19-8031

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

In re: James Allen Gregg — PETITIONER
(Your Name)

vs.

_____ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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

PETITION FOR WRIT OF CERTIORARI

JAMES ALLEN GREGG
(Your Name)
12699-073
Federal Medical Center
PMB-4000
(Address)

Rochester, MN 55903-4000
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

Is a defendant's due process rights adequetly protected when a district judge rejects a magistrate judge's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; whithout seeing and hearing the defendant and witnesses whose credibility is in question?

LIST OF PARTIES

■ All parties appear in the caption of the case on the cover page.

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

RELATED CASES

- United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

■ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix C to the petition and is

■ reported at 683 F.3d 941; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
■ is unpublished. but available at 2010 WL 3003235.

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

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

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[ ] is unpublished.

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

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[ ] is unpublished.

JURISDICTION

■ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was December 18, 2019.

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

■ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 21, 2020, and a copy of the order denying rehearing appears at Appendix F.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1): and/or 28 U.S.C. §1651(a).

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

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution, Rule 404(b), and statutes 28 U.S.C. §455(A), 28 U.S.C. §636(b)(1), 28 U.S.C. §1254(1), and 28 U.S.C. §1651(a).

STATEMENT OF THE CASE

1. Gregg was charged with one count of first-degree murder on an Indian Reservation, 18 U.S.C §1111 and 1152, and one count of discharging a firearm during and in relation to that crime, ID. § 924(c).

Gregg never denied shooting Fallis. The central issue at trial was instead his state of mind at the time he did so. Gregg took the stand and testified that he acted in self-defence; caught in surprise by Fallis's renewed assault and reacting instantaneously under conditions of great stress also brought on by his service in war, he felt he had no choice but to shoot because Fallis was seconds away from grabbing a gun from his own car and shooting at Gregg. The jury was forced, however, to evaluate this testimony without hearing Gregg's explanation of crucial background information, because Gregg's trial counsel misunderstood a basic evidentiary rule.

Gregg was thus put in the position of taking the stand and telling the jury that he acted out of a genuine fear for his life, without being able to explain why.

Even without the explanation, the jury rejected the government's theory of premeditated murder. It found Gregg guilty of last minute addition of second degree murder and its ammended firearms offense. Gregg was sentenced to 135 months for count one and the mandatory consecutive term of 120 months for count two, for a total sentence of more than 21 years.

2. On direct appeal, the court of appeals affirmed. The court agreed with Gregg that evidence of relevant prior acts of violence and aggression by Fallis, then known to Gregg at the time of the shooting, would have been admissible under rule 404(b) to show Gregg's state of mind and to present his claim of self-defense to the jury.

3. Gregg moved to vacate his conviction under 28 U.S.C. §2255, arguing that trial council provided inefective assistance by failing to proffer evidence of Gregg's understanding of Fallis's prior aggressive, violent acts to support Gregg's claim of self-defense. The motion was referred to a magistrate judge to hold an evidentiary hearing.

a) At an evidentiary hearing in May 2009, Gregg had his first chance to testify to what he knew and had heard at the time of the shooting, about Fallis's history of violent confrontations. Gregg's account was supported by testimony from others substantiating that history.

After hearing Gregg's testimony, the magistrate recommended that the district court order a new trial. His recommendation reviews in detail both the testimony at trial and that presented at the evidentiary hearing. The magistrate concluded that evidence of Gregg's knowledge of Fallis's character would have been directly probative of Gregg's state of mind at the time of the shooting and would not have been unduly prejudicial, confusing, collateral, or cumulative.

b) The distric court rejected the magistrate's recommendation and denied the motion to vacate. Without itself hearing from Gregg or any other witness, the court deemed Gregg's testimony not credible because it believed it was inconsistent with what the judge recalled at trial, undercutting Gregg's claim of self-defense.

The court granted Gregg a certificate of appealability on the question of prejudice.

c) A divided panel of the court of appeals affirmed. Judge Bye dissented. Gregg petitioned for rehearing en banc. Four Judges dissented from the denial of Gregg's petition for rehearing en banc.

d) Gregg has long sought justice and found hope in filing his writ for mandamus in the Eighth Circuit Court of Appeals. He did not file in his sentencing district, as the judge has reasonably shown a lack of impartiality and, therefore, an appearance of bias towards defendant.

This writ was received by the court on November 26, 2019. On December 18, 2019 the Circuit Judges Benton, Kelly and Kobes considered the petition and denied relief. Gregg petitioned for rehearing en banc and by panel, and both denied on January 21, 2020.

REASONS FOR GRANTING THE PETITION

There was never any question that James Gregg shot James Fallis. The question for the jury was, why? Gregg took the stand, subjecting himself to cross-examination, to tell the jury that he acted out of a genuine fear for his life. Because of an inexcusable lapse by his trial lawyer, he was not allowed to explain the criticle basis for his immediate, overwhelming fear and reaction to Fallis's threat. Even based on the truncated version of Gregg's testimony that it was allowed to hear, the jury rejected the government's charge of premeditated murder.

The magistrate judge, appointed on appeal, was the only judicial officer who has ever witnessed Gregg testify on this point. He recognized Gregg's personal account of what he knew or understood, at the time of the shooting, about Fallis's prior actions was "crucial to [Gregg's] defence." App. E37. The magistrate summarized how Gregg's testimony showed "knowledge of prior instances in which James Fallis's perception that if he had been wronged by a person, unchecked, could evolve into an irrational, violent rage against the person whom James Fallis believed had committed the wrong." App. E35. After personally hearing the testimony, he concluded that there was a "reasonable probability" that if the jury had been allowed to hear it, "the result of [Gregg's] trial would have been different. App. E38.

The district judge, Charles B. Kornmann denied the magistrates finding of credibility and based his own opinions on what he recalled from trial. The overriding error in Judge Kornmanns opinion is the failure to give any weight to the direct testimony by Gregg and the other witnesses given in the evidentiary hearing.

The judge, instead voiced his personal bias and prejudice against Gregg, questioning his impartiality within the meaning of 28 U.S.C. §455(a). Judge Kornmann's opinion was "an ipse dixit" consisting of "naugh but speculation, conjecture and accusations." The dismissive tone of Judge Kornmann's opinion misses the entire thrust of the magistrates findings, shows personal bias and prejudice, and foregoes due process.

The judge had no basis for reevaluating, on a cold record, the magistrate judges determination that if the jury had heard Gregg's testimony it might well have reached a different verdict. In United States v. Raddatz, 447 U.S. 667, 680-681 (1980) -(cautioning against a district judge "substitut[ing] the judge's own appraisal" of credibility for that of a magistrate judge, who actually heard the testimony in question). Just in this context alone, the Eighth Circuit has avoided the "troubling" question posed by the Supreme Court in their footnote.

Not only is the prospect troubling, but there are many other respects in which the judges account of the case in hand is incorrect and misleading. For example, the district judge asserts that Fallis "had no reputation for using firearms" and there was "no evidence" that he "even carried a firearm." As the court well knows, that is not correct, (Fallis's brother testified at trial that James Fallis owned a gun, borrowed guns from his father and brother, and used a shotgun for hunting.)-[see Trial Transcipts] Judge Kornmann further states "I am very familiar with the trial record," and that "Gregg apparently testified at the evidentiary hearing before the magistrate judge, inter alia, that he 'never went actively seeking for him'...

...The testimony at trial was that Gregg did specifically go looking for Mr. Fallis... and he should have left in his running vehicle... parked in a driveway with plenty of room to retreat." App. D 17 . This accusation has no evidence and Trial Transcripts prove otherwise. K.R.W.'s testimony at trial states: (TT81)

> "James [Fallis] ripped his coat off when he came out of the trailer" (TT99). K.R.W. "heard James [Fallis] and the person in the truck [Gregg] arguing with each other." (TT82) "Only James Fallis's voice was raised."(Id) "James Fallis tried to open the driver's side door of the pickup." (Id) "The door opened, then shut." (TT86) K.R.T. came out of the trailer and stood in front of the pickup."(TT86) "When James Fallis got inside the trailer, the pickup backed up and went between the trailers and left the same way he come in." (TT90-92)

Did Gregg really go to Fallis as the judge claimed, or did Fallis go to Gregg? D.A.'s testimony also stated that Fallis initiated the aggression, and that;

> "the pickup had trouble leaving first going forward, then it backed up and left the same way it came in."(TT120)

Judge Kornmann opinioned otherwise and believed Gregg "should have left in his running vehicle." App. D 17. K.R.T.'s testimony at trial also identified Fallis as initiating the confrontation, and that;

> "The vehicle was not running." (TT141)

Judge Kornmann ruled on beliefs and not facts. Not only was he prejudiced against Gregg, but his statements about Gregg's character were biased:

> "I was surprised that the jury found Mr. Gregg not guilty of premeditated murder. They gave him a jury pardon in their finding of not guilty." App. D 16 .

And that in this case, Gregg;

> "...could not be defended in the absence of a jury pardon or a successful claim of insanity." App. D 17 "The fact is that there was no logical or possibly believable evidence of self-defense." App. D 17 .

Here, the district judge reduced the magistrate's findings of facts as "[flying] in the face of all common sense." and "absolute nonsense." App. D 17. The district judge instead adopted his own erroneous beliefs and manifested injustice. Unchecked by the Supreme Court, this process undoubtedly continue in this Circuit.

Judge Kornmann might harbor extrajudicial reasons for his lack of impartiality. Distraught after his conviction, James Allen Gregg wrote in his legal notebook his suicide note. Naming Judge Kornman and the jury for what he honestly considered unjustice, Gregg wrote that he would rather die than live in Kornmann's world where one is to die rather than defend himself, and that he took the stand, yet was kept from testifying why he was acting in self-defence. On June 4, believing it was July 4, Gregg overdosed on the medication he had stashed, to die on the same day Fallis died. Only Gregg was found in the morning unconscious and not breathing. In a coma and with a collapsed lung filled with fluid, Gregg was flown to St. Alexis Hospital in North Dakota. The County Sheriff found Gregg's suicide note in his legalpad, then faxed and sent the whole legal notebook to Judge Kornmann's office.

Many issues present themselves in this case. The main accusation is the denial of the Due Process Clause, requiring that the district court conduct its own evidentiary hearing before rejecting the magistrate judge's credibility findings as to the defences testimony, and other witnesses testimony during evidenciary hearing held before the magistrate. The best evidence was the defendants own testimony, and the district judge erred by declining the opportunity to observe the defendants demeanor and testimony, before rejecting the magistrate judge's critical credibility finding on the defendant's testimony. There is no Supreme Court Precedent set in this regard, only its footnote.

Taking the Supreme Court's various hints, the First, Second, Third, Fifth, and Eleventh Circuits have all held that a district judge may not reject the credibility finding of a magistrate judge without holding a new evidentiary hearing. See Louis v. Blackburn, 630 F.2d 1105, 1109 (5th Cir.1980) ("[I]n a situation involving the constitutional rights of a criminal defendant, we hold that the district judge should not enter an order inconsistent with the credibility choices made by the magistrate without personally hearing the live testimony of the witnesses whose testimony is determinative."; Hill v. Beyer, 62 F.3d 474, 482 (3rd Cir.1995) ("A district court may not reject a finding of fact by a magistrate judge without an evidentiary hearing, where the finding is based on the credibility of a witness testifying before the magistrate judge and the finding is dispositive of an application for post-conviction relief involving the constitutional rights of a criminal defendant."); Cullen v. United States, 194 F.3d 401, 407 (2nd Cir. 1999) ("[I]t appears that a district judge should normally not reject a proposed finding of magistrate judge that rests on a credibility finding without having the witness testify before the judge."); United States v. Hernandez-Rodriguez, 443 F.3d 138, 148 (1st Cir.2006) ("[W]e join our sister circuits when we find that, absent special circumstances, a district judge may not reject the credibility determination of a magistrate judge without first hearing the testimony that was the basis for that determination.") United States v. Cofield, 272 F.3d 1303, 1306 (11th Cir.2001) ("[G]enerally a district court must rehear the disputed testimony before rejecting a magistrate judge's credibility determinations.")

The Eighth Circuit is still holding out on this decision, not willing to take any cases that may lead them to make a ruling.

The Ninth Circuit has made an in-depth ruling on the matter in Johnoson v. Finn, 665 F.3d 1063 (9th Cir.2011);

> "Under 28 U.S.C.§636(b)(1), when a district judge delegates to a magistrate judge the task of conducting an evidentiary hearing concerning a habeas petition, the district judge is to 'make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made.' Id §636(b)(1)(C). In two cases concerning magistrate judge rulings on motions to suppress, however, we have held as a matter of constitutional due process ' that a district court must conduct its own evidentiary hearing before rejecting a magistrate judge's credibility findings.' United States v. Ridgway, 300 F.3d 1153, 1154 (9th Cir.2002). In United States v. Bergera, 512 F.2d 391 (9th Cir.1975), required the 'district court to rehear the evidence if it decides not to follow the recommendations of the magistrate insure that any decision on the facts will be the result of first-hand observation of witnesses and evidence." Id at 393.

In re: Gregg presents the Supreme Court with an important issue that the court was unable to reach in United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); This court held in Raddatz that a district judge could accept a magistrate judge's determination of credibility without holding a new evidentiary hearing, while expressing doubt as to whether a district judge could reject a magistrate judge's finding in these circumstances.

The Court stated in a footnote that it found the latter prospect troubling:

> "We assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach." Id at 681 N.7.

In re: Gregg is thus asking you to reach this serious question here and to exercise this Court's supervisory power in setting an important standard that needs to be set. The Eighth Circuit has not ruled on this matter, and refuses to provide relief.

The Due Process Clause forbids both partiality in fact and the appearance of partiality by a judge. A fair trial in a fair tribunal is a basic requirement of due process.

For the foregoing reasons, Petitioner Gregg requests that this Court grant this Petition for a Writ of Certiorari/ Writ of mandamus disqualifying District Judge Charles B. Kornmann, District of Central Division from further participation in these proceedings and ordering reassignment of this case to another judge to permit discovery and hold an evidentiary hearing regarding the factual bases for issues raise in the petitioner's motion for a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES ALLEN GREGG

Date: February 20, 2020