No. 20-____

In the Supreme Court of the United States

MICHAEL B. BROWN,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL B. BROWN, CPA
PETITIONER PRO SE
P.O. BOX 3343
COLUMBUS, GA 31903
(706) 325-7903
MBBKCPC@GMAIL.COM

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QUESTION PRESENTED

Whether a judge's change of a party's transcribed deposition is an appropriate factual finding, conclusion, and decision defined by Sarbanes-Oxley's 29 C.F.R. 1980.109 to require a 29 C.F.R. 1980.110 petition for review in 14 days to consider Federal Rule Civil Procedure 60(d)(1), (3) motion to resolve a claim on the merits?

PARTIES TO THE PROCEEDINGS

Petitioner

- Michael B. Brown, former Audit Manager at Synovus Financial Corporation in Columbus, Georgia.

Respondent

- U.S. Department of Labor, on behalf of Synovus Financial Corporation.

LIST OF PROCEEDINGS

1. *Michael B. Brown v. Synovus Financial Corp.* CASE NO. 2015-SOX-00018 (ALJ Dec. 16, 2016) (Bergstrom).
2. *Michael B. Brown v. Synovus Financial Corp.* ARB CASE NO. 17-037 ALJ CASE NO. 2015-SOX-00018, Final Decision and Order Dismissing Untimely Appeal (ARB May 17, 2017).
3. *Michael B. Brown v. Synovus Financial Corp.* ARB CASE NO. 17-037 ALJ CASE NO. 2015-SOX-00018 (ARB June 27, 2017) (Order Denying Motion for Reconsideration).

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4. *Michael B. Brown v. Secretary of Labor*, 17-13151 (11th Cir. 2018, July 11, 2018; (2018 U.S. App. LEXIS 18803; 2018 WL 3385406).
5. *Michael B. Brown v. Synovus Financial Corp* D.C. Docket No. 4:16-cv-00249-CDL (Middle District of Georgia, August 19, 2019).
6. *Michael B. Brown v. Synovus Financial Corp.*, ALJ CASE NO.: 2015-SOX-00018 (30 October 2018).
7. *Michael B. Brown v. Synovus Financial Corp.* ARB CASE NO. 2019-0007 ALJ CASE NO. 2015-SOX-00018 (JUN 19, 2019).

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8. *Michael B. Brown v. U.S. Department of Labor* No. 19-13120 Agency No. 2015-SOX-00018 (11th Cir. May 4, 2020) (2020 U.S. App. LEXIS 14135).

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OPINIONS BELOW

The unpublished opinion of the court of appeals appears at App.1a. The opinions of the Administrative Review Board appear at App. 13a, 21a. The October 30, 2018 Opinion of the Administrative Law Judge appears at App.16a. The December 16, 2016 Opinion of the Administrative Law Judge appears at App.30a. The Title VII "sister" case opinion is reported at *Michael B. Brown v. Synovus Financial Corp.*, D.C. Docket No. 4:16-cv-00249-CDL (Middle District of Georgia, August 19, 2019).

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2020. This petition is filed within 150 days of the date on which a timely Petition for Rehearing was denied on July 30, 2020. (App.91a). Jurisdiction is invoked under 28 U.S.C. 1254(a).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. (App.92a)

STATEMENT OF THE CASE

1. Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended (SOX), 18 U.S.C. § 1514A provides protection for employee's who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of . . . 1344 [bank fraud] . . . when the information or assistance is provided to or is conducted by- . . . (C) a person with supervisory authority over the employee (or such other person working for the employer who has authority to investigate, discover, or terminate misconduct) . . . " *See* 18 U.S.C. § 1514A. (App.93a-95a).

2. By rule, "the decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint". *See* 29 C.F.R. 1980.109. "In the ordinary course a 'final decision' is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945). But Brown's Rule 60(d)(1), (3) motion leaves more for the court to do beside execute the judgment in finality.

3. The statutory language in 1514A is non-specific in regard to a "decision" with specification occurring in SOX implementing regulation 29 C.F.R. 1980.109. *See* 18 U.S.C. § 1514A; (App.92a-94a) and 29 C.F.R. 1980.109; (App.98a-99a). 29 C.F.R. 1980.109 is specific to the contents of a decision while other legal sources such as Black's Law Dictionary provide clarity as what a decision is; generally. A decision is defined as "a judicial or agency determination after consideration of the facts and the law; esp., a ruling order, or judgment pronounced by a court when considering a disposing of a case. *See* Black's Law Dictionary., *See* (App.94a-95a), and 29 C.F.R. 1980.109 (App.98a-99a).

The statutory language in 1514A and implementing regulation in 29 C.F.R. 1980.109 is non-specific in regard to the term "appropriate" but Merriam Webster's Dictionary defines "appropriate" as "especially suitable or compatible: Fitting". In reviewing an EPA provision in regard what is "appropriate and necessary" in regard to regulating pollutants, this Court reversed the D.C. Circuit which had determined that the term "appropriate" was ambiguous entitling the agency to deference. In its decision, this Court decided that the term "appropriate" is "capacious" and "all-encompassing" and therefore requires "at least some attention to cost." *See Michigan Et Al. v. Environmental Protection Agency Et Al.*, No. 14-46, 576 U.S. ___ (2015) (June 29, 2015). In the same manner, this court should hold the agency accountable for at least some attention to the appropriateness of a finding, conclusion to determine whether an appropriate decision has actually been made in accordance with the 29 C.F.R. 1980.109a rule.

Generally, a fact is "something that actually exists; an aspect of reality. Facts include not just tangible things, actual occurrences, and relationships, but also states of minds such as intentions and the holding of opinions. 2. An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." *See* Black Law Dictionary. States of mind and the holding of opinions are in regard to a party or a witness. Judge Bergstrom's December 16, 2016 order states in brackets "[reporting the fraud to the supervisor, general counsel's office, the audit committee, HR Department or Help Line]" but this statement simply does not exist in the September 28, 2015 deposition of Michael B. Brown, *See* 11th Circuit Appellant's Appendix–Volume III: pages 46-50, out of 114, that was fully transcribed by Lynne C. Fulwood, Certified Court Reporter. Even if the ALJ held an opinion that Brown meant to say "I'm saying I was terminated before—[reporting the fraud to the supervisor, general counsel's office, the audit committee, HR Department or Help Line]" he is not entitled to change a party's sworn and quoted testimony as did ALJ Bergstrom in the December 16, 2016 order. For instance, in financial reporting audit reports, Certified Public Accountants (CPAs) express an opinion as to whether an organizations financial statements are free of material misstatements. As part of that expression of an opinion, CPAs are not permitted go back in the evidence of the financial records and make material or unsupported adjustments to the financial record and then claim that they are expressing an opinion in regards to the entity's financial reporting. This would completely erode the public's trust in the U.S. Financial Reporting system. And permitting

judges to change a party's evidence threatens the public trust in the U.S. legal system due process of law.

"In the ordinary course a "final decision" is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945)." *Ray Haluch Gravel Co. Et Al. v. Central Pension Fund of International Union of Operating Engineers and Participating Employers Et Al.*, CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT No.12-992. January 15, 2014 (citing) *Catlin v. United States*, 324 U.S. 229, 233 (1945).

4. ALJ Bergstrom's December 16, 2016 order summarized 29 C.F.R. 1980.109 but explicitly left out the SOX requirement that an ALJ decision "will contain appropriate findings, conclusions" in part (a) "with at least some attention to" ensuring the ALJ decision regard the rules and "will contain appropriate findings, conclusions." 29 C.F.R. 1980.109(a), App.98a-99a.

The December 16, 2016 order stated, "§ 1980.109 Decision and orders of the administrative law judge. (a) . . . A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint. (b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity." *See Michael B. Brown v. Synovus Financial Corp.*, Case No. 2015-SOX-00018 (ALJ Dec. 16, 2016) (Bergstrom); *See* App.39a.

The part where it says "(a) . . . A determination. . . . " is the gap where 2016 ALJ Bergstrom schematically left out 29 C.F.R. 109's text requiring that the decision of the ALJ "will contain appropriate findings, conclusions" with specific disregard to the rule in regard to required appropriateness.

"Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *See Bostock v. Clayton County, Georgia*, No. 17-1618. October 8, 2019 Certiorari to the Eleventh Circuit. (June 1, 2020).

5. 29 C.F.R. 1980.110(a) Sarbanes-Oxley implementing regulation states that "any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The parties should identify in their petitions for review the legal conclusions or orders to which they object or the objections may be deemed waived. A petition must be filed within 14 days of the date of the decision of the ALJ . . . *See* App.22a.

6. Judicial review of agency action is authorized for aggrieved party's pursuant to 49 U.S.C. § 42121 App.97a, and 5 U.S.C. § 706(2). App.91a-92a, and Appellant's Principal Brief; page 20. Any limitation to judicial review in 29 C.F.R. 1980.110(a) is a limitation to a decision which 29 C.F.R. 1980.109(a) requires appropriate findings and conclusion. 2016 ALJ Bergstrom schematically excluded consideration

of the rule in regard to appropriateness of findings and conclusion to meet the rules requirements for a decision.

7. Federal Rule of Civil Procedure Rule 60(d) provides "Other Powers To Grant Relief' including: "(1) entertain an independent action to relieve a party from a judgment, order, or proceeding; (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or (3) set aside a judgment for fraud on the court." *See* App.104a. "Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence. [citation omitted] Rule 60(b)(6), the particular provision under which petitioner brought his motion, permits reopening when the movant shows "any . . . reason justifying relief from the operation of the judgment" other than the more specific circumstances set out in Rules 60(b)(1)-(5). *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, n. 11 (1988); *Klapprott v. United States*, 335 U.S. 601, 613 (1949). The mere recitation of these provisions shows why we give little weight to respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality. The issue here is whether the text of Rule 60(b) itself, or of some other provision of law, limits its application in a manner relevant to the case before us." *See Gonzalez v. Crosby*, 545 U.S. 524 (2005).

8. Rule 60(b) motions can be filed up to a year after a district court's ruling and Rule 60(d) motions can be filed beyond a year after a district court's ruling

so long as the filing is within a reasonable time. This Court prescribed reasonable care and diligence requirements for Rule 60 Relief in Rule 60(c) which this Circuit has continuously stated is "a reasonable time in regard to Rule 60(d) motions. *See* F.R.C.P. 60(c) Nothing within Rule 60 requirements for reasonable care and diligence or knowledge about harm require such knowledge within 14 days or even a year for a Rule 60(d)(3) motion and the agency erred by abusing it's discretion to override the intent of Congress that Rule 60(d) motions be made "within a reasonable time". *See Hansen v. Norman Roettger, et al.*, No. 17-14494 (11th Cir. August 31, 2018). *See* App.102a. *See also Matthew, Wilson & Matthews, Inc and Watkins v. Capital City Bank*, No. 14-13565.

This court recently emphasized that "a Rule 60(b) motion-often distant in time and scope and always giving rise to a separate appeal-attacks an already completed judgment. Its availability threatens serial habeas litigation; indeed, without rules suppressing abuse, a prisoner could bring such a motion endlessly." *Banister v. Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division*, No. 18-6943, Certiorari to the Fifth Circuit. (June 1, 2020). However, "from the beginning, there has existed alongside the term rule a rule of equity to the effect that, under the circumstances, which is after discovered fraud, relief will be granted against judgment regardless of the time of entry." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) *citing Marine Insurance Company v. Hodgson*, 7 Cranch 332; *Marshall v. Holmes*, 1412 U.S. 589. "This equity rule which was firmly established in English practice long before the foundation of our Republic the courts have

developed and fashioned to fulfill and a conversely recognized need for correcting injustices which, in certain circumstances demand a departure from the rigid adherence to the term rule.

"In particular, courts will not address new arguments or evidence that the moving party could have raised before the decision issued. *See* 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2810.1, pp. 163-164 (3d ed. 2012) (Wright & Miller); *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485-486, n. 5 (2008) (quoting prior edition). By contrast, courts may consider new arguments based on an 'intervening change in controlling law' and 'newly discovered or previously unavailable evidence.' 11 Wright & Miller § 2801.1, at 1610162 (3d ed. 2012). But it is rare for such arguments or evidence to emerge within Rule 59(e) strict 28-day timeframe." *Id.*

In the June 1, 2020 resolution of the question of "whether a Rule 60(b) motion for 'relie[f] from a final judgment' denying habeas relief counts as a second or successive habeas application", this Court determined that "it does, so long as the motion 'attacks the federal court's previous resolution of a claim on the merits." 545 U.S. 532 By contrast, *Gonzalez* held, a Rule 60(b) motion that attacks 'some defect in the integrity of the federal habeas proceedings' like the mistaken application of a statute of limitations-does not count as a habeas petition at all, and so can proceed." 545 U.S. at 532." *See Banister v. Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division*; No. 18-6943, Certiorari to the Fifth Circuit. (June 1, 2020) (citing *Gonzalez v. Crosby*, 545 U.S. 524 (2005). In this matter there has yet to be a decision pursuant to 29 C.F.R. 109(a) due

to the lack of appropriateness of the findings and conclusions directly resulting from a judge's [2016 ALJ Bergstrom's] change of a party's [Mr. Brown's] sworn deposition testimony which prohibits resolution of a claim on the merits. And the October 30, 2018 order specifically states Mr. Brown lost his rights to review of the facts and legal conclusions demonstrating that ALJ Johnson failed to review the merits as well. ALJ Johnson's October 30, 2018 is based on supposition of error which without consideration of the facts and legal conclusions which are unmentioned in his order.

9. In most cases, determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief, as in *Harris*, will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim on the merits, [citation omitted] since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings. *Gonzalez v. Crosby*, 545 U.S. ___ (2005).

10. The Eleventh circuit stated that the standard of review in this matter is the substantive evidence standard in stating, "Our review of the board's decision is governed by the Administrative Procedure Act. *Stone & Webster Const., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012). "We conduct de

novo review of the [board]'s legal conclusions, but we test the [board]'s factual findings for substantial evidence." *Id.* "The substantial evidence standard limits the reviewing court from deciding the facts anew, making credibility determinations, or re-weighing the evidence." *Id.* at 1133 (internal quotation marks omitted)." *See* App.3a-4a. In *citing Stone & Webster Const., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012), the Court of Appeals acknowledged the broader aspects of its required review including the fact that the Court of Appeals has stated "we look for substantial evidence supporting the agency's final decision." Substantial evidence supporting the agency's final decision is in 5 U.S.C. § 706(2)(E) which states:

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [concerning formal rulemaking and adjudicatory proceeding] or otherwise reviewed on the record of an agency hearing provided by statute; or

See App.93a.

In also citing, *Stone and Webster v. U.S. Department of Labor*, the Court of Appeals stated that the Secretary must support a decision with "articulate, cogent, and reliable analysis." *See Stone and Webster v. U.S. Department of Labor*, No. 11-11885. 684 F.3d 1127, June 19, 2012. citing *Herman*, 115 F.3d at 1572. "'Under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, federal courts shall set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' *Id.* § 706(2)(A). 'To make this finding the court must consider whether the decision was based on a consid-

eration of the relevant factors and whether there has been a clear error in judgment.' *Citizens to Preserve Overton Park, Inc,[.] v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 823-24, 28 L.Ed.2d 136 (1971), abrogated on other grounds. "A court must also consider whether the agency decision was not supported by 'substantial evidence' in the record. 5. U.S.C. § 706(2)(E). The substantial evidence test is similar to the arbitrary and capricious standard, but it applies to factual findings. *See Fields v. Dep't of Labor Admin. Review Bd.*, 173 F.3d 811, 813 (11th Cir. 1999) (per curiam). Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Stone & Webster Constr., Inc,[.] v. U.S. Dep't of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012) (quotation omitted)." *See* App.93a. The other criteria in regards to 5. U.S.C. § 706(2); including regard to whether a ruling is void is documented section 5. U.S.C. § 706(2)(B), (C), and (D). *See* App.92a-93a.

REASONS FOR GRANTING THE PETITION

I. A JUDGE'S CHANGE OF A PARTY'S TRANSCRIBED DEPOSITION ANSWERS IS NOT AS AN APPROPRIATE FACTUAL FINDING OR CONCLUSION DETERMINATION DECISION AS DEFINED BY SARBANES-OXLEY'S 29 C.F.R. 1980.109 TO REQUIRE A 29 C.F.R. 1980.110 PETITION FOR REVIEW TO SET ASIDE AN ORDER THROUGH F.R.C.P. 60(d)(1), (3).

Mr. Michael B. Brown was retaliated against by Synovus Financial Corporation after he provided infor-

mation to his supervisor that demonstrated that a violation of banking laws. App.31a, 68a-69a.

Greene provided a negative reviews in declaration against him but Greene was proven to have lied in his declaration in his subsequent deposition. *See* App.105a-115a; particularly 109a-110a, 114a which states:

> Q And paragraph 31, it says that, Although I no longer directly supervised Mr. Brown after the first quarter of 2010, I reviewed the performance improvement plan that Ms. Weekley issued to Mr. Brown in December 2012 to ensure that it fairly reflected Mr. Brown's performance and performance improvement needs I had observed.
>
> Q. (By Mr. Keegan) And that accurately reflects your testimony in paragraph 31?
>
> A. Yes.
>
> Q. And did anyone ask you to review that performance improvement plan?
>
> A. Ms. Weekley did.
>
> So Mr. Greene admitted to having part in the Performance Improvement Plan which links Mr. Greene to Mr. Brown's termination. And Mr. Greene has been proven to be liar who testimony cannot be trusted as having been completely invalidated.

Then Judge Bergstrom's changed Mr. Brown's transcribed deposition answers which " . . . strikes as "wrong with the force of a five-week old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling*

Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988); *United States v. Dixon*, 449 F.3d 194, 201 (1st Cir. 2006). The clearly erroneous and substantial evidence standards "are so similar in their wording and application, that many believe there really is very little, if any, difference between the two." *See* Lewis and Clark Law Review Vol. 13:1; *The Meaning, Measure, and Misuse of Standards of Review* by Amanda Peters, February 22, 2009. This Court "has suggested that the distinction between substantial evidence and clear error is a subtle one-so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome." *Id.* Citing *Dickinson v. Zurko*, 527 U.S. 150, 162-63 (1999). So the "dead fish" analogy applies in this matter as well.

2018 ALJ Johnson abused his discretion. "A district court would necessarily if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *See Cooter & Gell*, 496 U.S. at 405.

A. 2018 ALJ Johnson, the ARB, and the Court of Appeals Are "Dead Wrong."

1. 2016 ALJ Bergstrom Changed Mr. Brown's Deposition Answers in Regard to Objective Belief as Well as Subjective Belief.

The questions and answers at issue from Brown's deposition are in regard to objective belief in regard to whether provided information to his supervisor and "higher-ups" such that they could believe the information that Mr. Brown provided them. This is

the objective belief standard as stated in Complainant's Brief to ALJ; *See* 11th Circuit Appellant's Brief Appendix–Volume II, p.138-140. Excerpt from Michael B. Brown's September 28, 2015 Deposition transcribed by Lynne C. Fulwood, Certified Court Reporter. *See* Court of Appeals Appellant's Appendix Exhibit.

See 11th Circuit Appellant's Appendix–Volume I, p. 187, 118-154, Volume III: pages 46-50, 108 out of 114.

Page 265-9/28/2015 Brown Deposition:

265-line 13: Q "-did you go-did you tell anyone, Ms."

265-line 14: "Weekley, Mr. Cottle, Mr. Sawyer, the general counsel,"

265-line 15: "did you tell any of them that you suspected fraud?."

265-line 16: A "I told—I did that in the work paper."

265-line 19: A "I turned in my work paper."

265-line 24: A "It goes to my supervisor."

Page 282-9/28/2015 Brown Deposition:

282-line 22: Q "So you're not saying you had a plan to call the audit committee or general counsel's office?

282-line 23: A "I'm saying I was terminated before—before—it could have been while I was working."

The question on 282 was specific and limited only to calling the audit committee or general counsel's office. The 282: line 22 question:

- did not ask about or Mr. Brown's supervisor Ms. Weekley,
- did not ask about Mr. Cottle,
- did not ask about Mr. Sawyer, and
- did not ask about calling the audit committee.

So to surgically and schematically take the words from Synovus's question regarding these people and the audit committee in a completely different question and to strategically insert words from Synovus's question into Mr. Brown's mouth as an answer response from him is fraud. For one, Brown did not say [reporting the fraud to the supervisor, general counsel's office, the audit committee, HR Department or Help Line]". That was Synovus's question; not Mr. Brown's answer.

2016 ALJ Judge Bergstrom repeated his action to change Mr. Brown's deposition. As demonstrated on App.50a he repeated the same misstatement in brackets after explicitly stating earlier on the same page, he declined to say if he told S. Weekley, Mr. Cottle, Mr. Sawyer or the general counsel, of his belief of intentional misrepresentation/fraud in the ETR workpaper", even though Mr. Brown's deposition documents that Mr. Brown did in fact do so in his response stating on 265-line 16: A "I told—I did that in the workpaper." But that wasn't enough for Judge Bergstrom who; again, repeated his fraudulent change of Mr. Brown's deposition testimony as documented on App.85-86a but this time with the brackets removed as if Judge Bergstrom had not made any change to the deposition testimony at all. And this was in the crucial section where Judge Bergstrom stated in "V. When Viewed in the Light Most Favorable

to the Complainant, the Complainant Has Failed to Demonstrate That a Reasonable Person Would Believe That the Respondent's Alleged Conduct Constitutes a Violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348; Any Rule or Regulation of the Securities and Exchange Commission; or Any Provision of Federal Law Relating to Fraud Against Shareholders." So Judge Bergstrom's change of Mr. Brown's testimony is inextricably linked to the objective reasonableness test and to his denial of Mr. Brown's complaint.

The true character of the evidence demonstrates that Brown reported his suspicions to his supervisor Ms. Weekley regarding Synovus's conduct pursuant to 18 U.S.C. § 1514A. Yet Judge Bergstrom tipped the scale for Synovus and contradicted the evidence "central to the issue in the case" by significantly changing the changing the evidence of Mr. Brown sworn and transcribed deposition evidence violating the Due Process Amendments; 5 and 14 of the U.S. Constitution, 29 C.F.R. 18.22, 23, 29, 103(b) and Federal Rule of Civil Procedure 30(e).

Since the information was in the Paisley system other "higher-ups" had access to the same reported information provided by Mr. Brown.

Livingston v. Wyeth, Inc., 520 F.3d 344 (4th Cir. 2008); *Welch, supra*; *see also Henrich v. ECOLAB, Inc.*, ARB No. 05-030, ALJ Case No. 04-SOX-51 (ARB, June 29, 2006); *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB, July 29, 2005) While the Complainant need not cite a code section he believes was violated in his communication to the supervisor or other individual authorized to investigate and correct misconduct, the communication must identify the specific conduct that the employee rea-

sonably believes to be illegal, even if it is a mistaken belief." App.42a. Mr. Brown's belief is not mistaken and Mr. Brown's allegations are particularized and specific to Judge Bergstrom and actions to falsify the record of Mr. Brown's sworn testimony.

The non-conclusory evidence of the record directly refutes the agency's arguments in its response brief where the agency falsely represented to the Court of Appeals that "ALJ Bergstrom ultimately granted Synovus summary decision, he did so on entirely different grounds—namely, Brown's failure to demonstrate that his concerns were objectively reasonable, not any failure on his part to report those concerns up the chain of command." BRIEF FOR RESPONDENT THE SECRETARY OF LABOR, p.30. And their allegations of failure to demonstrate concerns to be objectively reasonable are in regard to a supervisor; not whether Brown believed the allegations himself for subjective belief. A reasonable mind would not accept the agency's conclusion that ALJ Bergstrom's change to Mr. Brown's testimony was unrelated to objective which demonstrates the failure of the agency to support its ruling based on "articulate, cogent, and reliable analysis." *See Stone and Webster v. U.S. Department of Labor*, No. 11-11885. 684 F.3d 1127, June 19, 2012. ALJ Johnson's reasoning in the October 30, 2018 ruling was arbitrary, capricious, and an abuse of discretion especially since the October 30, 2018 ruling fails to be substantiated or supported by the evidence. Brown has done more than show that ruling is unsupported by evidence by showing the fraud that occurred to justify the ruling.

The information above was provided to ALJ as documented in complainant MICHAEL B. BROWN'S RULE

60(D)(1)(3) MOTION. BRIEF. AND INDEPENDENT ACTION TO RELIEVE A PARTY FROM A JUDGMENT. ORDER, OR PROCEEDING TO SET ASIDE THE ORDER DUE TO FRAUD ON THE COURT. *See* 11th Circuit Appellant's Appendix–Volume I, p. 187, 118-154, Volume III: pages 46-50, 108 out of 114.

Brown explained the objectiveness reasonabless standard in his brief to 2018 ALJ Johnson where Brown stated,

> "The definition of protected activity in Section 806(a)(1) hinges on the reasonable belief of the employee about the employer's conduct, not on the kind of information provided. The question is whether the conduct in question would lead a reasonable person to believe, when standing in the shoes of the complainant, that such conduct constitutes a violation of one or more of the enumerated categories in Section 806(a)(1). . . . Presumably, encouraging a co-worker to report what he or she knows about a SOX violation could be a protected activity." Mr. Brown provided information to his supervisor and encouraged his only supervisor S. Weekley to report his findings forward to the next level. Mr. Brown's activity was protected.

See 11th Circuit Appellant's Appendix–Volume I, p.187, 118-154, Volume III: pages 46-50, 108 out of 114.

Brown also argued that, "The issue of objective reasonableness should be decided as a matter of law onlv when 'no reasonable person could have believed) that the facts amounted to a violation." *Sylvester v. Paraxel Int LLC*, ARB 07-123 (ARB May 25, 2011),

(citing *Livingston v. Wyeth Inc.*, 520 F.3d 344, 361 (4th Cir. 2008)). Brown also argued "The reasonable belief standard requires Brown to prove both that she actually believed that Owen committed wire and/ or mail fraud and that a person with her expertise would have reasonably believed that as well. *See Brown v. Lockheed Martin Corp.*, ARB No. 10-050, AUNo.2008-SOX-049 (ARB February 28, 2011). In recent case law, Sylvester quotes Melendez in stating that "the ARB has interpreted the concept of 'reasonable belief to require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable' *i.e.* he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the employee's] circumstances having his training and experience." *See Sylvester v Paraxel Int LLC*, ARB 07-123 (ARB May 25, 2011), (citing *Melendez v. Exxon Chems.*, ARB No.96-051 AUNo.1993-ERA-006 slip op. at 2 (ARB July 14, 2000).

Sylvester cites and quotes Melendez, in stating "and that the belief must be reasonable", is NOT the same thing as a "reasonable employee" must "also believe" which is a misrepresentation of Section 806(a)(1), *Melendez v. Exxon Chems.*, *Sylvester v. Paraxel*, and *Brown v. Lockheed*. "Belief refers to the Complainant's belief in regards to the allegations not the individual's belief. The Complainant's belief must be reasonable for an individual in the employee's circumstances. Melendez does not say that Complainant must prove that other employee's believe his allegations. *See* 11th Circuit Appellant's–Appendix Volume II, pages 138-140.

Brown presented argument that should have led to a successful resolution in his favor years ago. But ALJ Bergstrom's fraud to change Brown's testimony has resulted in years of costly litigation clear up a simple matter that is clear and obvious that judges cannot change a party's evidence. And this is particular clear when that evident demonstrates that Mr. Brown should win this case.

2. 2016 ALJ Bergstrom Demonstrated a Desire for Mr. Brown to Obtain Representation but Still Changed Mr. Brown's Evidence and Ignored Mr. Brown's Arguments Through Representation.

ALJ Bergstrom's October 1, 2005, ALJ Bergstrom stated:

> "It is specifically noted that the Complainant was advised in writing of his right to representation, the issues involved in this case, and the manner in which the case will proceed in the Order issued by this presiding Judge on June 11, 2015. The Complainant continues to proceed in this matter without representation and is considered to be a pro se complainant."

See 11th Circuit Appellant's Appendix–Volume I– page 137 of 174: "ORDER DENYING RESPONDENT'S PREMATURE MOTION FOR PROTECTIVE ORDER AND ORDER DENYING COMPLAINANT'S MOTION FOR APPROPRIATE RELIEF". So Mr. Brown diligently and respectfully obtained counsel even though it was extremely difficult to do so at the late stage of the proceedings. Nonetheless, ALJ Bergstrom essentially ignored Mr. Brown's represent-

ation and changed the evidence to tilt the case in Synovus favor.

Mr. Brown's attorney refuted Synovus's claims in Complainant's Response Brief to Motion for Summary Judgment, 11th Circuit Appellant's Appendix 19-13120, Volume I: Pages 162-174. But little of the Complainant's Response Brief; through counsel, is reflected in the December 16, 2016 order.

3. ALJ Johnson's Conclusion That Brown Could Have Addressed Judge Bergstrom' Changes to His Deposition Answers Before the Issued Is Dead Wrong, Arbitrary, Capricious, and an Abuse of Discretion That a Reasonable Mind Would Not Accept.

The December 16, 2016 order was not issued "before December of 2016" so the 2018 ALJ order arbitrarily, unreasonably, and falsely stated that "Mr. Brown based his entire argument on an order that was known to him before December of 2016 despite the ALJ knowing that the decree issued on December 16, 2016. The 2018 ALJ knew that it was impossible for Mr. Brown to have known about the December 16, 2016 order before it was issued unless the 2018 ALJ is suggesting that the 2016 ALJ; Judge Bergstrom, had improper ex parte communications with Mr. Brown but that is not stated in the order and would be improperly assumed in supposition. But assuming the October 2018 ALJ order to be correct, that order rules that Judge Bergstrom did in fact have ex parte communications with Mr. Brown which is a prejudicial and basis alone to set aside of December 16, 2016 ruling.

The Court of Appeals citation of *First National Life Insurance Company v. California Pacific Life Insurance Company*, 876 F.2d 877 (11th Cir. 1989) stating that in that case, "there was one inadvertent misstatement on the Sirota affidavit" fails to fit the facts and circumstances of this matter where there were multiple judicial changes of evidence and references to those changes to support the ruling. Unlike FNL in that matter, the was no way for Mr. Brown to have known or should have known the judge's thoughts and intent until after the judgment was rendered. Due to the Judge Bergstrom's role and as adjudicator and his conduct, Brown "would have no reason to pursue discovery that a judge was changing evidence.

By adopting the ARB,'s and the ALJ's conclusions, the Court of Appeals ruled that Brown knew of the judge's ruling before the ruling was actually rendered. To render such a ruling includes an inference of ex parte communications between the judge and Mr. Brown, but the agency and the Court of Appeals make no such allegation but only that Brown knew all by himself that the judge had changed his testimony before the initial entry of judgment. And since Mr. Brown knew that the judge changed his testimony before the initial entry of judgment, Mr. Brown was required to appeal that judgment within the short-time frame of an appeal or lose his right to review of the facts and legal conclusions.

The Court of Appeals ruling is in conflict with other circuits. In *United States v. Sierra Pac. Indus. Inc.*, the Ninth Circuit ruled that "relief for fraud on the court is available only where the fraud was not known at the time of settlement or entry of judgment. *United States v. Sierra Pac. Inc.*, 862 F.3d 1157 (9th

Cir. 2017) (citing *Hazel-Atlas*, 322 U.S. at 244, 64 S. Ct. 997 (allowing relief for 'after-discovered fraud)); *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1243-45 (9th Cir. 2016) (analogizing to fraud on the court, where crucial information was concealed until after settlement and entry of judgment . . . '; Pumphrey, 62 F.3d at 1133 (finding fraud on the court were crucial information was concealed and came to light after entry of judgment.))" Judge Bergstrom's fraud to change a party's transcribed deposition answers was not known to Mr. Brown "at the time of. . . . entry of judgment" since the fraud occurred during and as a part of Judge Bergstrom's ruling.

4. The Court of Appeals Failed to Properly Review Separately Appealable Rule 60(d)(1), (3) Motion as Untimely.

The 11th Circuit failed to review Mr. Brown's legal arguments in regards to the merits of either his Sarbanes Oxley claim, his Rule 60(d)(1) motion, and his Rule 60(d)(3) motion that have failed to be 'necessarily decided' as a decision.

The first stated issue in Mr. Brown's brief to the 11th Circuit was in regards to "whether the issue of ALJ Bergstrom's 16 December 2016 summary judgment order deposition fabrication fraud failed to be 'necessarily decided' in prior rulings rendering preclusion an invalid defense." *See* Appellant's Brief. In the issue, Mr. Brown used the word "preclusion" and also did not mention "collateral estoppel" in the issue but ultimately Mr. Brown argued finality which is what the agency raised in its conclusion without specifically stating "preclusion", "collateral estoppel", "repetitive claims", or some other word when the

agency raised the issue that Brown was attempting to "re-litigate his case" and then again to "re-argue his case". (App.4a) ("1. Collateral Estoppel. The board did not base its decision, or even mention, collateral estoppel, so we won't review the board's order under the collateral estoppel doctrine." *See Fla. Dep't of Labor & Emp't Sec'y v. U.S. Dep't of Labor*, 893 F.2d 1319, 1321-22 (11th Cir. 1990)). ("[A] reviewing court, in dealing with a determination or judgment which an agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." (internal quotation marks omitted)).

"As the names suggest, claim preclusion operates on the level of the claim, and issue preclusion operates on the level of the issue. Claim preclusion is based on the idea that the precluded litigant had the opportunity and incentive to fully litigate the claim in an earlier action, so that all matters that were or could have been adjudicated in the earlier action on the claim are considered to have been finally settled by the first judgment. In contrast, issue preclusion does not reach issues unless they were actually litigated and decided in the first litigation; however, it bars relitigation of those issues even in the context of a suit based on an entirely different claim." United States District Court District of Massachusetts Civil Action No. 05-11105-RWZ *Ramachandran Seetharaman v. Stone & Webster, Inc., Joe Green, Nick Zervos, David Edwards and John Martin* Memorandum and Order May 11, 2009 (citing) *In re Sonus Networks, Inc. S'holder Derivative Litig.*, 499 F.3d 47, 56 (1st Cir. 2007) (internal citations omitted).

Brown filed a combined Rule 60(d)(1) and Rule 60(d)(3) motion on October 8, 2018 for the first time

to the Office of the Administrative Law Judges; the same tribunal that issued the original decree. "[A]n independent action filed in the same court that rendered the original judgment is a continuation of the original action for purposes of subject matter jurisdiction" *Kenneth W. Brown v. Securities and Exchange Commission and Christopher E. Martin* Case No. 13-81307-CIV-MARRA, Southern District of Florida (February 3, 2015). The October 2018 ALJ had subject-matter jurisdiction in regard to the extent that he could rule on the facts but chose to arbitrarily and incorrectly say that "had he discovered for the first time, almost three years after the Decision and Order, that there had been fraud, he might be able to bring such a motion. But in this case, Mr. Brown bases his entire argument on evidence that was known to him before December of 2016, and on statements and analysis by Judge Bergstrom that was known to him in that month." And that "By failing to file a timely petition for review, Mr. Brown forfeited his right to have Judge Bergstrom's Decision and Order examined for factual and legal correctness. Having chosen to sit on his rights, he cannot now re-litigate his case." Then the 2018 ALJ arbitrarily concluded that since Brown left out a comma in his motion stylized as a Rule 60(d)(1)(3) stating "there is no such rule. Given his focus on the notion of 'fraud on the court,' I conclude that the motion is brought under Rule 60(d)(3)." One, Brown did not forfeit his right to have Judge Bergstrom's order reviewed for factual and legal correctness due to a lack of a decision on the merits of the actual evidence which is lacking. Two, even if the agency and court assumed; argumento, that no facts could be considered in regard to correct; which is what they did, facts can and must still be

considered in regard to fraud which is the subject of the timely separate appealable Rule 60(d)(1) and 60(d)(3) motions.

Sarbanes-Oxley Act (SOX) 18 U.S.C. § 1514A requires review of the facts on the merits the facts have yet to be addressed by the agency or the courts for court resolution of the merits since each and every ALJ, ARB and 11th Circuit orders; to date, are based on a judge's change of transcribed evidence instead of the evidence on the record. In considering the case, the court "must accept as true the undenied allegations of the petitioner. These facts are of great importance in considering some of the legal contentions raised." *Klapprott v. United States*, 336 U.S. 942, 69 S.Ct. 384 93 L. Ed. 1099 (1949)

In its December 23, 2019 response brief, the agency finally but merely restated several quotations from Brown's September 28, 2015 deposition without addressing wither the deposition had been changed; the subject matter and basis for Rule 60(d)(1),(3) motion. But the agency's mere recitation of deposition quotation was 1) too late and had no impact on the agency's order which had already been rendered years ago on December 16, 2016. 2) The agency's recitation of the deposition quotations failed to in any way argue whether ALJ Bergstrom had changed Mr. Brown's deposition or not to resolve either the SOX 1514A or Rule 60(d)(1),(3) matter on the merits. The agency included an excerpt of the Mr. Brown deposition without line number and page numbers which is critical because this presentation falsely makes it appear as the questions and answers dialogue in the actual deposition flowed as present; it did not, as the Mr. Brown's summarized description above and

the actual deposition demonstrates. The agency claims that their listing of Brown's deposition is "(ALJ Bergstrom's factual findings). *See* December 23, 2019 Response Brief. But this too is a fraudulent misrepresentation of the facts as Brown has specifically proven with the evidence of the record.

"The Agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). But since the ALJ ruled that that "Mr. Brown forfeited his rights to have Judge Bergstrom's Decision and Order examined for factual and legal correctness" and the October 30, 2018 order failed to include facts or analysis of legal correctness of the December 16, 2016 order. The October 30, 2018 ALJ order only included analysis in regards to Brown's Rule 60(d)(1) and 60(d)(3) motion in theory without actually touching or addressing the facts or legal conclusions of the December 16, 2016 which result in the failure to demonstrate a 'rational connection between the facts found and the choice made' pursuant to the 11th Circuit's ruling in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

See App.66a. And the 2013 Tax Audit was the primary basis for supporting the termination in the "Team Member Counseling Form." Since the alleged problems with the Tax Audit occurred in December 2013 after S. Weekley alleges to have already made her decision to terminate Mr. Brown in later summer early fall, a reasonable person would conclude the "Team Member Counseling Form" termination docu-

ment would primarily include discussion of pre-tax audit problems. But the termination form goes on and on about the Tax Audit which is the audit wherein Mr. Brown provided information about his concerns about Synovus's conduct.

5) The Court of Appeals Improperly Deferred to the Agency's Argument That Brown Had Failed to Demonstrate Fraud.

Mr. Brown clearly strong arguments of fraud are well documented. From the argument in:

A) COMPLAINANT MICHAEL B. BROWN'S RULE 60(d)(1)(3) MOTION. BRIEF. AND INDEPENDENT ACTION TO RELIEVE A PARTY FROM A JUDGMENT. ORDER, OR PROCEEDING TO SET ASIDE THE ORDER DUE TO FRAUD ON THE COURT. *See* 11th Circuit Appellant's Appendix–Volume II, pages 118-154;

B) Complainants brief to ARB. *See* Appellant's Appendix Volume II p. 185 ARB Brief.

Mr. Brown details argument of fraud by 2016 ALJ Bergstrom as well as by Synovus. Any of the agency's defenses alleging that Brown has failed to demonstrate fraud; intrinsic, extrinsic, constructive or otherwise, are wholly without merit.

The agency and court of appeals swimmingly ignore that what we are talking about is a judge changing evidence of a party. Now unless they and their peers do this regularly, this is an extraordinary and unconscionable act that is unauthorized by law. *See* Federal Rule of Civil Procedure 30(e). Parties to a deposition and changes to deposition changes are permitted by parties only; not judges.

6) The Court of Appeals Improperly Deferred to "Synovus Had Fired Him for Poor Performance, a Legitimate, Non-Retaliatory Basis. I App'x 19-21" *See* BRIEF FOR RESPONDENT THE SECRETARY OF LABOR, p.5.

In Petitioners motion for reconsideration of the 20 December 2019 denial of default judgment Brown included a copy of Greene's deposition where Greene admitted that his ratings of Brown were that Mr. Brown's performance was "exceeds expectations" for 8 out 10 categories and "meets expectations" for the remaining two categories disproving his claims in his declaration against Mr. Brown.

See 11th Circuit Appellant's Appendix–Volume III: pages 25-30. Greene provided a negative reviews in declaration against him but Greene was proven to have lied in his declaration in his subsequent deposition in *Michael B. Brown v. Synovus Financial Corp* D.C. Docket No. 4:16-cv-00249-CDL (Middle District of Georgia, August 19, 2019). *See* App.104a-114a; particularly

Greene also stated that "in approximately two (2) hours I was able to determine that the relevant information proved that there was no fraudulent manipulation of the loans to overstate income. In each of the cases that [the Complainant] cited as issues, he alleged that the customers had not made interest payments on the loans and that the loans were renewed to prevent them from going past due. He was wrong. In each of the cases, the customer paid the total amount of interest due on the loan from their own funds prior to the loan being renewed." But this fails to address the issue of why use Disbursement Authorization Forms to transfer loan balances that have been allegedly

paid off and closed out in the loan system; not just alleged interest payments. Keith Greene's declaration testimony was completely refuted. *See falsus in uno* doctrine. *See* Black's Law Dictionary.

Johnson deferred to Bergstrom who used Greene and Cellino as reasonable persons. But nothing in the record suggests that had similar training, education, and experience as Mr. Brown is a certified public accountant in the State of Georgia. App.36a. But there are no such statements for Greene, which is basis alone to have excluded them from any reasonable person test.

Sandra Weekley's own declaration as documented in the December 16, 2016 order; *See* App.65a-66a, demonstrates that Complainant provided had provided her information and that this information was in regard to interest income and interest income accruals; thereby along with the ETR workpaper demonstrated protected activity because Weekley was Brown's supervisor. S. Weekley stated that the Complainant was also assigned to the Tax audit which she began reviewing and discussing with the Complainant more closely on and after December 12, 2013. S. Weekley discussed the report for testing the Effective Tax Range (ETR) because "there was a detailed table with individual loans listed and several columns of testing that had been performed . . . [She stated she] was not sure how [the Complainant] reached the decision that detailed loans needed to be tested. During this conversation [the Complainant] said that loan interest income was a significant portion of the company's income, so he needed to be able to verify the accuracy of that number before he could rely on the income amounts used by the Tax Department. Weekley admit-

ted, "it appears that [the Complainant] used the [ETR] sample to per-form interest recalculations that were done in another audit and he also attempted to assess whether the loans were properly accruing interest." App.59a.

7) The agency and Court of Appeals erred by ruling that Brown's arguments were nothing more than ("Conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud." (alterations and quotation marks omitted)); *Brown v. SEC*, 644 F.App'x 957, 959 (11th Cir. 2016) (unpublished) (Rule 60(d)(3) relief was unwarranted because the "allegation that the trial court was biased is conclusory"; *Campbell v. Sec'y of Dep't of Veterans Admin.*, 603 F. App'x 761, 762-63 (11th Cir. 2015) (unpublished) ("Campbell's allegations of judicial misconduct are the very definition of conclusory averments that do not serve to raise the issue of the existence of fraud."). (alterations and quotation marks omitted).

The record; including this brief, demonstrates the 2018 ALJ Johnson's and court of appeals ruling to be error for all of the reasons stated.

CONCLUSION

Mr. Brown provided information of his belief so that his supervisor and others could believe him. Mr. Brown stated that "after reviewing paid loan reports at a high level, most of the loans on the paid loan

report were loans that had not actually been paid off but that were renewed. And using Disbursement Authorization Forms to transfer loan balances from closed loan accounts that were not paid already to new fresh accounts to reset the clock for interest accruals for non-performing is a banking violation. However, Judge Bergstrom changed the evidence of Mr. Brown's deposition and ultimately concluded that since the words "fraud" and "violation" were not specifically used that no one would believe Mr. Brown despite stating in the order that use of these terms is not required. Judge Bergstrom's fraud combined with Judge Johnson's, the ARB, and Court of Appeals error is a miscarriage of justice that must not stand to defile the court, the ALJ, and the due process of law within the U.S. legal system.

The 10th, 6th, and 7th Circuit split with the 11th Circuit in its interpretation of fraud on the court. "Fraud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court. *H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Circuit). . . . *Bulloch v. United States*, 763 F.2d 1115 (1985). A judge's changes of a party's transcribed and sworn deposition answers in not within the list of fraud on the court exclusions as defined by the 10th and 6th circuits and certainly meets the criteria of defiling the court, ALJ, ARB, and U.S. legal system with a ruling that simply ought not be part of case law.

"'Fraud upon the court' . . . attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases . . . presented for adjudication." *Kenner v. Commissioner of Internal Revenue Service*, 387 F.2d 689 (7th Cir. 1968).

In the agency's December 23, 2019 Response Brief, the agency stated, that Mr. Brown "cites no authority (and the Secretary knows of none) for the claim that fraud by an ALJ equates to fraud on the court" *See* Respondent's Response Brief p.22. As Mr. Brown has previously stated, "Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court." *Porter*, 536 F.2d at 1119. Moreover, the dishonest actions of a judge constitute fraud on the court since the judge is responsible for the impartial function of the court and tribunal.

The rulings thus far in this case threaten proper and impartial jurisprudence; particularly in regard to the purpose and use of depositions and threatens the validity of summary judgments since the use of depositions is weakened by hampering the public's trust in the process as a whole. If the legal system allows a judge to insert his own words into Mr. Brown's mouth to change actual deposition testimony other judges can do the same in any legal matter and cite *Brown v. U.S. Department of Labor* as a basis to permit judicial changes to the substantial evidence of the record.

The case law Mr. Brown cited is in regard to officers of the court and case law demonstrating fraud on the court is not between parties as noted above. As ALJ Johnson quibbled about a potential missing comma

in Brown's Rule 60(d)(1), (3) motion, the agency quibbled about fraud on the ALJ as opposed to fraud on the court as if the ALJ does not function as a court tribunal; which is incorrect and unreasonable. But in the agency's quibbling, the agency helps to demonstrate; in agreement with Mr. Brown, that this matter is a matter of precedent and a crucial matter that requires this Courts attention.

The rulings thus far in this case threaten proper and impartial jurisprudence; particularly in regard to the purpose and use of depositions and threatens the validity of summary judgments since the use of depositions is weakened by hampering the public's trust in the process as a whole. If the legal system allows a judge to insert his own words into Mr. Brown's mouth to change actual deposition testimony other judges can do the same in any legal matter and cite *Brown v. U.S. Department of Labor* as a basis to permit a judicial change to the substantial evidence of the record.

Respectfully submitted,

MICHAEL B. BROWN, CPA
PETITIONER PRO SE
P.O. BOX 3343
COLUMBUS, GA 31903
(706) 325-7903
MBBKCPC@GMAIL.COM

COUNSEL FOR PETITIONER

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