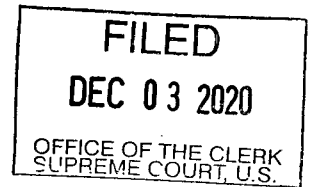


RECORD No:
20-6618

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Manel 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

Manel Malachowski, Pro Se
Great Plains Correctional Facility
P.O. Box 400
Hinton, OK 73047

QUESTIONS PRESENTED

Does An Appeal Brought Under 28 U.S.C. § 455(a) Associated To Habeas Proceedings Represent A Civil Action For Purposes of § 1915(e)?

What Avenue Of Relief Exists When An Appellate Court Fails To Adequately Resolve Impartiality Issues, Underlying Request For Recusal, That Continue To Appear Affecting Current Matters?

In View Of Impartiality Claims: Do Misrepresentations Made By Both The District Court And Government Relevant To Plea Considerations, So Infect The Fairness Of Proceedings That A Due Process Violation Should Be Inferred, Rendering A Plea Involuntary And Unknowing?

In A Case Where Prior Questionable Convictions Have Gone Uncorrected, Does Due Process Oblige A Court To Assess (Not Determine) The Validity Of Such Convictions As They Bear Upon Consideration Of A Current Constitutional Claim In A Subsequent Matter?

Does A Due Process Violation Occur Under A Court's Failure To Apply Pro Se Standard Of Review, While In View Of A Denial To Re-appoint Counsel?

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Parties Involved

MARCEL MALACHOWSKI

UNITED STATES OF AMERICA

Related Cases

United States v. Malachowski, 09-CR-125 (TJM), NDN4 (Jan. 4, 2014)

United States v. Malachowski, 14-0703-CR, Second Circuit Court of Appeals, Judgement Entered, (September 9, 2015)

Malachowski v. United States, No. 15-9396, 136 S.Ct. 2526 (June 27, 2016)

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Malachowski v. United States, 19-4669, Second Circuit Court of Appeals, Judgement Entered (October 20, 2020)

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Brady v. United States, 397 U.S. 724, 747 (1970)

Godinez v. Moran, 509 U.S. 389, 400 (1993)

Haines v. Kerner, 404 U.S. 519, 520 (1972)

In re Murchinson, 349 U.S. 133, 136 (1955)

Liljeburg v. Health Services Acquisitions Corp., 468 U.S. 863, 864 (1998)

Missouri v. Frye, 566 U.S. 134 (2012)

McMann v. Richardson, 397 U.S. 759, 760 (1970)

Liteky v. United States, 510 U.S. 560, 563 (1994)

Neitzke v. Williams, 490 U.S. 319, 325 (1989)

Penton v. Hernandez, 504 U.S. 25 (1992)

Offault v. United States, 348 U.S. 11 (1954)
Strickland v. Washington, 466 U.S. 668, 667 (1987)
Turney v. Ohio, 273 U.S. 510, 532 (1927)
Weary v. Cain, 136 S.Ct. 1002 (2016)
United States v. Cronin, 466 U.S. 648 (1984)
Alexander v. United States, 121 F.3d 752 (3d Cir. 1996)
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Gonzales v. Hasty, 802 F.2d 212, 225 (2d Cir. 2015)
In re Nagy, 89 F.3d 115 (2d Cir. 1996)
In re Phillips, 133 F.3d 770 (10th Cir. 1998)
Apple v. Jewish Hospital & Medical Str., 829 F.2d 326, 333 (2d Cir. 1987)
Kincaid v. Sparkman, 117 F.3d 949, 1997 FED App. 192P (6th Cir. 1997)
McIntosh v. U.S. Parole Comm'n, 115 F.3d 809 (10th Cir. 1997)
Phillips v. Smith, 632 F.2d 1019 (1980)
Thompson v. Chornski, 525 F.3d 205 (2d Cir. 2008)
Triestman v. Fed. Bureau of Prisons, 470 F.3d 741 (2d Cir. 2006)
United States v. Jacobs, 955 F.2d 7, 10 (2d Cir. 1992)
United States v. New York, 717 F.3d 72, 99 (2d Cir. 2013)
United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977)
United States v. Simmonds, 111 F.3d 731 (10th Cir. 1997)
Santana v. United States, 98 F.3d 752 (3d Cir. 1996)

Constitutional And Statutory Provisions

28 U.S.C. § 455(a)

28 U.S.C. § 1651(a)

28 U.S.C. § 1915 et seq.

28 U.S.C. § 2253

28 U.S.C. § 2255

FED R. Civil P. Rule 60(b)

Opinions Below

United States v. Malachowski, 673 F.App'x 562, 563 (2d Cir. 2015),
cert. denied, 136 S.Ct. 2526 (2016)

Jurisdiction

On October 20, 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. § 1615(a)

Statement of the Case

This matter involves an appellate court decision to dismiss a pro se *informa pauperis* appeal, involving a district court's denial of a justifiable request for recusal associated to habeas proceedings. Questions of due process arise where dismissal occurred precluding any further attack on the underlying convictions. And, without providing adequate resolution to the underlying issue of impartiality. Issues which have recently stood to affect consideration of a request for compassionate release, in light of circumstances presented by COVID-19. A meritable claim supported by pre-existing and arising health conditions that deserve fair and impartial consideration.

Further questions of due process and Eighth Amendment concern arise where the district court has recently issued a ruling that possibly identifies a disqualifying pre-disposition. Now, with the subject appeal dismissed prior to any resolution, such issues stand to affect any further considerations. A second request for recusal would certainly antagonize the court(s), only to cause further prejudice.

Under *California v. Rothin*, this Court posited that "the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application. When the gloss has thus not been fixed, but is a function of the

process of judgement, the judgement is bound to fall differently at different times and differently at the same time through different judges." Id. Under such consideration, the facts and circumstances presented by the instant matter, affords an opportunity to fix the technical content through this Court's process of application. Having previously addressed both legal and factual frivolity, now stands an opportunity to fix the jurisdictional limitations of such use in a criminal matter, as opposed to a straight forward civil action.

Brought under relevant statute, request for recusal sought to have a Rule 60(b) motion associated to habeas proceedings, reviewed by a court unburdened by any possibility of impartiality consistent with relevant authority provided by this Court. In pursuit of such relief, it appears that there exists no established authority that would prohibit such a legal conclusion, providing that grounds for recusal exist. Furthermore, relevant judicial authority available in other circuits, do not appear to support a dismissal in view of the facts and circumstances underlying request for recusal.

Courts have held that there exists no exact formula for recusal, facts and circumstances must be evaluated on a case by case basis. Such evaluation must apply an objective standard, and not a subjective one by the party involved. The Constitution created an independant federal judiciary in order to ensure that

judicial decisions would be partial and only made upon law. As such, relevant law provides that it is preferable for a judge to err on the side of caution and disqualify himself in a questionable case.

After nearly two and a half years of proceedings previously involving Petitioner, and nearly three and a half involving more than twenty co-defendants and attorneys. Petitioner was the only defendant to be singled out to have another judge re-assign himself in order to take over management. Asserted to promote a speedy trial as later declared. Raising an initial question, re-assignment is a procedure that is unusual, and used as an extreme remedy that is rarely imposed. Especially where proceedings had begun nearly a year prior to Petitioner's indictment, and continued for several co-defendants in front of the original judge at the point of re-assignment. Recusal is warranted in order to provide balance, to give the appearance of fairness and impartiality.

Request for recusal is grounded upon facts and circumstances that are anything but irrational or wholly incredible. Most critical to consideration of recusal, while also raising a significant question of possible court impropriety. The court openly declared support for two appointed attorneys subject of a pre-trial Sixth Amendment claim. The court's declaration attested specifically

to subject attorneys competence, while making reference to alleged prior court-attorney history.

Questionably, the court quickly rebuffed Petitioner's ineffective assistance of counsel claims, grounding its decision upon a declaration that the court either knew or should have known to be false. Staking the court's confidence in subject attorneys on nothing more than a pre-conceived notion, that because they were attorneys, they must be competent. A declaration that was further undermined by attorney conduct later exhibited in this matter and others. In fact, one of the subject attorneys had been disbarred, occurring while direct appeal was pending in this matter. Then, occurring later under habeas proceedings, the court plainly refused to acknowledge proffered misrepresentations provided by the other, in response to further Sixth Amendment claims. Completely belied by the attorney's own case file and correspondence evidenced before the court.

In another instance, further declarations made by the court demonstrates a view formed prior to habeas proceedings. Detailing an accusation, that Petitioner issued a thinly veiled threat directed at a magistrate judge, based upon the court's own misperception. Occurring as the result of a prejudicially misconstrued; well intended effort made by the Petitioner, in order to possibly receive assistance

from the only individual familiar with proceedings. At reaching a possible combined resolution to both matters in light of questionable government conduct that had been revealed.

In its denial, the court demonstrated an unwillingness to even accept honest mistake in light of the aforementioned facts and circumstances. Making it improbable that the court would impugn its own standards, in effect, recognizing its own intractable position placed upon Petitioner to choose between two alternatives. In turn, effectively denying him his Sixth Amendment right to the effective assistance of counsel. Resulting in a plea that was made both unknowing and involuntary, based upon the facts and circumstances that existed occurring on the day of, and prior to trial.

The need to hold the balance clear and true between the government and Petitioner is established by the pronouncements of this Court. Especially warranted in prosecutions involving questionable conduct resulting in a complete misrepresentation of evidence. The record in this case provides that the prosecution utilized evidence in its proposed plea agreement, that it knew or should have known was false. Evidence which falsely alleged the use of a firearm in furtherance, and a stipulation to relevant conduct occurring in a prior matter. A matter that has since been evidenced to involve evidence tampering and perjury committed by agents

involved in the investigation of Petitioner. Recent clarification of relevant statute under which prior convictions occurred, presents even further support to the claim that the government had misrepresented evidence during the plea bargaining stage.

As such, considered together with the courts own misrepresentations, coinciding pre-trial, creates a significant question of due process in light of relevant authority utilized to previously challenge Petitioner's plea. Authority provided by this Court instructs that government misrepresentations alone amount to impermissible conduct. Thereby, rendering a plea involuntary and unknowing. The issue pertaining to the plea in this case is compounded by the courts misrepresentation. While also tending to establish that, Petitioner was denied his Sixth Amendment right to the effective assistance of counsel. Because, the court forced Petitioner to choose between proceeding pro se or continue with an appointed attorney subject of his pre-trial ineffective assistance claim(s). Noting, that the court had denied request to remove counsel while believing in the attorney's competence.

Questionably, either choice Petitioner faced, resulted in a 20yr statutory penalty, or a very likely life sentence. When originally, a plea to a 10yr statutory penalty would have occurred, if not but for government misrepresentations causing Petitioner to

reject the offer.

Interestingly, while in view of government misrepresentations pertaining to the proposed plea, presented under a request for reconsideration, Petitioner asked the district court to re-open habeas proceedings in light of judicial authority. A matter decided by this Court occurring while the subject appeal was pending. The motion raised specific issue to the district court's misapplication of cited authority found under this Court, detailing misrepresentations that rendered his plea involuntary and unknowing.

Demonstrating an unreasonable application of binding authority, possibly influenced by a failure to remain impartial. The court failed to acknowledge actual government misrepresentations, supported by evidence tampering and use of evidence deemed to be false. Instead, the ruling indicates a much more rigid application, requiring that prior convictions must be reversed in order to warrant relief.

The subject ruling gives rise to a question of substantive due process concern. Presented while this Court has previously stated that it is not in the business of correcting lower court error. In and of itself, suggests that there are unconstitutional convictions that ultimately go uncorrected. The district court's ruling asks whether the court had a due process obligation to consider and

answer Petitioner's claim, whether or not his plea was rendered involuntary and unknowing by government misrepresentations, rather than require reversal of prior convictions. Furthermore, due process and Eighth Amendment issues arise in light of a credible and compelling claim of actual innocence that has went unconsidered by the courts in the Second Circuit.

In a final issue, the appellate court's dismissal indicates that it failed to apply *pro se* standards to any remaining issues, presented under appeal in pursuit of certificate of appealability pertaining to his Rule 60(b) motion. Whereas, occurring previously under a prior appeal, a separate panel construed a *pro se* motion seeking abeyance, presented in an effort to have his actual innocence claim considered, as one in request for COA.

The merit of his remaining arguments grounded upon the aforementioned plea challenge, viewed by the court as attacking the district court's denial of his Rule 60(b) motion. Suggests that Petitioner may have been prejudiced by the appellate court's failure to evaluate remaining claims. Failing to reasonably apply *pro se* standard of review to those claims.

REASONS FOR GRANTING THE WRIT

Substantial questions of due process concern presented by this matter would not only lend aid to this Court's jurisdiction, while further exercise of its supervisory power is necessary in order to resolve issues underlying request for recusal. Critically providing an avenue for fair and impartial consideration of Constitutional claims. Moreover, resolution is needed to cure impartiality issues that continue to stand, affecting critical consideration of a matter involving individual health and safety.

A. Appellate Court's Use of Neitzke And § 1915(e) Was Improper Creating A Due Process Challenge

While the government issued no reply to Petitioner's brief, filed under the instruction provided by the Court. The Second Circuit Court of Appeals dismissed subject appeal under the standards provided by Neitzke v. Williams, 490 U.S. 319, 325 (1989), also citing, 28 U.S.C. § 1915(e). Holding that, "... the appeal 'lacks an arguable basis in law or fact.'" Id. Petitioner contends that the ruling is problematic, raising questions of due process concern.

1. In view of Neitzke, the first question presented asks whether the subject appeal presents an arguable basis in law. "Dismissal is only proper if the legal theory (as in Petitioner's § 455(a) claim)

lacks an arguable basis. Petitioner leans on the Prisoner Litigation Reform Act (PLRA) which provides, "an in forma pauperis [appeal] cannot be considered legally frivolous unless it embraces... [an] unarguable legal conclusion." *Id.* at 324, quoting, *Prisoners Rights* 3rd Ed. (2003). Meitelle deals with how a court determines legal frivolousness. *Id.*

Simply put, the argument presented under appeal, as it appears in prior motion brought under 28 U.S.C. § 455(a), supports a conclusion that the district court should have granted recusal. Thereby, affording a court unburdened by any possibility of impartiality or bias to evaluate his claims brought under Rule 60(b). See e.g., Witek v. United States, 510 U.S. 560, 563 (1994)

To the extent that the appellate court ruling might suggest request for recusal was improperly brought. 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). As represented on appeal, it was not until the district court's habeas decision was pronounced did Petitioner question that something was truly amiss. Previously holding steadfast to the faith and belief that the lower court would adjudicate claims fairly and impartially, despite some

earlier signs. Furthermore, Petitioner alerted the appellate court to the fact that the pro se litigant had only learned of relevant law, and possibility for such a request in January, 2019.

Lending to further undermine the appellate court ruling, the district court had not certified in writing that the appeal was not taken in good faith. 28 U.S.C. §1915(a) As such, reasonable argument presents that, the legal conclusion to be drawn from the subject appeal does not support a dismissal under Heitke.

2. The second question presented by the subject ruling asks whether the appeal lacked an arguable basis in fact. Critically, Heitke does not define whether an appeal is factually frivolous.

For that definition, the appropriate standard is found under Denton v. Hernandez, 504 U.S. 25, 112 S.Ct. 1728, 1733, 118 L.Ed. 2d 340 (1992). Denton, provides that for an appeal to be considered factually frivolous, "... the facts [must] rise to a level of irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Id.*

Under request for panel reconsideration (deemed moot), presented that because the facts and circumstances underlying request for recusal are firmly grounded in the record. Therefore, fall well

short of being "irrational" or "wholly incredible". Id. Denton, provides that, "E[ven] long as the legal claim has some arguable merit and as long as the factual allegations are not patently irrational or incredible, the court should allow the [appeal] to proceed..." Id., quoting, Prisoners Rights, 3rd Ed. (2002), see also; Brown v. Barger, 207 F.3d 863, 2000 FED App. 109P (6th Cir. 2000) (holding that allegations were not "fantastic or delusional" and not based on legal theories that were indisputably meritless.)

Under appeal, Petitioner identified judicial conduct, *inter alia*, to be measured against instruction provided by Denton. Further supports a conclusion that the appeal should have been allowed to continue. Lending additional support to this contention, Petitioner identified three primary instances where the court's impartiality could have been reasonably questioned. Litely, *supra*; 28 U.S.C. § 455(a), see also; (19-4069, App. Br. 23-31) For instance,

- a) Petitioner has argued that "[p]re-trial statements demonstrate that the district court plainly failed to remain impartial. Moreover, the false [representations] and misplaced confidence given by the court in support of subject attorneys [was] improper." (App. Br. 31-33(2)(b)).

In view of the subject statement made by the court, which was later established to be false, raises two independent issues which

Warrant proper evaluation under Liteky, *supra*.

i) False representations put forth by a court raises a question of impropriety. Especially where the court knew or should have known the statement being given in response to a pre-trial Sixth Amendment claim was indeed false.¹

ii) The court's questionable view of the subject attorneys, appeared to impair impartial consideration of both, pre-trial and habeas ineffective assistance of counsel claims. The demonstrated view, not only caused the court to quickly rebutt any claim(s), but also, precluded any request for re-appointment. Furthermore, as a result of the court's favor or sympathy to counsel(s), ineffect, deprived Petitioner of his Sixth Amendment right to counsel. And, ultimately led him into a plea that was made involuntary and unknowing. See, C(1)(a)

iii) Petitioner argues that the asserted impropriety was not harmless, the issue is further compounded when evaluated in view of identified attorney conduct available from the record. In evaluation of Fifth and Sixth Amendment claims brought under § 2255, the district court has appeared to double down on its prior position, refusing to acknowledge questionable attorney assistance as the crux behind
¹ Information derived from an inquiry into court-attorney history, revealed that the court's declaration in support of attorney competence was untrue. As neither attorney had ever tried a case in front of the subject judge.

the decision to proceed pro se. Especially in light of the court's denial to remove counsel.

- b) Construed liberally, Petitioner argued that because the district court re-assigned itself to the case, raises an additional question to whether or not the court would be likely to impugn its own standards.

It is also important to consider, circuit precedent provides that re-assignment only occurs in "unusual circumstances." See, Gonzales v. Hasty, 802 F.3d 212, 225 (2d Cir. 2015) (quoting, United States v. Robin, 553 F.3d 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). Petitioner further argued that there was nothing about this case at the point of re-assignment, that met the aforesaid standards in order to justify this unusual procedure. The court's recent intervention occurring in view of Petitioner's § 3582 motion only raise further questions to the court's impartiality.

Especially, where "[Petitioner] was the only defendant of more than twenty co-defendants, to have another Judge intervene." (Oct. 637) After two and half years of proceedings, involving co-defendants and attorneys, establishes that there were facts and circumstances unavailable from the record. Arguably, the court intervened with a pre-

conceived view, that "it was time for this case to be disposed of." *Id.* Arguing further that the court exhibited a pre-disposition that reasonably demonstrates an unwillingness to impartially re-evaluate issues and questions for possibly a second or third time. Questions of Fifth and Sixth Amendment concern, involving attorneys subject of the court's favor and confidence.

c) Raising the most significant question to impartiality, occurring immediately prior to habeas proceedings. The court wrongfully opined, based upon the court's own misperception, that Petitioner made "...a thinly veiled threat to [former Acting U.S. Attorney] Magistrate Judge Baxter." See, (App. Rv. pg's 27-30, 2(a)). Indeed, the court's "misperception" as later represented by the court when challenged, is clearly evidenced by the record.

Plainly, the court was not only incorrect, but its stated view raises additional questions for consideration. Critically, the negative view was formed from an extra-judicial source, filed as part of the docket by the prosecution. Misconstruing a reasonable well intended attempt made in good-faith, at reaching possible resolution to both matters sparing any further proceedings beyond sentencing. The negative view continued through habeas proceedings undisturbed, until request for recusal occurred while presenting motion brought under Rule 60(b).

i) Prior to habeas proceedings, the court had already been faced with questions of attorney conduct at least two or three occasions previously. Considered in view of the ill perceived threat, occurring just prior, further grounded the court into its prior position. Possibly influencing the court to overlook critical facts and relevant law material to determination. And, whether through obduracy or honest mistake, failed to recognize disqualifying pre-dispositions. Litely, *supra*.

d) Questionable Attorney Conduct Adds Merit To Factual Basis.

Attorney competence is significantly challenged in view of the following facts and circumstances, evidencing that the court's stated support is further undermined apart from the falsity that occurred.

i) One of the subject attorneys had been disbarred while Petitioner's direct appeal was pending. Disciplined for demonstrating identical conduct in other matters. Petitioner had filed a formal complaint during pre-trial proceedings.

ii) The record provides that the more recent attorney mentioned:
(1) had applied for employment with the very same U.S. Attorney's Office prior to appointment; (2) later admitted to accepting gov't

evidence as true over the pleas of his client, while effectively joining the prosecution in efforts to gain conviction²; (3) counsel entered into a non-disclosure agreement with prosecutors, preventing counsel from providing discovery material to his client, without alerting either the court or Petitioner; and, (4) proffered misrepresentations of actual facts, evidenced against counsel's own case file, in response to Sixth Amendment claims. See, McMann v. Richardson, 397 U.S. 756, 760 (1970) "[I]f the right to competent counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.*

In summary, Petitioner has presented that the court's stated confidence in the subject attorney(s), occurring only under a pre-conceived notion without little more, compromised its good sense and discretion. If anything, Nietzke inadvertently strengthened Petitioner's appeal. Because, "dismissal is proper only if the legal theory (as in [Petitioner's § 455(a) claim]) or the factual contentions lack an arguable basis." *Id.*

² For months counsel argued (literally) with, and refused to accept Petitioner's assertions of innocence. Absolutely denying the allegation that he had threatened a co-defendant with a firearm. During the pre-sentence investigation, Petitioner was vindicated of any such claims involving any use of a firearm at any time.

3. Use Of § 1915(e) Raises Significant Question Of Due Process In View Of Judicial Precedent.

Petitioner argues that not only does relevant authority support a conclusion that, the subject appeal should have been permitted to continue. But also, the appellate court has placed § 1915(e) at odds with § 455(a) and § 2255, creating a due process challenge.

Addressing this issue would aid in this court's jurisdiction by providing binding authority protecting action directed at collaterally attacking criminal convictions, when prior proceedings may have been corrupted by the appearance of impartiality. Moreover, the court's use of § 1915(e) in this instance, conflicts with prior holding. See e.g., In re Nagy, 89 F.3d 115 (2d Cir. 1996) (extra-ordinary writs that are not directed at the inmates criminal convictions, are considered civil actions [for purposes of § 1915(e)]. "

Several other circuits have also established similar positions. See e.g., Davis v. Fectel, 150 F.3d 486 (5th Cir. 1998); Alexander v. United States, 121 F.3d 312 (7th Cir. 1997); Santana v. United States, 98 F.3d 752 (3d Cir. 1996), as amended, (Nov. 14, 1996); Kincade v. Sparkman, 117 F.3d 770 (10th Cir. 1998) (holding that filing fee provisions of § 1915 are inapplicable for [] actions brought under 28 U.S.C. § 2241, § 2254, and § 2255); McIntosh v. U.S. Parole Com'n, 115 F.3d 809 (10th Cir. 1997)

(§ 2241 proceedings and appeals of those proceedings are not "civil actions" within the meaning of § 1915). Providing compelling support indicating that the subject appeal has been inappropriately dismissed.

B. Appellate Court Failed To Adequately Resolve Recusal Issue That Continues To Affect Current Proceedings, Leaving Petitioner With No Avenue Of Relief.

1. Recent district court action raises additional questions of impartiality, establishing a due process challenge to ongoing proceedings.

For consideration, any motion pursuant to 18 U.S.C. § 3582 must be brought before the sentencing court, previously subject of a request for recusal that has possibly went unresolved. Presents a significant issue of due process with no apparent avenue of relief. Moreover, two recent district court rulings raise additional grounds suggesting the appearance of impartiality.

a) Petitioner submitted such a request initiated on October 27, 2020, identifying that on October 20, 2020, medical staff at Great Plains Correctional Facility informed Petitioner that a "dense mass" had been identified in his thyroid area. And, that on August 18, 2020, medical staff indicated that "abnormalities" had been identified

on lung x-rays performed a month earlier.

Petitioner further detailed that he suffers a pre-existing susceptibility to bronchial infections, a condition existing since early childhood. And, that on and off for more than a decade, he has a history of cigarette smoking. In 2013, Petitioner experienced respiratory difficulties while undergoing surgery that required extended hospitalization and added cause for concern by the surgeon (Surgery occurred while in custody).

As such, Petitioner asserted that pre-existing and arising conditions, reasonably establish that he falls into the high risk category for experiencing difficulties in light of circumstances presented by COVID-19. Federal courts across the country have been inclined to recognize that "[a]ny incarcerated person with one of the underlying conditions identified by the CDC is unlikely to be able 'to provide self-care within the environment of a correctional facility' to avoid contracting COVID-19." U.S. Sentencing Guidelines §1B1.13cm.1 (A)(ii). COVID-19 is "a precarious situation that a growing number of federal courts have found to constitute an 'extra-ordinary and compelling' reason warranting relief." (citations omitted) "As COVID-19 is a respiratory disease, and '[S]moking... increases the risk of severity of pulmonary immune function in general,' when the disease worsens, current and former smokers had more acute or critical

conditioning or death." (citations omitted)

However, in light of the following court action, Petitioner has since moved to withdraw his claim in order to avoid any possible prejudice that may occur. In the event that prior or current impartiality issues come to bear upon such a critical determination.

b) For instance, on July 9, 2020, while the subject appeal was pending, the district court issued a ruling indicating that, "no basis for altering [Petitioner's] sentence exists." (Dkt. 892, pg. 5) While the ruling pertained to a request for reconsideration in efforts to re-open habeas proceedings. A court must evaluate whether or not such a view could possibly qualify as a disqualifying pre-disposition. Because, it is possible that the court's view may extend to any future claims for relief without affording due consideration. In turn, giving rise to a due process violation.

i) Petitioner further contends that the aforesaid ruling (Dkt. 892), presents an additional question of substantive due process concern. The ruling appears to suggest, that the district court has either refused, or unreasonably applied relevant authority found under Brady v. United States, 347 U.S. 747 (1970), see also; Point C(i)(b)(ii), pgs 33-38 of the instant petition.

In contrast to Brady, the district court held that another court

must first reverse prior convictions before relief is warranted. The ruling is void of any evaluation of whether or not "impermissible conduct" may have influenced Petitioner's decision to plea. *Id.* Not only does the ruling appear to stand in tension with Brady, but also, gives rise to an issue of due process in view of the following.

There can be no doubt, that errors and wrongs occur that eventually go uncorrected through the course of a case. Ineffect, questionable convictions remain uncorrected, whether presented in a plea agreement or utilized in determination of a sentence in a subsequent matter. Petitioner contends that such circumstances raise a significant issue of due process, regardless of whether or not such convictions have been reversed, at least as far as Brady v. United States, implies. Where as here, it is possible that impartiality has come into play preventing such action from occurring.³ Where prior convictions have played a role in both, plea bargaining and sentencing matters.

Drawing support for this argument, this Court has previously stated, that "it is not in the business of correcting lower court error." Weary v. Cain, 136 S.Ct. 1002 (2016). Similarly, Justice Barrett recently stated, that "the Court was not designed to correct every error

³ The Second Circuit Court of Appeals has twice refused to consider prior claim(s) of actual innocence occurring under 08-CR-701 (NH), see also; S.Ct. (20-5149). Moreover, the appellate court has effectively refused to consider a single ineffective assistance of counsel claim through two cases.

or right every wrong that occurs.." Senate Confirmation Hearings (2020). In effect, confirms that there are cases where unconstitutional convictions go uncorrected or reversed. In turn, does that mean even though prior convictions have gone uncorrected, possibly occurring as a result of impartiality occurring at a higher level, that no consideration should be given to the Constitutional bearing such convictions may have wrongfully affected subsequent proceedings? And, at what point does the Constitution oblige a court to right wrongs that have previously occurred? Especially considering that such convictions or evidence resulting thereof, have possibly caused a defendant to reject a proposed plea agreement, or enter a plea that was both unknowing and involuntary. Ultimately forcing him into an increased penalty that would not have occurred otherwise. And, if in fact the defendant was actually innocent of the prior convictions, would this not amount to an Eighth Amendment violation?

- c) Petitioner further contends that, district court action exhibited in direct response to request brought under § 3582, raises further question to the appearance of impartiality.

Simply put, two separate text orders, issued by different Judges, demonstrate a difference in course of action to be taken occurring in response to the same request. In effect, signals the possibility of

different views held of Petitioner. An evaluation of both text orders establish that, the Judge subject of recusal reversed, or at least caused to undermine the prior order entered by the original Judge assigned to the case. Further establishing that the Subject Judge has intervened a second time during the course of proceedings. For the foregoing reasons, Petitioner's appeal relevant to such a critical issue should have been allowed to continue. In turn, warranting exercise of this Court's supervisory power.

C. Second Part Of Ruling Stands In Contrast To Prior Determination Establishing A Conflict.

In view of the lower court's ruling, "[w]ith respect to [Petitioner's] remaining arguments challenging the district court's denial of his Rule 60(b) motion, the appeal is dismissed because [Petitioner] has not moved for a COA, which is required for such a challenge." citing, 2d Cir. Local R. 22.1(a).

By comparison, under prior appeal (19-2560), it appears that the court applied relevant authority found under Thompson v. Chorniski, 525 F.3d 205 (2d Cir. 2008), and; Triestman v. Fed. Bureau of Prisons, 470 F.3d 741 (2d Cir. 2006), providing that pro se filings are to be construed liberally, to read the strongest argument they suggest. Enumerating tenets as established by this Court under Haines v. Kerner, 404

U.S. 519, 529 (1972). See e.g., Malachowski v. United States, No. 18-2560 (2d Cir. 2020) ("the motion is also construed as seeking a certificate of appealability.")

Petitioner argues that the appellate court has inconsistently applied *pro se* standard of review, in turn, gives rise to a question of due process in view of remaining arguments. Especially, when the court had previously denied re-appointment of counsel to assist with appeal.⁴ Petitioner contends that due process requires that any remaining arguments presented within the brief, viewed by the court as challenging the denial of his Rule 60(b) motion. Should have been construed liberally, to read the strongest argument they suggest in pursuit of COA.

1. Remand Should Occur To Provide Evaluation Whether Or Not Petitioner Demonstrated The Denial Of A Constitutional Right Under Remaining Arguments.

An evaluation of Ground One presents significant argument in

⁴ The appellate court had previously appointed counsel to the subject appeal without any request from Petitioner. However, occurring a short time after, under counsel's own initiative and without any prior notice. Counsel asserted a conflict of interest in request to be relieved, while also requesting re-appointment. Questionably, the court granted counsel's request to be relieved, but denied re-appointment of new counsel.

pursuit of COA. Under Rule 60(b)(6), which allows for a court to grant post-judgment relief for extra-ordinary circumstances, including if there are well founded grounds for judicial recusal under §455(a) that may warrant relief. See e.g., Litkeburg v. Health Services Acquisitions Corp., 468 U.S. 863, 864, 108 S.Ct. 2194, 100 L.Ed 2d 855 (1988).

a) Under this rule, Petitioner previously argued that, "to justify denying relief to a Constitutional claim [Sixth Amendment] based upon a falsehood⁵ pertaining to the subject attorney(s) establishes manifest error." Id. (pg. 17)

For consideration, occurring on the first day of trial,⁶ the court addressed Petitioner's claim alleging ineffective assistance of counsel. While quickly rebutting Petitioner's aforementioned claims, and denying request to remove (re-appoint) counsel. The court declared its support of subject attorney(s) stating, "[both counsels) have tried many cases in front of me and they are 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." (TT, pg. 6)

Under Rule 60(b), Petitioner further argued that "the false claim

⁵ Upon relevant inquiry, Subject counsel admitted to having only tried four federal cases in twenty years of practice. None of which occurred in front of the subject Judge as represented.

⁶ Petitioner filed a pre-trial request more than 10 days in advance of trial.

[inter alia] relative to attorney [], speaks to the integrity of proceedings, which is the crux of Petitioner's [claim]. "Id. The falsity underscoring the court's declaration, while coinciding with notice that counsel had recently applied for employment with the same U.S. Attorney's Office prosecuting the case.⁷ Would cause any objective observer to question the appearance of impartiality.

However, considered together raises significant constitutional questions, highlighted by counsel's admitted support to the prosecution (trusting government's false evidence while attempting to influence acceptance of the deficient plea agreement).

Under habeas proceedings, Petitioner argued that United States v. Cronin, 466 U.S. 648 (1984) governed his Sixth Amendment Claims. "A defense attorney who abandons his duty and loyalty to his client and effectively joins the prosecution in effort to attain conviction [or] sentence suffers from an obvious conflict of interest and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalties other than the [Petitioner], because the interest of the prosecution and [Petitioner] are necessarily opposite." Id. See also, Arrienti v. United States, 313 F.3d 807, 810 (2d Cir. 2012) In the Second Circuit, "an actual conflict of interest exists where, during the course of representation, the attorneys and [Petitioner's] interest diverge with

⁷ The Second Circuit has previously found that "application for employment to the U.S. Attorney's Office creates a conflict of interest." See, Phillips v. Smith, 632 F.2d 1019 (1980)

respect to a material factual or legal issue or a course of action. "Id.

See also, (Det. 884 - Ground Two, pgs 19-25)

In addition to attempts at influencing Rehman to accept the questionable plea agreement, without any regard for his plea of innocence. The record also reflects that counsel actually argued contrary positions to that of Rehman, as represented under pro se filings in request for relief. For instance, counsel's sentencing statement pertaining to relevant conduct, in an effort to include 08-cr-701 (DWT), are not only counter-instructive to Rehman's claims of innocence. But also, counsel's own statement of facts is completely belied by evidence available from the record. (E.g., (Grand Jury Testimony)

While Rehman acknowledges receiving benefit from the court's finding of relevant conduct, determined in order to afford credit for the time already served under 08-cr-701 (DWT). Rehman contends that the benefit is insubstantial, if he is forced to serve a twenty-year sentence that possibly occurred in violation of his constitutional rights.

Further demonstrating a veritable claim under Grain, warranting further evaluation by a court unburdened by any possibility for impartiality. Two critical factors support a conclusion that counsel abandoned his client pre-trial. Because, counsel firmly believed the government's bald allegation, that Rehman had threatened a co-

defendant with a gun (Herrmann's false claim). It is worth mentioning that the false claim was made while the co-defendant was attempting to reach a co-operation agreement with the government. Demonstrating abandonment, counsel plainly refused to take any necessary steps ineffect to vindicate Petitioner of this false allegation while ignoring his adamant denials.

Moreover, while in the same vein, abandonment is further demonstrated by counsel's refusal and failure to assist, or pursue avenues of relief pertaining to 08-CR-701 (DWH) despite many requests. Especially as the matter came to prejudicially bear upon the instant case. For months counsel heard claims of innocence, discovery issues, and ineffective assistance of counsel claims pertaining to the prior matter. However, the crux of any remaining argument that warrants further evaluation is demonstrated by the following contention.

- b) Ineffective Assistance Of Appointed Counsel and A Decision To Deny Request To Remove Counsel, Resulted In A Denial Of A Constitutional Right Under The Sixth Amendment.

Petitioner contends that this issue is of the type that warrants review by a court free from any possibility not to hold the balance nice, clear, and true, while in view of the facts and circumstances presented by this case. Identifying questionable government conduct,

court action, and demonstrated bias giving the appearance of impartiality. And, attorney conduct lending support to the prosecution.

Reasonable argument exists, presenting that the district court had effectively suspended Petitioner's right to effective assistance of counsel. As previously detailed, there are numerous reasons to draw upon which support a conclusion that counsel did not discharge his duties under the Sixth Amendment.

Placing possible court impropriety aside, the district court then proceeded to present Petitioner with an irretractable position, forcing a choice between proceeding pro se or continuing with counsel subject of ineffective assistance claims.⁸ Thereby, establishing that the court had effectively left Petitioner with no real possibility of receiving effective assistance of counsel at trial.

Moreover, neither alternative offered no real intelligent choice while in the face of such a complex matter. Petitioner further contends that being forced with such a choice, directed by the court, in and of itself raises a significant question of due process concern. Especially, considering pre-trial conditions that existed as a pro se litigant. Whereby, the record reflects significant discovery issues, and a denial of a reasonable request for a continuance in order to

⁸ Court denied request to remove attorney.

adequately prepare for trial and formulate a defense.

Critical Factors Omitted On Direct Appeal Under Rule 11 Violation⁹

Put another way, the alternatives presented by the court, in effect, forced Petitioner to choose between a very likely life sentence to occur under the C.C.E. court (at trial with or without counsel who was unprepared), or enter a plea in open court to all counts.¹⁰ Which ultimately forced Petitioner into a 20yr sentence.¹¹ Petitioner further contends that the decision to plea was made both unknowing and involuntary. This Court has held, a trial court can only accept a guilty plea that is made "voluntary, knowingly, and intelligent with sufficient awareness of relevant circumstances and likely consequences." Godinez v. Moran, 509 U.S. 389, 400 (1993)

Conversely, in an effort to demonstrate prejudice, had Petitioner received effective assistance of counsel leading up to, and on the first

⁹ See also, No. 15-9396, 136 S.Ct. 2526 (2016)

¹⁰ At trial, the Government declared that Petitioner had to plead to all counts, or a trial would proceed. Noting, it was the Government that forced at trial through its refusal to relinquish aforementioned stipulations.

¹¹ Petitioner was also unaware that the court had no authority to depart from the statutory minimum. Influenced by counsel, Petitioner was led to believe that the court had authority to depart based upon mitigating circumstances.

day of trial. Presented with newly revealed ATF reports and Jents material evidencing Herrmann's claim to be false. An allegation that the Government knew or should have known to be false during the plea bargaining process. After conferring with his client with respect to such evidence and its implications, counsel could have thereby presented a justifiable and compelling request for a continuance. Grounded upon a claim of actual innocence to the prior matter, which had arguably affected proceedings.

Currently, both lower courts have issued determinative denying relief to various Constitutional claims, by utilizing counsel's sentencing argument advocating for relevant conduct. Furthermore, because 08-CR-701 (DNH) occupied a second stipulation that caused Petitioner to reject the proposed plea agreement, it would be reasonable to conclude that the court would have been inclined to permit additional time to explore and resolve such issues before proceeding.

In the face of forensic evidence establishing that agents involved in the investigation (included DEA agent) had tampered with evidence, and committed possible perjury at the first trial. It would also be reasonable to conclude, that the government would have been inclined to re-offer the proposed plea agreement minus the questionable stipulations grounded upon Herrmann's false claim and relevant conduct (government argued at sentencing the matters were unrelated).

In turn, subjecting Petitioner to the more favorable 10 yr statutory penalty.

i) For consideration, Petitioner has previously argued under Rule 60 (b)(1), "authorizing 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.'" (App. Br. 33-39) Contending that, under habeas proceedings, the court failed to appropriately apply the standards enunciated by this Court found under Missouri v. Frye, 566 U.S. 134 (2012). Frye, instructs 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)

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

The record demonstrates counsel's own statement affirming that, "[Petitioner], who wanted to negotiate this case and plead guilty,

was prevented from doing so by the government's reluctance to give up this point [Herrmann's false claim - 2pt enhancement]. [] After he pleads guilty [open plea] at -- while trial is going on, they back away from the point." (A-223) Consider also, "so therefore, I am subjected to a 20 year mandatory -- statutory mandatory minimum, rather than the ten years that I would have been had the government either investigated Sean Herrmann's [claim] properly or relinquished that stipulation." (A-229)

ii) In addition to counsel's deficient performance, under habeas proceedings, the district court has overlooked the fact that government misrepresentations have possibly rendered Petitioner's plea involuntary and unknowing. By failing to apply standards found under Brady v. United States, 397 U.S. 724, 747 (1970). Hinging prior stipulations "on egregious impermissible conduct on the date of the entry of plea and because the misconduct influenced the decision to plead guilty or, put another way, it was material to that choice. Under Brady, this Court held that government misrepresentations constitute impermissible conduct.

As such, Petitioner should be afforded the opportunity, in accordance with Litky, supra., to have the following two factors evaluated under Brady. First, the record indisputably provides that the Government knew or should have known Herrmann's claim was

in fact false. And, speaking to the second stipulation involving relevant conduct pertaining to 08-CR-701 (DNH), the prosecution knew or should have known that agents involved in the investigation. Had tampered with evidence and were willing to commit perjury in order to increase chances of conviction at trial, occurring previously under the prior matter. Re-iterating, that it was the Government that elected to delay a second indictment, resulting in a separate prosecution. See also, Brady v. Maryland, and progeny. Under Kyles v. Whitley, this Court has instructed that the prosecution is chargeable with information known to agents involved in the investigation.

Interestingly, the district court has previously found, that "the purportedly [altered] audio tapes tapes in NDN 08-CR-701 (DNH), if discovered, would have provided [] impeachment material in the instant case." citing, Friedman, 618 F.3d at 153 (quoting, Ruiz, 536 U.S. at 29 (emphasis in original) ("impeachment information is in special relationship to the fairness of trial.") In effect, the court has confirmed that impermissible conduct has occurred. Now, the question that remains, asks whether or not government stipulation to relevant conduct, may have also caused Petitioner to reject the proposed plea. Such a consideration must also include Petitioner's claims of actual innocence to the prior convictions.

However, there is an additional factor to also consider that

Petitioner contends, amounts to additional impermissible conduct pertaining to the relevant conduct stipulation. Whereby, the Government has argued two different positions, occurring at different stages, but involve the same issue.

For consideration, during the plea bargaining stage, counsel for the government required that Petitioner stipulate that conduct occurring under 08-CR-701 (DWH) was relevant to the conspiracy under 09-CR-125 (TSM) (Count One). But then, at sentencing counsel argued a contrary position to the earlier representation. By "asking] the court to sentence [Petitioner] to a consecutive term of imprisonment and -- for the prior crime and instant offense. The government believes that the gun charge, the Utica case is a separate and distinct offense." (A-224) Indeed, the government has reversed an asserted position twice occurring during proceedings relevant to the proposed plea.

Petitioner further contends that because he could not accept the proposed plea while including the aforesaid stipulations. And, by the Government's declaration that he plead to all counts or a trial would proceed. Ineffect, resulted in a plea that was made both involuntary and unknowing. Because, a reasonable conclusion can be drawn, indicating that the aforementioned facts and circumstances, more likely than not, influenced Petitioner's plea

or was at least material to that choice. As such, under Brady, if a defendant establishes that an "unconstitutional influence actually infected the pleading process, that it was a significant factor in his decision to plead guilty, then he is entitled to reversal of the judgement of conviction entered on the plea." *Id.*

Furthermore, had the Second Circuit Court of Appeals construed any remaining claims as seeking COA, the appeal should have been allowed to continue on the premise that he has demonstrated the denial of a constitutional right under this issue. Without providing for fair and impartial review, in effect, Petitioner continues to be subjected to an increased Statutory penalty as a result of government misrepresentations, and possibly ineffective assistance of counsel. Considering, the more favorable plea to Count One would have ultimately resulted in exposure to a guideline range of 132-165 months, rather than the 240-month Statutory minimum that resulted.

It is also important to consider, that Petitioner has already served 144 months of his current sentence. Serving an increased sentence that resulted from impermissible conduct, raises significant questions of due process and Eighth Amendment concern in light of circumstances presented by COVID-19. Presenting a heightened risk to health and safety under conditions of

of confinement.

Also, further consideration should be afforded to the collateral consequences and ensuing prejudices that will certainly result. Occurring from being unnecessarily convicted of additional sixteen counts under the facts and circumstances presented by this case, for what amounts to a single overall offense.

D. Extra-Ordinary Circumstances Presented By Due Process And Eighth Amendment Implications.

Exercise of this Court's supervisory power is warranted in order to provide an avenue of relief warranted under due process of law. By resolving issues that have possibly impeded fair and impartial consideration of substantial Constitutional questions. In effect, would therefore provide for thorough and meaningful evaluation of such claims as presented under *Missouri v. Frye*, and; *Brady v. United States*. Currently, these critical issues represent possible violations that have resulted in an increased sentence. Where no reasonable avenue for possible relief exists, gives rise to a question of Eighth Amendment Concern.

For consideration, facts and circumstances presented by this matter pertaining to attorney assistance, while in view of record

docket (20-5149), highlighting the Second Circuit's prior treatment of case 08-CR-701 (DNH). Together establish that through two cases, resulting out of a decision to delay a second indictment, indicates that the Second Circuit Court of Appeals has effectively refused to afford any thorough and meaningful evaluation of a single ineffective assistance claim presented before the court. Presenting a significant question of Due Process concern in light of the fact, that the appellate court has also refused to consider two prior claims of actual innocence leading up to the instant petition. Together should provide compelling argument for closer scrutiny by this Court.

When a country currently striving for equality under the law is so paramount, such considerations are imperative to this Court's jurisdiction. By sending a clear message, that even in the name of law, such abuses under the Constitution will not be tolerated.

In closing, it is worth mentioning that, this Court has also demonstrated that it did not shy away from summarily deciding cases in view of egregious behavior exhibited by a lower court.

Weary v. Carw.

E. Conclusion

For the reasons presented herein, Petition For Certiorari should be granted.

Date: November 25, 2020

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