20-5514

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DERYL DUDE NELSON
Petitioner,

V

MIKE BROWN, Acting Warden,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED FOR REVIEW

Did the Circuit Court commit a reversible error and grossly violate petitioner's Due Process when it (1) overlooked the district court's fact-finding and its determination that the assistant prosecutor did commit a fraud on the court by signing the various documents initiating the prosecution against petitioner (2) overlooking the district court's reasoning contrary to the law/authority it cited, that it was without authority to GRANT petitioner relief from judgment because the fraud was not committed by a federal officer?

Did the Circuit court commit a reversible error and grossly violate petitioner's Due Process when it overlooked the record and evidence that petitioner presented to support his request to disqualify the district court's judge for ignoring the Michigan Court of Appeals ex post facto Law used to affirm his conviction?

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The February 14, 2020, opinion and order of the United States District Court Eastern District of Michigan denying the motion to disqualify. Case No. 2:16-cv-12260. Apx B(1).

The February 14, 2020 opinion and order of the United States District Court Eastern District of Michigan denying the motion for relief from judgment. Apx B(2).

The above-stated opinions and orders are all reproduced in the appendix of this petition.

STATEMENT OF JURISDICTION

This matter is before this Honorable Court pursuant to a petition for writ of certiorari. Petitioner seeks review of the June 16, 2020, order denying petitioner certificate of appealbility from the United States Court of Appeals for the Sixth Circuit and its July 10, 2020 and July 30, 2020, orders denying rehearing en banc. This Court not has lawful jurisdiction to entertain this petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment IV

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

U.S. Constitution Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crimes, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation.

U.S Constitution Amendment XIV Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any state deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of laws.

BACKGROUND OF FACTS

Petitioner Nelson was tried in Wayne County (Michigan) Circuit Court on charges of second-degree murder and reckless driving causing death. Petitioner Nelson challenged the trial court's jurisdiction and authority to try him without a sworn complaint mandatory to bring the case within the provision of law. Exhibit (1)pp. 3-15.

Not only did the motion hearing reveal that no sworn complaint existed it revealed that the complaint was signed by someone not identified as the complaint witness in the complaint. Exhibit (1) p. 8. The trial court did not establish nor deny that it lacked jurisdiction. However, the defense counsel had gave consent to its jurisdiction and illegally proceeded to trial. Exhibit (1) p. 13.

During trial, State Trooper Sergeant Keely Cochran identified in the criminal complaint as the complaining witness appeared in court as a witness not for the prosecutor, but for the defense and denied making the complaint against Petitioner Nelson. Exhibit (2) p. 107. Petitioner was thereafter convicted. (The essential element of forgery was before the court).

Petitioner Nelson appealed his illegal conviction directly to the Michigan Court of Appeal. Petitioner Nelson asserted that no sworn complaint existed and that the court officer signed the complaint as the complaining witness and that the trial court lacked subject-matter jurisdiction and its judgment is null and void. (The essential element of forgery was before the court).

The Michigan Court of Appeals did not deny that the complaint was not sworn to. However, contrary to state law and to the Fourth and Fourteenth Amendment to the United States Constitution it stated that the signed complaint met the statutory requirement for initiating the prosecution and for

the issuance for an arrest warrant. Ex (3) pp. 6, 7 The Court affirmed petitioner's conviction.

Petitioner Nelson sought denied leave to appeal by the Michigan Supreme Court.

Petitioner Nelson sought from the United States District Court habeas relief, for among other things, that the state trial court lacked subject jurisdiction because the complaint was a forgery and unsworn to. The district court applied Stone v Powell 428 U.S. 465, 494-95 (1976), to deny petitioner's jurisdiction claim and habeas relief. The district court did not address whether or not the complaint was sworn to or forged.

S T A T E M E N T O F T H E C A S E

Petitioner sought a certificate of appealability from the United States Court of Appeals for the Sixth Circuit from the Michigan Eastern United States District Court pursuant to RULE 60(b) motion for relief from judgment and pursuant to 28 U.S.C. § 455(a) motion to recuse. The cases were consolidated and denied.

For case no 20-1190. petitioner among other things, raised claim (1) that the Wayne County's assistant prosecutor committed "fraud on the court" by forging the signature of the complaining witness on a criminal complaint initiating the prosecution and claim (2) that the district court committed fraud on the court when it willfully ignored that petitioner raised a "forged complaint" argument during habeas review.

For case no 20-1210 petitioner petitioned to move the district court for a new judge on the ground that the judge was partial and ignored, turning a blind eye to the Michigan Court of Appeals use of an ex post facto law to affirm petitioner's illegal conviction. Ex. 4. The district court denied the motion to recuse without denying the allegations. Apx. B(1)

The district court contended that petitioner's claim (2) "forged complaint" argument is barred pursuant to RULE 60(b)(1) and declined to go into the merit of the claim. However, the district court did make fact findings for claim (1) "fraud on the court" and determined that the assistant prosecutor did commit fraud on the court by signing the various documents initiating the prosecution against petitioner.

The district court held firm that the the fraud on the court must have been committed on the federal court by a federal officer of the court and it was without authority to grant petitioner relief from judgement pursuant to Buell v Anderson 48 F. App'x 491, 499 (6th Cir 2002)(citing Workman v Bell, 227 F. 3d 331, 336, 341 (6th 2000)(en banc).

The district court stated:

> Petitioner's "fraud on the court" claim is without merit, because he failed to show that any alleged fraud was committed by an officer of this Court. (emphasis supplied). In order for a claim of fraud on the court to succeed, so as to permit relief form a state conviction pursuant to Fed. R. Civ P. 60, "the fraud must have been committed by an officer of the federal habead trial or appellate courts. "Buell v Anderson 48 F. App'x 491, 499)6th Cir 2002)(citing Workman v Bell 227 F.3d 331, 336, 341 (6th Cir. 2000)(en banc)). The assistant prosecutor was not acting as an officer of the federal habeas court when, while acting in his capacity he signed the various documents initiating the prosecution against petitioner, thus, the "fraud upon the court" exception does not apply to permit petitioner to relief from judgment. Id Appx. B(2)p.3

The circuit court overlooked the district courts fact finding of fraud on the court committed by the assistant prosecutor. The circuit court stated in relevant part:

> On September 12, 2019, Nelson filed a Federal Rule of Civil Procedure 60(b) motion for relief from judgment, arguing that the district court judge committed fraud by failing to address his allegation that a signature on the criminal complaint was forged. Nelson also argued that the district court failed to address "an audio recording of a phone conversation where [attorney] was lying to [him] about the motions that he was retained to file[]" and failed to include a letter as part of the record.

Nelson also filed a motion to disqualify the district court arguing that she was biased and partial because she refused to recognize that the had raised a meritorious argument in his habeas petition. He contended that the judge's conduct amounted to a violation of the Racketeet Influenced and Corrupt Organizations Act 18 U.S.C § 1962(d), and a conspiracy to overthrow or destroy the United States government, in violation of 18 U.S.C. § 2384.

The district court denied Nelson's Rule 60(b) motion, finding that he failed to allege that an officer of the federal habeas court committed fraud. It noted that, to the extent that Nelson alleged that the assistant prosecutor forged a signature on the charging documents, he was alleging a fraud committed on the state court. It further found that, the the extent that Nelson alleged that it failed to address his claim about the forged complaint, his motion was untimely because it was not filed within one year of the challenged judgment. The district court declined to issue a COA and denied leave to proceed IFP on appel. Nelson file a notice of appeal and that appeal is docketed as Case Number 20-1190. The district court also denied Nelson's motion disqualifying that its prior adverse rulings were insufficient to show judicial bias. Nelson filed a notice of appeal challenging the denial of his motion to disqualify, and that appeal has been docketed as Case Number 20-1210. Nelson filed two COA applications, which the district court transferred to this court.

In the COA application that Nelson filed in this court in Case Number 20-1190, Nelson reiterates his argument that the district court committed fraud when it failed to grant relief on his claim that the criminal complaint filed in state court contained a forged signature, He maintains that his convictions "are illegal and wholly unjust." Nelson also argues that the district court has inherent power to grant relief for fraud upon the court that is not discovered until well after earlier judgment issued. Nelson's motion to remedy a jurisdictional defect simply argues the merits of his claim that the criminal complaint was invalid because it was not signed under oath.

In the COA application that Nelson filed in Case Number 20-1210. Nelson argues that the district court judge shall have recused herself because it was apparent from the face of his habeas petition and exhibits that the Michigan Court of Appeals "made [a] mockery of the Federal Constitution" when it found that the criminal complaint complied with the requirement of Michigan law. He contends that the judge "willfully ignored" this claim when ruling on his habeas petition. Appx. A.

A R G U M E N T I

Did the circuit court commit a reversable error and grossly violate petitioner's Due Process when it (1) overlooked the district court's fact-finding and its determination that the assistant prosecutor did commit a fraud on the court by signing the various documents initiating the prosecution against petitioner (2) overlooked the district court's reasoning, contrary to law/authority it cited, that it was without authority to GRANT petitioner relief from judgment because the fraud was not committed by a federal officer.

DISCUSSION:

Fed. R. Civ P. 52(a)(6) states in relevant part that a Circuit of Appeals must not set aside a District Court's findings of fact unless they are clearly erroneous. Teva Pharma, USA, Inc v Sandoz, Inc., 574 US 318, 135 S.Ct 831, 190 LEd 2d 719 (2015).

Here, the Circuit Court diverted from the standard provided by Rule 52(a)(2) in reviewing petitioner's application for certificate of appealability. The circuit court determined that petitioner was not entitled to COA and relief from judgement was properly denied in its convenience of overlooking the district court's finding of "fraud on the court" that the assistant prosecutor did commit.

If the circuit court would not have overlooked the finding of fact by the district court the circuit court would have had overcome the burden of providing that the district court applied Buell v Anderson 48 F. App'x 491, 494 (6th Cir. 2002) correctly to have denied petitioner relief from judgment. Where in that case the Sixth Circuit court had established an **exception** that if a state trial prosecutor commits a fraud on the state trial court mandates an evidentiary hearing and relief from judgment will be permitted upon conclusion that the habeas counsel was privy to the state trial prosecutor's fraud. Buell supra at 500.

Here, the circuit court would also have had to overcome the burden of proving that petitioner did not satisfy the **exception** in Buell. In Buell the petitioner had alleged that the state trial judge committed fraud on the court accordingly his claim failed because the state's trial judge was not a federal

officer nor was he under the prosecution's chain of command. The 6th Circuit Court stated in pertinent part:

> an allegation of fraud against the state trial prosecutors could be sufficient to mandate an evidentiary hearing on whether the state's habeas counsel committed the same fraud on the habeas courts. However, Buell here accuses not the state's trial counsel of misconduct, but rather the state trial judge. A judge is not part of the prosecution team....at 500.

Here the district court positively declared that the assistant prosecutor did commit a fraud on the Court. Therefore, Buell v Anderson was appropriate authority to remedy the fraud and permit petitioner relief from judgment. However, the district court contrary to law denied the remedy. This error warrants reversal. See Apx. B (2) p. 3.

The Fifth and the Fourteenth Amendment to the United States Constitution hold, "No person shall be deprived of life, liberty, or property, without due process of law."

The circuit court is bound by the district courts fact-finding and overlooking of its findings of facts violated petitioner's due process. The circuit court failed to make an attempt to reach the merit to disprove the district court's fact-finding pursuant to Fed. R. Civ. P. 52(a)(6) resulted in a miscarriage of justice. United States v Beggerly 524 U.S. 38, 49, 118 S.Ct 1862, 141 L.Ed 2d 32 (1988).

A fraud on the court is the most HATED fraud there is and once a fraud on the court had been declared to exist it MUST BE REMEDIED, Hazel-Atlas Glass Co. v Hartford Empire Co., 332 U.S. 238, 294 (1944), AND THERE IS NO EXCEPTION TO THIS RULE OF LAW.

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Moveover, petitioner point out to this Court's attention that the type of "fraud of the court" that the district court declared that the assistant prosecutor committed by signing the various document initiating the prosecution against him reflect a Fourth Amendment violation described in Kalina v Fletcher 522 U.S. 118 (1997). See Apx B(2) p.3. Federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact. Herrera v Collins, 506 U.S. 390, 400, 122 LEd 2d 203, 113 S.CT 8553 (1993).

And if the Habeas counsel was not privy to the state trial assistant prosecutor's fraud it would have resolved the matter on its own motion, see Kalina v Fletcher 522 U.S. at 122, instead it sought for the habeas court to enforce the judgement obtained by fraud and without probable cause to be sustain in violation of petitioner's 5th and 14th Amendment right to the United States Constitution.

The Fourth Amendment to the United States Constitution states:

> The right of the people to secure in their persons, houses, papers, and effects, against unresonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched , and the persons or things to be seized.

The Court held in Glusksman v Henkel 221 U.S. 508; 31 S.Ct 704, 55 L.Ed 850 (1911) at 5, that Without a sufficient complaint on oath there is no jurisdiction to issue the warrant. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

A. The Sixth Circuit Court of Appeals is in conflict with another Circuit Court of Appeals in regard to the well established principle for a jurisdictional challenge.

The U.S. Court of Appeals for the Fifth Circuit in Hamilton v McCotter, 772 F. 2d 171, 182, 183, 184, 185 (5th Cir. 1985), understand that a wholly forged indictment would not confer criminal jurisdiction to the state trial court and that the "conviction" would be void. In that case it was alleged that the foreman's signature was forged and was grounds for a remand.

Here, the Sixth Circuit failed to recognize that petitioner's "forged complaint" claim (2) related to the jurisdiction of the convicting court and that a jurisdictional claim can be raised at any time and Rule 60(b) does not and can not preclude a jurisdictional challenge and that signature forged voids the document that the signature lies on.

B. The Sixth Circuit Court of Appeals ignore this Court's precedents in regards to the well established principle for a jurisdictional challenge.

The Sixth Circuit Court has ignored this Court's precedents hold that the lack of subject-matter jurisdiction in the convicting court has long been a basis for habeas relief. Ex part Lange 85 U.S. (18 Wall) 163; 21 LEd 872 (1973): Ex parte Siebold, 100 U.S. 371 (1880).

C. The Sixth Circuit Court of Appeal ignored this Court's precedent in regard to the well established principle for correcting injustice.

The Sixth Circuit failed to cite any authority that states that petitioner is barred from raising a jurisdictional claim via Rule 60(b) alleging that his "felony complaint was forged," in which, the district court determined that it was, while it addressed petitioner's claim (1) establishing "the assistance prosecutor committed fraud on the court." Apx B (2) p. 3. The circuit court however, cited Hazel-Atlass Glass Co v Hartford-Empire Co. 332

U.S. 238, 244 (1949), it consequently failed to ahere and follow this Court's authority and principle to correct injustice. This Court held that appellate court had both the duty and the power to vacate its own judgment and to give the trial court appropriate directions. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

A R G U M E N T I I

Did the circuit court commit a reversible error and grossly violate petitioner's due process when it overlooked the record and evidence that petitioner presented to support his request to disqualify the district court's judge for ignoring the Michigan Court of Appeals ex post facto Law used to affirm his conviction?

DISCUSSION:

The circuit court overlooked petitioner's evidence that the district court judge ignored the Michigan Court of Appeals ex post facto Law that violated petitioner's due process. The Sixth Circuit in Olsen v McFaul 843 F.2d 918, 931 (6th Cir. 1988) stated, 'In Bouie v Columbia 378 U.S. 347, 12 L Ed 894, 84 S.Ct 1697 (1964), the Supreme Court held that, when a state appellate court affirms a conviction by constructing a statute in a new and unexpected manner, thereby making criminal what previously was not recognized as such, the conviction violates the due process clause and must be reversed."

The Michigan Court of Appeals reasoned that a "signed" complaint (rather than a sworn complaint) satisfied the statutory requirement to confer jurisdiction for the issuance for a warrant negates the Fourth Amendment to the United States Constitution and is contrary to Gluakman v Henkel 221 US 508; 31 S.Ct 704, 55 L Ed 850 at 5 (1911), this Court held that, without a sufficient complaint on oath there is no jurisdiction to issue the warrant. Ex. (3) pp 6, 7, 11.

Because the district court judge failed to correct the ex post facto law that the Michigan court of Appeals had set in place as competent law to affirm petitioner's conviction, petitioner felt this was sufficient evidence and cause to have the district court's judge to be disqualified. However, the circuit court overlooked this evidence stating:

> Reasonable jurists also could not debate the district court's conclusion that Nelson's motion to recuse was meritless, because his arguments were based solely upon the district court's decision to deny habeas relief. "[O]pinion formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings...do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Liteky v United States, 510 U.S. 540, 555 (1994). Nelson cited nothing outside of his current habeas proceeding to support his allegation of bias, and he did not set forth any facts to indicate that the district court judge "display[ed] a deep-seated favoritism or antagonism." Id Apx. A.

In Liteky supra, 510 U.S. at 554 this Court stated:

> The fact that an opinion held by a judge derives form a source outside judicial proceedings is not a necessary condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice.

Here petitioner did not have to "cite nothing outside of his current habeas proceeding to support his allegation of bias" pursuant to Liteky supra, the record can be used to recuse a judge. It's the circuit court, not the law, that required petitioner to find facts outside of the record. Petitioner had satisfied 28 U.S.C. 455(a). See Ex (4) and Ex. (3).

Petitioner, not the circuit court has the Fifth and Fourteenth Amendment Constitutional DUE PROCESS RIGHT to use the law in whole or in part how he sees fit. Where the law gives options to petitioner to use, the circuit court

can not obstruct justice to limit the law to its liking and doing so put petitioner here at a disadvantage that resulted in this "grave miscarriage of justice" that is before this Honorable Court. It is petitioner's life and liberty that is here at stake, not the circuit court's. Therefore, a reversal and remand is required for this issue.

The Fifth Amendment to the United States Constitution specifically states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or in the Militia, when in actual service in time of War or public danger; not shall any person be subject for the same offence to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law: nor shall private property be taken for public use, without just compensation.
>
> (emphasis added)

The Fourteenth Amendment to the United States Constitution specifically states:

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

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

CONCLUSION

This district court relied on Buell v Anderson 48 F. App'x 491, 499 (6th Cir. 2002), to deny petitioner relief from judgement and failed to recognize that there was an **exception** in Buell supra, to grant relief and petitioner satisfied that **exception.**

The circuit court should not be allowed to have its jurisdiction stand in the space of omissions. The circuit court overlooked petitioner's complete defense to the district court's denial for relief from judgement. This Court must hold the circuit court accountable for its flagrant omission and its injustice. This Court pursuant to Haze-Atlass Glass Co. v Hartford-Emprie Co. 332 U.S 238 (1949) must issue an order and directions to the circuit court to apply the correct remedy to the district court's findings of fact for the "fraud on the court' it declared that the assistant prosecutor committed, in which, also resulted in a **continual** Fourth Amendment violation. Petitioner, therefore, respectfully requests that this Court GRANT CERTIORARI to resolve these miscarriages of justice.

The circuit court ignored petitioner's complete defense to disqualify the district court judge when it ignored petitioner's evidence that the district court judge **turned a blind eye** to the Michigan Court of Appeals use of an ex post facto Law and failed to correct such Law. Therefore, this request for certiorari should be GRANTED.

For these reasons, Petitioner Nelson asks that this Court GRANT this petition for a writ of certiorari.

Date August 19, 2020

Respectfully submitted

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