

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FIKRI APTILIASIMOV — PETITIONER
(Your Name)

vs.

COMMONWEALTH OF PENNSYLVANIA RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

FIKRI APTILIASIMOV

(Your Name)

SCI COAL TOWNSHIP, 1 KELLEY DRIVE
(Address)

Coal Township, Pa. 17866
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

WHETHER THE TRIAL COURT JUDGE'S, A FORMER PROSECUTOR OF APPELLANT'S PRIOR CRIMINAL TRIAL, REFUSAL TO RECUSE HIMSELF AND HIS SUBSEQUENT JUDICIAL PARTICIPATION VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

WHETHER APPELLANT WAS DENIED AN EFFECTIVE ASSISTANCE OF COUNSEL...?

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:

Luzerne County Court of Common Pleas
Superior Court of Pennsylvania

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Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. ed. 2d 749	
Commonwealth v. Williams, 105 A. 3d 1234, ____ Pa. ____ (2014)	
Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 129 S. Ct. 2252, 173 L. ed. 2d 1208 (2009)	
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STATUTES AND RULES

42 Pennsylvania Consolidated Statutes, Section 4401 et seq.

OTHER

ABA Model Code of Judicial Conduct Rules (2011)

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 _____ 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[] is unpublished.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 United States district 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[] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix A 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 Superior Court of Pennsylvania court appears at Appendix B 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 _____.

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: _____, 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. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was May 22, 2020. A copy of that decision appears at Appendix ___ A _____.

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

Amendment 5: 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.

Amendment 6: 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.

AMENDMENT 14: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 PA. C. S. 4401 et seq. Legislative findings and declaration.

Pa. Constitution, Article 1, Section 9: In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by in-

dictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

STATEMENT OF THE CASE

On April 23, 2014, Fikri Aptiliyasimov ("Petitioner"), a 70 year old Bulgarian-American, was arrested on charges of possession with intention to deliver heroine (under The Controlled Substance Act, 35 P.S. 780-102 et seq.). The Wilkes-Barre Anti-Crime Unit executed a search warrant at the Aptiliyasimov residence. During a search of the residence, officers recovered a large quantity of heroine in a small safe. Also recovered, was a large sum of money (\$115,000.00) in a different location of the same room, in a black duffel bag. Also, a safe key was found on the Petitioner's person (in a pant pocket). Petitioner was subsequently arrested and charged.

Petitioner was arraigned on April 24, 2014. His bail was set at \$100,00.00, and he was committed to the Luzerne County Jail. Petitioner's counsel waived the preliminary hearing. On August 14, 2014, a formal Arraignment was scheduled to be held on November 14, 2014, but the information was not filed until November 12, 2014.

The Luzerne County Public Defender's Office appeared as counsel for the Petitioner, defendant in the criminal case, advising him to plead guilty rather than hearing the relevant facts of the case. Then Petitioner revoked counsel as ineffective. On May 20, 2015, Stephen W. Geist, Conflicts Counsel, of the Office of Indigent Counsel, Luzerne County Courthouse, 200 North River Street, Wilkes-Barre, Pennsylvania, was appointed to represent the Petitioner, entered his appearance and requested discovery. However, viewing Petitioner through the lens of a case-file, and apparently having difficulty understanding (or believing) the Petitioner, advised him also to plead guilty. The Petitioner refused to do so. Then counsel withdrew his appearance when it became clear that he would not plead guilty on September 30, 2015. At this point, the Petitioner, unable to post bail, had already languished in the county jail almost a year and a half.

Subsequent counsel's withdrawal, his colleague John B. Pike entered his appearance and also again requested discovery.

Petitioner ultimately entered a guilty plea, on January 5, 2016, on an unscheduled date in the Judge's chambers before the Honorable Judge David W. Lupas. At sentencing, on March 21, 2016, Petitioner sought to withdraw his plea claiming that counsel had promised him a 'simple possession charge'. The Judge denied Petitioner withdrawal of the plea. The Judge used a plea colloquy from Petitioner's first withdrawal for the same reason. Petitioner was sentenced to serve 27-to-72 months in State incarceration with RRRI.

On November 20, 2015, the Petitioner filed a Rule 600 Speedy Trial Motion. The trial court never addressed it, but instead the Petitioner pled guilty.

Petitioner then appealed to the Superior Court of Pennsylvania on April 1, 2016. Petitioner claimed that he was denied an Bulgarian interpreter and could not fully understand what was going on. Another Judge had granted him an interpreter, but Judge Lupas refused to provide him one. Petitioner claimed that his plea should be withdrawn because it was involuntary, and he should be granted a new trial. The Superior Court AFFIRMED the Judgment and Sentence. Petitioner was granted a PCRA hearing before the Honorable David W. Lupas, a former prosecutor in a previous criminal case regarding Mr.

Aptiliiasimov, Attorney Jeffrey Yelen represented him and he was again denied in withdrawing his plea agreement on October 4, 2018.

On November 2, 2018, Petitioner filed PCRA (Post-Conviction Relief Act) appeal to the Superior Court, by Attorney Mary V. Deady, and Ms. Deady filed a NO-Merit Letter which was granted and Petitioner's appeal was DENIED. Petitioner then filed for reargument pro se, after having an inmate that understand his language to an extent, and began to disclose facts not on the record that are extremely relevant to his innocence. See Appendix C. Because of prison interferences, Petitioner's reargument was dismissed as untimely on February 4, 2020. The Petitioner then filed for leave to file an Allowance of Appeal in the Supreme Court of Pennsylvania. It was also

dismissed as untimely on March 4, 2020. See Appendix D. Thereafter, the Petitioner filed for leave to file for an Allowance of Appeal Nunc Pro Tunc, and was denied on May 22, 2020. See Appendix B.

REASONS FOR GRANTING THE PETITION

The Petitioner claims that he is innocence of the charges, see Appendix C, and that had he not 1) been told by his counsel that he was entering a plea agreement for simple possession and that he would be able to go home that day (January 5, 2016), or 2) had his Rule 600 Speedy Trial Motion been heard in that court, or 3) had he not been held in the county jail for so long without trial, or 4) had his Judge (David W. Lupas), his former prosecutor recused himself, he would not have pled guilty at all. Furthermore, Petitioner was denied re-argument in the appellant court because of untimeliness, not on the merits of newly presented facts. Also, the Supreme Court of Pennsylvania dismissed his Allowance of Appeal for the same reason, untimeliness, and not on the merits of his claims. The Supreme Court further denied his Nunc Pro Tunc application for an Allowance of Appeal. See Appendix A. Despite common state prison interferences, and Petitioner's pro se limitations, his claims should not have been dismissed as untimely. On March 31, 2020, the Commonwealth was given fourteen (14) days to respond to the petition for leave to file an allowance of appeal now-for-then, to which it did not respond until May 11, 2020, 41 days later. Because of that unfair advantage, the claims was dismissed.

Petitioner claimed that the trial court judge should have recused himself, because he was a prosecutor in a previous criminal case that involved corrupt officers that have been criminally charged thereof, and petitioner had also pled guilty in a similar fashion as here. Nor have the trial court counsel raised this issue. Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the petitioner's case(s). In these circumstances, the Supreme Court of the United States has applied an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable". See *Puckett v. U.S.*, 556 U.S. 129, 141, 129 S. Ct. 1423,

173 L. ed. 2d 266

In this case, the trial court judge had refused a Bulgarian interpreter, after a separate judge ordered such, and had never entered a ruling on his Speedy Trial Motion, and had used a previous plea colloquy to substantiate the plea agreement that he wished to withdraw because he claimed to have had been lied to by his attorney. Thus, in favor of the Petitioner, Pennsylvania law has held that the circumstances in the instant case are such that the courts need not necessarily reach the federal questions because "the appearance of impropriety compels" the courts to at least grant a new trial. See Commonwealth v. Darush, 501 Pa. 15, 24, 459 A. 2d 727, 732 (1983) (the appearance of impropriety is sufficient justification for the grant of new proceedings before another judge.)

This is based from the premise that "no judge may participate in any proceeding in which the judge's impartiality might reasonably be questioned". ABA Model Code of Judicial Conduct Rules 2.11(A)(1), (A)(6)(b)(2011).

In order for the integrity of the judiciary to be compromised, the state supreme court held that a judge's behavior is not required to rise to the level of actual prejudice, but the appearance of impropriety is sufficient. In the interest of McFall, 533 Pa. 24, 34, 37,617 A. 2d 707 (1992) (A tribunal is either fair or unfair. There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings.) Moreover, Your petitioner had tried to tell each counsel in the criminal proceedings, and on appeal, that the Judge was his prosecutor, and that an notarized affidavit claiming ownership of the drugs found at his residence, but no attorney had notified the court of it. Therefore, Your petitioner should at least be granted an opportunity to present his claims to a court un-burdened by any "possible temptation...not to hold the balance nice, clear and true between the State and the accused". see Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. ed. 2d 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 Pp. 12-14; Commonwealth v. Williams, 105 A. 3d 1234 (2014).

This Court has applied the objective standard asking not whether a

judge had harbored an actual, subjective bias, but instead whether as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881, 129 S. Ct. 2252, 173 L. ed. 2d 1208 (2009).

Petitioner asserts here that a new trial before a disinterested or impartial judge, an interpreter, and an effective counsel, the outcome would be much different. The only reason that petitioner is able to present his case in a new light is because an inmate at the state prison where he is currently held speak some Russian and was capable of de-ciphering the "actual" facts of the case. Due process entitles Your petitioner to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him".

Furthermore, the trial court record will demonstrate that each trial court counsel had only sought petitioner to plead guilty, wheras the evidence against him was insufficient to support the charges of PWID; and, also, the appeal counsels sought to withdraw from the case under the assumption that there was no merit in the appeal.

Petitioner was no doubt deprived of his constitutional rights to a fair trial and effective assistance of counsel in his criminal case. The Pennsylvania Judicial Code provided a means to secure the fairness of those proceedings by awarding him an interpreter, but had denied him that request. 42 Pa. C.S. 4401 et seq. (it is hereby declared to be the policy of this Commonwealth to secure the rights constitutional or otherwise, of persons who because of a non-English speaking cultural background...are unable to understand or communicate adequately in the English language when they appear in court or are involved in judicial proceedings. It is the intent of this chapter to provide for the use of interpreters to secure the rights of persons with limited English proficiency in all judicial proceedings.); see also, Commonwealth v. Diaz, Bucks Co., 2013 Pa. Dist. & Cnty. Dec. LEXIS 144, No. 6973-2007 (2013). Thus, any movement toward justice should include a full deposition of an interpreter, and an effective counsel, and recusal of the former prosecutor.

This Court should grant certiorari to expound upon the Petitioner's rights upon the questions presented above.

For the foregoing reasons, Your petition prayerfully requests that this Court should grant certiorari to determine whether the state trial court which led to petitioner's alleged induced plea agreement was constitutionally valid in view of the claims set forth herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Elke Pohlhausen

Date: 6-16-2020