No.: 19-8275

IN THE UNITED STATES

SUPREME COURT

ROBERT LEE SWINTON JR.

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

ORIGINAL

On petition for a Writ of Certiorari to

THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Robert L. Swinton Jr. PRO SE

Seneca County Jail

6150 State Route 96

Romulus, N.Y. 14541

QUESTIONS PRESENTED FOR REVIEW

The petitioner spent 57 months in pretrial detention due to an erroneous Government applied career offender enhancement designation until trial; the person actually alleged in trial to have possessed the drugs in the petitioner's guilty verdict in count two died after the petitioner's speedy trial requests; 69 days were taken as "complex" to rule on the final remaining suppression motion that was previously denied under the "good faith" doctrine; 51 days were excluded as "automatic" motion practice for unrelated Government continuances when there were no motions pending and all of these timeframes were credited to the petitioner for speedy trial purposes.

(1) Was there error in the U.S. Sixth Amendment Speedy Trial and Speedy Trial Act assessment of this case due to an unverified prior conviction, structural error and misapplication of Speedy Trial laws and precedents that expands the scope of the STA ?

The african american petitioner only had one cooperating witness against him in trial of caucasian decent, and her recorded false statement to The NYS Troopers requested by the petitioner was destroyed before trial; and while similarly situated as the petitioner, this witness engaged in two more separate distribution crimes of drugs and firearms on each offense after the petitioner's case, named in a W.D.N.Y. complaint and yet not charged, and was not cooperating with authorities on either of the later cases. Prejudicial evidence was admitted and Swinton's sentencing yielded a different outcome than precedents of other defendants as well.

(2) Was this selective prosecution and was the petitioner denied due process of law in trial and sentencing ?

LIST OF PARTIES

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

RELATED CASES

United States v. Swinton, No.: 18-101cr, U.S. Second Circuit Court of Appeals, Judgment entered December 23, 2019, Mandate on February 19, 2020

United States v. Swinton, No.: 15-cr-6055-EAW-MWP (W.D.N.Y.)

Swinton v. Florida, No.: 19-7625, United States Supreme Court (Counsel Appointed in 15-cr-6055 (W.D.N.Y.) for State of Florida Collateral Review in 2014)

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CERTIFICATE OF COMPLIANCE

This document has been prepared in accordance with U.S. Supreme Court Rules 33.2 and 34, 14 font, computer generated and double spaced.

OPINIONS BELOW

This case is from the Federal Courts, and the Decision and Order appealed from is the opinion of The United States Court of Appeals for The Second Circuit on December 23, 2019 and Mandate issued February 19, 2020, which is reported at 2019 U.S. App. LEXIS 38141 and appears at APPENDIX A.

The Western District of New York Decision and Order for April 24, 2017, which was reported at 251 F.Supp.3d 54 (W.D.N.Y.) and appears at APPENDIX C. The District Court Judgment in this case appears at APPENDIX B.

The Western District of New York Magistrate Judge issued a Second Report and Recommendation on October 21, 2016, reported at 2016 U.S. Dist. LEXIS 146847 (W.D.N.Y.) and appears at APPENDIX D.

The Western District of New York Magistrate Judge issue a First Report and Recommendation on February 10, 2016, reported at 2016 U.S. Dist. LEXIS 16883 (W.D.N.Y.), and appears at APPENDIX E.

The United States Second Circuit Court of Appeals denied petitioner's petition for Rehearing/Rehearing En Banc on February 12, 2020, without opinion and appears at APPENDIX F.

JURISDICTION

The U.S. Court of Appeals decided this case on December 23, 2019, a timely petition for rehearing was denied on February 12, 2020, in which denial order appears at APPENDIX F and the Mandate was issued on February 19, 2020.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. First Amendment, stating:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Fifth Amendment, stating:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor 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. Sixth Amendment, stating:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C. § 3161(c)(1), stating:

> "In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate [United States magistrate judge] on a complaint, the trial shall commence within seventy days from the date of such consent."

18 U.S.C. §§ 3161(h)(1)(D) and (H), stating:

> "(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:"
>
> "(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—"
>
> "(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;"

"(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."

18 U.S.C. § 3161(h)(7)(A) and (C), stating:

"(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."

"(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."

18 U.S.C. § 3162(a)(2), stating:

"(2) If a defendant is not brought to trial within the time limit required by section 3161(c) [18 USCS § 3161(c)] as extended by section 3161(h) [18 USCS § 3161(h)], the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3) [18 USCS § 3161(h)(3)]. In determining whether to dismiss the case with or without prejudice, the court shall consider,

among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter [18 USCS §§ 3161 et seq.] and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section."

18 U.S.C. § 3164(c), stating:

"(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required."

STATEMENT OF THE CASE

"ECF" will refer to the district court docket followed by the number then page, and "App. ECF" will refer to The Second Circuit docket followed by the number then page, both as assigned by the defendant's initial submissions.

The petitioner ("Swinton") was incarcerated on October 16, 2012, federally charged on October 19, 2012 and proceeded to trial almost 57 months later on July 10, 2017 in the W.D.N.Y. In November of 2012, the Government alleged that Swinton was a career offender pursuant to U.S.S.G. 4B1.1, and proposed a plea agreement of 188 to 235 months. Swinton only had two possible qualifying priors and has been incarcerated the entire time, and until this date.

The two prior convictions were (1) 1994 Florida conviction for Armed Robbery, pursuant to Fla. Stat. §812.13(2)(a) and (2) a 1999 New York conviction for Attempted Sales of a Controlled Substance, in which no statute of conviction has been established by any reliable documentation. The petitioner has no other adult felony convictions and currently 44 years old.

Three counselmen, James Riotto, David Owens and Donald Thompson represented Swinton until he proceeded to trial pro se. All three counselmen alleged that they were challenging the 4B1.1 enhancement, and no counsel relayed to Swinton that (1) they sought any plea agreement, plea colloquy or any other comparable judicial document for the NYS 1999 prior conviction, or (2) pursued the requested challenges of Swinton, pursuant to *Anders v. California, 386 U.S. 738 (1967)* and *Penson v. Ohio, 488 U.S. 75 (1988)*, of the FL 1994 prior conviction while requesting continuances to do so.

The W.D.N.Y. court appointed Patrick M. Megaro, Esq. in 2014, to collaterally challenge the FL prior in The State court, in which Megaro abandoned Swinton's requested challenge to the ineffectiveness of trial counsel that has never been ruled upon by the State of Florida to this date. See *Swinton v. Florida, U.S. S.Ct. No.: 19-7625*. Swinton told all counselmen of this case that he was over sentenced by Florida law and judicial precedents. Florida 2005 supplement to Stat. § 3.850 and recent U.S. Supreme Court precedents made this challenge possible at the time in Florida, which led to the usurping of Swinton's autonomy right to his defense by his own counselmen and the first 30 months of pretrial detention.

All information and responses were fully submitted to the court on August 12, 2016 on the only remaining cell phone suppression motion, after its initial denial on 02/10/16. The court gave itself two "interests of justice" extensions for complexity on September 12, 2016 to October 12, 2016 and October 17, 2016 to October 21, 2016. The motion was denied on the plain language of the warrant and the "good faith" doctrine.

The Report and Recommendation was issued on October 21, 2016, defense counsel extended time and filed on December 12, 2016. The Government was given 14 days to respond, due December 27, 2016. The Government requested 4 continuances, until February 17, 2017, in which all were excluded as "automatic"

pursuant to 18 U.S.C. § 3161(h)(1)(D) (hereon "(D)") by the district court and unexplained on the record by the court.

On March 10, 2017, Swinton filed affidavits with the court, relieved counsel for usurping his autonomy right to his defense, dilatory actions of counsel and unresponsiveness. The petitioner also addressed the prosecutor requested adjournments excluded under § (D). See App. ECF 93, 60-61 and ECF 114. On April 24, 2017, the court ruled that no speedy trial violation was made, and did not address the December to February adjournment period pursuant to § (D). Thru Motions in Limine, Notice of Constitutional Violations, Second Circuit appeal briefing and Motion for Rehearing En Banc, no court has addressed this timeframe in which redress has repeatedly been requested by the petitioner.

Swinton did not request any continuance on April 28, 2017, given an unrequested two week continuance and time was excluded in the interests of justice to acquire discovery documents from the relieved dilatory counselman. The court informed the petitioner that Government made a motion to set a trial date, in which no motion has been received by Swinton to this date. See 18 U.S.C. § 3008 and FRCP 49. The petitioner received his discovery April 29, 2017.

The petitioner's alleged codefendant in count one, David Jones, aka "Diz", aka "Dizzle", was killed on May 27, 2017, and was the only other alleged direct

coconspirator and witness to the crimes alleged to Swinton in this case. The only cooperating witness, Danielle Bowen, alleged that Jones was in possession of the drugs in count two of the indictment, in trial, that Swinton was found guilty of. Swinton proceeded to trial pro se, motioned to dismiss the indictment and release pending trial in Limine motions for speedy trial purposes. See 18 U.S.C. §§ 3161(a)(2) and 3164(c).

On July 7, 2017, the court was assessing which priors of Danielle Bowen will be used in trial. The court inquired into the specifics of the two outstanding Georgia charges for Robbery and Theft of Services, 2013 NYS heroin conviction, and the 2016 cocaine base and firearm possession conviction. The Government alleged that Bowen was not cooperating with the Government on these offenses. Swinton raised that this was arbitrary distribution of justice and litigated the claim until July 10, 2017 when the court stated that there was no biasness. Bowen was twice similarly situated in the W.D.N.Y. as Swinton, named in a federal drug and gun distribution case complaint, *U.S. v. Frazier, 15-mj-586 (W.D.N.Y.)*, and alleged to have supplied Frazier with weapons and sold heroin for him while committing the 2013 NYS heroin offense. See ECF 215 in its entirety, which addresses the sentencing disparities between Bowen, Jones and Swinton, with Bowen's criminal record showing that she was similarly situated as Swinton.

REASON TO GRANT THE WRIT

QUESTION ONE. At no point was any approved documentation for the 1999 NYS prior produced to satisfy *Shepard v. United States, 544 U.S. 13,16,20,24 (2005)*. To date, Swinton has only received certified fingerprint/arrest verification, police reports and a NYS complaint for this conviction in discovery materials. For 30 months, counselmen Riotto, Owens and Thompson claimed that they were challenging the 4B1.1 enhancement alleged by the Government, yet without proper documentation or a request from NYS Monroe County Clerk's Office for such documents during these 30 months of the petitioner's pretrial detention.

The court held that Swinton was a career offender in pretrial proceedings and denied release with the reservation for a detention hearing, and allowed all counsel to pursue challenges to the 1994 prior at their requests. No counsel challenged the documentation of the 1999 prior, in which both a 4B1.1 and 18 U.S.C. § 851 enhancement relied on this prior conviction. This effectively shifted the burden of proof of the conviction on the defendant on the defendant, and all counselmen were constitutionally ineffective for failing to demand reliable documentation for both prior convictions, which plagued all of the court's decisions in this case from granting continuances to denying pretrial release. See

United States v. Tucker, 404 U.S. 443 (1972) and *Strickland v. Washington, 466 U.S. 668 (1984)*.

> "Without any inquiry into what penalty-phase evidence he might be forgoing, he succumbed to tunnel vision-and as a consequence left Lance defenseless. Because nothing here ``obviate[d] the need for defense counsel to conduct some sort of mitigation investigation," Lance has satisfied Strickland's deficient-performance requirement. Por-<*pg. 625> ter v. McCollum, 558 U.S. 30, 40, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (per curiam); see also Rompilla v. Beard, 545 U.S. 374, 381, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); Wiggins, 539 U.S., at 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471."

Lance v. Sellers, 139 S.Ct. 511,514-515,202 L.Ed.2d 621,624-625 (2019).

The petitioner informed Riotto, Owens, Thompson and federally appointed Florida counselman Megaro that he was over sentenced in the State of Florida by law, provided the Presentencing Report, Sentencing Score sheet and Fla. Citations documents that 1994 trial counsel was constitutionally ineffective and his first appeal of right was denied without counsel on appeal. See *Swinton v. Florida, U.S. S.Ct. Cert. Petition 19-7625, Appendix pages 25-42* , *Anders*, Id. and *Penson*, Id.

The only counselman to make a challenge to any prior conviction was Megaro, and the W.D.N.Y. Court appointed him to make the argument that was brought to the court's attention by Swinton and considered to be possibly meritous in the State court by the Federal court. The court came to the conclusion that this

would make a critical difference in Swinton's sentencing exposure, under the belief that the petitioner was a career offender. Megaro and Thompson both erroneously came to the conclusion that the argument could not be made in the Florida courts past two years from finality of the case, and made their own motion against Swinton's requests, in which was denied. See *Swinton v. Florida, Id.,Appx. 25-26*(Megaro's e-mail stating reasons why he abandoned Swinton's defense request); *Martinez v. Ryan, 566 U.S. 1 (2012)*; *Trevino v. Thaler, 569 U.S. 413 (2013)*; *Pace v. DiGuglielmo, 544 U.S. 408,425 (2005)*(holding that attorney neglect could excuse procedural bar in Fla. § 3.850 motion). All four counselmen were constitutionally ineffective for failing to research procedural bar exceptions for the 1994 conviction, which is a basic ineffective assistance of trial counsel. See *Glover v. United States, 531 U.S. 198 (2001)*.

Swinton complained to the court the entire time that all counselmen either made no challenges that they were requesting continuances for or made unauthorized challenges to this 1994 Fla. prior conviction, after being told not to do so. See ECF 265, all subsections thereof. All of Swinton's counselmen in this case failed to act as the petitioner's agent and caused a needless 30 months of pretrial detention and litigation. See *Brookhart v. Janis, 384 U.S. 1,7-8 (1966)*. Megaro also failed to timely inform Swinton of the State court's denial or his

appeal without briefing, in which a brief could have been prepared from federal counsel or the petitioner, in which he file the rejected motion by Swinton.

At this point, 30 months of pretrial time was credited to Swinton in a U.S. Sixth Amendment assessment for counselmen that refused to honor Swinton's autonomy right to choose his defense. See *McCoy v. Louisiana, 138 S.Ct. 1500,1511,200 L.Ed.2d 821,833 (2018)*. The petitioner is requesting a structural error assessment due to the fact that the petitioner could not undue the prejudice that 30 months of pretrial litigation and detainment caused, or re-evaluation of *Barker v. Wingo, 407 U.S. 514 (1972)* factors. Swinton has now been remanded for arguments relieved counselmen failed to make, in which there is no way to assess the outcome of the case if counselmen (1) requested *Shepard* documents (2) made Swinton's requested argument in the Florida courts, which caused this timeframe of litigation, and (3) ceased all of their requested continuances that Swinton told counsel that he objected to before they were made. This has been a new epidemic among defendants of the W.D.N.Y. that counsel disregards the defendant's autonomy right to their defense. See *United States v. Tigano, 880 F.3d 602,615-19 (2d Cir. 2018)*, App. ECF 93, 57-58 and ECF 111.

David Jones, aka "Diz", was Swinton's alleged coconspirator and codefendant, and also a direct witness by all accounts of this case. See ECF 1; ECF

53; App. ECF 158, 16-18 and *Dickey v. Florida, 398 U.S. 30,35-38 (1970)*. Jones was killed on May 27, 2017 and Swinton's trial was on July 10, 2017. Jones' death occurred after the petitioner relieved all counsel and requested a speedy trial on March 10, 2017, for dilatory extensions and objections to Thompson concerning these continuances. See App. ECF 93, 54-58 and *United States v. Black, 918 F.3d 243, 2019 U.S. App. LEXIS 7847 at *13-16 (2d Cir.)*. Had Jones taken sole responsibility for the drug paraphernalia and the 2.126 grams of powder cocaine in trial that was alleged to be in his possession by Bowen, the outcome would have been different. See App. ECF 93,68-69 and App. ECF 209,5-8. Jones was not available to testify due to the extensive lapse in time before trial.

In *Dickey*, Id., this court held that a deceased and possibly adverse witness due to time lapse and after speedy trial request prejudiced the case enough for a U.S. Sixth Amendment speedy trial dismissal. Jones pled guilty, via plea agreement, to a conspiracy with Swinton without a cooperation agreement with the Government, for a 30 month sentence. This would mean that Jones had no intention of testifying to this conspiracy in a court of law, while gaining a 90 month variance from the mandatory minimum of 120 months. Both the District and The Second Circuit Courts have held that Jones would have not have helped, and has not recognized that Swinton had a U.S. Sixth Amendment right to compel

this witness for his defense, in which Jones' assessment was for a jury to decide by his testimony in trial. See App. ECF 209, 16-19.

After trial, Swinton requested that his Stand-by counsel, Michael J. Tallon, Esq., look for documentation on the NYS 1999 prior conviction. Tallon went to the State, and no judicial documents exist except the complaint. Swinton explained that his final plea was given by The State Court judge, and orally accepted by Swinton, to a lesser included offense that could only be NYS CPL § 220.31. This statute was invalidated for federal use as an enhancement by *United States v. Townsend, 897 F.3d 66 (2d Cir. 2018)*.

On direct appeal to The Second Circuit, Robert Rosenthal, Esq., was appointed as stand-by counsel pursuant to 18 U.S.C. § 3006A. Swinton made the same request to Rosenthal for the search of existing judicial documents in the 1999 NYS prior, and Rosenthal reached the same conclusion as Tallon.

Swinton alleged in his initial briefing that the Government had not produced any plea agreement or plea colloquy for the NYS 1999 prior conviction. App. ECF 94, 25-26. The Government made no response to this accusation whatsoever in briefing, submitted no records of the prior conviction which evidently concedes the fact that *Shepard*, Id. documents are not in the Government's possession. At this point, Swinton alleges that *Shepard* documents were never in the Government's

possession, and the Government caused 30 months of unnecessary litigation from the onset of this case, that was credited to the petitioner for speedy trial analysis. See *United States v. Black, 918 F.3d 243,260-61,2019 U.S. App. LEXIS 7847 at *35-37 (2d Cir.)*.

The Government needed to use the 1999 NYS conviction, or both of its major enhancements fail. See App. ECF 94, 25-27. Without these enhancements and the same consecutive 60 month sentence for 18 U.S.C.§ 924(c), Swinton's sentence would have been a total of 81 to 87 months for all convictions. The Government offered this same time in a conditional plea agreement if the petitioner was not found to be a career offender, yet with a 188 to 235 month plea if Swinton was found to be a career offender. This gained Swinton nothing, and gained the Government a conviction by plea agreement as if trial was lost by the defendant without actually having a trial. As of this petition, Swinton will have 90 months of incarceration served, and 378 days of Federal Bureau of Prisons good-time credit that will be lost because of the erroneous enhancement.

In *United States v. Black*, Id., the Second Circuit affirmed the Sixth Amendment dismissal with prejudice of the Hobbs Act/Murder/Rico indictment of this case. Donald Thompson was also *Black*'s attorney as well as Swinton's counsel during the same timeframes, and Thompson made the same requests for

continuances. The Government in the W.D.N.Y. alleges that this was a death penalty eligible case, and it would try the case capitol for 2 years and ten months. After this timeframe of litigation, the court inquired about the death penalty enhancement, only to discover that (1) the Government had not received authorization to try the case capitol and (2) the Government has not sought authorization from Washington, D.C. to try the case capitol after the AUSDA had alleged multiple times that the case would be tried capitol. Due to the unwarranted litigation this caused, the 34 month death penalty litigation time was credited to the Government in a Sixth Amendment Speedy Trial assessment and dismissed with prejudice. Due to Swinton's own erroneous enhancement applications by the Government, the petitioner is humbly requesting the same consideration as in *Black* from this court. See *United States v. Williams, 2019 U.S. App. LEXIS 6676 (3d Cir. 2019)*. The petitioner also requests that this court consider why the Government did not alert the court that it did not have the *Shepard* documents in this case, as a normal tactic at that time, and humbly request that this Honorable Court grant Certiorari to address this rapidly growing issue in the W.D.N.Y.

The Second Circuit has noted in *Black, 918 F.3d at 248*, that this is a pattern in the W.D.N.Y. See *United States v. Tigano, 880 F.3d 602 (2d Cir. 2018)* and *United States v. Pennick, 713 Fed.Appx. 33 (2017)*. As with the aforementioned

cases, Swinton's case is a W.D.N.Y. case, and this pattern has been continual in the W.D.N.Y. after his case. See App. ECF 158, 19-20.

At sentencing, the Presentencing Report directly stated, "Details: The details for this case is not available.", pertaining to the 1999 NYS prior. See App. ECF 98, 19, ¶ 76-77. Swinton humbly requests the same treatment as other recent Second Circuit cases when the PSR was incorrectly relied upon, as plain error. See App. ECF 158, 1-3; *United States v. Genao, 869 F.3d 136,142-43 92d Cir. 2017)*; *United States v. Peña, 762 Fed.Appx. 34,37-38 (2d Cir. 2019)*; *United States v. Parker, 745 Fed. Appx. 431(2d Cir. 2018)(Summary order)*; *Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018)*; FRCP 52(b). Swinton's case was remanded to argue *United States v. Havis, 907 F.3d 439 (6th Cir. 2018)* and *United States v. Winstead, 890 F.3d 1082,1090-92 (D.C. Cir. 2018)*, due to the fact that the petitioner's 1999 NYS prior conviction was for an "Attempted" crime and conflicting the U.S.S.G. with the commentary note, nor a crime in the statute of 21 U.S.C. § 841 et seq. to support an § 851 enhancement. The most concerning facts are (1) there are no documents to make this argument and (2) no court has made an assessment of how this affected the petitioner's speedy trial.

In sum of the U.S. Fifth Amendment Due Process of Law for Structural Error, U.S. Sixth Amendment Speedy Trial pursuant to Strunk v. United States,

412 U.S. 434 (1973) and Counsel Ineffectiveness pursuant to Strickland v. Washington, 466 U.S. 668 (1984) , the petitioner humbly asks this Honorable Court to grant Certiorari to consider the entire assessment for the aforementioned reasons, apply the initial 30 months of litigating the erroneous career offender enhancement to the Government and dismiss the indictment with prejudice.

UNREASONABLE APPLICATION OF

18 USC §§ 3161(c)(1), (h)(1)(D), (h)(7)(A) and 3164(c)

The petitioner brought forth speedy trial act dates the he found to be in calculation error, to the district and circuit courts. These dates were September 12, 2016 to October 21, 2016; December 27, 2016 to February 17, 2017; April 24, 2017 to June 1, 2017. See App. ECF 93, 60-61; App. ECF 94, 29-31; App. ECF 209, 1-4, 8. Swinton was denied 18 U.S.C. § 3164(c) release after 90 days.

August 12, 2016, all motions were submitted to the court. According to the statutory provisions of 18 U.S.C. § 3161(h)(1)(H) (hereon "(H)"), the court had 30 days in which to render a decision. On 09/12/16, the 31st day, the court made a § (7)(A) extension to 10/12/16, due to the complex nature of the case. ECF 92. On 10/17/16, 5 days past the extension date, the court made another § (7)(A) extension to 10/21/16. ECF 93. Only one motion was pending and it only pertained to a

credibility assessment to suppress the cell phone extraction, and only relied upon the language of the warrant and *United States v. Leon, 468 U.S. 897 (1984)*. The motion had previously been issued a decision, and this ruling was pursuant to an evidentiary hearing to reconsider the court's earlier report and recommendation on 02/10/16. See ECF 78 and Appendix E. The extensions were made for the "general congestion of the court's calendar" rather than a needed exclusion for a decision that was already made, evinced by the late § (7)(A) extensions.

No explanation was placed on the record of what made the motion "complex" and this Court has found that a passing reference to complexity insufficient to toll the speedy trial clock. In *Zedner v. United States, 547 U.S. 489,507 (2006)(E.D.N.Y)*, this Court stated:

> "In ruling on a defendant's motion to dismiss, the court must tally the unexcluded days. This, in turn, requires identifying the excluded days. But § 3161(h)(8)(A) is explicit that "[n]o . . . period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable . . . unless the court sets forth . . . its reasons for [its] finding[s]." Thus, without on-the-record findings, there can be no exclusion under § 3161(h)(8). Here, the District Court set forth no such findings at the January 31 status conference, and § 3161(h)(8)(A) is not satisfied by the District Court's passing reference to the case's complexity in its ruling on petitioner's motion to dismiss. Therefore, the 1997 continuance is not excluded from the speedy trial clock."

Also see *United States v. Bert, 814 F.3d 70,85 (2d Cir. 2015)*. This same template was also used in *United States v. Bailey, 2017 U.S. Dist. LEXIS 23400 at *11 – 14 (W.D.N.Y.)*. Circuit and District court did not tally 12/27/16 to 02/17/17.

Magistrate Report and Recommendation objection time is 14 days. See 28 U.S.C. 636(b)(1). Time to respond, if extended for any reason, must be made by § (7)(A). See *Bloate v. United States, 176 L.Ed.2d 54,66-68,599 U.S. 196 (2010)*, which remanded *United States v. Oberoi, 547 F.3d 436 (2d Cir. 2008)(Jacobs, J., and also on Swinton's pannel),130 S.Ct. 1878 (2010)*. The entire time requested by the Government for extensions was excluded as "automatic" pursuant to § (D). No exclusions made pursuant to § (D) will be held subject to any challenge by the district and circuit courts, as shown by the petitioner's unanswered district court pretrial and post-trial challenges, and petitioner's circuit court briefing and rehearing requests to review the timeframe from December 27, 2016 to February 17, 2017, in which Swinton has not been afforded U.S. First Amendment redress of this grievance. See ECF 114; ECF 142-1, 13; ECF 142-3, 10-11; ECF 197; ECF 229, 11-13; App. ECF 93, 54-61; App. ECF 94, 29-31; App. ECF 158, 10-12; App. ECF 209, 1-4, 8. This also renders § (7)(A) superfluous. See *Bloate*, supra.

An entire loophole has been created by this application of § (D) and will be used against defendants in the W.D.N.Y. and immune from any challenges or

explanation unless this Honorable Court addresses the use of § (D) to circumvent the requirements of § (7)(A) or opting out of the Act altogether. This also deprives the public of a speedy trial as well. See *Zedner, 547 U.S. at 501-502*.

The petitioner alleges that the § (7)(A) continuance from April 28, 2017 to May 15, 2017 was an abuse of discretion, and chargeable to the Government due to relieved counsel Thompson failing to turn over discovery materials when he was relieved on March 10, 2017. See *United States v. Tigano, 880 F.3d at 616-617* (holding that deliberately dilatory defense counsel time counted towards the government). Swinton was still being penalized for counsel's dilatory actions while stating to the court that this was part of the reasons for terminating Thompson. See ECF 111; App. ECF 93, 54-59; App. ECF 209, 9-10.

The district court also held that a motion was pending, when in fact Swinton informed the court that he had not received any filings from the court and was in transit. The Government never served the "Motion to Set a Trial Date" upon the defendant as required by 18 U.S.C. § 3008 and FRCP 49. The petitioner agreed in setting a trial date as soon as it was brought to his attention in court, and a date was set for July 10, 2017 off of the record, on April 28, 2017. See ECF 245, 2; App. ECF 93, 67, ¶ 9-11(Government brought up unrecorded conversation about trial date on 04/28/17). The petitioner made FRAP 10(e) motions in the district and

circuit court pertaining to this unrecorded conversation. See ECF 259; App. ECF 119; App. ECF 132; App. ECF 165.

According to Second Circuit precedents, the Western District of New York has a tortured history with the constitutional and statutory speedy trial rights of defendants of its jurisdiction since the 1970s, and most of these second circuit speedy trial precedents are from this district. From recent rulings, there has been a constitutional speedy trial dismissal every year since 2017, and these actions still persist. See App. ECF 158, 19-20. Some cases are falling through the cracks of being properly adjudicated, as all parties, including the public, have this right that is being overlooked on a grand scale. Pretrial detainees are increasingly becoming suicidal or incompetent to stand trial in the W.D.N.Y. The petitioner was a witness to this happening, and has been nationally noticed in The First Step Act of 2018.

In sum, the petitioner humbly and urgently requests the granting of Certiorari to guide the lower courts on how to enforce a timely disposition of cases and prompt Government and defense counsel compliance with the defendant's rights, and applying the U.S. Sixth Amendment Speedy Trial and Speedy Trial Act to minimize these timeframes of pretrial detention that has been hallmark of the Western District of New York.

QUESTION TWO. Danielle Bowen was the only cooperating witness in trial against Swinton in this case. Bowen is a Caucasian female and Swinton is an African American male. Humbly, the petitioner requests that this Court take judicial notice of W.D.N.Y. ECF 215 in its entirety before proceeding.

This case was an unreasonable application of The U.S. Fifth Amendment Due Process of law and *United States v. Armstrong, 517 U.S. 456,supra,464-65 (1996)*, in which a similarly situated person of a different race and gender was declined prosecution by the W.D.N.Y. on two different occasions. The petitioner will assume the court's familiarity with the well known discriminatory treatment of African American defendants, and has been congressionally recognized in The Fair Sentencing Act of 2010 and the First Step Act of 2018. Respectfully, the petitioner requests that this Honorable Court address the biggest problem causing this discriminatory charging and sentencing practice; Selective Prosecution.

Bowen was arrested October 16, 2012, in this case and became a cooperating witness. On November 22, 2013, Bowen was arrested transporting 349 bags of heroin from New York City to Elmira, New York. During this time, Bowen was alleged in *United States v. Frazier, 15-mj-586 (W.D.N.Y.)* that she sold heroin for Frazier. Bowen was also alleged to have provided Frazier with a .40 cal. and 9 mm. handguns, in which she brokered the deals between the burglars of Sam's Gun

Store and Frazier for the transfer of more guns. Bowen was not an informant nor cooperating witness in these cases, as alleged by the government, or had any agreement with the Government pertaining to this case. After being named in the *Frazier* complaint and these aforementioned allegations by Frazier himself, Bowen was not federally charged in the W.D.N.Y. Both Frazier and Terry Decker became cooperating witnesses, and Decker, a Caucasian male, was given about 1/5 of the time that Frazier, an African American male, received. On Bowen's testimony, Swinton was given a 18 U.S.C. §§ 846 and 841(b)(1)(B) conspiracy, acquitted in count one, and was the sole source of any constructive or aiding and abetting testimony in the petitioner's trial for conviction on count two. See App. ECF 158, 23-25.

On July 26, 2016, Bowen was arrested for possession of cocaine base and a firearm and not federally charged in the W.D.N.Y. According to the Government, Bowen had no agreement with them, nor was she an informant or cooperating witness in this case, and was also the sole defendant in this case. Bowen received two NYS misdemeanors and 30 days "time served" and released from a NYS parole violation, on June 20, 2017, right before Swinton's July 10, 2017 trial.

Unlike *Armstrong*, supra, Id., Swinton is directly alleging that Bowen was twice similarly situated as the petitioner, and Swinton raised this issue to the

district court before trial, as soon as he was informed of Bowen's non-cooperation with the Government in both cases. See ECF 270, 51-52 (July 7, 2017); July 10, 2017, trial transcript times of 5:30:21 PM to 5:33:42 PM; App. ECF 158, 29-30. The prosecutor has wide discretion to prosecute, yet decision to prosecute Swinton and decline to prosecute Bowen was based on race and gender; the only two things not in common. See *Wayte v. United States, 470 U.S. 598,608 (1985)*. Swinton was federally charged 3 days after his State arrest in the W.D.N.Y.

The charging practices of targeting minorities for prosecution and the severity of this prosecution between races, particularly Swinton and Bowen, abridge the U.S. Fifth Amendment Due Process Clause and a discriminatory practice in prosecution for the Western District of New York. This was also raised in appeals court, and the Second Circuit or Government did not respond to the briefing of this issue or the petition for rehearing challenge of this issue. See App. ECF 94, 61; App. ECF 158, 26-30.

During Bowen's November 22, 2013 NYS Trooper arrest, she gave a recorded statement in which she was alleged by law enforcement to have been untruthful with these officers and then later admitted to picking up heroin in New York City and transporting it to Elmira, New York. She denied this in trial. See App. ECF 93, 28-29. The petitioner made multiple requests for 18 U.S.C. §§

3500(b) and (e)(2) for this report and this general discovery as early as July 6, 2015, ECF 59, and again orally on November 4, 2015 and March 10, 2017 pro se. See *Jencks v. United States, 353 U.S. 657,672 (1957)*. After the petitioner's mid-trial request for this report, the Government alleged that it had been destroyed by NYS Trooper program deletion. The Government failed to meet its continual obligation under *Brady v. Maryland, 373 U.S. 83 (1963)*, to collect and preserve this FRE §§ 404(a)(3), 609(a)(2) and 613(b) material, which hindered the effective impeachment of Bowen in trial.

Without the recorded statement, the jury couldn't use this to compare to Bowen's live testimony to determine exactly how and when the witness was being untruthful by comparison to the recorded statement, or the petitioner could have completely perjured Bowen in trial as the only witness. This denied Swinton a fair trial and due process of law. See *Smith v. Cain, 565 U.S. 73 (2012)* and *Wearry v. Cain, 136 S.Ct. 1002 (2016)*.

Bowen gave the only testimony to convict Swinton under a constructive possession or aiding and abetting theory that she claimed to be involved, in which a cumulative conspiracy instruction was added to the aforementioned instructions by the acquitted count one in trial. Swinton alleges that this is U.S. Fifth Amendment double jeopardy by jury instructions. See App. ECF 158, 23-25.

Bowen's prior criminal history before trial was terribly flawed as she testified in trial, wanted on two other charges in the State of Georgia, and she provided all of the criminal testimony of this case. With the exception of what was found in the search of Swinton's residence, no officer testified to having personally witnessed any crime or criminal activity of Swinton in trial. Jones would have been one of the two other witnesses that could have been called, and Swinton was denied all access to CS-1, the only other possible witness by the criminal complaint and officer allegation therein, in pretrial motion practice and in trial. See ECF 59; ECF 148; ECF 157; App. ECF 93, 17. Due to marijuana being alleged by law enforcement to have been sold, CS-1 would have been highly useful to prepare a defense of which person sold what drug, possibly excluding someone from sales of cocaine, which was the only drug alleged in the indictment. The court also admitted over defense objection and 33 months of litigation, the extracted cell phone text messages that were uncorroborated as to any substance referenced by the messages or a coconspirator. See *United States v. Pauling, 256 F.Supp. 3d 329,337 (S.D.N.Y.), aff'd, 924 F.3d 649 (2d Cir. 2018)*, stating:

> "The evidence cannot support an inference beyond a reasonable doubt that Steve's comment on July 3 referred to quantity, rather than to drug type, especially given that Pauling was known to sell cocaine as well as heroin, sometimes at the same time. (See, e.g., Gov't Exs. 737, 744, 757; Tr. 172:18-173:1, 370:8-16.) The only evidence of a sale to Steve just prior to July 3

was a June 29 call in which Steve sought to purchase only a single gram from Pauling"

The death of a primary witness, admission of prejudicial evidence, *Brady* obligations that were not met, withholding the identity of and denying the questioning of CS-1 all undermine the core of a fair trial. The petitioner urges this Honorable Court to restore the fundamental fairness to our adversarial process. See *Chambers v. Mississippi, 410 U.S. 284 (1973)* and *Smith v. Illinois, 390 U.S. 129,131 (1968)*.

CONCLUSION

I pray that this Honorable Court grants Certiorari and rebalance the scales herein, especially for a pro se litigant, and restore justice for all.

Under the penalty of perjury, pursuant to 28 U.S.C. § 1746, I swear all herein is true.

Respectfully Submitted,

Date: March 31, 2020

/s/ Robert L. Swinton Jr., PRO SE