation of § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a judge knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances.

In 1994, the Court clarified that a judge's bias or prejudice need not be from "extrajudicial" sources. Liteky v. United States, 510 U.S. 540 (1994). Justice Scalia, writing for the Court, explained that "[a] favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs forth from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment." Liteky at 551. Judicial remarks in the course of a trial or sentencing will show bias or partiality if "they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Id. at 555.

Indeed, "[t]he relevant consideration under § 455(a) is the appearance of partiality," and that a judge should be disqualified "if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." Id. at 558 (Kennedy, J, concurring).

In the case below, the Fourth Circuit attempted to distinguish this case from Liteky and Berger v. United States, 255 U.S. 22 (1921). Ex. A at 14. However, the facts in this case are arguably even more egregious than in Berger. An affidavit filed in that case seeking assignment of another judge asserted that the trial judge had said, "One must have a very judicial mind indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty." Berger at 28. The cases are extremely similar to each other because the prejudiced and biased statements of the trial judge in this case and Berger flowed from the generic disfavored category of people to the specific defendant or defendants at bar.

As a result, in Berger, the Court held that the trial judge in that case had no lawful right or power to preside as judge over defendants indicted for espionage, and should have recused himself.

The Fourth Court has also held that §455(a) is a catch-all provision of broader scope than the specific disqualification provisions of subsection (b). Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978). "The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances." Id. The Court's task, then is:

> [T]o determine whether a reasonable person would have had a reasonable basis for doubting the judge's impartiality. In the process of making such a determination, we cannot be influenced by our own faith in the integrity of a particular judge. Congress was concerned with the appearance of impropriety to the general public. Neither our faith nor the imaginings of one highly suspicious of others are relevant. The inquiry begins and ends with a determination whether a reasonable person would have had a reasonable basis for doubting the judge's impartiality.

Rice at 1117.

Here, a reasonable member of the public would easily have a reasonable basis for doubting the trial judge's impartiality. Indeed, the trial judge left no one in doubt about his strong feelings and bias against Pit Bull Terrier owners and the dogs themselves, a bias which he never separated from his analysis of the case before him. Early in the government's presentation, the trial court's own words revealed strong feelings and bias against those charged with dog fighting crimes. Almost immediately thereafter, the trial court went further and imputed bad conduct to all who own an American Pit Bull Terrier. "[W]hen some guy is walking down Main Street with a pit bull on the leash, your suspicions automatically get engaged." J.A. 826. Shortly thereafter, the district court cited "facts or folklore," that "if a child might wander into an unprotected area that sometimes a child is mauled and killed by pit bulls." J.A. 842.

Accordingly, the trial judge should have recused himself *sua sponte* if he held the strong opinions and prejudice that his statements indicate. His failure to do so violated the due process and statutory rights of Mr. Chadwick. The Court should grant certiorari to address the constitutional and statutory considerations for recusal

when a trial judge expresses such a bias against an otherwise law abiding class of citizens as well as the criminal activity of the individual defendants before him.

II. The Court Should Grant Certiorari To Address Under What Conditions a Violation of Fed. R. Crim. P. 32(i)(1)(A) Requires Resentencing.

Rule 32(i)(1)(A) requires that the sentencing court "must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report." Fed. R. Crim. P. 32(i)(1)(A). In the past, the Fourth Circuit has held that "[t]he district court must, without exception, determine that a defendant has had the opportunity to read and discuss the presentence investigation report with his counsel." United States v. Miller, 849 F.2d 896, 897–98 (4th Cir. 1988) (reasoning that "a bright-line approach is mandated by the clear language of Rule 32").

> Rule 52(b) permits an appellate court to recognize a "plain error that affects substantial rights," even if the claim of error was "not brought" to the district court's "attention." Lower courts, of course, must apply the Rule as this Court has interpreted it. And the cases that set forth our interpretation hold that an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Puckett v. United States, 556 U.S. 129, ——, 129 S. Ct. 1423, 1429, 173 L. Ed. 2d 266 (2009) (internal quotation marks omitted); see also United States v. Olano, 507 U.S. 725, 731–737, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); Johnson v. United States, 520 U.S. 461, 466–467, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997); United States v. Cotton, 535 U.S. 625, 631–632, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002).

U.S. v. Marcus, 560 U.S. 258, 262 (2010).

In this case, the district court committed multiple violations of Rule 32 of the Federal Rule of Criminal Procedure which constitute procedural error requiring that Chadwick's sentence be vacated and the case be remanded. See United States v. Wilkinson, 590 F.3d 259, 269 (4th Cir. 2010).

Rule 32(i)(1)(A) requires that the sentencing court "must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report." Fed. R. Crim. P. 32(i)(1)(A). That did not happen in this case for any of the defendants. See J.A. 818-928; 1072-1147.

"The district court must, without exception, determine that a defendant has had the opportunity to read and discuss the presentence investigation report with his counsel." United States v. Miller, 849 F.2d 896, 897–98 (4th Cir. 1988) (holding "a bright-line approach is mandated by the clear language of Rule 32").

This procedural breakdown greatly prejudiced Chadwick because the chief rationale used in the written order for his variance was that he had been involved in dog fighting for 35 years, and that the sentencing guidelines "do not differentiate between those offenders who engage in animal fighting once or twice and those who offend repeatedly over a long period of time." J.A. 1012. The district court based this finding on Chadwick's purported admission in the PSR that he had been fighting and training dogs for 35 years. J.A. 1012.

Chadwick reported to the undersigned what he had actually said to the federal agent was that he had owned dogs for 35 years, not that he had been fighting them. This was confirmed by the actual testimony of the agent at the sentencing hearing.

J.A. 875 (testifying that Chadwick told him he had been "raising dogs for 35 years – he didn't specify what kind of dog, but said he had been raising dogs for 35 years."). In his argument, Chadwick's attorney stated Chadwick had not gotten involved in raising pit bulls for the purpose of dog fighting until sometime after 2005. J.A. 889-90.

However, this did not come up in the sentencing hearing in a way that Chadwick was able to address it, even though his admission was clarified by the actual testimony of the agent. There was no written objection to this information submitted by Chadwick's trial counsel, despite his statements at the sentencing hearing. Because the district court did not comply with the key procedural requirement of Rule 32, highly prejudicial, inaccurate information was used to justify more than tripling Chadwick's sentence above the advisory guideline range.

At the time of sentencing, Chadwick was 63 years old with serious health issues. Among his health conditions, the PSR lists diabetes requiring insulin, problems with blood circulation, high blood pressure, neck and back issues that had required surgery, and Post Traumatic Stress Disorder. J.A. 1291. He has a high school education, with some vocational training. J.A. 1291-92. Prior to this case, he did not have experience with federal felony convictions and sentencing. The procedural requirement that the trial judge ensure that a defendant has actually read the pre-sentence report, discussed it with his lawyer, and thus had the opportunity object to information and correct it is essential to help prevent what happened to Chadwick, i.e. that he be sentenced in information that is inaccurate without the

ability to address it in a systematic way. Thus, the violation of Fed. R. Crim. P. 32(i)(1)(A) greatly prejudiced Chadwick, and the Court should remand the case for resentencing.

The trial court also violated Rule 32(i)(3) of the Federal Rules of Criminal Procedure, which allows it to accept any undisputed portion of the presentence report as a finding of fact, and requires the court to make a finding of fact for any disputed portion of the presentence report or other controverted matter. Fed. R. Crim. P. 32(i)(3). Here, the district court's written order makes several findings of fact with respect to Chadwick, but these findings were not made orally. In fact, there were no findings of fact explicitly stated in the sentencing transcript in Chadwick's case. And, as stated, the fact used to justify Chadwick's extreme variance was incorrect and contradicted by the testimony and argument presented.

The nature of both of these Rule 32 violations, put together, compounds their prejudice. Had the district court followed Rule 32, it would have discovered the extent and nature of Mr. Chadwick's (lack of) interaction with the facts in the Pre-Sentence Report. Fed. R. Crim. P. 32(i)(3) is premised on, among other things, the requirement under Fed. R. Crim. P. 32(i)(1)(A) that the district court confirm that a defendant has read the Pre-Sentence Report, actually discussed it with his counsel, and that any factual or legal objections to it are resolved in an orderly judicial process. Because neither of these things happened in Chadwick's case, his sentence was not procedurally reasonable.

Mr. Chadwick received a 60 month sentence, more than triple his Advisory Guideline range of 12 to 18 months. And the trial court made an erroneous finding in its written order, not mentioned in the sentence hearing, which it then treated as a very significant factor to justify the length of the extreme upward variance. J.A. 1012. Mr. Chadwick's counsel did not lodge any objections to the PSR on his behalf. J.A. 1297.

As a result, under the plain error standard, Mr. Chadwick has demonstrated error. Under the Fourth Court's "bright line rule" the error is plain. Cf. United States v. Miller, 849 F.2d 896, 897–98 (4th Cir. 1988); United States v. Lockhart, 58 F.3d 86, 88 (4th Cir. 1995). Mr. Chadwick has also been prejudiced by that error in his substantial rights.

Chadwick need only show a reasonable probability of a different outcome but for the error. See United States v. Dominguez Benitez, 542 U.S. 74, 83 & n.9 (2004) (to establish an effect on substantial rights for purposes of plain-error review, defendant must normally show a reasonable probability that, but for the error, the outcome of the proceeding would have been different). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that the defendant prove by a preponderance of the evidence that but for error things would have been different." Id. at 83 n.9 (citation omitted). Cf. United States v. Cole, 27 F.3d 996 (4th Cir. 1994) (district court's violation of defendant's allocution rights plain error).

Here, the incorrect fact was the key fact relied upon to justify the variance in the subsequent written order! J.A. 1012. Thus, to the extent that the appellate courts' review is *de novo* for procedural error, that error has occurred. To the extent that the plain error standard may be applicable, that error has occurred, it is plain, and it has prejudiced Mr. Chadwick's substantive rights.

Rule 32(a)(1)(A) has great structural importance to the sentencing process. The Court should grant certiorari to clarify that it deserves a "bright-line approach" to its enforcement, due to its very nature.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that the Court grant his petition for writ of certiorari to the Fourth Circuit Court of Appeals, and grant whatsoever other relief may be just and proper.

Respectfully submitted this the 10th day of March, 2020.

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