RECORD NO:
20-5149 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Marcel Malachowski,
Petitioner,

v.

United States of America,
Respondant,

ON PETITION FOR WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

Petition for Writ of Certiorari

Marcel Malachowski, Prose
Great Plains Correctional Facility
P.O. Box 400
Hinton, OK 73047

QUESTIONS PRESENTED

1. Did The Second Circuit Court of Appeals Commit An Abuse Of Discretion By: (a) Exceeding the Scope of Review Defined By 28 U.S.C. § 455(a); (b) Failure To Provide Fair Notice, and; (c) Failing To Provide Thorough And Meaningful Review Under Pro Se Standard?

2. Does Deficient Advice Provided By Appointed Counsel (Assigned To Related Appeal) Causing Default, Establish Justifiable Grounds Under the Excusable Neglect Standard In Request For Reconsideration?

3. Does The Appearance Of Impartiality Standard Apply To An Appellate Court Under The Facts And Circumstances Presented By This Case?

4. Under The Slack, Standard; Does A Claim Of Actual Innocence Demonstrate A Valid Claim Of The Denial Of A Constitutional Right When Also Supported By Intervening Interpretation Of Relevant Statute Under Which Conviction Occured?

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Jurisdiction

On April 10, 2020, the Second Circuit Court of Appeals denied motion for panel reconsideration, or, in the alternative, for reconsideration en banc. This Court has jurisdiction under 28 U.S.C. § 1651(a).

I. STATEMENT OF THE CASE

Through post-conviction proceedings thus far, the facts and circumstances surrounding conviction give rise to numerous questions of Constitutional concern. New evidence not previously presented at trial not only supports proclomation of innocence. But also, reveals instances of impermissable conduct including evidence tampering, perjury, and a series of continuous deliberate misrepresentations of fact and evidence undermining the integrity of prior proceedings. Efforts that extended to effectively suppressing favorable material and critical witnesses from the defense. Thus far, the lower courts treatment of this case is so far from a departure from normal course of proceedings as to warrant the exercise of this Courts supervisory power. To permit such flagrent abuses of power to go unchecked would therefore leave an inconceivable notion that such blatent conduct has become acceptable in the course of Due Process.

The crux of the instant petition challenges the integrity of habeas proceedings. Whereby, ironically the lower courts have disregarded emerging truths, while accepting prosecutorial conduct and evidence that stands in violation of protected rights. In fact, new evidence establishes that the integrity of the truth seeking function of trial proceedings has been impaired from it's initial onset. Facts and circumstances suggest that the lower courts have failed to remain impartial. Presenting a significant argument to this claim, thus far the lower courts have either misapplied, or disregarded a compelling number of binding precedent in rendering prior decisions.

As previously stated, scientific evidence establishes both, government recordings had been tampered with prior to submission as evidence. While also confirming instances of perjury committed by federal agents during trial testimony. Such incontrovertible evidence is significant in a case where the arrest for possession of firearms occured while exiting the immediate location (storage unit) with nothing in possession - physical or otherwise. Evidence also provides that no further arrangements had been attempted or made, involving any specifics such as date, time, or location in which to support government allegations. More importantly, there had been no arrangement for payment. All of which are needed in order to consumate intent. Especially where momentary holding without more, does not establish a violation of law as confirmed by newly clarified judicial precedent.

The instant petition is not, strickly speaking, about challenging lower court rulings for error. It also represents a greater concern for equal protection under the same color of law as applied in attaining conviction. To be applied in a manner of establishment, and as written. To deprive an individual of that basic right, would therefore result in a miscarriage of justice.

As represented earlier, a review of the record in evaluation of prior rulings while in view of relevant binding law. Presents an objective challenge to court impartiality, lending to undermine the integrity of habeas proceedings.

A look back on appeal (14-0226-CR (CON)) from two prior pro se Rule 33 motions, along with the request to amend. (Dkts. 101, 110, 119, 123) Provides that both lower courts refused to construe pro se motions as brought under §2255. When in fact, the request to amend included, inter alia, review under § 2255. As such, the Rule 33 motions were deemed untimely, effectively avoiding review of prior ineffective assistance of counsel claims. See, (Dkt. 101) Claims that occured nearly eight years prior becomes important to consider. See e.g., (App. Br. Pg's. 51-58, 14-0226-CR (CON)).

Under the aforementioned appeal, the court was presented with new evidence in the form of scientific analysis and documentation of Native Status. The appellate

court declined to review evidence for the first time on appeal, notwithstanding, lending to support subject Brady claims. Considered together with the current habeas decision and the appellate court's decision to disregard a second actual innocence claim renewed under intervening clarification of relevant statute. Together raises a significant question of Due Process concern. Demonstrating that thus far, Petitioner has been denied thorough and meaningful review of new evidence that lends to establish both lawful and factual innocence to the crimes charged.

In further illustration of this emerging pattern, suggesting the appearance of impartiality. The aforementioned rulings evidence that the district court overlooked a claim of excusable neglect grounded upon attorney negligence. Attorney negligence directly caused default relative to timeliness of Rule 33 motion (dkt. 101). Whereas, the appellate court considered this claim for the first time on appeal, notwithstanding, the involvement of pure matters of fact. While no inquiry, or examination of subject attorney had been conducted below. In support of the claim, an affirmation provided by an outside party attesting to attorney conduct had been presented to the court.

The current facts and circumstances provide that Petitioner has been wrongfully denied thorough and

and meaningful review of motions brought under 28 U.S.C. § 455(a), and; Fed. R. Civil P. Rule 60(6), in violation of due process.

Procedural History

On December 23, 2016, Petitioner moved the district court under 28 U.S.C. § 2255, grounded upon two primary claims: (I) newly discovered evidence establishes and confirms Brady violations under the Due Process clause of the Fifth Amendment, and; (II) several instances of ineffective assistance of counsel resulted in [] violations under the Sixth Amendment. Most significant, Petitioner asserted a claim of actual innocence to all counts. citing Schlup v. Delo, 513 U.S. 298, 324 (1995).

In response, the district court held, "petition is untimely and meritless and must be dismissed." (Dkt. 161, pg. 17) On appeal in request for certificate of appealability, the Second Circuit Court of Appeals denied request holding that, "[Petitioner] has not shown that 'jurists of reason would find it debatable whether the district court was correct in it's procedural ruling' as to the timeliness of [Petitioner's] motion filed pursuant to 28 U.S.C. § 2255." citing Slack v. McDaniels, 59 U.S. 473, 478 (2000). See e.g., (Appendix A-2)

In view of the evidence presented accompanied by

underlying constitutional claims, suggests that habeas rulings are in tension with established law under the United States Supreme Court.

On August 2, 2019, Petitioner moved the district court in seperate motions pursuant to 28 U.S.C. §455(a), and; Fed. R. Civil Procedure Rule 60(b) grounded upon: (1) the appearance of judicial impartiality / bias provides grounds for recusal; (2) facts and evidence provide that the opposing party committed a fraud upon the court, and; (3) judicial bias affected the court's judgement in resolution of habeas petition. Further requesting that the court "vacate order and re-open habeas proceedings. (Dkt's. 172, 173)

Brought under motion for recusal, evidence identified court action and views formed prior to habeas proceedings that would reasonably cause an objective observer fully informed of the facts and circumstances to question the courts impartiality.

Utilizing an appropriate standard of review as provided by the Supreme Court of the United States, consideration should be given to motion for recusal. (Dkt. 172) A review of the trial record provides that the district court partially directed the verdict in violation of due process. In view of three additional issues involving trial error, to which the government received further benefit. Viewed together

raises a veritable question to the courts impartiality warranting recusal. See e.g., (Dkts. 172, pg's. 8-18; 173, pg's. 39-49)

Additionally, an objective observer could reasonably conclude that the district court had been wrongfully influenced by the prejudicial misperception rendered by Judge McAvoy in related case (09-CR-125 (TJM)). Evidenced by the court's consideration and reference to the record in reaching it's habeas decision. See eg., (Dkt. 178, pg. 4)

An objective evaluation of that record provides that Judge McAvoy egregiously concluded that Petitioner had issued "a thinly veiled threat" towards a Magistrate Judge (former acting United States Attorney responsible bringing both indictments). See (Appendix B, App. Br. pg's. 27-31 (19-4069)).

A review of the record provides that a letter in request for possible assistance in reaching resolution to both matters was prejudicially misconstrued as one issuing a threat. Furthermore, it is important to consider that prosecutors filed the letter as part of the docket in efforts to negatively influence court perception. The aforementioned circumstances must be considered collectively in order to effectively evaluate the need for recusal.

Presenting further questionable action, in response to both motions the district court held, "[P]etitioner's filing seek[s] relief beyond the scope of Rule 60(b)." citing

Hines v. United States, 2006 WL 13013 (N.D.N.Y. Jan. 3, 2006) (Dkt. 174) An objective observer could reasonably conclude that the court failed to impugn it's own standards, as well as disregarding Ground Two, in favor of the government.

Subsequently, a timely notice of appeal was filed on August 16, 2019, (dkt. 175), along with a request for certificate of appealability occuring on August 17, 2019. (Dkt. 178)

On September 17, 2019, Petitioner moved the Second Circuit Court of Appeals in request for the following: (1) appointment of counsel; (2) to hold appeal in abeyance while the district court had an opportunity to consider motion brought under 28 U.S.C. § 2241(c)(3), and; (3) re-assignment of § 2241, motion on grounds under 28 U.S.C. § 455(a) relevant to subject appeal. A seperate § 2241, motion presenting a claim of actual innocence grounded upon newly clarified interpretation of relevant statute under Rehaif v. United States, established by the Supreme Court of the United States, was also filed.

The chronology of events establish that on December 9, 2019, Petitioner filed notice of appeal in related case (19-4069) in the district court. A review of that docket reveals that the Second Circuit Court of Appeals provided notice of appointment to appellate counsel Robin C. Smith, esq., under appeal (19-4069) occuring the same day. Notice of appointment had been given, notwithstanding, docketing notice had not issued, and no

no formal request had been made. (On September 17, 2019, Petitioner requested appointment of Robin C. Smith, esq., to the instant appeal (19-2560)).

Then on December 17, 2019, appellate counsel notified Petitioner of appointment via an arranged legal call. Surprised by the unexpected appointment, natural questions were presented to counsel. However, no protest occured for the reason that the intention was to also request appointment to (19-4069). Petitioner explicitly questioned whether a possible administrative error had occured. Presenting that notice of appeal had merely been filed a week or so earlier. (Unaware that the two events actually occured on the same day.)

In further discussions on the subject of appeal (19-2560), a question posed whether further steps should be taken as there had been no response to request for appointment. In response, counsel had indicated that Petitioner should wait until the appellate court responded to the formal request.

On January 9, 2020, in a text order, the district court denied request for COA. (Dkt. 184) At this time the appellate court had still not responded to request for appointment of counsel presented back in September, 2019.

Then on February 7, 2020, appellate counsel arranged a second call. After discussions pertaining to ongoing medical

issue, limited access to legal resources, focus was then placed upon possibly requesting an extension of time to file appeal brief. Both parties presumed eventual appointment would also occure to appeal (19-2560). Again, counsel re-iterated to wait until the appellate court responded before proceeding any further.

Without any relevant notice, on February 14, 2020, the Second Circuit Court of Appeals "construe[d] motion to hold appeal in abeyance as seeking a certificate of appealability, upon consideration, thereby ordered that the motion be denied and the appeal dismissed because [Petitioner] has failed to show that '(1) jurists of reason would find it debatable whether the under(ying habeas petition, in light of the grounds alleged to support the [Rule] 60(b) motion, states a valid claim of the denial of a Constitutional right." citing Kellogg v. Strack, 269 F.3d 100, 104 (2d Cir. 2001)(per curiam).

Silently, the appellate court disregarded request to re-assign motion filed under §2241, establishing that in a second instance the court has ignored a claim of actual innocence. Noting that no response or aknowledgement of request for appointment of counsel had been provided.

Petitioner then moved the Second Circuit Court of Appeals for panel reconsideration, or alternatively consideration en banc. Bringing forth and highlighting that reconsideration should be granted on several grounds. First of these grounds identified

that the appeal involved two seperate motions. Arguing that "[p]rior to dismissing the appeal, no consideration or evaluation had been given to motion for recusal." Ineffect, Petition had been wrongfully denied review of motion for recusal, and the incorrect standard of review had been applied to Ground One (dkt. 172, pg. 19-20).

Providing further grounds for relief, "[] a possible administrative error occured depriving [Petitioner] of fair and reasonable opportunity to present effective appeal in relation to motion for recusal, and [proper] request for COA, pertaining to motion brought under Rule 60(b), also subject of the appeal." Additionally presenting that "[c]ounsel's advice directly caused no formal request for [COA] to be filed within the 28 day time period, [accuring] from the denial of COA in the district court." Ineffect, causing the Court of Appeals to "construe[] request for abeyance as a petition for COA, thereby [resulting in] prejudice to [Petitioner's] appeals." Id.

II. REASONS FOR GRANTING THE WRIT

Independent of issues presented in tandem brought under § 2241, meaningful and thorough review should be afforded to the issues presented herein. Asserting that potential relief under related petition would not resolve issues that have arrisen from prior habeas proceedings. Issues that would aid in this Courts jurisdiction.

A. Appellate Court Action Demonstrated By Prior Determinations, Also Warrant Review Under An Objective Standard As Provided By 28 U.S.C. § 455(a).

Judicial precedent as established by this Court should serve as guideposts in consideration of petition for writ of certiorari. Having previously "recognized the importance of need to disqualify [a court] 'based upon... judges motivation to vindicate a prior conclusion when confronted with a question for the second or third time and given that [courts] sometimes find it difficult to put aside views formed during some earlier proceeding..." See Liteky v. United States, 510 U.S. 560, 562-63, 127 L.Ed 474, 114 S.Ct. 1114 (1994), See also; Tumey v. Ohio, 273 U.S. 510, 532 (1927)(Petitioner "must be granted an opportunity to present his claims to a court unburdened by any 'possible temptation... not

to hold the balance nice, clear, and true between the government and defendant.")

1. The extra-ordinary circumstances provided by the aforementioned circumstances demonstrated by prior rulings establish that the appellate court has failed to remain impartial. Indeed, where two independant claims of actual innocence have been unconstitutionally disregarded while in the face of Circuit precedent. See e.g., Rivas v. Fischer, 687 F.3d 514, 539 (2d Cir. 2012); Bryant v. Thomas, 2018 U.S. App. LEXIS 1530 (forensic evidence raised sufficient doubt in order to toll AEDPA timelines); Holmes v. Capra, 2018 U.S. Dist. LEXIS 38579 ("scientific research qualifies" under Schlup, Standard).

a.) A prior claim of actual innocence brought under §2255, grounded upon forensic evidence, inter alia, accompanied by underlying Constitutional claims went unconsidered by the Second Circuit Court of Appeals. New evidence not presented at trial lent to undermine government allegations, while also establishing instances of perjury during trial testimony delivered by key government witnesses. Underlying claims were further supported by prior appellate court rulings that tend to impute the ineffective assistance of counsel resulting in trial error.

See Malachowski, 415 F. App'x 307 (2d Cir. 2011)(defense counsel failed to request affirmative defense [under] 8 U.S.C. § 1359); 623 F. App'x 555 (2d Cir. 2015), cert. denied sub nom., 136 S.Ct. 2526 (2016)("[Petitioner] had burden of proof on this issue.") citing e.g., United States v. Cournew, 788 F.2d 1335, 1338 (8th Cir. 1986)(describing defense under 8 U.S.C. § 1359). The Court also held that, "[forensic] evidence could have been discovered with the exercise of due diligence." (Brady Claim) Id. Prior rulings signaling ineffective assistance of counsel were rendered prior to actual innocence claim.

2. To further demonstrate that the Second Circuit Court of Appeals has failed to remain impartial through the pendency of proceedings thus far. In rendering prior determinations, the court has either misapplied or disregarded binding law to the government's benefit in each instance. See e.g., Kyles v. Whitley, 514 U.S. 419 (1995)(misapplied the "touchstone of materiality" to prior Brady claims); Giglio v. United States, 405 U.S. 97 (1976)(misapplied and overlooked - where trial counsel presented no witnesses or evidence in defense, the appellate court held that withheld ATF reports were "cumulative" to evidence presented at trial. Instances of perjury by government agents have been disregarded.); Holland v. Florida, 560 U.S. 631, 659 (2010)(overlooked - directly applies to prior claim of excusable

neglect relevant to timeliness issue under Rule 33); Schlup v. Delo, 513 U.S. 298, 324 (1995)(overlooked - prior actual innocence claim grounded upon evidence not presented at trial); Russell v. United States, 369 U.S. 749, 764 (1962) (overlooked - fair notice doctrine applies to last minute change to jury charge.); United States v. Bagley, 473 U.S. 667 (1985) (overlooked - directly applies to perjured testimony of two key government witnesses in ATF Agents Kopf and Cassanova.); California v. Trumbetta, 467 U.S. 479 (1984)(overlooked - while in the face of scientific evidence establishing government recordings were tampered with prior to submission as evidence. Ineffect, revealing prosecutorial misconduct.); Agostini v. California, 521 U.S. 203, 236 (1997)(overlooked - applicable to prior decisions that were clearly erroneous); Banks v. Dretke, 540 U.S. 668 (2003) (overlooked - wholly speaks to facts and circumstances presented by this case.); Chapman v. California, 386 U.S. 18, 24 (1967) (overlooked - as it would have provided analysis by a special variant to the charge delivered to jury); United States v. Schaffer, 523 U.S. 303, 309 (1998)(overlooked - directly pertains to forensic evidence and pre-trial request to exclude government recordings.); Harris v. Nelson, 394 U.S. 286, 300 (1969)(overlooked - would have required appellate court to remand case for hearings. In turn, revealing impermissable government conduct.); Hinton v. Alabama, 571 U.S. 263 (2014)

(overlooked - as it provides "attorney ignorance of a point of law [Native Status] that is a quintessential example of unreasonable performance under Strickland."); Coleman v. Thompson, 501 U.S. 722, 750 (1991)(overlooked - applies to claim of actual innocence; excusable neglect; evidence tampering, and; perjury); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 241 (1944) (overlooked - government willfully and deliberately submitted false evidence, and numerous instances of misrepresentation, establishes a fraud on the court.); Mapp v. Ohio, 367 U.S. 660 (1961)(overlooked - would have served to protect "[b]asic rights served by the Due Process Clause, we can no longer permit it to be revocable at the whim of [ATF Agents] who, in the name of law enforcement itself, cho[se] to suspend it's enjoyment [by tampering with evidence], our decisions, founded on reason and truth, gives to the individual no more than which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."), and; Daniels v. Williams, 474 U.S. 331 88 L.Ed 2d 662, 106 S.Ct. 662 (1986)("historically, guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.")

How often, if ever occuring before, does a case present such a significant argument. It is irrefutable that the Second Circuit Court of Appeals was bound to apply

the aforementioned precedent to the issues presented by this case. In and of itself, should compell this Court to exercise it's supervisory power to address the flagrent abuses that have occured through habeas proceedings. When currently, two independant, but related claims of actual innocence have been disregarded by the appellate court. Such action strikes at the very heart and purpose of habeas corpus.

B. The Second Circuit Court of Appeals Wrongfully Dismissed Appeal.

1. Either an incorrect standard of review was applied or, the appellate court exceeded it's authority in evaluation of appeal.

Firstly, it is unclear from the ruling whether or not motion for recusal brought under 28 U.S.C.s 455(a), was independantly considered apart from motion brought under Fed. R. Civil P. Rule 60(b). (Compare (19-4069), §455(a) motion docketed for independant review.)

For sake of arguendo, if motion for recusal had been independently considered. The ruling itself indicates that the appellate court applied the standard of review provided by Kellogg v. Strack, 269 F.3d 100, 104 (2d Cir. 2001)(per curiam),

enunciating the standards as setforth by Slack v. McDaniel, 529 U.S. 473, 478 (2000).

The Supreme Court of the United States established the importance and standard to which a motion for recusal is to be evaluated under Liteky v. United States, supra.; see also, SEC v. Razmilovic, 738 F.3d 14, 31 (2d Cir. 2013)("Recusal is examined under an 'objective standard': the question is whether an objective and disinterested observer, knowing and understanding all the facts and circumstances, could reasonably question the courts impartiality). See e.g, Malachowski 09-CR-125-4(TJM); (19-4069).

Under review of motion for recusal, Petitioner was not required to demonstrate the standard as enunciated by Slack. By applying the incorrect standard of review, ineffect, increased the burden for demonstrating §455(a) grounds.

Alternatively, the ruling demonstrates that the appellate court overlooked a critical step in evaluation of appeal. Initial evaluation should have provided consideration whether grounds for recusal had been met guided by the appropriate §455(a) standard. See e.g., Liteky, supra. If grounds for recusal had been met, then the case should have been remanded and re-assigned to the district court in order to consider motion brought under Rule 60(b). See e.g. Buck v. Davis, 2017 U.S. LEXIS 1429 (appellate court exceeded authority under scope of review provided by Slack.)

a.) However, there exists another important factor for consideration lending to further establish extra-ordinary circumstances under which to grant petition

An objective standard of review should be applied to all the facts and circumstances, that could reasonably cause an objective observer to call into question the appellate courts impartiality. Especially where no hearing has occured in view of evidenced conduct, and thus far no impropriety has been found.

Critical to consideration on this issue, "judges commonly disqualify themselves when a fellow judge in their district is a party to a legal proceeding. Previously mentioned, Judge Baxter is obviously not a party to the case, but was figured into possible testimony in (09-cr-126), relative to conduct exhibited by agents involved in the investigation. Arguing ineffect, that an objective observer might question whether the Second Circuit Court of Appeals "might be affected in ruling, either consciously or subconsciously, by friendship or a spirit of collegiality or because the relationship between judges []."

The Supreme Court has repeatedly stated that "justice must satisfy the appearance of justice." Offalt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed 11 (1954); In re Murchison, 349 U.S 133, 136 75 S.Ct. 623, 625, 99L.Ed 942 (1955)), and; Tumey

v. Ohio, supra.

2. Petitioner Demonstrated A Valid Claim of The Denial Of A Constitutional Right.

a.) Petitioner's actual innocence claim whether viewed as previously brought under § 2255, or as recently renewed under § 2241, filed as part of docket (19-2560), have went unconsidered by the Second Circuit Court of Appeals. In and of itself, demonstrates a valid claim of the denial of a Constitutional right under the Fifth Amendment. See eg., Coleman v. Thompson, 501 U.S. 722, 750 (1991)(failure to consider claim will result in a fundemental miscarriage of justice.), see also; Triestman v. United States, infra.

The instant appeal presents a second instance where the appellate court has failed to consider a significant claim that would have resulted in review of underlying issues. However, the question that is presented under Coleman, this issue does not simply end there. In fact, by previously refusing to construe prior pro se Rule 33 motions as one brought under § 2255(f)(4), notwithstanding, request to amend (dkt. 119, 123). Thus, establishes that the appellate court has effectively avoided reaching Petitioner's constitutional claims for a third time.

Under appeal, the appellate court declared that petitioner's motion to amend was an attempt to end run time limitations." 623 F. App'x 555 (2d Cir. 2015). A ruling in tension with Harris v. Kerner, 404 U.S. 519, 529 (1972)(pro se motions must be construed liberally, to read the strongest argument they suggest.) See also, e.g., App. Br. pg's 51-58 (14-0226-CR-(CON). It is important to consider that, not only did the issues raised under Rule 33 motions (dkts. 101, 110, 119) qualify under §2255(F)(4), but the Second Circuit Court of Appeals misapplied the excusable neglect standard as established under Holland v. Florida, supra.

Putting aside the first actual innocence claim for sake of arguendo, while affirming the district courts habeas ruling declaring [§2255] petition as "timed barred," because Petitioner "has not identified any newly ... discovered facts, §2255(F)(4), that might support any claim for relief in this case." (Dkt. 161, pg. 10-footnote.) In view of the facts and evidence presented, the appellate court failed to review the discovery dates relevant to this holding. Indeed, where the appellate court previously declined to review subject evidence for the first time on appeal. Furthermore, additional facts and evidence supporting prior claims were discovered while the subject appeal was pending, occuring in July, 2016. Because, the Supreme Court of the United States denied request for

certiorari in June, 2016'. (cert. denied sub nom., 136 S.Ct. 2526 (2016)). Motion brought under § 2255(f)(4), was filed in December, 2016', presenting evidence and facts discovered in 2014' through 2016'. See eg., (Dkt. 173, pg's 35-38, 39-49)

b.) The Denial of Prior § 2255 Under AEDPA Timelines, While In View of Actual Innocence Claim Demonstrates A Valid Claim Under the Eighth Amendment.

Under Triestman v. United States, 124 F.3d 361, 378-79 (2d Cir. 1997), the Second Circuit Court of Appeals, "[I] observed, without deciding the issue, that denial under AEDPA of collateral review to a party claiming actual innocence could raise serious Eighth Amendment and due process questions." Id.

Facts and circumstances provide that Petitioner is similarly situated to Triestman. The appellate court was also alerted to a question of due process under Rehaif, appearing in request to hold appeal (19-2560) in abeyance. See (Dkt. 12, pg's. 1-2). After several months, the court construed the motion as one seeking certificate of appealability. See, (Appendix A-1)

a.) By construing the motion as one seeking COA, Petitioner argues that jurists could debate, in view of circuit precedent, whether the district court was correct in it's

ruling as to the timeliness of motion brought under §2255, in light of the grounds alleged to support the Rule 60(b) motion.

Circuit precedent establishes that an actual innocence claim serves as a gateway to having the underlying constitutional claims heard. See Rivas; Bryant; and, Holmes, supra., accord; Schlup v. Delo, 513 U.S. 298, 324 (1995). Judicial precedent suggests that the district court abused its discretion in view of incontrovertable forensic evidence presented previously under §2255. Furthermore, a reasonable jurist could debate whether the facts and evidence qualified under §2255(f)(4), when discovered in 2015' and 2016', while prior appeal was pending.

Critical to this issue, possibly demonstrating an abuse of discretion. Occuring previously under appeal (18-2501), the Second Circuit Court of Appeals did not reach the underlying constitutional claims. See (Appendix, A-2) Therefore, the current ruling demonstrates that the panel in (19-2560) has possibly exceeded it's scope of authority by not squarely addressing the proceedural ruling affirmed under prior appeal.

b.) Under the Eighth Amendment's prohibition against cruel and unusual punishment, Petitioner argues that he continues to be subjected to an increased statutory penalty

penalty as a result of prior convictions to which facts and evidence provide for both factual and lawful innocence.

Both the Second Circuit Court of Appeals, and the district court (09-CR-125(TJM)), have denied post conviction relief by wrongfully utilizing prior convictions attained in this matter. Demonstrating prejudice, relief would therefore reasonably subject Petitioner to a guideline range of 137-165 months. Currently, Petitioner continues to be subjected to a statutory minimum of 240 months, while having already served 132 months of his sentence. It is also worth mentioning the stigmatisms associated with such convictions.

3. Appellate Court Ruling Is In Tension With Well Settled Judicial Precedent.

Petitioner offers that the Second Circuit Court of Appeals abused it's discretion by construing pro se motion as one seeking COA. Well settled law provides that the motion should have been construed to raise the strongest argument that it suggests. See Harris v. Kerner, Supra.; Thompson v. Chorisky, 525 F.3d 205 (2d Cir. 2008); and, Triestman v. Fed. Bureau of Prisons, 470 U.S. F.3d 741 (2d Cir. 2006).

Under this standard while in view of Rehaif, and Triestman v. United States, the appellate court should have

afforded opportunity to voluntary dismiss appeal or, grant request to hold appeal in abeyance. Then, either provided consideration to motion brought under §2241(c)(3), or re-assigned it to the district court. The Second Circuit Court of Appeals also had jurisdiction under §2241(a). See e.g., Triestman v. United States, Supra. (28 U.S.C. §2241(c)(3) appropriate for a prisoner who alleges actual innocence based upon intervening interpretation of the Statute which he was convicted.)

4. The Panel Abused Its Discretion In Denial Of Reconsideration.

a.) Failed To Provide Fair Notice.

No notice of prior, and possible default had been provided to pro se appellant. There had been no scheduling order provided relevant to appeal on motion for recusal. Compare to appeal (19-4069) presenting identical circumstances, required that pro se appellant submit scheduling order to avoid default.

Additionally, reasonableness provides that the default to the 28 day timelimitation to provide request for COA, resulted from counsel's advice to wait until the court had responded to request for appointment of counsel.

b.) Failed To Consider, And Correct Possible Administrative Error.

Facts and circumstances present that it is more likely than not, that an administrative error occured, incorrectly notifying or appointing counsel to appeal (19-4069), rather than appeal (19-2560). There is no reasonable or procedural explanation for the fact that appellate counsel had been appointed to an appeal, where no docketing notice had issued, and no formal request had been made, in such an instance.

Important to consider, the panel under (19-4069), denied appellate counsel's request for re-appointment citing a conflict of interest. But, then granted counsel's request to be relieved. See e.g., (Motion For Reconsideration (19-4069)). Court action unfairly deprived Petitioner the assistance of counsel.

Alternatively, where counsel provided deficient advice causing default, together with possible administrative error established extra-ordinary circumstances supporting a claim of excusable neglect. Thereby, warranting re-instatement of appeal.

5. Conclusion

The color of law overlays a deprivation of a constitutional right when deprivation is achieved by a "misuse of powers, possessed by virtue of [Federal] law and made possible only because the wrongdoer is clothed with the authenticity

of [federal] law." United States v. Classic, 313 U.S. 299, 325-26, 61 S.Ct. 1031, 85 L.Ed 1368 (1940); United States v. Screws, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed 1495 (1944), quoting Chief Judge Dennis Jacobs, Second Circuit Court of Appeals. (citation omitted)

It would be wholly unreasonable to conclude that Petitioner has not demonstrated the deprivation of a constitutional right, where the facts and circumstances are analgous to the aforementioned statement. With each instance that a lower court rules in contrast to established law, a ripple effect occurs. With each and every ebb, the lines defining protected rights blur. Justice and the public are not served by a single prosecutorial victory in this instance.

As part in parcel of public confidence in the integrity of judicial proceedings, is the faith and belief that the color of law will be administered equally under the protections provided by the Constitution. Paramount to that faith and belief, is the omnipotence of this Court to establish and ensure the rule of law. There exists an inherent responsibility of this Court pronounced by the Constitution to address the issues presented by the facts and circumstances of this case.

WHEREFORE, for all the foregoing reasons set forth herein, Petitioner prays that this Court grant petition for writ of certiorari, affording such other and further relief as

deemed justified and proper.

Date: May 20, 2020

Respectfully Submitted,
Marcel Malachowski, Pro Se
15287-052
GPCF
PO Box 400
Hinton, OK 73047

TABLE OF AUTHORITIES

STATUTES

RULES

In The United States Court of Appeals

For The Second Circuit

Marcel Malachowski,

Appellant,

v.

United States of America,

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction in the district court was conferred by 18 U.S.C. §3231, granting original and exclusive jurisdiction of all offenses against the United States, including Appellant's offense of convictions. Entry of the district court's judgement of conviction occured on January 14, 2014, and the court entered an appealable judgement in this matter on November 12, 2019, and reconsideration on December 2, 2019. A timely Notice of Appeal was filed in the Court of Appeals on December 9, 2019. The Hon. Thomas J. McAvoy presided over the district court proceedings. This Court's jurisdiction is invoked pursuant to 18 U.S.C. §3742(a) and 28 U.S.C. §§1291, 2106.

STATEMENT OF ISSUES

1. Did The United States District Court Commit An Abuse Of Discretion Where The Court Overlooked Critical Facts, Failed To Acknowledge Honest Mistake, And Recognize A Disqualifying Predisposition And Cricumstance?

2. Did The District Court Unreasonably Apply An Objective Standard Of Review?

3. Did The District Court Abuse It's Discretion In Denial Of Motion Brought Under Rule 60(b) Without A Hearing Where Motion Demonstrated A Plausible Sixth Amendment Claim?

STATEMENT OF THE CASE

This is an appeal from the Northern District of New York docket 09-CR-125-4. Appellant was charged, along with over twenty other defendants, with conspiracy to distribute marihuana. Micheal Cook, Sean Herrmann, and Appellant were also charged with engaging in a continual criminal enterprise.

The Indictment

The sixty-four count indictment alleged that marihuana was brought into the United States and distributed to various locations.

Count One alleged that Appellant and twenty-one others, in or before April 2007, up to and including the date of the indictment, in Albany and Franklin Counties in the Northern District of New York, and else where, conspired to possess with intent to distribute more than 1000 kilograms of marihuana, in violation of 21 U.S.C. §§§ 841(a)(1) and 841(b)(1)(A), and 846.(A22-23)

Count Two alleged that Appellant and eleven others, in or before April 2007, up to and including the date of indictment, in Franklin County in the Northern District of New York and else where, conspired to import more than 1000 kilograms of marihuana in violation of 21 U.S.C. §§ 952(a) and 960(b)(1)(G) and 963 (A24).

Count Three alleged that Appellant, in or before April 7, 2007 up through and including February 19, 2009, engaged in a continuing criminal enterprise in that violated 21 U.S.C. §§841 and 952 by possessing with intent to distribute and import marihuana, which were part of a continuing series of violations of the Controlled Substances Act, 21 U.S.C. §801, et seq. The indictment alleged that Appellant acted in concert with at least five other persons with respect to whom Appellant occupied a position of organizer, supervisor, or any position of managment, and from which continuing series of violations, Appellant obtained

substantial income and resources in violation of 21 U.S.C. §848(a). (A25-29)

Count Five alleged that during the month of Febrary, 2008, Appellant imported 100 kilograms or more of marihuana into the United States from Canada in violation of 21 U.S.C. §§952, 960(2)(G) and 18 U.S.C. §2. Counts Six through Thirteen continued these monthly importation allegations, with each count charging importation in a seperate consecutive month from March, 2008 through November, 2008. (A36-40)

Counts Sixteen through Twenty-four, alleged that during the month of February, 2008, through November, 2008, Appellant possessed with intent to distribute and distributed 100 kilograms or more of marihuana every month except April, 2008, in violation of 21 U.S.C. §841(a)(1) and 841(b)(1)(B) and 18 U.S.C. §2 (A42-46)

Proffered Plea Agreement

From indictment in 2010, through 2012, while represented by two different appointed counsel during this period, the government and Appellant engaged in plea negotiations. Throughout this period, the government proposed that Appellant plead guilty to Count One of the indictment, conspiracy to distribute and possess with intent to distribute more than a thousand kilograms of marihuana in violation of 21 U.S.C. §846 and 841(b)(1)(A). The government's offer was favorable because Count One, carried a ten-year mandatory minimum sentence, rather than a possible twenty-year mandatory minimum sentence carried by Count Three. (A72, 222-224)

However, a plea agreement was never realized and plea negotiations fell apart in 2013, as a result of the government's conditioning that Appellant must stipulate, inter alia, to a two level Guideline incrfease pursuant to §2D1.1(b)(1) for possessing a firearm in furtherance of criminal activity in relation to an allegation by co-operating defendant Sean Herrmann that Appellant had other individuals threaten him with a gun with regards to missing proceeds.

Appellant has asserted that plea negotiations fell apart because the proposed enhancement was premised upon Herrmann's ficticious claim that he had been threatened with a gun. Whereby, the government relentlessly insisting on the the stipulation when the claim was in fact false, and the government knew or should have known the claim was concocted.

Ultimately, the government forced trial because they made an unreasonable demand upon Appellant that was later vindicated by the pre-sentence report. Trial counsel vividly recanted at sentencing that he and Appellant had heated, "nose-to-nose, red faced" arguments over his refusal to accept and stipulate to threatening Herrmann with a gun. At sentencing counsel stated:

> [Appellant] is right, He refused to make a deal because any deal offered by the government, prior to the date of trial, include[d] his having to admit that he placed a gun to ht ehead of Sean Herrmann and he categorically denied this from the beginning.
>
> Frankly, Judge, I trusted the government's position and the government's evidence and [Appellant] and I had some nose-to-nose, red faced arguments at the Albany County jail as to whether or not he should be pleading guilty and he absolutely refused to do so if accepting the-the accusation or the allegation that he placed a gun to Herrmann's head was going to be included, he would not do that.
>
> [] The presentence report is done, and [in] the pre-sentence report the government backed away from the allegation. Se we find ourselves in the nominal position here of [Appellant], who wanted to negotiate this case and plead guilty, was prevented from doing so by the government's reluctance to give up on this point.

(Sent Trans.,pg.36-37)

Re-Assignment of Case

After three and a half years into proceedings, this matter was re-assigned

from the Hon. Judge Kahn, to the Hon. Judge McAvoy. No lawful explanation, or notification was made prior, notwithstanding, the length of time that had elapsed. At the point of re-assignment, the government had not yet provided the bulk of discovery.

Request For Adjournment of Trial

On March 29, 2013, during a telephone conference, Appellant's jury trial was scheduled for June 4, 2013. On April 11, 2013, by written motion, Appellant requested a seven month adjournment of the trial date on the grounds that he had not yet had opportunity to review discovery that had recently been provided, that events in his prior case had affected his ability to focus on the instant matter, and that Appellant had not been provided adequate discovery to make an informed decision on the government's plea offer (Dkt.602). On May 13, 2013, in a text order Judge McAvoy denied Appellant's request for additional time to prepare for trial (dkt.603).

Motion For Counsel To Be Relieved & Adjournment of Trial For 90 Days

On May 30, 2013, Appellant moved for appinted counsel to be relieved because counsel had failed to share discovery materials with him, obtain materials to assist in defense, had not met with Appellant until just two weeks prior to trial in order to begin preparations, counsel divulged defense strategy to the prosecution, and realzing that counsel's application for employment with the same U.S. Attorney's office months earlier demonstrated a conflict of interest. (Appellant had made two prior requests directly to counsel via correspondence to inform the court of the perceived conflict, and acrimonious relationship that existed months prior to trial.) (Dkt.637, pg.,17-19)

Trial Day One

On June 4, 2013, the first day of trial, Appellant informed the court that he was in need of more discovery, that was believed to have been withheld (dkt. 637, pg.17).

The district court denied Appellant's motion for additional time to prepare for tial, and for further discovery, notwithstanding, newly appointed pro se status. The court directed the government to turn over previously withheld ATF reports part of the investigation and subject of controversy raised in the prior proceedings (08-CR-701(DNH)).

Trail Day Two and Change of Plea Hearing

On the second day of trial, June 5, 2013, Appellant arrived to court realizing that without discovery, or needed time to prepare, together presented little chance to adequately defend himself.

Alerting the court to the possibility of entering a plea should certain conditions be met. The court thereby granted Appellant fourty-five minutes to confer with stand-by counsel. Appellant discussed an alternative to trial, while seeking advise whether the court had the authority to depart downward based upon mitigating circumstances. Appellant was led to believe that the court had the authority to depart from the mandatory minimum sentence. Both the court, and government agreed to a sentencing hearing, which was a determinative factor in Appellant's decision to plea.

The district court informed Appellant of his rights to trial. The Court also advised Appellant the by entering a guilty plea, he would be reliquishing those rights. Then, the court asked the government to advise Appellant what the maximum or any minimum penalty would be:

AUSA: Yes, your Honor. Counts One and Two, the maximum term of

imprisonment is ten years , up to life. There is a mandatory five years supervised release, up to life; a ten million dollar --a potential ten million dollar fine; a hundred dollar special assessment fee.

Count Three, the continuing criminal enterprise, a maximum term of imprisonment is a mandatory 20 years up to life. There is a possibility of a two million dollar fine and at least three years supervised release, a hundred dollar special assessment fee.

For Counts Five through Thirteen and Sixteen through Twenty-four, each of these counts carry a mandatory minimum sentence of five years up to 40 years; at least four years supervised release, up to life; a possibility of a five million dollar fine, and a hundred dollar special assessment fee.

(A.110-111)

The district court then advised Appellant that there were Sentencing Guidelines that "used to be mandatory, but are no longer mandatory, but still must be considered by the Court in the Sentencing process." "[S]ometimes the Court can sentence"..."above the guidelines or below the guidelines"..."depending on the facts, the circumstances and the law." (A.112)

Pro Se Motions To Withdraw Guilty Plea

On June 6, 2013, after having an evening to review previously withheld ATF reports, Appellant notified standby counsel via telephone that he wished to withdraw his guilty plea to several counts. Appellant also requested that stand-by counsel promptly notify both, the government and the court.

In August, 2013, two months after trial, Appellant was provided with Jenks 3500 material. Appellant then moved to withdraw his guilty plea by pro se motion filed on September 3, 2013, October 28, 2013, and January 2, 2014, which were all denied. (A.122-134; 157-167; 175-187)

In Appellant's September 3, 2013, motion to set aside his guilty plea, Appellant alleged that although he wished to enter into a plea agreement, he was

unable to reach an agreement with the government. The only obsticle to an agreement, it was alleged that the government had insisted that Appellant stipulate to a two-level guideline increase for co-defendant Sean Herrmann's false claim that Appellant had threatened him with a gun.

Appellant explained that during plea negotiations, he had repeatedly denied the claim that he had anyone threaten Herrmann with a gun.

Appellant explained that during plea negotiations, he had repeatedly denied the claim. Appellant explained that he had suggested that his veracity be tested by polygraph on the issue. While asserting that if not but for the government's insistence that he stipulate to Herrmann's false claim, he would have accepted the government's plea agreement. Which included a plea to a single count, Count One. However, the government's position was intractable, and consequently, the plea was rejected and utlimately was forced to plead guilty to the indictment. (A.124-126)

In providing additional means of disproving Herrmann's false claim, it had been requested that counsel simply make inquiry into whether any other co-defendant's had corroberated Herrmann's claim. Further requesting that counsel investigate additional issues pertaining to government witnesses in order to prepare for trial. In response, detailed in attorney correspondence, counsel claimed that "he knew of no way to investigate potential witnesses."

Petitioner explained in the motion that after his guilty plea, counsel provided him with DEA-6 reports revealing statements that demonstrated that Harrmann's claim was in fact false, and that Herrmann recanted his claim in an interview with the government prior to Appellant's guilty plea. In his May 15, 2013, proffer, Herrmann recanted his story that Appellant threatened him with a gun and confirmed that, "no one put a gun to [his] head." (A.145)

Appellant asserted that Herrmann's false claim forced him to reject the government's plea offer to Count One, and caused him to plead guilty to the

to the indictment, subject to a twenty-year statutory mandatory minimum sentence for Count Three. (A.128) Appellant argued that as a result of the government's adoption of Herrmann's false claim as fact, he faced a mandatory minimum setence that carried double the sentence of what he would have faced had the government not insisted that Herrmann's false claim was true. (A.127-128) Considered along with the changes in recent years, scoring would have resulted to include the drugs minus two adjustment to the drug quantity table. Ultimately subjecting Appellant to a guideline range of 135-165 months.

January 2, 2014', Pro Se Motion

In his final motion, Appellant alleged, that it was not until his interview with Mr.Craig Penet, from probation that he learned there was a twenty-year mandatory minimum sentence for Count Three, from which the district court was not permitted to depart. (A.180-91)(According to the PSR, Appellant was interviewed by Penet on June 24, 2013 and August 2, 2013.)

Appellant did not know that there were absolute restrictions applicable to his guilty plea until after his decision to plead guilty, which divested the Court of authority to depart absent a letter issued by the government for assistance. It was the Appellant's understanding that the court "depart []if warranted... based upon mitigating factors," and that there was no truly mandatory mininmum sentence. Further alleging in his motion, that had he been fully informed, "he would have elected to proceed to trial on the CCE count."

Sentencing

On September 17, 2013, the district court re-appointed and modified counsel's representation from stand-by counsel to counsel of record. Appellant requested appointment of counsel to assist with sentencing because the Albany County Jail had removed federal law resources from it's library.

On January 7, 2014, Appellant appeared at sentencing held before Judge

McAvoy, represented by Fred Rench. Counsel argued that pursuant to Guideline §5G1.3, any sentence in the case should run concurrently with appellant's previous sentence in his Utica case on the ground of relevant conduct. Arguing that the players and law enforcement agents were the same, and that the cases should have been tried together. (A.219-221)

Counsel also requested that the district court depart from the mandatory minimum sentence:

> I've got a secondary point which [Appellant] asked me to add and that's the Court depart from a mandatory minimum sentence in this case and my reasons for the departure below the mandatory minimum, I should say [Appellant's] reason for the departure below the mandatory minimum are set forth in sequence in the pre-sentence report. Excuse me in my sentencing memorandum and I need not go through them.

The district court responded that the court could not depart. (A.221)

Counsel further argued that the government and Appellant were unable to come to a plea agreement because of the government's intractable stance that, in order to reach a plea agreement, Appellant was required to stipulate to threatening co-defendant Herrmann with a gun. According to counsel, from the outset of the case, Appellant refused to stipulate to threatening Herrmann with a gun, because he insisted the allegation was ficticious.

After Appellant's guilty plea, counsel argued that, the government flip flopped it's position and abandoned the assertion that the threat had occured. But, by then Appellant had pled guilty to the indictment. (A.222-224) Appellant also informed the district court that he wished to plead guilty, but the false allegation prevented him from coming to an agreement. (A.196-198)

Questionably, the government denied requiring that Appellant stipulate to the gun enhancement for the false allegation and suggested that it would have been the probation department that would have been responsible for scoring the two-point enhancement for violence. (A.225-226) However, two plea agreements

proffered to Appellant, required the firearms enhancement. (A.69-78)

The court found that the corresponding Guideline range was 188 to 235 months, but that the twenty-year mandatory minimum sentence on the C.C.E. charge applied. (A.234-236) Pursuant to Guideline §5g1.3(b)(1), the court adjusted Appellant's 240- month sentence to credit the 62 months imprisonment Appellant had already served. Consequently, the court sentenced Appellant to 178 months imprisonment to run concurrently to his prior term. (A.234-238, 244-248)

Direct Appeal

On September 9, 2015, a panel of this Court issued a summary order affirming Appellant's convistions. On appeal, the panel exercised it's baseline aversion to reviewing ineffective assistance of counsel claims on direct. On appeal, appellate counsel raised issue, interalia, that upon re-appointment counsel was ineffective for failing to withdraw Appellant's plea relevant to the false claim affecting plea negotiations.

§2255 Motion

Appellant's brief raised the following issues: (I) ineffective assistance of counsel(s) and a decision by the court denying request for a fourth resulted in a denial of a constitutional rights to counsel under the Sixth Amendment; (II) Brady violations establish due process violations under the Fifth Amendment; (III) Appellant's plea was improperly influenced and coersed in violation of due process under the Fifth Amendment, and; (IV) ineffective assistance of appellate counsel established further violation under the Sixth Amendment.

On June 11, 2018', the district court denied Appellant's motion in it's entirety. Holding that "because [] §2255 motion is denied without a need for a hearing, [] motion to conduct discovery is denied as moot. The court also found that the "[Appellant] fail[ed] to present viable issues upon which

reasonable jurists could debate...," thereby denying certificate of appealability pursuant to 28 U.S.C. §2253.

By Order dated December 19, 2018', the United States Court of Appeals denied motion for a certificate of appealability holding that the "Appellant has not 'made a substantial showing of the denial of a constitutional rights." citing Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Motion For Recusal

Appellant sought recusal of the Hon.Judge McAvoy in this matter pursuant to 28 U.S.C. §455(a). (Dkt. 884) Appellant argued that the appearance of impartiality/bias would undermine the fairness of proceedings in evaluation of motion brought under Fed.R.Civil P. Rule 60(b).

Rule 60(b) Motion

Appellant moved the district court under Rule 60(b), challenging the integrity of habeas proceedings on the following grounds: (1) judicial conduct and the appearance of impartiality/bias provide cause for recusal; (2) cousel's omissions and misrepresentations wrongly influenced court decisions against Appellant, jeopardizing the integrity of habeas proceedings. In effect, establish fraud on the court, and; (3) judicial bias affected the court's judgement in misapplication of well settled law to Appellant's Constitutional claims.

On November 12, 2019', the district court denied Appellant's motion for recusal (dkt.884), and also denied motion to vacate and re-open habeas proceedings (dkt's. 887, 880). The court held that the view "would not cause an ordinary person to question the Court's impartiality,"...[]..."nothing in the Court's statement's, findings, or conduct would indicate to a reasonable, objective observer that the Court acted out of prejudice, bias, or antagonism to the [Appellant]." (D&O, pg.8)

The court further rejected Appellant's additional grounds brought under

Rule 60(b) motion "as improper," []..."[and] is not with integrity of habeas proceedings, but an attempt to challenge his underlying concivtion," and "therefore den[ied]... motion as beyond the scope of Rule 60(b)." (D&O, pg.14)

STATEMENT OF FACTS

This case has a long procedural history that also relates to case (08-CR-701(DNH)). In a second indictment, the government named Appellant alleging his involvment in various marihuana related violations on March 13, 2010. (Dkt. 79) After a great deal of pre-trial motion practice and lengthy proceedings involving numerous co-defendant's held before the Hon.Lawerence E. Kahn, the Hon. Thomas J. McAvoy was re-assigned the case on March 13, 2013. (See Dkt.588)

Prior to court re-assignemnt, Appellant had requested two prior appointed attorney's to be relieved on grounds of ineffective assistance of counsel. In demonstrating these claims, first, Mr. Zuckerman was unwilling to provide so much as a contact phone number, or any sort of professional history other than that counsel had once been prosecutor. Mr.Zuckerman was the first attorney to aggressively advocate for accepting a verbally offered plea to Count One, which was to include the aforementioned 2pt enhancement premised upon Herrmann's false allegation. Counsel also persisted on co-operation with the government, suggesting that any potential sentence would not matter. At this point, merely a week into proceedings, counsel had not been provided discovery let alone had an opportunity to adequately review the case in order to effectively qualify a possible plea. Consequently, the district court agreed that counsel's premature advocation for a plea without having reviewed discovery was justification for re-appointment of counsel. (Pre-Trial Trans.,pg.14)

As a result, Attorney Gaspar Castillo was then appointed to represent Appellant. Mr.Castillo's conduct has also become known to this Court in other matters. Where in 2016', while appellant's direct appeal was pending, Chief

Judge Dennis Jacobs suspended cousel from representing clients in the Second Circuit Court of Appeals. See e.g. In Re Castillo, 645 Fed.App.29; In Re Castillo, 645 Fed.App. 41 (2d Cir.2016)("[Castillo] by defaulting on numerous occasions...,[] put his client at serious risk of prejudice...failed to alter behavior."); In Re Gaspar Castillo, 2018 U.S. App. LEXIS 1272 (Attorney disciplinary record would be provided to judge and parties in an inmates §2255 proceeding since the record was arguably relevant to the claim.) Appellant had filed a complaint citing grievances with the Third Department is 2013 regarding misconduct. See e.g. (08-CR-701(DNH)), dkt.131, 92-1).

Counsel's deficient performance played a pivitol role in affecting both proceedings. Most critically, plea negotiations that had lagged un-necessarily for over two and a half years. Whereby, counsel pursued no avenue of remedy in efforts to vindicate Appellant of the false claim made by Herrmann. It can also be said that counsel failed to take up the cudgel's. Mr.Castillo caused default to a critical Rule 33 motion relevant to (08-CR-701(DNH)) causing request for another re-appointment.

Pre-trial, Appellant raised three significant issues pertaining to third appointed counsel Fred Rench. Asserting that counsel operated under a conflict of interest, disclosed defense strategy to the prosecution, and several issues related to discovery. (Dkt's 599, 601, 602)

Illustrating these issues, in correspondence dated March 9, 2013, and March 26, 2013, addressed to counsel, Appellant detailed the following, "I hope you make the request...[a]fter having a few months to consider your conduct [and] application [for employment to the U.S. Attorney's Office]. I feel it's your obligation to pursue remedy with the Court." Then on March 26, 2013, Appellant questioned counsel's motives, "why did you wait until after the attempted plea to inform me of your application to the U.S. Attorney's Office. [] I tell you my trust level is at zero even less based on history and experience." (Dkt.880,

attached letter's)

On May 30, 2013, Appellant moved to remove appointed counsel (dkt.623). Then on June 4, 2013 occuring the first day of trial, the district court denied Appellant's request. In justifying it's denial, the court stated, "Mr.Rench and Mr.Castillo have tried many cases in front of me and they're very competent and very capable and if I were in the position that you are in, I would certainly want either one of them to be my representative." (See Dkt.637, pg.3-6)

Appellant also informed the court that he was in need of discovery material that was believed to have been withheld. Specifically asserting "serious Brady violations" with both matters. The government assured the court that all discovery had been disclosed. Once again, Appellant attempted to pursue his discovery claims, but instead, the court stated that it would not hear anything further because the jury was ready. Holding it's stated position that "it's time for this case to be disposed of." Id. at 5-6.

After having a brief opportunity during the evening to review previously withheld ATF reports provided on the first day of trial. On the second day, the court granted Appellant fourty-five minutes to confer with counsel regarding the possibility of entering a plea.

Appellant considered, inter alia, the government's irrecusable position relevant to the proffered plea together with the newly revealed favorable material. Formulating that by evidencing certain exculpatory facts that it may have been possible to warrant a downward departure based upon mitigating factors. Appellant then stated:

> "Your Honor, I'm prepared to plead guilty today. I would state on the record that I intend to request a sentencing hearing in this case. It is my understanding that the government will not object to me calling witnesses in the hearing, including Agent Murphy, Michael Cook, and Sean Herrmann, and I will be reasonably allowed latitude while examing these witnesses at the hearing."

(Change or Plea, pg.34-36)

As previously detailed in several pro se pleadings, it had been Appellant's misinformed belief that the court had authority to depart from any potential sentence. Appointed counsel's knowledge of Appellant's misinformed belief can be inferred from "extensive conversation...[], culminating in discussion just a few moments ago, perhaps the last hour..." Id.36

At the change of plea hearing, counsel represented to the court that "we've had complete discovery," irrespective of Appellant's request for additional materials. Upon further inquiry the government also declared, "[y]our Honor, we've turned over all the discovery we have related to the case." Stating the importance of discovery to the pending matter, the Court stated:

> "[T]his has to be done correctly from a proceedural standpoint. And the important thing...is that all the evidence that is going to be offered before this Court has been turned over to and the defendant knows about it." (Id. 18-19)

Despite the court's stated instruction, neither the government or counsel alerted the court to the non-disclosure letter (agreement) that had been issued and agreed upon. Counsel made an agreement with the government that scores of Jenks material disclosed on May 21, 2013', would not be provided to Appellant. (Dkt. 725, cover letter) Moreover, no formal request had been made to the court.

On the same day, the court accepted Appellant's open plea to the indictment, notwithstanding, the aforementioned circumstances. The next day, on June 6, 2013', Appellant telephoned counsel and advised him that he desired to withdraw his plea evidenced by letter dated June 11, 2013'.

Then, in a letter dated June 7, 2013', counsel detailed that, "upon returning to my office on June 6, 2013', I noticed a number of email messages directed to me from AUSA Dan Gardner. As I recall, much of the information was sent to me by Mr.Gardner at your request. I now enclose these materials herewith as I believe they may bear upon your Utica case and ultimately, upon the Albany

case." (219 pg's of Jenks material that had been withheld from pro se litigant.)

Then on June 25, 2013', counsel states in a letter that, "I have compiled and boxed the discovery material and Jenks material from your trial which was provided to me by the U.S. Attorney's Office. I will be dropping the box off at the Albany County Jail in the near future." (Material subject of the non-disclosure letter)

On November 6, 2013', Appellant wrote to the former Acting United States Attorney responsible for bringing both indictments. After a thorough review of withheld material relevant to both matters, the letter stated:

> "With respect for the court and in the interest of justice," ..."bring[ing] to your attention certain developments that would potentially reflect negatively...on the U.S. Attorney's Office. Your extensive knowledge of both matters may prove valuable where others lack in reaching resolution. [] Any further proceedings taken upon my behalf in order to vindicate myself of the unjust [Utica] conviction, and in furtherence of relief to the statutory minimum involved in the second matter would only stand to reflect negatively on the U.S. Attorney's Office, and agents involved in both investigations. In order to achieve a combined resolution, it may be prudent to enter into discussions with the current authority...It is my feeling that in order to achieve this both efficiently and effectively, any aid you Honor may lend would serve the interest of justice. Respecting that any direct involvement would not be permitted by your Honor's current designation. (Dkt.686)

The former acting U.S. Attorney displayed an unusual interest by attending Appellant's first trial. The letter was addressed directly to the subject party and was not intended to be included as part of the record. Part of the motivation behind writing the letter stemmed from the fact that judicial and prosecutorial re-assignment had occured. Both of which caused gaps in proceedural history and familiarity with matters.

SUMMARY OF ARGUMENT

Court's have held that there exists no exact formula for recusal, facts and circumstances must be evaluated on a case by case basis. Evaluation must apply an objective standard, not a subjective one by the party involved. The Constitution created an independant federal judiciary in order to ensure that judicial decisions would be impartial and made only upon law. Tradition is to assure not only fair and impartiality. As such, it is preferable for a judge to err on the side of caution and disqualify himself in a questionable case.

After nearly four years of proceedings, involving more than twenty co-defendants, Appellant was the only defendant to be subject to judicial re-assignment. Raising an initial question, re-assignment is a procedure that is unusual, and used as an exteme remedy that is rarely imposed. Especially where proceedings had begun nearly a year prior to Appellant's indictment, and continued for several co-defendants in front of the original judge at the time of re-assignment. Recusal is justified in order to provide balace, to give the appearance of fairness and impartiality.

Statements made by the district court not only suggest that the court harboured a prejudicial view of Appellant. But also, demonstrated improprieties committed by the court illustrate that the court failed to remain impartial. Together, reasonably calling into question the integrity of habeas proceedings in view of the facts and circumstances presented by this case.

The need to hold the balance clear and true between the government and Appellant is especially justified in prosecution(s) inolving questionable conduct on the part of the government. Several instances illustrate a consistent pattern of Brady violation. Also including deficient assistance by appointed counsel's exhibiting sympathies towards the prosecution.

A motion for an indicative ruling was decided while direct appeal was

pending, leaving no opportunity to file for recusal. Moreover, the court's statement and position went unrecognized by appellate counsel. Additionally, Petitioner was convinced, absolutely convinced and kept faith that Judge McAvoy could see the truth and would do the right thing irrespective of the misperceived threat. Also, the court unreasonably failed to account for the pending duration of time that had elapsed while under direct appeal in it's time calculation.

Prior to the habeas decision there was no indication that the court would not even be willing to accept honest mistake. While in view of all the facts and evidence pertaining to appointed counsels, relevant to his Sixth Amendment claims. It was not until the habeas ruling itself, while in the face of such evidenced conduct that rocked the faith previously held in the court by Appellant.

Most critically, in view of the facts and circumstances pertaining to the ineffective assistance of counsel experienced during plea negotiations. To conclude that Petitioner has not be wrongfully subjected to a double statutory penalty would be wholly unreasonable. Especially where no hearing has been held in order to resolve any disputed facts. On this issue, judicial precedent established by the Second Circuit Court of Appeals and the Supreme Court are binding on the lower court. The district court's decisions on this issue cannot be located within law as established by judicial precedent.

III. ARGUMENT

A. Grounds For Recusal

Appellant asserts that because Hon. Judge McAvoy has overlooked critical facts, failed to acknowledge honest mistake, and recognize a disqualifying pre-disposition and circumstance, together establish an abuse of discretion.

The Supreme Court has recognized the importance of need to disqualify trial judges "based upon...judges motivation to vindicate a prior conclusion when confronted with a question for the second or third time and given that judges

sometimes find it difficult to put aside views formed during some earlier proceedings..." See Liteky v. United States, 510 U.S. 560, 562-63, 127 L.ED 474, 114 S.Ct. 114 (1994)

1. Prior Re-Assignment

No consideration or response was given in denial of recusal addressing the issue of prior re-assignment of Appellant's case to Judge McAvoy, after two and a half years of proceedings. As previously stated, Appellant was the only defendant of more than twenty co-defendants to have re-assignment occur where Judge McAvoy "took over management of the case on March 13, 2013", in "efforts to promote a speedy trial." (D&O, pr.2,12)

The court's exhibited pre-disposition that, "it [was] time for this case to be disposed of," demonstrates the type of circumstance that would justify recusal in evaluation of issues and questions for possibly a second or third time. (Dkt.637, at 5-6) Especially where possible relief would require re-opening habeas proceedings resulting in further action.

In evaluating the effects of prior re-assignment, consideration must be given to the following facts. First, the court was completely unaware of the lengthy plea negotiations and controversial circumstances provided by the government's use of Herrmann's false claim as part of stipulation to the 2pt enhancement. When in fact, Appellant had been truthfully denying the allegation and objecting to it's use. All the while appointed counsel(s) failed to adequately act in a role as advocate by pursuing several reasonable avenues of vindication.

Furthermore, the court was completely unaware of attorney Gaspar Castillo's negligent conduct that directly attributed to any delay, timeliness issues resulting in default, and a continuous pattern of conduct also exhibited in other matters. Ultimately leading to disciplinary action occuring during the pendancy

of appeals. These facts considered together, suggest that the court has been unwilling to set aside views formed early on in proceedings.

Unexplainably, re-assignment occured notwithstanding Second Circuit precedent establishing that cases are only re-assigned in "unusual circumstance." See Gonzales v. Hasty, 802 F.3d 212, 225 (2d Cir.2015)(quoting United States v. Robin, 553 F.2d 8, 9-10 (2d Cir. 1977)). Re-assignment is "an extreme remedy rarely imposed." See United States v. New York, 717 F.3d 72, 99 (2d Cir. 2013) (citing United States v. Jacobs, 955 F.2d 7, 10 (2d Cir.1992)). There was nothing about the Appellant's case at the time of prior re-assignment that would have met the above cited standards in order to justify the unusual proceedure.

Alternatively, counsel Fred Rench provided ineffective assistance for failing to object to re-assignment in view of the aforementioned facts and circumstances.

In view of additional facts and circumstances presented by this case, including instances of perjury, misrepresentation, and evidence tampering. Reasonable argument exists that these issues have not been given due consideration under relevant jurisprudence. It is important to also consider that a prior ineffective assistance claim raised on direct, was deferred to habeas proceedings and has went unreviewed by this Court. Evaluation of this issue by the district court twice in seperate proceedings, has been tainted by prior statements made by the court relevant to subject attorney. Considered together raises a question of impartiality. Whereby, the court's statements declaring competence in the subject attorneys, render it unlikely that the court would reverse it's previously stated position.

In Tumey v. Ohio, 273 U.S. 510, 532 (1927), the Supreme Court held that recusal is warranted in order to provide [Appellant] opportunity to present claims to a court unburdened by any "possible temptation...not to hold the balance nice, clear, and true between the government and defendant." Id.

Further considering that previously, the district court has demonstrated a prior unreasonableness and arbitrary insistence upon expeditiousness in the face of justifiable requests for further discovery, needed time to adequately prepare in light of newly appointed pro se status, and request to remove assigned counsel Fred Rench.

To further demonstrate the district court's pre-disposition to dispose of this matter, that might reasonably cause any objective observer to question impartiality. Evaluation should be given to the following facts and circumstances. On the first day of trial, Appellant raised issue that "[t]here is serious Brady issues invloving this case with the Office of the Northern District, because [] the investigations were going on simultaneously. Officers were aware of both investigations at such time. Mr.Murphy [DEA Agent] was present at the first thing. [] They deliberately withheld [or destroyed] evidence that exculpated what happened.")Dkt.637, pg.15) "I started requesting discovery, which I don't even have [to] this date. Important recordings, again, that goto, [] evidence being withheld and situations that I've already experienced." Id.17 (See also, 08-CR-701(DNH))

In addition, Appellant requested seven witnesses for trial, one of which was not available despite involvment in (08-CR-701), and while being indicted relevant to the instant matter. (See Dkt.637, pg's. 27-30) None of which had been made available to pro se defendant at the time of jury selection.

Despite the district court's declaration that "this has to be done [correctly] from a procedural standpoint." Id. These issues involving questions of Due Process went unresolved when the court later declared, "[y]ou know Mr.Malachowski, I want to hear what your concerns are, but you have got to realize we are on a limited time..." Id.

Due Process under Brady v. Maryland, 397 U.S. 724, 90 S.Ct. 1413, 25 L.Ed 2d 747 (1970), provides that where misrepresentations made by the prosecution

render a plea involuntary and unknowing. In United States v. Fisher, the Fourth Cicuit Court of Appeals "reversed the lower court's denial of habeas relief hinging it's decision on egregious impermissable conduct (misrepresentation) antedat[ing] the entry of plea and because the misconduct influenced the decision to plead guilty or, put another way, it was material to that choice. Further supported by the United States Supreme Court holding that government misrepresentations constitute impermissable conduct. Fisher, at 2 (See Dkt.880, pg.33-36)

Appellant has evidenced through habeas proceedings that the government misrepresented evidence that Herrmann was threatedned with a gun when the prosecution knew or should have known of the falsity. And, that all evidence recordings material to proceedings had been turned over when they had not. Forensic evidence now provides that the government has withheld, and tampered with evidence recordings. Prohibited conduct committed by agents involved in the investigation(s). Indeed, these issues had been raised pre-trial, notwithstanding, the governments reluctance to provide adequate discovery to Appellant.

2. The District Court Unreasonably Applied An Objective Standard Of Review.

As stated by the court, under federal law, "[a] judge is required to recuse [him]self from 'any proceeding in which h[is] impartiality might reasonably be questioned.'" citing SEC v. Razmilovic, 738 F.3d 14, 31 (2d Cir.2013)(quoting 28 U.S.C. §455(a)) Recusal is examined under an "objective" standard: "the question is whether an objective and disinterested observer, knowing and understanding all of the facts and circumstances, could reasonably question the court's impartiality." Id.

Appellant argues that the use of "might" in the statute clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case. See Potashnick v. Port City Constr. Co., 609 F.2d 1101, 111 (5th Cir.1980), cer.denied, 449 U.S. 820, 66 L.Ed 2d

22, 101 S.Ct. 78 (1980). The Supreme Court has repeatedly stated that "justice must satisfy the appearance of justice." Offalt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed 11 (1954), see also; In re Murchison, 349 U.S. 133, 136 75 S.Ct. 623, 625, 99 L.Ed 942 (1955)), and; Tumey v. Ohio, supra.

Appellant asserts that the following evidenced statements present a reasonable possibility that

an observer uncolored by prior feelings and opinions could reasonably question the cout's impartiality. (See e.g., Dkt.884, pg.4-6) Statements made by the court occuring pre-trial and prior to habeas proceedings raise natural questions concerning impartiality.

a. Evinced from the district court's ruling relevant to (dkt.753, pg.6, footnote), Judge McAvoy held that Appellant made "...a thinly vieled threat to [former acting U.S. Attorney] Migistrate Judge Baxter." (See e.g., Dkt.880, pg. 4-5)

In sum and substance, Appellant argued that this statement and position held by the court evidence a prejudicial view formed during procieedings. A stated view formed prior to habeas proceedings, thereby, jeopardizing the integrity of proceedings. Especially where no threat existed, but misconstrued as such. This is not some usual circumstance that would be easiliy overlooked by an objective observer.

In response, "[t]he court disagree[d]," holding that "[e]ven accepting the [Appellant's] position that the court misconstrued his intentions in writing the letter, nothing in the court's characterization of that document would lead and ordinary person to question the Court's impartiality in the matter." (D&O, pg.9)

Appellant argues that the court's view is a subjective one, and not an objective one. It is unreasonable to conclude that an objective observer, or an "ordinary person" as stated by the court, would reason the

"mischaracterization" away as any part of normal occurance, and not cause any sort of question to impartiality.

Plain and simply, the court's statement gives rise to two independant questions which naturally cause impartiality concerns. First, the court provides no clarification, nor identifies what type or possible threat has been perceived. Especially where no hearing or further inquiry into the matter occured in order to dispell or dispose of any possible error.

Second, reasonableness provides that any objective observer would indeed question the court's use and reference of the letter in response to appellate counsel's motion for an indicative ruling (see dkt.753) Otherwise what possible explanation could be given by the court, except for one that would be disingenious. Which arguably in and of itself supports the inference of impartiality.

There are two underlying facts to consider here, the motion (dkt.753) primarily involved the ineffective assistance of counsel directly pertaining to attorney Fred Rench. An attorney to which the court provided false assurances, and completely misrepresented the court's experience- which were known or should have been known to be false. And, re-iterating that the letter was not submitted or filed as part of the record or docket by Appellant. Circumstances which raise questions to it's use not only by the court, but also the government. The Supreme Court has held that judicial misconduct may be found where a court's remarks "reveal an opinion that derives from an extra-judicial cource." See Liteky, supra. Arguably, the letter constitutes an extra-judicial source.

Furthermore, because the court also deemed that it "found the matter suspicious is hardly surprising," provides further support for recusal. (D&O,pg.10) In review of the record, the court overlooked critical facts and should not have found Appellant's efforts at resolution suspicious, or threatening in any manner. Occuring the first day of trial, the government raised issue to Appellant's witness list. Judge Baxter had been requested to be produced for

possible testimony. Explaining the theory that, "at the time, your Honor, he was not a judge []. He was actually...I guess a supervisor [] at the time, and he was the one conducting both investigations, your Honor. Information and responsibility as far as evidence and conduct going to, [], to both of these [cases], his awareness of both of them at the same time." Id.32-33. In response, the court agreed to make him available. The court was also aware that as acting U.S. Attorney, Judge Baxter attended Appellant's first trial.

For consideration in evaluation of this issue, an objective observer fully informed and understanding of all the facts and evidence. Would necessarily include the aforementioned instances of evidence tampering, perjury, misrepresentation, questionable conduct relating to discovery through both prosecutions. Therefore, might reasonably cause an objective observer to call into question the court's impartiality. Especially where the court has held no hearing, or thus far found no impropriety in relation to prohibited conduct in consideration of Constiutional issues. Considered collectively, illustrates a rather subjective standard applied by the court in evaluation of recusal.

Judges commonly disqualify themselves when a fellow judge in their district is a party to a legal proceeding. While Judge Baxter is obviously not a party to the case before the court, he was figured into possible testimony. See e.g., Poludniak, supra. Appellant argues that a reasonable person might question whether a judge in the Northern District might be affected in ruling, either consciously or subconsciously, by friendship or a spirit of collegiality or because of the relationship between judges on the same bench.

In further support of this claim, had the court provided an opportunity to be heard in light of the factual issues that were in dispute involving attorney Fred Rench. At a hearing providing opportunity to examine counsel, truthful testimony would have revealed Appellant's numerous requests to counsel to pursue similar line of resolution. Requesting that counsel attempt reaching

resolution with a higher authority, namely the current U.S. Attorney at the time. On the theory that the newly re-assigned AUSA's, were unaware and uninformed of prior proceedural and underlying history. It cannot be said if counsel had in fact made any actual attempt at this form of resolution prior to Appellant's individual effort. Counsel's application for employment with the same office, in essence, had been rejected.

b. Pre-trial statements plainly demonstrate that the district court failed to remain impartial. Moreover, the false assurances and misplaced confidence given by the court in support of the subject attorneys were improper. (See Dkt. 884, pg.4, 7-11; Dkt.880, pg.17-25)

Utilized in part as justification in denial of pre-trial Sixth Amendment claims, the court sided with subject attorneys by stating, "[l]et me assure you that Mr.Rench and Mr.Castillo- I don't know much about Mr.Zuckerman, I've only had him a few times- Mr.Rench and Mr.Castillo have tried many cases in front of me and they're very competent and very capable and if I were in a position that you are in, I would certainly want either one them to be my representative." (Dkt.637, pg.5-6) The statement clearly demonstrates specific reference to subject attorney's, and not to the court's experience in general.

In denial of recusal the court held, "[t]he court spoke from experience, and even if [Appellant] were correct that the Court's view was a mistaken one, nothing in the Court's statements, findings, or conduct would indicate to a reasonable, objective observer that the Court acted out of prejudice, bias, or antagonism to the [Appellant]." (D&O, pg.8) This holding is problematic for several reasons.

Giving abundance of respect to the court, for sake of arguendo, if characterization provides only that the court's view was mistaken. The court fails accept even honest mistake, applying a subjective standard evidenced by the response. Also, the court's response provides no evaluation in consideration

of the facts and circumstances existing from the pre and post letter positions represented by the court.

A further demonstration of this argument exists in the face of attorney Gaspar Castillo's suspension occuring during the relevant time period, and evidence undermining Rench's veracity while under oath. Further establishing that the court's statments were improper. The court's ruling does not provide consideration given to an objective evaluation of evidenced attorney conduct against the court's statements.

In speaking to the court's impropriety, the American Bar Association's standard of impropriety is also an objective one: "A judge shall avoid impropriety and the appearance of impropriety." Is. at 888 (quoting Model Code of Judicial Condut 2 Am Bar Ass'n 2004) The ABA Model Code's test for appearance of impropriety is 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out responsibilities with integrity, impartiality and competence is impaired."' Id. (quoting Canon 2A) See e.g., Neroni v. Grannis, 2016 U.S. Dist. LEXIS 108967

Appellant acknowledges that while there is a large place in the course of proceedings for defense attorneys acting as an officer of the court. To effectively and ethically encourage plea's while meeting ABA standards. However, the facts and circumstances of this case do not warrant the court's approbation of grievous attorney conduct. The court's ruling suggests that it is willing to overlook such striking conduct in consideration of Constitutional rights would cause any reasonable objective observer to question impartiality.

3. Timeliness Of Motion For Recusal

The district court held that "[a] complaint about a ruling that came eighteen months before [Appellant] filed his habeas petition can hardly be a complaint about the fairness or integrity of the habeas proceedings." Id. pg.13

Further holding that, "[Appellant] has not presented any evidence other than broad speculation that the Court's supposed bias continue[d]." Id.14

To conclude that Appellant's arguments are made without a firm factual basis, supported by evidences rulings and conduct, would be unreasonable. Court statements and action compared pre and post letter while in view of evidenced attorney conduct, considered against the habeas ruling and jurisprudence relative to each issue cannot be considered "broad speculation" under an objective standard. It is beyond refute that everyone makes mistakes, honest or otherwise, there should be no exception under the rule of law in this instance.

Appellant re-iterates that it was not until the court's habeas decision was pronounced did it occur that something was amiss. Previously holding steadfast to the belief and faith that Judge McAvoy would ajudicate the matter fairly and impartially. Second Circuit precedent establishes that "[a] recusal claim must be 'made at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.'" See Apple v. Jewish Hospital & Medical Str., 829 F.2d 326, 333 (2d Cir.1987)

4. Appellant's Rule 60(b) Motion Demonstrates A Plausible Sixth Amendment Claim That Warranted A Hearing. (See e.g. Dkt.888, pg.26-37)

Under Rule 60(b), an evidentiary hearing on an ineffective assistance of counsel claim is required only when the Petitioner has stated a "plausible" claim. See Puglisi v. United States, 586 F.3d 209, 213 (2d Cir.2009). Depending on the facts developed through discovery, [Appellant] may also be able to demonstrate relief in pursuit of his Fifth and Sixth Amendment claims.

Furthermore, Second Circuit precedent provides that Rule 60(b)(1), authorizes relief from a judgement or order based on "mistake, inadvertance, surprise, or excusable neglect"-"is available for a district court to correct legal errors by the court." See United Airlines v. Brien, 558 F.3d 158, 175

(2d Cir.2009)(quoting In re 310 Assocs., 346 F.3d 31, 35 (2d Cir.2003)). Under this rule, Appellant was permitted to identify court mistake or inadvertance providing opportunity to correct legal errors committed during habeas proceedings.

a. The District Court's Evaluation Was Unreasonable.

Evidenced from the habeas ruling itself, the district court does not squarely address Appellant's arguments for recusal by providing legal grounds as to why binding judicial precedent had not been applied under habeas consideration. Based upon the court's experience, intelligence, and thoroughness, the only reasonable inference that can be drawn is that either impartiality or bias affected the judgement resulting in error.

In response to Appellant's argument that "judicial bias affected the court's judgement in the misapplication [or overlooking] of well settled law to [] constitutional claims," the Court held, "[Appellant's] argument here again rehash the events that led to his plea bargain and allegedly defiecient conduct of his attorneys." Concluding that, "...[Appellant] challenges the underlying conviction, which is not the proper purpose of a Rule 60(b) motion seeking to overturn a decision on a habeas peition." Id.,pg.16

Again, the ruling does not provide legal grounds as basis for applying this holding in view of Rule 60(b)(1), guided by Brien, supra. At no time did Appellant's motion request that his convictions or sentence be vacated, but merely that habeas proceedings be re-opened under the cited grounds.

b. The District Court Abused It's Discretion In Denying Appellant Reasonable Opportunity To Be Heard Through A Hearing.

Under habeas review, counsel's sworn admissions and statements contrary to evidence provided sufficient apprisal to a conflict of interest. Which was further evidenced by counsel's statements made at sentencing. Therefore,

obliging the court to conduct inquiry into the plausible ineffective assistance claim.

The Second Circuit Court of Appeals has held that, "where the district court fails to make such an inquiry," constitutes this "to be reversible error." See United States v. Williams, 372 F.2d 96 (2d Cir.2004). Appellant's conflict of interest claim relative to Fred Rench is governed by Puglisi v. United States, 566 F.3d 209 (2d Cir.2019)("if material facts are in dispute a hearing should usually be held, and relevant findings be made."), see also; Armienti v. United States, 313 F.3d 807, 810 (2d Cir. 2012)(remanding for a hearing where appellant alleged specific instnaces of attorney deficiencies that were product of specific conflict of interest.)

i. Rench's statement's made at sentencing clearly demonstrateed cousel's sypathies and support of the prosecution that existed pre-trial through sentencing. Also demonstrating that the false claim made by Herrmann prejudiced counsel's view of Appellant affecting his performance. It is important to note that plea negotiations hinged on counsel's mistaken belief (performance) that the 2pt enhancement was justfied. In view of these facts, and given the circumstances in request for recusal, the district court was to apply an objective standard of review. Which provides that a fully informed, of all relevant law and facts, would not have raised question of impartiality in view of the decision. But, see also; United States v. Cronic, 466 U.S. 262, 271, 101 S.Ct. 1097, 67 L.Ed 2d 220 (1981)("A defense attorney who abandons his duty and loyalty to his client and effectively joins the [government] in efforts to attain conviction [or] sentence suffers form an obvious conflict of interest."), and; Cuyler v. Sullivan, 466 U.S. 335 (1980) Under review, this court must also consider what inference would be drawn considering counsel just previous to appointment, applied for employment with the very same U.S. Attorney's Office.

ii. For further consideration, an objective observer would also be

required to consider evidence of attorney Gaspar Castillo's suspension in addition to the aforementioned facts. What appearance does it give where Appellant had been represented by an attorney who did not appreciate his professional responsibilities. Especially through the most critical stage of plea bargaining. Through a hearing, Castillo's disciplinary record could have been included because it became relevant to Appellant's Constitutional claims under habeas review. In Re Gaspar Castillo, supra.

iii. The district court has thrice overlooked Rench's sworn affirmation in consideration of Sixth Amendment claims. Counsel's sworn affirmation in contradiction to evidence available to counsel further suggests impropriety. Especially where the district court has failed to address veracity issues through three pleadings which have resulted in adverse decisions. Issues that involve counsel's oath given to the court which has been substantially challenged in view of evidence. The court's reluctance to address the impropritey deminishes the integrity of proceedings. Moreover, these circumstances suggest that the court has accepted counel's statements as true in denial of habeas relief. Providing grounds under Rule 60(b)(3), asserting that cousel's misrepresentations and omissions have wrongfully influenced negative decisions against Appellant.

The aforementioned facts and circumstances weighed together cause to unbalance the scale of impartiality. In determining whether the district court's judgement was affected by impartiality, this Court must evaluate the following claim also.

c. Appellant Received The Ineffective Assistance of Counsel During The Plea Bargaining Stage.

Appellant argues that Missouri v. Frye, 566 U.S. 134 (2012), governs this issue. Under Frye, the Supreme Court held that the Sixth Amendment right to effective assistance of counsel extended to the consideration of plea offers that

lapsed or were rejected. That right applied to "all 'critical' stages of criminal proceedings." Id. See also; Strickland v. Washington, 466 U.S. 668, 687 (1987) (See dkt.880, pg's. 28-33)

"To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance. [Appellant] must demonstrate a reasonable probability that [he] would have accepted the more favorable plea offer had [Appellant] been affored effective assistance of counsel and that the plea would have been **entered** without the prosecution canceling it or the trial court's refusing to accept it." Id.

Also relevant to this issue, this Court must also consider the extra-ordinary circumstances presented by misrepresentations made by the prosecution rendering Appellant's plea involvuntary and unknowing supported by precedent found under Brady v. Maryland, 397 U.S. 724, 90 S.Ct. 1463, 25 L.Ed 2d 747 (1970), see also; United States v. Fisher, 2013 U.S. App. LEXIS (4th Cir.Md., April 1, 2013)(See Dkt.880, pg.34-37, 08-CR-701) Under Fisher, the Fourth Circuit Court of Appeals reversed the lower court's denial of habeas relief hinging it's decision on egregious impermissable conduct (misrepresentation) antedat[ing] the entry of plea and because the misconduct influenced the decision to plead guilty or, put another way, it was material to that choice. Supported by the United States Supreme Court holding that government misrepresentations constitute impermissable conduct. Fisher, at 2.

i. The proposed plea agreement including Count One, had been both rejected and then lapsed prior to pro se appointment which occured the first day of trial. Noting, pro se appointment had only been requested as a direct result of the experienced ineffective assistance of counsel. See Frye, supra.(evaluation applies to all critical stages, involving both rejected and lapsed offers.)

ii. Both Castillo and Rench failed to advise Appellant that he could have

pled to Count One, according to the proposed agreement and then challenged the 2pt enhancement under Brady. A challenge based upon the actual context and misrepresentations made under the actual agreement. Further advising Appellant that challenges could have been made during the pre-sentence investigation and through a sentencing hearing. Assuming arguendo that the government would have honored it's obligations under Brady. Providing both, evidence of Herrmann's recantation and previously withheld ATF Reports. Acting on information provided by Appellant during relevant interviews, Mr.Craig Penet of probation would have been onligated to inform the court of his findings.

iii. A court must evaluate whether it would have accepted the plea. And, evaluate whether the government would have retracted the stipulation in formal proceedings while presented with evidence that suggests it knew or should have known the allegation was false.

Through formal proceedings while in view of the actual agreement, the government would not have been able to switch it's represented position as occured in habeas proceedings.

iv. In speaking to counsel's performance, the reason that neither attorney provided the aforementioned advice (overlooked). Is that they both had accepted the government's position, and mistakenly believed that their client had individuals threaten Herrmann with a firearm. A belief that was later evidenced by Rench's statements at sentencing.

v. Further consideration should be afforded to government conduct under Due Process concern. Had Appellant accepted the proposed agreement under effective advice, did the government meet it's obligations under Brady? Considering that the government reluctantly provided withheld ATF reports on the first day of trial, while the bulk of discovery was not provided until May, 2013'. And, continued to misrepresent evidence up until the pre-sentence

investigation occuring in August, 2013'. Facts and circumstances provide that any plea occuring prior to May, 2013', would have resulted in critical material being withheld from the defense unlikely to have been discovered. In line with this Brady concern, agents have also known that the number one individual on the indictment, while claiming to have "worked for" Petitioner in order to satisfy required elements under the C.C.E. statute. In fact, maintained several sources of supply independant of the Petitioner, lending to undermine government allegations.

CONCLUSION

For the reasons set forth herein, the judgement of the district court must be reversed, thereby granting request for recusal. Further remanding the case to Magistrate Judge Randal Terrece in order to permit further discovery. Alternatively, the case must be remanded for the district court to evaluate Appellant's claims under the correct standard of review, to permit further discovery, and assigning Magistrate Judge Randall Terrece to conduct further proceedings.

Date: April 9, 2020

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