ORIGINAL

No. 19-8657

IN THE
SUPREME COURT OF THE UNITED STATES

MANOJ KUMAR JHA
(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

The first question deals with circumstances under which an evidentiary hearing may be warranted, including the level of burden a petitioner must meet in a post-conviction collateral motion, which has divided the Circuits. For example, while the First Circuit has held that the burden is a "heavy" one, the Sixth and Seventh Circuits have held that the burden is "relatively light". The Fourth Circuit, in the current case, by upholding the District Court's decision denying petitioner's 28 U.S.C. § 2255 motion without an evidentiary hearing and declining to issue a Certificate of Applicability even when the petitioner had alleged, based on the review of the record and additional evidence obtained from the prosecution's files and another Federal Agency under the Freedom of Information Act, that multiple government witnesses lied under oath at pre-trial and trial proceedings, and government introduced into evidence a forged and fraudulent document in order to prove petitioner's *mens rea* to commit the alleged crimes with full knowledge of prosecution, appears to have sided with the First Circuit by significantly raising the petitioner's burden to seek an evidentiary hearing.

The second question deals with the proper interpretation of the baseline criteria crafted by this Court in *Liteky v. United States* 510 U.S. 540 (1994) for identifying trial judge's in-trial conduct amounting to pervasive bias which may be violative of due process and require recusal of the trial judge. While majority of the Circuits favor recusal when bias stems from a trial-judge's in-trial conduct which may be deemed pervasive, the Fourth Circuit has held that the alleged bias, no matter how pervasive must not have arisen out of litigation (although in a post *Liteky* case the Fourth Circuit did recognize that "the only cases where courts have granted recusal motions based

on in-trial conduct tend to involve singular and startling facts."). The two questions presented for the Court's review are:

1. Can the District Court deny a 28 U.S.C. § 2255 motion without holding an evidentiary hearing by disputing the veracity of the facts alleged by the petitioner under the penalties of perjury, when: (a) those facts are neither refuted by the record nor inherently incredible; and (b) the specific factual allegations that, if true, state a claim on which relief could be granted?
2. Did the trial judge's pre-trial and trial conduct, including her stark remarks, expression of disbelief over a key defense witness's testimony in the presence of the jury, and a favorable argument made at her own initiative on the government's behalf without requiring the government to produce testimonial evidence to prove the truth of the matter asserted, deny the petitioner a fair trial in a fair tribunal guaranteed by the Constitution?

LIST OF PARTIES

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

RELATED CASES

I. U.S. Court of Appeals-Fourth Circuit

- *U.S. v. Jha*, No. 19-6527 (4th Cir. 2019). Judgment entered August 27, 2019. Petition for rehearing and reharing *en banc* denied on November 5, 2019.
- *In Re: Manoj Kumar Jha*, No. 18-1718 (4th Cir. 2018). Judgment entered October 25, 2018.
- *In re Jha, 710 F. App'x 127*, No. 17-2210 (4th Cir. 2018). Judgment entered February 1, 2018.
- *United States v. Jha, 670 F. App'x 815,* No. 16-6856 (4th Cir. 2016). Judgment entered November 22, 2016.
- *United States v. Jha, 613 F. App'x 212,* No. 14-4717 (4th Cir. 2015). Judgment entered June 4, 2015.

II. U.S. District Court-Maryland

- *Jha v. USA* - 2255, No. 1:2016cv03449 - Document 2 (D. Md. 2019). Judgment entered February 27, 2019.
- *Jha v. USA*, Criminal No. ELH-12-00595, Related Civil No. ELH-16-3449. (D. Md. 2018). Judgment entered June 12, 2018.
- *US v. JHA*, Criminal No. ELH-12-00595, (D. Md. 2017). Judgment entered February 24, 2017.
- *US v. JHA*, Criminal No. ELH-12-00595, (D. Md. 2016). Judgment entered June 13, 2016.

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PETITION FOR WRIT OF CERTIORARI

Manoj K. Jha, pro se respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. An extension to file the certiorari petition through April 3, 2020 was granted by this Court on January 30, 2020. App., *infra*, 1.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 2) is unpublished and can be found at the Fourth Circuit's website as *U.S. v. Jha*, No. 19-6527 (4th Cir. 2019). The opinions of court of appeals (App. *Infra,* 3-4) denying the writs of mandamus are unpublished and can be found at the Fourth Circuit's website as *In Re: Manoj Kumar Jha*, No. 18-1718 (4th Cir. 2018) and *In Re: Manoj Kumar Jha*, No. 17-2210 (4th Cir. 2018)[1]. The opinion of the district court (App., *infra*, 5) denying the 2255 motion is reported at: *Jha v. USA* - 2255, No. 1:2016cv03449 - Document 2 (D. Md. 2019). It is also filed as ECF[2] 248 in the district court's docket, Case No. 1:12-cr-00595-ELH (D. Md.).The opinions of the district court denying the two recusal motions (App, *infra*, 6-7) can be found as ECFs 233 and 198 in the district court's docket, Case No. 1:12-cr-00595-ELH (D. Md.)

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2019. App., *infra*, 8. A timely petition for rehearing and rehearing *en banc* was denied on November 5, 2019. App., *infra*, 9. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

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[1] This case is reported at *In re Jha, 710 F. App'x 127* (2018)

[2] ECF stands for Electronic Case Files in the District Court's Docket.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 28 U.S.C. § 2255(b), which states in relevant part:

   "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

2. Due Process Clause of the Fifth Amendment of the U.S. Constitution. "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." *In re Murchison.,* 349 U.S. 133, 136 (1955).

STATEMENT

This petition presents two questions, the first involves proper interpretation of circumstances under which a district court can dispose of a 28 U.S.C. § 2255 motion without holding an evidentiary hearing and the second involves the acceptable bounds of a trial judge so that a criminal defendant's constitutional due process right of a fair trial in a fair tribunal is not violated.

With respect to the first question, petitioner alleged in his 28 U.S.C. § 2255 motion and supplements (collectively "2255 motion"), under the penalties of perjury, with proper citation from the record, and based on certain newly discovered evidence obtained from the Department of Justice ("DOJ") and the United States Citizenship and Immigration Services ("USCIS") under the Freedom of Information Act ("FOIA") that the government obtained a tainted conviction using false evidence, including false testimonies from multiple government witnesses, and a forged and fraudulent document to prove petitioner's *mens rea* to commit the alleged crimes, with full knowledge of prosecution. ECF[3] 180 at 24-30. The district court disputed the veracity of the facts alleged by the petitioner without properly reviewing the record and denied relief without holding an evidentiary hearing. ECF 248. The Fourth Circuit upheld the district court's judgment and denied issuance of a Certificate of Appealability ("COA"). App. 2. Unfortunately, Fourth Circuit's ruling, albeit unpublished has deepened the Circuit split on the issue of the petitioner's burden that would justify an evidentiary hearing in habeas cases. *See infra*. This Court therefore must intervene and resolve the Circuit split.

[3] ECF stands for Electronic Case Files in District Court's Docket. Case Number: ELH-12-00595, (D. Md.).

With respect to the second question, this Court has long held that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison.*, 349 U.S. 133, 136 (1955). Petitioner, in the 2255 motion, showed from the record an instance when the trial judge at the pre-trial hearing asserted to the defense counsel in the open court that "I have a job to do. This case is going to trial on March 17. If I have to deny every single motion because we never get to it, then I'm just denying all the motions." ECF 180 at 14. According to a footnote in his reply brief in direct appeal, defense counsel asserted that the reason he did not press for an evidentiary hearing on the *Franks*[4] issue, "was not because the issue was unimportant or conceded. The Defense was under extreme time pressure from the Court to conclude the motions hearing ... The Defense simply tried to accommodate the Court's need to conclude the hearing." *Id.* at 15. Thus, it is clear that the district court's start remarks had a chilling effect on the defense counsel and his decision not to press the court to hold an evidentiary hearing on remaining pre-trial motions, including the *Franks* issue was not because the issue was unimportant or conceded but because he was under extreme time pressure from the court to conclude the pre-trial hearing. Evidence uncovered by the petitioner at the post-conviction stage showed that had the defense counsel pressed for an evidentiary hearing at pre-trial, the outcome of the pre-trial motions would have been different. *See infra.*

Petitioner also showed in the 2255 motion occasions when the court expressed disbelief over the veracity of a critical defense witness in the presence of jury and advanced an argument at its own initiative at the pre-trial proceedings (which turned out to be the winning argument for the government in direct appeal) while relieving the government from its burden of proof to prove

[4] In one of its pre-trial pleadings, Defense had sought a suppression hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). ECF 56.

the truth of the matter through a live witness. *See infra.* Evidence obtained by the petitioner from the DOJ under FOIA showed that government could not have produced any evidence had it been compelled to prove the truth of the mater being asserted through the testimony of a live witness. *See Infra.* Petitioner also quoted a statement from one of the government's post-conviction pleadings in which the government prosecutor admitted having an *ex parte* communication with the trial judge. ECF 238 at 4-10.

Notable relevant cases in which this Court found that the District Court overstepped its authority and showed bias, are *Berger v. United States*, 255 U.S. 22 (1921) and *Webb v. Texas*, 409 U.S. 95 (1972). The second question asks the Court to decide whether trial judge's pre-trial and trial conducts denied the petitioner his constitutional right to have a fair trial in a fair tribunal.

Both questions are a matter of great importance since the Court's decision would serve as a check on the District Court judges who may, at times be abusing their wide discretion by denying an evidentiary hearing in habeas cases when material facts are in dispute and credibility is at issue; and who may be abusing their discretion by exhibiting pervasive bias in a way that favors one party over the other.

FACTUAL BACKGROUND

On November 14, 2012, Petitioner, a former engineering professor was charged by a federal grand jury with misuse of certain federal grants funded by the Federal Agency called the National Science Foundation ("NSF"). ECF 1. The charges involved several counts of wire and mail fraud, and falsification of record. On August 21, 2013, a superseding indictment was returned in which

an additional count with respect to two Department of Defense ("DOD") subcontracts was added on which petitioner had worked while employed at the Morgan State University ("MSU"). ECF 49. In this count petitioner was charged with engaging in a student stipend scheme and demanding kickbacks from certain graduate students. Petitioner through his attorney, filed several pre-trial motions, including a motion: (a) to suppress his statement; (b) to suppress evidence seized by the government in violation of the Fourth Amendment; and (c) a *motion-in-limine* to keep the government from presenting certain evidence that violated applicable grant and subcontract rules. ECFs 52-58.

In February 2014, the District Court held pre-trial hearings. ECFs 146-148. Most of the pre-trial motions, including the motion: (a) to suppress petitioner's statement; (b) to suppress evidence seized by the government in violation of the Fourth Amendment; and (c) the *motion-in-limine* were denied. In March 2014, petitioner proceeded to trial. ECF 150. At trial, government presented several exhibits through live witnesses which showed, among other things that the NSF grants were fixed amount awards on which the government was not authorized to track expenditures. JA 1726[5]. Furthermore, the Exhibits (JA 1712-1724, JA 1725-1742) also showed that timesheets and expenditure details did not need to be prepared and submitted, and the only submission requirement on the NSF grants and DOD subcontracts was a technical report. Evidence submitted by the government also showed that the NSF and DOD found the technical reports satisfactory and did not ask for any expenditure details or timesheets. ECF 257 at 10-11. However, government also presented testimony through various live witnesses, including the case agent Michael Pritchard ("agent Pritchard") that refuted written NSF grant rules with respect to primary

[5] JA stands for Joint Appendix submitted to the Fourth Circuit in direct appeal, Case Number: 14-4717.

employment rule, expenditure of grant funds, preparation of timesheets, and proof of third-party equity investment required for one of the grants. *Id.*

With respect to the DOD subcontracts, government witness Dana Hammett testified that one of the subcontracts was a fixed amount subcontract without any requirement for submitting expenditure details (ECF 154 (Tr. Transcript of March 26, 2014) at 75-87). Another government witness, James Huthinson testified that stipends were not authorized on the other subcontract (ECF 154 (Tr. Transcript of March 26, 2014) at 66). Both government witnesses testified that work on both subcontracts were done to the complete satisfaction of the government. *See* Dana Hammett's and James Hutchinson's Trial Testimony in Tr. Transcript of March 26, 2014. But government also presented contradictory evidence that showed expenditures on the subcontracts, including stipend payments authorized by an MSU employee Rochelle Massey (ECF 153 (Tr. Transcript of March 25, 2014) at 156.

While government presented testimony to prove that petitioner used part of the stipend money which he demanded from the students for personal gain, two defense witnesses testified that part of the stipend money collected by the petitioner was used for hosting an international conference and international travel for the students. ECF 155 (Tr. Transcript of March 27, 2014) at 87-108, 120-137. One of the defenses witnesses also testified that no student complained about contributing their stipend money for the international conference. *Id.* at 107. However, the District Judge expressed her disbelief over the testimony of one of the key defense witnesses, Dr. Abdullah in the presence of the jury. *Id.* at 97. Trial Judge Hollander directly rebutted the testimony of Dr. Abdullah by disputing his version of events and inserting her own testimony. *Id.*

After the trial, petitioner was found guilty on all counts. ECF 156. He was sentenced to 36 months incarceration followed by a three-year supervisory release and a restitution in the amount

of $105,726.31. ECF 137, ECF 158. Petitioner served his prison time and was released in April 2017 due to his good behavior. He was placed on a three-year supervisory release on July 11, 2017, which will expire on July 10, 2020.

In October 2016 while incarcerated in a federal prison, Petition filed a 2255 motion in which he presented under the penalties of perjury with appropriate citations from record, multiple instances of presentation of false testimony by the government, including presentation of a forged and fraudulent slide set to prove his *mens rea* to commit the alleged crimes. ECF 180. He showed examples from the record when the trial judge advanced "favorable arguments on the government's behalf", relieved "the government from its burden of proof", held "ex parte proceedings with the government" and "expressed disbelief over defense's evidence and witness." *Id.* at 9. He also filed a motion to recuse the trial judge from adjudicating the 2255 motion and a supplement to the 2255 motion. ECFs 182, 203. The alleged basis for recusal was trial judges' certain pre-trial and trial conducts which exhibited pervasive bias. ECF 182.

Subsequently, based on certain newly discovered evidence obtained under FOIA from the DOJ and NSF, and certain statements made by the government prosecutor Clarke in one of his post-conviction pleadings, petitioner filed two additional supplements to the 2255 motion. ECFs 238, 243. Petitioner also filed another recusal motion based on a newly discovered *ex parte* issue. ECF 217. The district court denied both recusal motions without holding an evidentiary hearing. ECFs 198, 233. Subsequently, petitioner filed separate petitions for a writ of mandamus in the Fourth Circuit seeking the trial judge's recusal. The Fourth circuit denied both petitions. *In Re: Manoj Kumar Jha*, No. 17-2210 (4th Cir. 2018); *In Re: Manoj Kumar Jha*, No. 18-1718 (4th Cir. 2018). In denying both petitiones, the Fourth Circuit held that in order to seek the reusal of the

trail judge on the ground of bias "nature of alleged bias must be personal and **not arising out of litigation**." (citing *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987)). (emphasis in bold).

On February 27, 2019, the District Court denied the 2255 motion without holding an evidentiary hearing and declined to issue a Certificate of Appealability ("COA"). ECF 248. Petitioner timely appealed in the Fourth Circuit. On August 27, 2019, the Fourth Circuit denied the appeal and declined to issue a COA. App., *infra*, 2, 8. Petitioned filed a petition for rehearing and rehearing *en banc*, which was denied on November 5, 2019. App., *infra*, 9. On January 21, 2020, Petitioner filed an application to the Honorable Chief Justice seeking a 60-day extension to file the Certiorari. On January 30, 2020 the Court granted the extension and extended the deadline to file the Certiorari through April 3, 2020. App., *infra*, 1.

In the meantime, on February 25, 2020, petitioner filed a Fed. R. Civ. P. 60(b) motion in the District Court asking the Court to vacate its February 27, 2019 judgment denying the 2255 motion, under Fed. R. Civ. P. 60(b)(1) and 60(b)(3). ECF 257. He also filed two additional motions, one seeking the trial judge's recusal from adjudicating the Rule 60(b) motion and another asking the District Court to hold off the proceedings until this Court decided on the Certiorari petition. ECFs 258, 259. Those motions are still pending in the District Court.

REASONS FOR GRANTING THE CERTIORARI

I. THE FOURTH CIRCUIT INCORRECTLY UPHELD THE DISTRICT COURT'S JUDGMENT AND DENIED A COA SINCE THE DISTRICT COURT DENIED RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING WHEN JHA'S ALLEGATIONS WERE NEITHER REFUTED BY THE RECORD NOT INHERENTLY INCREDIBLE.

In *Schriro v. Landrigan*, 550 U.S. 465 (2007), this Court held that "In deciding whether to grant an evidentiary hearing, a federal court must consider whether the hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." In the instant case, Petitioner had alleged under the penalties of perjury, with proper citation from the record, among other things, that "GOVERNMENT MADE MULTIPLE BRADY AND GIGLIO VIOLATIONS" ECF 180 at 21-24; "THE PROSECUTION KNOWINGLY AND INTENTIONALLY USED FALSE AND PERJURED TESTIMONY FROM MULTIPLE GOVERNMENT WITNESSES." *Id.* at 24-29; and "GOVERNMENT PROSECUTOR FARA DAMELIN DELIBERATELY INTRODUCED FALSE EVIDENCE AT TRIAL." *Id.* at 29-20. In addition, he specifically asserted that government prosecutor Fara Damelin's "most egregious conduct was introduction of a forged and fraudulent slide set in order to elicit the false testimony of NSF attorney Montgomery Fisher, in order to prove Jha's mens rea to committed the alleged crimes." *Id.* at 30.

In denying relief, the District Court: (a) disputed the veracity of Jha's allegations; (b) did not address some of the allegations; (c) did not review the record to examine whether or not Jha's

allegations were refuted by the record; and (d) made factual assertations on its own without any support from the record. ECF 257 at 4-31[6]. For example, the court incorrectly asserted that (a) Jha's allegations of perjurious testimonies by various government witnesses at pre-trial and trial were unsubstantiated (ECF 248 at 20-21) when in fact they were amply supported by the record (ECF 257 at 4-20); (b) "There is no basis to support Jha's bald assertion that the slides were 'forged and fraudulent'" (ECF 248 at 20) when in fact the record clearly showed that the slides were forged and fraudulent (ECF 257 at 14); (c) the government provided the defense alternate sources of MSU e-mails (ECF 248 at 16) when in fact the record contained no testimonial evidence to this effect (ECF 257 at 26-27); (d) "the findings of the HUD report were disclosed to Jha" (ECF 248 at 17) when in fact the record contained no testimonial evidence to this effect (ECF 257 at 27); (e) Jha's claim that a copy of the operations plan was not given to him is "belied by the record" (ECF 248 at 17) when in fact it wasn't (ECF 257 at 28); and (f) response to Jha's FOIA request with respect to the ROUTS letter was not probative (ECF 248 at 19) when in fact it was because it casted doubt on the veracity of agent Pritchard's testimony and (ECF 257 at 29). Furthermore, the FOIA response from DOJ casted doubt on government's claim that it obtained the MSU e-mails from other sources. ECF 232 at 2-3.

Because this Court's precedent in *Schriro*, *supra* required the district court to carefully review the record to examine whether or not petitioner's allegations were refuted by the record; and whether an evidentiary hearing was warranted to examine the credibility of various government witnesses (who petitioner had claimed to have lied under oath with proper citation from the record

[6] This is part of petitioner's Fed. R. Civ. P. 60(b) motion currently pending in the District Court. In this motion, petitioner comprehensively described how the District Court overlooked some of the allegations, did not review the record to examine whether or not Jha's allegations were refuted by the record, and made factual assertations without any support from the record.

and based on newly discovered evidence obtained under FOIA) and resolve the factual dispute to ascertain if petitioner was entitled to relief, the district court abused its discretion by not holding an evidentiary hearing.

Petitioner's claim that an evidentiary hearing was warranted is also supported by the statutory construct of 28 U.S.C. § 2255(b) which states that "Unless the motion and the files and records of the case **conclusively** show that the prisoner is entitled to no relief, the court **shall** cause notice thereof to be served upon the United States attorney, **grant a prompt hearing thereon**, determine the issues and make findings of fact and conclusions of law with respect thereto. ..." (emphasis in bold). Petitioner's claim that multiple government witnessed lied under oath with full knowledge of prosecution was clearly not resolved by the record. ECF 257 at 4-20. The additional evidence that petitioner obtained from the prosecutions' files under FOIA bolstered his allegation that government prosecutor Marty Clarke falsely asserted, without presenting any evidence through a live witness that government acquired MSU e-mails from other sources when in truth of fact he knew full well that other courses of MSU e-mails did not exist. ECF 232 at 2-3. Based on the FOIA response, petitioner further alleged that government prosecutors also "scammed the Fourth Circuit by claiming that government obtained MSU e-mails from other sources before the search, by referencing bogus Joint Appendix Pages, when in truth of fact, they knew full well that other sources of MSU e-mails before the search did not exist." *Id* at 3.

Petitioner also obtained additional evidence under FOIA from the USCIS which casted doubt on the veracity of agent Pritchard's testimony at the pre-trial hearing when he asserted that a copy of the ROUTS letter was obtained by the government from the USCIS. ECF 232 at 4. This new evidence created a factual dispute which was clearly not resolved by the record. ECF 257 at 28-30.

Government prosecutor Clarke's statements in one of government's post-conviction pleadings created a factual dispute with respect to the *ex parte* issue. ECF 238 at 4-10. This was yet another ground for the district court to grant an evidentiary hearing.

Finally, the defense counsel's footnote remark in his reply brief in direct appeal demonstrated that an evidentiary hearing would have helped the whole truth to come out with respect to agent Pritchard's prior knowledge about the physical boundary of Jha's company within his house; and the *motion in limine* in which the defense had asked the Court to limit the government from presenting evidence that contradicted applicable grant and subcontract rules. ECF 180 at 14-16.

In sum, it was necessary for the district court to hold an evidentiary hearing to examine the credibility of government witnesses, resolve the factual dispute, and decide if the petitioner was entitled to relief.

This case is different than *Schriro, supra* in that there the evidence from record clearly refuted respondent Landrigan's position at trial. In the case at bar, the petitioner had alleged widespread government misconduct which were neither controverted by the record nor inherently incredible. *See supra*. Therefore, it follows that the record does not conclusively show that petitioner was not entitled to relief. The district court, therefore abused its discretion by not granting an evidentiary hearing.

II. WITH RESPECT TO EVIDENTIARY HEARING REQUIREMENT, THERE IS A CIRCUIT SPLIT WHICH THIS COURT MUST RESOLVE BY GRANTING CERTIORARI.

In deciding whether to hold an evidentiary hearing to adjudicate a post-conviction collateral motion, the Court of Appeals are split and use conflicting standards. For example, while the First Circuit has held that "Evidentiary hearings on § 2255 petitions are the exception, not the norm, and there is a **heavy burden** on the petitioner to demonstrate that an evidentiary hearing is warranted.." *Moreno-Morales v. U.S.,* 334 F. 3d 140, 145 (1st Cir. 2003) (emphasis in bold), the Sixth Circuit has held that "The burden 'for establishing an entitlement to an evidentiary hearing is **relatively light**,' and "[w]here there is a factual dispute, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims." *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999). (emphasis in bold). The Sixth Circuit has further held that "[W]hen a defendant presents an affidavit containing a factual narrative of the events that is neither contradicted by the record nor inherently incredible and the government offers nothing more than contrary representations to contradict it, the defendant is entitled to an evidentiary hearing." *Huff v. U.S.*, 734 F.3d 600, 607 (6th Cir. 2013). The Seventh Circuit has a similar holding. *Torres-Chavez v. U.S.*, 828 F.3d 582, 586 (7th Cir. 2016) ("The petitioner's burden for receiving an evidentiary hearing is **relatively light** and one is generally required when the record contains insufficient facts to explain counsel's actions as tactical".) (emphasis in bold) (citation and internal quotation mark omitted).

The Second Circuit appears to have taken the position of the First Circuit. It has held that "[A] district court need not assume the credibility of factual assertions, as it would in civil cases, where the assertions are contradicted by the record in the underlying proceeding." *Puglisi v. U.S.,*

586 F. 3d 209, 214 (2nd Cir. 2009). It has further held that "when the judge that tried the underlying proceedings also presides over the Section 2255 motion, a less-than full-fledged evidentiary hearing may permissibly dispose of claims where the credibility assessment would inevitably be adverse to the petitioner." *Id.* But, to the contrary, the Third Circuit's holding appears to be similar to that of the Sixth and Seventh Circuits. It has held that "the District Court is obligated to—and abuses its discretion if it does not—hold a hearing if the habeas petition "allege[s] any facts warranting relief under § 2255 that are not clearly resolved by the record." *United States v. Tolliver*, 800 F.3d 138, 141 (3d Cir. 2015) (alterations in original) (quoting *United States v. Booth*, 432 F.3d 542, 546 (3d Cir. 2005). In assessing whether a hearing is necessary, the court "must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record." *Id.* (quoting *Booth*, 432 F.3d at 545).

The Fourth Circuit has held that while the determination of whether to hold an evidentiary hearing ordinarily is left to the sound discretion of the district court (*Raines v. United States*, 423 F.2d 526, 530 (4th Cir. 1970)), "if the parties produce evidence disputing material facts with respect to non-frivolous habeas allegations, a court must hold an evidentiary hearing to resolve those disputes." *United States v. White*, 366 F.3d 291, 297 (4th Cir. 2004); *see* also *Raines*, 423 F.2d at 530 (recognizing "a category of petitions, usually involving credibility, that will require an evidentiary hearing in open court"). The Court has further held that "An evidentiary hearing is 'especially warranted' when factual allegations in a § 2255 motion 'relate primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light, and where the ultimate resolution rests on a credibility determination.' *White*, 366 F.3d at 302 (alteration, citations, and internal quotation marks omitted).

Thus, while in its published opinions, the Fourth Circuit appears to impose a lighter burden on the petitioner seeking an evidentiary hearing and therefore appears to have sided with the Third, Sixth, and Seventh Circuits, in the case at bar, it appears to have sided with the First and Second Circuits by upholding the district court's judgment denying the 2255 motion without holding an evidentiary hearing despite the fact that there were numerous issues with respect to the credibility of various government witnesses and there were additional factual issues in contention upon which the record casted no light. *See supra.* This Court therefore should grant the certiorari on the first question to resolve the circuit split in order to craft a uniform and consistent standard for holding an evidentiary hearing in post-conviction habeas cases.

III. BECAUSE JHA'S CONSTITUTIONAL RIGHT OF A FAIR TRIAL IN A FAIR TRIBUNAL WAS VIOLATED AND BECAUSE FOURTH CIRCUIT'S DECISION CREATES A CIRCUIT CONFLICT, CERTIORARI SHOULD BE GRANTED.

In *Liteky v. United States* 510 U.S. 540, 551 (1994), this Court explained that while trial judges are accorded a wide latitude in trial management and "expressions of impatience, dissatisfaction annoyance, and even anger" (*Id* at 555-556) are not to be taken as signs of bias, "A favorable or unfavorable predisposition can ... deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment". *Id.* at 551. This line of reasoning has confused the Circuits and appears to suggest that district judges have a free reign to try cases and not to be recused even when their in-trial conduct might exhibit pervasive bias.

In *Murchu v. United States*, 926 F.2d 50, 53 n. 3 (1st Cir.1991), which is a pre-*Liteky* case, the First Circuit held that "the district judge should have recused himself as to those portions of

[the] section 2255 motion which alleged judicial misconduct". In *Daye v. Attorney General of State of New York*, 696 F.2d 186, 197 (2nd Cir. 1982), which is also a pre-*Liteky* case, the Second Circuit held that "The gravamen of a claim of denial of a fair trial due to judicial bias does not depend on the source of the bias or the manner of its manifestation. If judicial bias, or the appearance of it, existed, due process was denied." With respect to bias stemming from a district court's in-trial conduct, in *Unites Sates v. Antar*, 53 F. 3d 568, 575 (3d Cir. 1995), which is a post *Liteky* case, the Third Circuit explained that "Biases stemming from facts gleaned during judicial proceedings themselves must be particularly strong in order to merit recusal." The Court commented on the district court's stark remarks and found it unacceptable. *Id.* at 576. It concluded the district judge's opinions formed during the course of judicial proceedings displayed a high degree of antagonism against a criminal defendant." *Id.* The court's reasoning was clearly in line with this Court's holding in *Webb, supra* in which this Court found the district court's in-trial conduct unacceptable and violative of due process.

In the case at bar, the district judge appears to have lost her patience at the pre-trial hearing when she said that "I have a job to do. This case is going to trial on March 17. If I have to deny every single motion because we never get to it, then I'm just denying all the motions." JA 663. Defense counsel's footnote in his reply brief in direct appeal clearly suggests that district judge's comments had a chilling effect on him which prevented him from effectively presenting testimonial evidence by pressing for an evidentiary hearing at pre-trial. ("The Government points out that the Defendant asked the District Court to decide the *Franks* issue on the pleadings ... This was not because the issue was unimportant or conceded. The Defense was under extreme time pressure from the Court to conclude the motions hearing ... The Defense simply tried to

accommodate the Court's need to conclude the hearing." Defenses' Reply Brief in Direct Appeal at 7, n.4.).

Petitioner cited additional examples from the record which showed, among other things the trial judges' expression of disbelief over a key defense witness's testimony in the presence of the jury (ECF 180 at 17; ECF 155 at 97; JA 1376), and her attitude to serve as a prosecutor by advancing a favorable argument at her own initiative on the government's behalf without requiring the government to produce any testimonial evidence, which turned out to be winning argument for the government in direct appeal (JA 180 at 10-12). All this exhibited a consistent pattern of pervasive bias which was violative of petitioner's constitutional right of a fair trial in a fair tribunal and served as the basis for the trial judge's recusal from adjudicating the 2255 motion.

The issue in the case at bar is similar to that in *Webb v. Texas*, 409 U.S. 95 (1972) in which this court found that trial judge's stark remarks had a chilling effect on one of the key defense witnesses ("The fact that Mills was willing to come to court to testify in the petitioner's behalf, refusing to do so only after the judge's lengthy and intimidating warning, strongly suggests that the judge's comments were the cause of Mills' refusal to testify." *Id.* at 97) and violated the defendant's due process rights of being tried fairly. The issue in the current case is also similar to Seventh Circuit's holding in *Walberg v. Israel*, 766 F.2d 1071, 1077 (7th Cir. 1985) ("The Judge who is so hostile to a lawyer as to doom the client to defeat deprives the client of the right to an impartial tribunal.") (citation omitted).

There are similar cases from the First, Sixth, Eighth, and Ninth Circuits which support the conclusion that in-trial conduct of a trial judge exhibiting pervasive bias are violative of due process and grounds for recusal. *Cf. Crowe v. Di Manno*, 225 F. 2d 652, 659 (1st Cir. 1955) ("In short, the record indicates that the judge throughout the trial openly exhibited a partisan zeal for

the plaintiff wholly out of keeping with his office which deprived the defendants of their fundamental right to a fair and impartial trial. We must order a new trial before another judge."); *Knapp v. Kinsey*, 232 F. 2d 458, 466 (6th Cir. 1956). ("When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored."); *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985) ("The district court's conduct was so virulent here as to result in material harm to [appellants'] defense.") (internal quotation mark omitted). Likewise, in *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888 (8th Cir. 2009), the Eighth Circuit concluded that recusal would have been appropriate where the judge "directed profanities at Plaintiffs or Plaintiffs' counsel over fifteen times" and refused to allow the plaintiffs to present argument at the sanctions hearing. *Id.* at 904-05.

In contrast to the above cases, the Fourth Circuit, in the instant case denied petitioner's petitions seeking a writ of mandamus to recuse the trial judge[7], citing its opinion in *In Re Beard*, 811 F.2d 818, 827 (4th Cir. 1987) which is a pre-*Liteky* case in which the Court had held that "nature of alleged bias must be personal and **not arising out of litigation.**" (emphasis in bold). Thus, the Fourth Circuit continues to take the position that alleged bias seeking recusal no matter how pervasive must not have arisen out of litigation, which conflicts with the position taken by

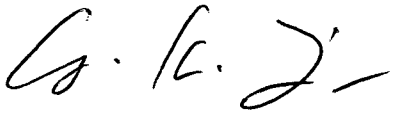
[7] Petitioner had sought two separate writs of mandamus from the Fourth Circuit seeking the trial judge's recusal from adjudicating the 2255 motion. *In re: Manoj Kumar Jha*, No. 17-2210 (4th Cir. 2018); *In Re: Manoj Kumar Jha*, No. 18-1718 (4th Cir. 2018).

the majority of the other Circuits[8]. This Court should therefore grant certiorari on this question to resolve the circuit split.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari on either of the questions presented for review.

Respectfully submitted,



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[8] There are two additional notable cases in which the Fourth Circuit has denied recusal in which claims of recusal were made based on the trial-judge's in-trial conduct. *Belue v. Leventhal*, 640 F. 3d 567 (4th Cir. 2011); *United States v. Richardson*, Nos. 17-4760, 17-4761, 17-4770, 18-4023, 18-4024. (4th Cir. 2019 (unpub). Although in *Belue*, the Fourth Circuit recognized that "the only cases where courts have granted recusal motions based on in-trial conduct tend to involve singular and startling facts." *Belue* at 573.