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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 17 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEITH SMEATON,

Defendant-Appellant.

No. 20-15364

D.C. Nos. 3:17-cv-06828-SI
3:83-cr-00213-SI-1

Northern District of California,
San Francisco

ORDER

Before: OWENS and BENNETT, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.



“ C ”

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
KEITH M. SMEATON,
Defendant.

Case No. 83-cr-00213-SI-1

**ORDER DENYING MOTIONS FOR
RECONSIDERATION OF APRIL 3,
2018 ORDER; CONSTRUING
DEFENDANT'S FILINGS AS
REQUESTS FOR PERMISSION TO
REOPEN THE TIME TO APPEAL;
AND GRANTING DEFENDANT'S
REQUEST TO REOPEN TIME FOR
APPEAL BUT DENYING A
CERTIFICATE OF APPEALABILITY**

Re: Dkt. Nos. 95, 98, 99, 100

On November 28, 2017, *pro se* defendant filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Smeaton was convicted in 1983 of wire fraud, and he was convicted in 1984 of bail jumping. Judge Schwarzer of this Court presided over the criminal cases, and Smeaton filed an appeal with the Ninth Circuit, which was denied. Smeaton has long since completed the four-year consecutive sentence for both convictions.

Smeaton's section 2255 motion (1) requested that the Court remove any references to his criminal cases from the internet; (2) asserted that his criminal convictions for wire fraud and bail jumping are "moot" and "bogus" because of prosecutorial misconduct and ineffective assistance of counsel; (3) asserted that defendant has new evidence showing that he suffers from dyslexia and that this evidence requires that his convictions be set aside; and (4) complained about various rulings by Judge Schwarzer and the Ninth Circuit.

In an order filed April 3, 2018, the Court dismissed Smeaton's section 2255 motion for lack of jurisdiction. Dkt. No. 91. The Court held:

(31)

“By its clear terms, § 2255 is applicable only to prisoners in custody claiming the right to be released.” *United States v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999) (holding defendant who solely challenged restitution order and did not seek release from custody could not bring a motion under section 2255). The “in custody” requirement is jurisdictional. *See United States v. Reves*, 774 F.3d 562, 564-65 (9th Cir. 2014). Accordingly, because defendant is not “in custody” and does not seek relief available under section 2255, the Court dismisses the motion for lack of jurisdiction. *See id.*

Id. at 2-3. The Court entered judgment the same day. Defendant did not file a notice of appeal.

Since the issuance of the April 3, 2018 order and judgment, Smeaton has filed numerous documents, including a letter that this Court construed as a motion to recuse the undersigned. In an abundance of caution, the Court referred the recusal motion for reassignment to another district court judge. On October 25, 2018, Judge Donato denied the motion for recusal. Dkt. No. 101.

The Court now rules on the remaining pending motions that have been filed since April 3, 2018. Defendant seeks leave to file a motion for reconsideration of the April 3, 2018 order. Defendant also states that he did not receive a copy of the Court’s judgment until August 17, 2018. Dkt. No. 95 at 1. Defendant requests that if the Court denies him leave to file a motion for reconsideration, that the Court construe his motion for reconsideration as a notice of appeal.

The Court finds no basis for reconsideration of the prior order, and thus defendant’s request for reconsideration, even if it was timely filed, is DENIED. *X/*

Defendant’s notice of appeal should have been filed by May 3, 2018. *See Fed. R. App. Proc. 4(a)(1)*. However, “the district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

Fed. R. App. Proc. 4(a)(6). The Court finds that these conditions have been satisfied. Defendant states he did not receive the judgment until August 17, 2018, and he filed his motion for reconsideration on August 20, 2018. The Court also finds that the government would not be prejudiced by allowing defendant to file a notice of appeal. Accordingly, the Court construes

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

KEITH M. SMEATON,
Defendant.

Case No. 83-cr-00213-SI-1

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 10/29/2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's office.

Keith M. Smeaton
Flat 3
St. Martins Court
55 Hertford Road
Londond, N1 5TD

Dated: 10/29/2018

Susan Y. Soong
~~Clerk, United States District Court~~
[Signature]

By: _____
Tracy Kasamoto, Deputy Clerk to the
Honorable SUSAN ILLSTON

[Signature] (34)

1 defendant's August 20 filing as a request to reopen the time to appeal, and so construed, the motion
2 is GRANTED. Defendant shall have 14 days from the filing date of this order to file a notice of
3 appeal. The Court directs the Clerk to serve defendant by both e-mail and through the postal service,
4 as defendant currently resides in London. Defendant is informed that a notice of appeal is filed in
5 the district court. *See* Fed. R. App. Proc. 4(a).

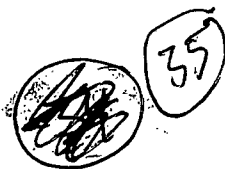
6 Finally, the Court DENIES defendant a certificate of appealability pursuant to 28 U.S.C.
7 § 2253 because defendant has not made a "substantial showing of the denial of a constitutional
8 right." 28 U.S.C. § 2253(c)(2). Thus, if defendant wishes to file an appeal, he must file a motion
9 for a certificate of appeal with the Clerk of the Court of Appeals for the Ninth Circuit. *See generally*
10 Ninth Circuit Rule 22-4 (located at <https://www.ca9.uscourts.gov/rules/>).

11
12 **IT IS SO ORDERED.**

13
14 Dated: October 26, 2018



SUSAN ILLSTON
United States District Judge



c A "

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 15 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEITH SMEATON,

Defendant-Appellant.

No. 20-15364

D.C. Nos. 3:17-cv-06828-SI
3:83-cr-00213-SI-1

Northern District of California,
San Francisco

ORDER

Before: THOMAS, Chief Judge, and BRESS, Circuit Judge.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry Nos. 3, 4, 5 & 6). The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

29

[Handwritten signatures and initials]



Part of the Department for Work and Pensions

Website: www.thepensionsservice.gov.uk

01858
Mr K Smeaton
Flat 18, Ravenscourt
Bentham
Road
London
N16 7SS

If you get in touch
with us, tell us this
reference number **YE052005B**

Our address **The Pension Service 4
Mail Handling Site A
Wolverhampton
WV98 1AG**

Our phone number **0800 7310469**

If you have a
textphone **0800 7310464**

Date **15 March 2021**

Dear Mr Smeaton

This letter is for your information. Please retain it as evidence of Pension Credit entitlement for the following people:

Mr Keith Smeaton

This is about the Pension Credit you will receive from April 2021.

From April the rates of some benefits may change.

Your Pension Credit will be £142.91 from 12 April 2021. The Pension Service will pay you £130.66 a week.

Because your Pension Credit includes the Pension Credit guarantee credit, you are also entitled to some health benefits. Please see the enclosed leaflet **INF2(PC)** which tells you more about this.

Other Benefits

You will be contacted separately about any increases to other benefits you receive. These letters are issued over a number of weeks so do not worry if you do not receive one immediately, or if your friends or neighbours have already received theirs.

Do you need to contact us?

This letter is for your information. You only need to contact us if any circumstances have changed.

The easiest way to tell us about something that has changed is to phone us on the number shown at the top of this letter. If you do not want to use the telephone you can write to us at the address on the top of this letter.

Yours sincerely

Office Manager
Manager

6213/3216

Page 1 of 1

37559032160010011

Keith Smeaton,
18 Ravenscourt
Benthal Road
London N16 7SS
M: 07999558103
E: hello@keithsmeaton.com

In The Ninth Circuit Court of Appeals

**3rd Additional argument supporting 1st & 2nd arguments for Motion for Reconsideration
opposing Slack V. McDaniel & Gonzalez V. Thaler to dismiss POHC No. 1551 Appeal
Starting Line 466.**

**Additional 2nd Supporting Medical Evidence and
Argument filed January 3rd, 2021 at line 359 Page
11 16 Pages in all..**

Between

No. Keith Smeaton

Petitioner Defendant

V

1 - HHJ W William Schwarzer Presiding

**2 - U. S Attorney San Francisco, The United
States of America .**

Respondents / Defendants

-) **Case Order No. 20-15364 March 2020 order**
-) **denying Petition For Write of Habeas Corpus**
-) **WWS-85- CV-1551 in case WWS-83-CR-0213**
-) **Mail Fraud and falls statements to banks**
-) **related to:**
-)
-) **Direct Appeal of WWS-83-CR-0693**
-) **Bail Jumping records wrongly removed from**
-) **Ninth Circuit Records to impede appeal but**
-) **publicly published.**
-)
-) **Motion for reconsideration Embanc of**
-) **denying Appeal Habeas Corpus No. 1551**
-) **Appeal of order 15364 and for oral argument**
-) **invoking Void ab Initio negating subject**
-) **order and Nun Pro-tunc laws.**

MOTION FOR RECONSIDERATION EMBANC AND ORAL ARGUMENT

This court March 2020 order dismissing Petaton of Habeas Corpus will be filed as
soon as I receive it form the Ninth Circuit Court of Appeal. Which I have not received to date
and as of the evening of December, 29th, 2020 this court's clerk has agreed to send to me by

39 U.S Mail. In this regard, there is a law which allows this court to send me the March 2020
40 decision to deny my POHC No. 1551 by email. Also please note the Covid-19 and Christmas
41 mail will delay this court receiving this motion which I have sent by the UK's registered
42 which confirms mail its filing with the legal time frame from that date I received it..
43

44 Because I the undersigned Petitioner (KS) has never received this court's March 2020
45 order denying his Appeal of his Petition of Habeas Corpus No. 1551 from this court this
46 Motion will be filed in time. The only reason I am aware of it is because I telephoned the
47 Ninth Circuits Clerks Office today on December 29th, 2020 who informed me the said order
48 was sent to the wrong address despite my informing this court in early 2019 in both writing
49 and verbally by phone of my new address for service is **"18 Ravenscourt, Benthall Road,
London N16 7SS, UK"**. The Clerk's office, as of today, agreed to send me the said order
51 which, because of Corona-19 epidemic and the current Christmas Mail, will delay my receipt
52 of it. In addition, the law facilitates the court to email the order to me which it has not done
53 previously.
54

55 This court's denial of my appeal of lower Courts has resulted from it not considered
56 the grounds, law and supporting evidence stated in both my appeal of Habeas Corpus No,
57 1551 and raised in my appeal of it to this court which supports my current Motion for
58 Reconsideration Embanc which includes supporting Supreme Court and other Appeal Court's
59 legal precedents which this court is unable to oppose or challenge. This court's subject order
60 does not negate the said Supreme Court Law. Therefore negating both this and the lower
61 Court's decision to deny my Petition For Writ of Habeas (POHC) No. 1551 because said
62 lower Judge HHJ Schwazer. For example he clearly erred when contravening and
63 overriding Congress's rules governing Habeas Corpus pursuant to Title 28 USC Sec 2255
64 when not acting upon it within 28 days of his receipt of it but waited for nearly three
65 months to do so. Then he erred by dismissing my POHC by his personal letter which I
66 could not appeal because it is not a court order which denied me due process and access to
67 the Court's power of relief. Because said POHC exhibited evidence of my innocents ignored
68 by lower judge resulted in said lower Judge subjecting me to the torture of falls
69 imprisonment and slavery at the hands of the Bureau of prisons who forced me to work for
70 virtually no pay and restricted my freedom / liberty of movement knowing of my innocents,
71 by virtue of my POHC No. 1551 filed with them. The lower court also knew it had no
72 jurisdiction to overrule Title 28 USC law rules as required by U.S Constitutional law,



73 Congress and Supreme Court Precedent when waiting nearly 90 days deny my POHC for
74 which he also had no legal jurisdiction to do. In support, The U.S Attorney's Office, in reply
75 to this court's prior order to respond to my POHC No. 1551. This court's March 2020 denial
76 ignored the fact that after I obtained an appealable 1980's order from lower court via my
77 petition for Mandamus to this court at that time abused due process by delaying my said
78 appeal until I was released from prison mooted my POHC and said appeal 1551 facilitating
79 their not being required to act on it at all because I was not in prison abusing the legal intent
80 of Habeas Corpus and which elevated the Government to reply to it again denying me due
81 process of law denying me access to the Court and U.S. Constitutional protection of law. In this
82 regard the recent 2018 response from the Attorney's office raises no objection or defence to
83 my POHC No. 1551 objectives and its legal argument, law and evidence. Therefore, this
84 court had no jurisdiction to deny my appeal of my POHC for which they raise no legal
85 supporting opinion which currently confirms the legal merits of my POHC No. 1551 issues.
86 This will keep the Supreme Court in the Dark as to why this lower Appeal court denied my
87 said appeal. In this regard, I note this court failed to address the U.S Attorneys only
88 objection to my said appeal is the lower court had no jurisdiction to hear my 2018 to 2020
89 POHC No. 1551 because it had been dismissed by in 1998/5/6 by the lower Judge WW
90 Schwarzer. As said this dismissal resulted from his error abuse of due process. In any event,
91 this objection is negated on grounds Supreme Case Law confirms that because of these bogus
92 and erroneous conviction created by Mr Eb Luckle's Assistant U.S Prosecutor's and Mr David
93 Westburge Postal Inspectors fraud upon the Grand Jury and the subsequently the Federal
94 Trial Court caused by their obstruction and perversion of justice when concealing favourable
95 defence evidence as I argue and support in my POHC No. 1551, I am currently subjected to
96 travel restriction internationally based upon said illegal Conviction. This court refused to
97 note that said conviction are a contravention of The 1948 Universal Declaration of Human
98 Rights barring torture of falls imprisonment resulting from the lower Court Judge's very
99 significant errors as argued and proved in my POHC No. 1551 of which this court is aware
100 but ignores which is an abuse of discretion and Due process and is an insult to the U.S
101 Constitution and Bill of Rights. In support, this court knows the Government's offences
102 committed against me result from said Prosecutor and Postal Inspector's deception and fraud
103 upon the U.S Courts and internationally accepted law and treaties which occurred on U.S soil
104 and is contravention of U.S and UK Treaties and with the Country's of the Western
105 Hemisphere.



107 This court fails to oppose my POHC grounds that the said convictions were also a
108 result of FPDS, Hansen, Bondoc and others total ineffectiveness as argued in my POHC No 1551
109 which is grounds for appeal for which there is no defence and FPDs refused to investigate or
110 mount a valid defence to the Government's erroneous, merit-less and fictitious Indictments.
111 As argued in my POHC. This, combined with HHJ Schwarzer's Presiding total and many
112 judicial errors and judicial abuses prejudiced me to my detriment as argued in POHC No.
113 1551 which contravened Due Process of Law and e.g, The 5th & 6th Amendments based
114 upon Magna Carta's 39th and 40th Article upon which the 5th and 6th Amendments are based
115 the right to fair trial which, as said, has contravened The Bill of Rights and the U.S
116 Constitution and international law. PRESIDENT BILL CLINTON STATED THE 5TH & 6TH
117 AMENDMENT ARE BASED UPON ARTICLES 39/40 MAGNACARTA.

As said this court ignored the fact that as a result of HHJ Schwarzers errors I was
119 subjected to slavery at the hands of the U.S. Prison Service which offended The 1948
120 Universal Declaration of Human Rights baring false imprisonment and U.S and UK Treaties
121 which was is insult to the U.S Constitution. Also this court also ignored the fact that I had to
122 file a Petition For Writ of Mandamus to facilitate my appeal of lower Judge erroneous and
123 legally wrongful denial of my POHC. Once I was able to appeal to the 9th Circuit in 1985,
124 they just sat on it waiting until I was released for prison into USINS Hands for illegal
125 deportation proceeding. Because I was released form Federal Prison meant my POHC No.
126 1551 was invalid moot and the 1980 9th Circuit had no need to legally adjudicate it?

128 Therefore, because of the reasons stated above it is clear error for this court to deny
129 my POHC No. 1551 on erroneous grounds the lower Judge was correct to deny my aid said
130 POHC? IN support, and regarding Case 06903 (1) if lower Judge had done his duty
131 regarding POH, I would not have been illegally imprisoned, and deported and defamed
132 internationally and there would have been no Bail Jumping conviction. In this regard, I note
133 the current 9th Circuit two panel Judge erroneously denied my POHC No. 1551 contravened
134 not only my common law rights, internationally accepted, but insulted The U.S Constitution
135 in its entirety and Internationally accepted Human Rights law . Therefore, it appears the two
136 Panel Judges of the 9th Circuit had no legal Jurisdiction to deny my PO HC because there is
137 no legal grounds for them to do so because they failed to consider the supporting evidence,
138 argument and supporting law which is a denial of access to the court and a breach of my U.S
139 Domestic and Internationally accepted Civil & Human Rights as supported by the United
140 Nations. Which has also been contravened. Therefore the actions of the subject U.S

39
[Signature]

175 Justices of the Appeal Court allow these possible criminals to escape justice on grounds I
176 have asked this and lower court for appointment of Counsel to overcome my dyslectic
177 problems. The denial of this again violates my Civil Rights. This court must order 3/
178 appointment of counsel before this a Appeal was adjudicated / denied facilitating proper
179 access to the court assisting their Justices understanding of the issues and due process of law
180 particularly because this is a Civil Human Rights Case.

181
182 Why does this court ignore the legal fact that the lower Judge did not know or
183 consider the actual factual defence raised in my POHC No. 1551 on the grounds based upon
184 promissory estopple proving I did not make falls statements to banks or commit mail fraud
185 because ~~and~~ my clients relied upon the Bank's representations that the trust account existed
186 which Government wrong argues did not exist. Therefore this evidence raised in my POHC
187 No. 1551 proves clearly there was no criminal scheme on my part as the Government fallsley
188 based its indictment upon which they knew was a fraud upon the court which is a
189 Government Employee's obstruction and perversion of justice and a criminal offence.

190
191 This court ignored the factual defence raised in my POHC No. 1551 of my
192 establishing the fact I was not in mental state to make the decision to plead guilty because it
193 ignores he fact that I was under mental therapy and suffering "adjustment reaction" at the
194 time as proven in the related bail Jumping case which the Court(Lower)accepted and which
195 this court ignores in contravention of due process as proven by Doctor Sykorsky, Expert
196 witness in the bail Jumping case and not challenged in the Government current reply to my
197 POHC No. 1551. The proven adjustment reaction demonstrated I was open to the
198 suggestion to plead guilty. This resulted FPD Hanson ineffectiveness when refused to contact
199 presiding psychiatrist at the Mount Diablo Rehabilitation Centre treating me for depression
200 and trauma and extreme anxiety which this court ignored to my prejudice, discrimination and
201 detriment. My POHC supports Mr Luckle's intent was to mislead FPD to facilitate my plead
202 pleading guilty when this court ignores the fact that said FPD Hansen informed the court of
203 "my being "Technical Guilty" when Luckle and Westburg knew I was not as proven in my
204 POHC No. 1551 but ignored by this court..

205 This court ignored Luckle's scheme was / is that that once I was convinced by
206 FPD's Office to plead guilty I could not appeal and he was home and dry. This resulted in his
207 intent to allow the culpable banks who did inform my client trust account existed were
208 protected from prosecution rendering I was intentionally maliciously and selectively

(40)

2/ CONTINUED FROM GRAND JURY AND THE FEDERAL COURT AND
IT WAS DENIED MY RIGHT TO TESTIFY BEFORE GRAND JURY AS TO TRUTH.

209 prosecuted which FPD's office ineffectiveness allowed said Luckle's fraud upon the court.
210 Which this court ignored when wrongly dismissing my POHC.

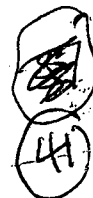
211
212 Luckle's fraud comprised of various untruthfulness raised in my POHC ignored by
213 this Court e.g he knew R.L Abbott embezzles money from me and my family company RJS
214 Packaging USA financed by our English company of similar name. This court and the lower
215 court ignored the post conviction evidence of the County Court Judgment against Abbott
216 which Luckle and Westburge concealed from the Grand Jury and the Federal Court.
217 Disproving their contrived and fals claim I had cheated all I had come in contact with since
218 being in the USA which they knew to be untrue. Luckle and Westburg to gain fraud
219 conviction needed to rely on Abbott's false testimony that I was a crook when they knew he
220 was and my innocents. The lower Court and this court ignored the fact that Abbott had lied to
221 them which again is a criminal offence by both Lukcle and Westburg which is proven in my
222 POHC No. 1551. In this regard this court chose to ignore this evidence abusing Due Process
223 of law.

224 Similarly, this court chose to ignore the proven unchallenged fact that the real-estate
225 Agent ~~MAJOR~~ committed fraud when he and or his colleges falsified my Mortgage
226 application on ground they needed to raise money from the sale of one of his many houses to
227 me . In this regard, this court chose to ignore the factual unchallenged evidence that my hand
228 writing samples, willingly given to Westburge, clearly proved I did not make fals statement
229 to bank which Westburg concealed form the Grand jury facilitating Westburges criminal
230 intent to convict me of fraud when he well knew I had not committed such crime and the
231 FPD's office refused to investigate this fact or present it to the Court. In this regard, this court
232 chose to ignore that Westburge's and Lukles joint scheme to act as judge and jury by
233 manipulating the courts process to thei advantage as clearly argued in my POHC No. 1551.

234
235 This court ignored the fact that the FPD Ineffectiveness and incompetence.

236
237 This court and the lower Court ignored the fact that I was totally confused during
238 forced plea proceeding caused by Adjustment reaction which causes my brain to shut down
239 causing me to be open to the suggestion to plead guilt. IN this regard, this court chose to
240 ignore the extensive overwhelming expert medical testimony and written diagnosed evidence
241 file and examine by this court during the Bail Jumping trial as I argue in my POHC No. 1551
242 ignored by this court..

3/ SEE MURPHY V. SMITH. LITIGATION REFORM ACT 42 U.S.C sec 1201



243

244 This court ignored the fact that the lower judge was biased and abused Due Process
245 when without notice to defence called his own prosecution witness the Probation Officer who
246 committed perjury when stating I had not filed my financial state when in fact I had
247 arraignment when the record proves I had as argued in my POHC No. 1551.

248

249 Note this case is a civil and human rights issue encompassing both Civil and Criminal
250 jurisdiction and the Supreme Court has ruled that pro se litigants must be appointed
251 professional representation when Petition Claimant suffers form learning disability Dyslexia
252 a hidden mental disability "One who can n ot understand the meaning of that which is
253 written and suffers from extreme anxiety rendering me to miscommunicate when in stressful
254 situation such as court proceeding as expert witness testimony proves which this court
255 ignores to my discrimination, prejudice and detriment resulting in this court denying me
256 access to the court's power of relief creating in-justice internationally which grounds for my
257 motion for reconsideration to be granted.

258

259 Finally, if this court denies this my Motion For Reconsideration Embanc – which I
260 believe it will - please accept this as my notice of appeal to the Supreme Court. In this regard,
261 when the lower court realised I was dyslectic it should have stayed proceeding to obtain
262 expert witness to assist the court on the effects said mental disability will effect the
263 proceeding. The lower Court did not do this violation due process of law and access to justice
264 which this court ignored to my prejudice and discrimination on grounds this court to insure
265 justice is seen to be done should have appointed attorney to insure my subject appeal was
266 accurately and currently constructed and filed before considering the subject appeal. Bothe
267 the lower and this court failed in this regard. Therefore these entire proceeding from 1982
268 start to date are an abuse of due process, U.S Constitutional and International Human Right
269 law and abuse of the Bill of Rights land my common law rights and an abuse of United
270 Nation Mandate in total.

271

272 Therefore, in light of the above how can this court deny my valid POHC on grounds
273 the lower Judge was right in his decision to deny my POHC No. 1551 which any reasonable
274 man woulf agree is not merit-less but clearly valid. This courts decision denying POHC No.
275 1551 Appeal is an international in- judicial abuse which this court is under a duty of care to
276 correct on grounds the two judges dismissing my POHC Appeal, and the lower Judge, have

42

1551

277 compromised their oath of office resulting in the argument of the U.S Legal system
278 protecting life freedom and happiness and Freedom and liberty for all is otherwise a joke on
279 grounds said decision plunges the knife in the heart of the U.S Constitution, The Bill of
280 Rights and the Declaration of Independence which injustice dictates must be must be
281 corrected. In the natural cause of justice.

282

283 **This court and the lower Court has refused to consider all the issues I raise in my**
284 **POHC No. 1551. In this regard, this court error dismissing said Appeal without oral**
285 **argument which I herewith apply for via zoom which is my U.S Constitutional Due**
286 **process right..**

287

288 Because I am indigent I am unable to provide volumes copies of this document or pay
289 for professional representation.

290

291 ***Void ab initio, applicable here on grounds*** According to the maxim,
292 proposition in law within a court's

293 jurisdiction, a certain document which purports to affect legal rights is or was null and
294 void from its beginning, because of some vitiating element., in this case abuse of due
295 process and statute law as argued above.

296

297 ***Nunc pro tunc***, applicable hear on grounds may also apply to acts that are allowed
298 to be done after the time legally allotted to carry them out has passed. For example,
299 in the probate of an estate, if property, such as lands, mineral interests, etc., are
300 discovered after the final decree or order, a *nunc pro tunc* order can include these
301 discovered lands or assets into the estate and clarify how they were meant to be
302 distributed. Or, when a court clerk makes a clerical error or a mistake on the public
303 record without any legal authority to do so, without a judicial order, or without
304 obtaining consent by the parties involved. A Nunc Pro Tunc corrects the record to
305 accurately reflect judicial proceedings and agreements reached between parties, In
306 this case the agreement is the presiding statute requiring due process which this
307 court has ignored.

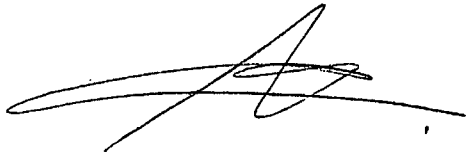
308

43
Zat

309
310
311 Finally, if this court denies my motion for reconsideration please accept this as my
312 notice of appeal to the supreme court on grounds subject 9th Circuit Judgement is an insult to
313 the U.S Constitution and Bull of Right and Intermodally accepted law and treaties with other
314 nations and the United Nations Mandate the article of which must be orally argued as the law
315 proscribes.

316

317 *Respectfully submitted*



318 *Keith Smeaton Pro Se, knowing the*
319 *penalty for perjury swear the above narrative is true and correct.*

320 *I, Keith Smeaton, knowing the penalty for Perjury confirm that I have placed a*
321 *copy of this Motion For Reconsideration in the Royal Mail to the Respondents on*
322 *December 30th 2020 at The 9th Circuit Court of Appeal, 95 7th St, San Francisco, CA*
323 *94103, United States and the U.S Attorney General Office at 450 Golden Gate Ave, San*
324 *Francisco, CA 94102, USA*

325 -----

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327

328 **Petition For Motion to Reconsider the Ninth Circuit Court of Appeal and Oral**
329 **Argument of March 2020 Order denying Appeal of Petition For Habeas Corpus**
330 **No.WWS-85-CR-1551 in case WWS-83-CR-0213 and related Direct appeal to**
331 **Ninth Circuit Appeal of case WWS-83-CR-0693.**

332 **"hello@keithsmeaton.com" [hello@keithsmeaton.com]**

333 Sent: 10:40 am
334 To: "pacer@psc.uscourts.gov"
335 Attachments:

336
337 0102 9th Circuit Motion for Reconsideration of Denal of POHC No. 1551-29-12-
338 2020.docx
339 Gents,

340
341 Please insure the attached Motion is filed with The Clerk of the Ninth Circuit Court of
342 Appeal and the U.S Attorney's Office, Federal Court House 450 Golden Gate Ave,



San Francisco CA 94109, Regretfully I do not have their email address. I have sent it by both the UK's Royal Registered mail No. RN633741046GB which confirms it is filed with the 9th Circuit Court of Appeal as of December 30, 2020 at 13:07 the date of mailing hard copy. The reason I sent it via your organization is because of Covid-19 and Christmas Mail delaying the Ninth Circuit Court of Appeal receiving it.

Thanking you in advance

Sincerely



Keith Smeaton
Petitioner Appellant / Defendant.
M: 07999558103
E: hello@keithsmeaton.com

ADDITION ARGUMENT:

IN support of above, it raises additional argument and medical evidence: This court and lower court arguably appears not to want to grant Petitioner (KS) appeal of POHC 1551 debits its legal merits because if granted it will establish a new legal precedence which provides grounds to set-aside many previous third parties fraud conviction e.g.:

- 1- A new novel defence against fraud based upon "Promissory Estoppel Reliance" which establishes a bridge facilitating U.S Civil Law supporting a defence of reliance upon false third party representation upon which I and my clients relied to our detriment as argued in POHC 1551 negating U.S Criminal Law indictments on grounds it sets aside conviction as erroneous and misconceived in law which;
- 2- Support's (i) ineffective assistance of Defence Council on grounds of their professional negligence for raising said novel defence in time before conviction and sentence. (ii) they will be open to civil money claims redressing their negligent for not applying said civil defence initially based upon false imprisonment . (iii) Abusive Government investigation designed to mislead the Grand Jury as to fact and law creating false Judicial Prejudice against Me Plaintiff which (iii) constitutes obstruction and perversion of justice as I argue in my POHC 1551 which this and lower Court ignores abusing due process and Constitutional and International law e.g. The 1948 Universal Declaration of Human Rights to which the U.S Federal Government signed said treaty (iv) supporting investigating government agency and professionally negligent as in my subject case seminally as that of the U.S Attorney's Office in the 1980's prosecution of this case or facilitating said meritless and erroneous grand jury

381 investigation indictment perpetrating a fraud on the Federal Courts as evidence supports in
382 POHC 1551. This supports that this and lower court do not want to consider the Assistance
383 U.S Attorney's Mr Eb Lukle manipulation of the Justicel system which he did arguable on
384 grounds that he and Mr Wrstburg set himself up as Judge and Jury resulting in the erroneous
385 and unfair indictments as in this case which this and the lower court dose not want to
386 consider. Also this and lower courts do not want to consider Mr Lukle, Assistant Prosecutor
387 and Mr David Westburg, Postal Inspector are culpable for the criminal offences of obstruction
388 and perversion of justice because they personally chose to act out of their professional juris-
389 diction committing said crimes against me which if appeal of POHC is granted will confirm
390 as my POHC evidence confirms which is why no court to date has illegally not considered in
391 breach of due process which also appears to be a criminal offence which are crimes against
392 humanity and the U.S Constitution and International law which the evidence clearly
393 establishes as I argue in my P OHC 1551.

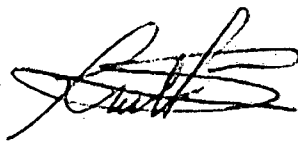
394 3- This and lower court refuse to consider POHC 1551 appeal, if granted, creates a novel
395 grounds to dispel the hitherto judicial concept that : "There is no defence to guilty Plea" when
396 in fact there is as said POHC 1551 proves and which all Federal Court's to date refuse to
397 consider. The Question is Why? This creates damages to me and other wrongly convicted
398 and imprisoned persons. (iv) This supports that the current U.S criminal philosophy is wrong
399 and an abuse of due process of law and U.S and International Law protection of citizens.
400 Under the Universal Declaration of Human Rights baring torture through false imprisonment
401 for when Government agencies are culpable. This and Lower Court do not want to establish a
402 precedent in this regard and their they prefer to abuse due process under the excuse it is there
403 Judicial ruling which is in fact bogus and an abuse of their oath of office and an abuse of the
404 trust the people - The Soverign - has placed in them.

405 4- The issue here is that this and the lower Federal courts must allow the judicial system to
406 develop new common law principles and new precedent. If they block this we would all be
407 currently subject to sink of swim law legal jurisdiction which;

408 5- The this court's March / April 17th 2020 denial of my Appeal of POHC 1551 clearly and
409 erroneous and unfairly and unconstitutionally does creating manifest in-justice which is an
410 insult to the U.S Constitution and Bill of Right, as said afor,e which must be judicially
411 corrected and such judicial abuses arguably will not be condoned by the U.S Supreme Court
412 particularly when this and lower Courts have refused to apply the ADA Statute requiring
413 adequate adjustments for Appellant's hidden mental learning disability of dyslexia as
414 evidence supports Ref POHC No. 1551 - a premiant protected condition - for which said
415 judiciary have and had no legal jurisdiction to do. Ref attached recent Medical Confirmation
416 fetter form Hackney NHS Syc Services in support of the 1983 Medical Diagnosis filed and
417 served with POHC No. 1551.

46

418 6-
419 7- Respectfully:



420 8- Keith Smeaton Plaintiff Appellant

421 I, Keith Smeaton knowing the penalty for perjury certify I have sent this addition to the U.S
422 Attorney via mail on January 3rd 2021 to sailaja.paidipaty@usdoj.gov
423

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"1"

ALEX G. TSE (CABN 152348)
Acting United States Attorney

BARBARA J. VALLIERE (DCBN 439353)
Chief, Criminal Division

SAILAJA M. PAIDIPATY (NYBN 5160007)
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-6821
FAX: (415) 436-7234
sailaja.paidipaty@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEITH SMEATON,

Defendant.

) UNITED STATES' OPPOSITION TO
) DEFENDANT'S MOTION TO VACATE
) CONVICTION PURSUANT TO 28 U.S.C. § 2255

No seal or signature !!

USA OPP'N. TO MOT. TO VACATE
NO CR 83-213 SI

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I. INTRODUCTION

Over thirty years ago, Defendant Keith Smeaton was convicted of one count of wire fraud, in violation of 18 U.S.C. § 1343, and one count of bail jumping, in violation of 18 U.S.C. § 3150. This court sentenced Smeaton to two years' imprisonment for each count, to be served consecutively. Smeaton, who no longer lives in the United States, moves this Court to vacate his conviction pursuant to 28 U.S.C. § 2255. Because Smeaton is no longer in the custody of the United States government, this Court does not have jurisdiction to grant relief. Further, this Court previously denied a motion for relief under § 2255 in 1985. Smeaton's current motion is a successive habeas petition that has not been certified by the Ninth Circuit. For these reasons, the motion must be denied.

II. STATEMENT OF FACTS

Following defendant's guilty plea to one-count of wire fraud, this Court sentenced Smeaton on September 9, 1983 to two years' imprisonment. *United States v. Smeaton*, 762 F.2d 796, 797 (9th Cir. 1985). Smeaton was ordered to voluntarily surrender, but failed to report as required. *Id.* Instead, Smeaton fled to the United Kingdom. *Id.* In December 1983, Smeaton returned to the United States under an assumed name and was immediately arrested upon landing at LaGuardia Airport in New York. *Id.* Smeaton was subsequently prosecuted for bail jumping and was convicted at trial. *Id.* He was sentenced to an additional two years' imprisonment, to be served consecutively with his sentence for committing wire fraud. Smeaton appealed his conviction to the Ninth Circuit claiming that (i) the government failed to show that his failure to surrender was "willful," (ii) he was entitled to an acquittal pursuant to an insanity defense, and (iii) the trial judge provided an erroneous jury instruction with respect to the insanity defense. The Ninth Circuit rejected these arguments and upheld the bail jumping conviction. *Id.* at 798-99.

On February 12, 1985, Smeaton filed his first motion to vacate his conviction under 28 U.S.C. § 2255. *See* Def.'s Mot. to Vacate, Dkt. 84 at pp.18-43. He claimed, primarily, that he was provided ineffective assistance of counsel during his prosecution for wire fraud, and pled guilty under duress and pressure from his attorney. *Id.* On April 11, 1985, the Hon. Judge William W. Schwarzer denied Smeaton's motion via letter. *Id.* at 17.



1 According to Smeaton, because he believed Judge Schwarzer's denial letter was not a formal
 2 order which he could appeal, Smeaton sought a Writ of Mandamus from the Ninth Circuit requiring the
 3 District Court to issue a formal order denying his initial habeas petition. *Id.* at 6. Smeaton subsequently
 4 completed his custodial sentence, rendering the Writ of Mandamus and underlying habeas petition moot.
 5 *Id.*

6 Smeaton currently resides in the United Kingdom.

7 **III. ARGUMENT**

8 Smeaton is no longer in the custody of the United States. Further, his habeas petition is an
 9 unauthorized successive petition. This Court, therefore, must dismiss the motion for lack of jurisdiction.

10 **A. Because defendant is not "in custody," the Court lacks jurisdiction to grant the** 11 **requested relief.**

12 "By its clear terms, § 2555 is applicable only to prisoners in custody claiming the right to be
 13 released." *United States v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999). Section 2255's "language
 14 clearly and unambiguously limits its applicability to defendants seeking release from custody." *Id.*

15 The "in custody" requirement is jurisdictional and applies at the time the Section 2255 motion is
 16 filed. *United States v. Reves*, 774 F.3d 562, 564-65 (9th Cir. 2014).

17 Smeaton has long since concluded his time in custody. Between the two convictions, he was
 18 sentenced to a total of four years' imprisonment with no period of supervised release to follow. Because
 19 he is not "in custody" for purposes of Section 2255, the district court is required to "dismiss the motion
 20 for lack of jurisdiction." *Id.*

21 **B. Defendant's motion is barred as second or successive.**

22 Second, the district court should dismiss the motion for lack of jurisdiction as an authorized
 23 second or successive motion. 28 U.S.C. § 2255(h); *see Ezell v. United States*, 778 F.3d 762, 765 (9th
 24 Cir. 2015). "If the petitioner does not first obtain [the Ninth Circuit's] authorization, the district court
 25 lacks jurisdiction to consider the second or successive application." *United States v. Lopez*, 577 F.3d
 26 1053, 1061 (9th Cir. 2009).

27 As Smeaton acknowledges, he filed an original habeas petition in 1985, which was subsequently
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1 denied by this Court *See* Def.'s Mot. to Vacate, Dkt. 84 at pp.17-43. Because defendant has not
2 receiving authorization from the Ninth Circuit to bring a successive habeas petition, the district must
3 dismiss the motion for lack of jurisdiction.

4 **IV. CONCLUSION**

5 Smeaton's motion must be denied.

6 DATED: March 5, 2018

Respectfully submitted,

7 ALEX G. TSE
Acting United States Attorney

8
9 /s/
SAILAJA M. PAIDIPATY
Assistant United States Attorney

(51)

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E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 14 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KEITH SMEATON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 17-71850

Northern District of California,
San Francisco

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

The court is in receipt of petitioner's original motion filed pursuant to 28 U.S.C. § 2255. A motion under 28 U.S.C. § 2255 must be filed in the district court that imposed the sentence. *See* 28 U.S.C. § 2255(a); *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006). If an original 28 U.S.C. § 2255 motion is filed in the court of appeals, the motion is transferred to the appropriate district court. *See* Fed. R. App. P. 22(a); *see also* 28 U.S.C. §§ 1631, 2241(b).

Accordingly, the Clerk shall transfer the 28 U.S.C. § 2255 motion to the United States District Court for the Northern District of California.

Upon transfer of the motion, the Clerk shall close this original action.

ELF/MOATT

11 F

The Honorable W Schwarzer, J.
Of The Clerk of the Court,
The Federal District Court
Northern California,
450 Golden Gate Ave,
San Francisco,
Ca 94102.

April 7th 1985.

RE: Case No 83-0213 MMS Post Conviction Relief ^{"2255"}
Case No 83-0693 MMS Sentencing.

Dear Sir,

On the 12th of February 1985, my motion/writ 2255 requesting post conviction relief was filed in this Court, Ref Case 0213. To date I have not received a communication from the court informing me of it's current status. I would appreciate knowing when it will be acted upon.

With regard to Case 0693 sentencing. I understood at sentencing that the sentence was to run concurrently with case 0213. I, therefore believe that the consecutive sentence as stated in the commitment order -ref- for case 0693 is in error. Please advise.

Yours sincerely,

K *[Signature]*
Keith Swanton 75262-011
PO Box 4000,
Springfield,
Mo, 65808.

EXHIBIT - B - (MANDAMUS)

(154) (54)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA 94102

April 11, 1985

CLERK OF
WILLIAM W. SCHWARZER
UNITED STATES DISTRICT JUDGE

Mr. Keith Smeaton
PO Box 4000
Springfield, MO 65808

Re: Case No. 83-0213-WWS; 83-0693-WWS

Dear Mr. Smeaton:

Responding to your letter of April 7, 1985, please consider all motions filed by you in this court, to the extent not previously ruled on, to have been denied.

With respect to your sentence in Case 8693, the Court at the time of sentencing specifically stated that it would run consecutive to the sentence in Case 0213.

Very truly yours,

William W. Schwarzer
William W. Schwarzer
United States District Judge

EXHIBIT - C - (MANDAMUS)

39

THIS SECOND LETTER FROM PRESIDING JUDGE DISMISSED RE: P.O.F.H.C.
FILES IN FEB 1985 PROVING JUDICIAL ABUSE BY (1) J. H. HORD
TITLE 28 USC SEC 2255 GOVERNING P.O.F.H.C. TIME FRAMES
AND (11) FILES IMPRISONMENT/TOURURE WHEN P.O.F.H.C.
SUPPORTED BY INNOCENTS. UK CONSULAR HAD COPY OF ALL DOCS.

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MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

ORIGINAL
FILED

FEB 12 1985

WILLIAM L. WHITTAKER
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States District Court		District
Name of Movant		NORTHERN CALIFORNIA
Place of Confinement	Prisoner No.	Docket No.
U.S. MEDICAL CENTER FOR FEDERAL PRISONERS, P.O. BOX 4100, SPRINGFIELD, MO. 65802	75242-011	CR-83-0213 WWS

UNITED STATES OF AMERICA

V.

KEITH SMEATON

(full name of movant)

WWS

MOTION

1. Name and location of court which entered the judgment of conviction under attack U.S.D.C., NORTHERN DISTRICT OF CALIFORNIA, JUDGE WILLIAM SCHWARTZER PRESIDING

2. Date of judgment of conviction SEPTEMBER 9, 1983

3. Length of sentence 2 YEARS

4. Nature of offense involved (all counts) 18 U.S.C., SECTIONS 1341/3 WIRE FRAUD, 1 COUNT

5. What was your plea? (Check one)

- (a) Not guilty ☐
(b) Guilty ☒
(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

OTHER COUNTS DISMISSED

6. Kind of trial: (Check one)

- (a) Jury ☐
(b) Judge only ☒

7. Did you testify at the trial?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☒

5 [stamps]

D. Ground four: SELF INCRIMINATION

(SEE AFFIDAVIT IN SUPPORT AND MEMORANDUM IN SUPPORT)

Supporting FACTS (tell your story briefly without citing cases or law):

E. GROUND FIVE: TEMPORARY DIMINISHED CAPACITY

(SEE AFFIDAVIT IN SUPPORT AND MEMORANDUM IN SUPPORT)

F. GROUND SIX: ILLEGAL SENTENCE BASED ON F.R.C.R.P. RULE 32.

(SEE AFFIDAVIT IN SUPPORT AND MEMORANDUM IN SUPPORT)

G. GROUND SEVEN: VIOLATION OF DUE PROCESS AND CONSTITUTIONAL RIGHTS.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: (N/A)

H. GROUND EIGHT: COURT BEING WITHOUT

JURISDICTION BY VIRTUE OF CIVIL MATTER. (SEE
AFFIDAVIT IN SUPPORT)

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing JEFFERY HANSON

FPD OFFICE, SAN FRANCISCO, CALIFORNIA

(b) At arraignment and plea SAME

(c) At trial SAME

(d) At sentencing SAME

(e) On appeal N/A

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☒ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future:
U.S.D.C., NORTHERN DISTRICT OF CALIFORNIA

(b) Give date and length of the above sentence: MAY 21, 1984, 2 YEAR (CONSECUTIVE)
CR 83-0593 MMS

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

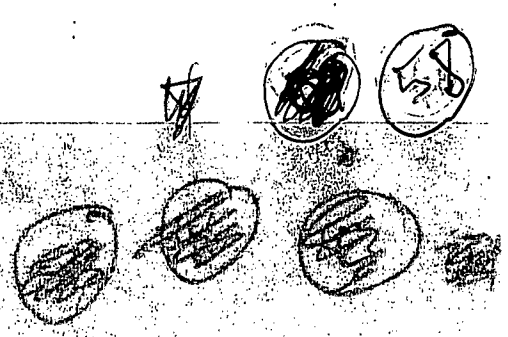
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

(date)

A+L

Signature of Movant



9. If you did appeal, answer the following:

- (a) Name of court _____
(b) Result _____
(c) Date of result _____

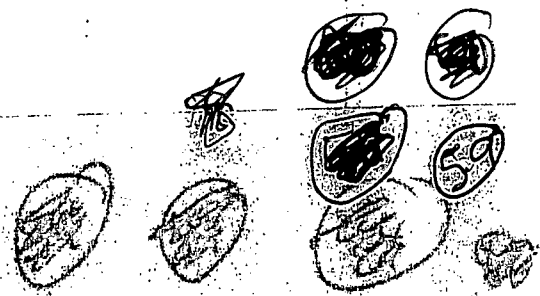
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
(5) Result _____
(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

- (1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____



(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of Result _____

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(3) Third petition, etc. Yes ☐ No ☐

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

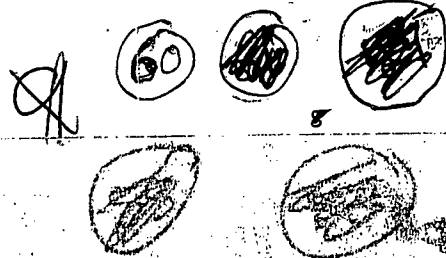
CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent

vs

Petitioner.

IN THE MATTER OF

DUCKET NO. CR-83-0213 WWS

HONORABLE WILLIAM SCHWARZER, J.

AFFIDAVIT AND

MEMORANDUM OF LAW IN SUPPORT OF 2255 MOTION

COMES NOW *AxL* first being duly sworn under oath, and deposes
and states as follows:

1. I am the petitioner in the attached Section 2255 Motion.
2. That on or about September 9, 1983, I was influenced by my court appointed counsel to plead guilty to Count Five of a 13 count indictment. I am, in fact, innocent of the charge.
3. At the time the guilty plea was entered I was, for following reasons, inter alia, in no sound state of mind to do so. I was under duress from defense counsel to plead as I did. The record clearly indicates that I did not wish to plead guilty. I had, in fact, withdrawn my guilty plea; however, defense counsel forced me to continue with it (refer to pre-sentence investigation report wherein I am quoted as saying, "Counsel informs me that Dyslexia is no grounds for defense.")
4. By virtue of the dual-sided nature of my mental defect causing my disability (causing overpowering anxiety under pressure and confusion

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in oral and written communication) which was not fully understood by the Court, myself, defense counsel, or by the Probation Department, who, together with defense counsel, refused to research said disability in its totality. I was, as the transcript obviously shows, in a confused state. The court, noted by asking me "Do you (Mr. Smeaton), understand what is going on here today?" Counsel, by interrupting, did not allow me to answer and interjected, "I do, your honor." The court by not ordering me to answer, did not receive my personal answer.

5. That, at the time I entered my plea, I was not fully aware of my actions or their consequences due to my state of relapse (refer to the Guy Gray Report, Attachment "A" hereto) ~~AND TRANSCRIPT OF PROCEEDINGS~~,

6. That the Court inadvertently misunderstood the meaning of my choice of words which was caused by my disability. The Court, thereby, I submit, unintentionally accepted the guilty plea without a thorough interrogation and in so doing violated Rule 11 of the Federal Rules of Criminal Procedure (herein after F.R.Cr.P.); further, the following narrative will prove to this Honorable Court that, if relative material information had been presented, the Court would not have accepted the guilty plea. I will further show that the prosecution would not have been able to prove their charge as stated in the Indictment, nor would the Grand Jury have indicted me.

7. In United States v. Margille, 604 F.2d 1254 (9th Cir.), cert. denied 444 U.S. 1035 (1980), it is stated, "that the government must prove each and every element of a crime beyond a reasonable doubt."

The charges brought by the government are, to-wit:

I devised and intended to devise a scheme artifice to defraud by means of the following false and fraudulent pretense, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made. The defendant, for the purposes of entering or executing the aforesaid scheme utilized the mails, telephone, etc.

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* DISABILITIES IN THE WORKPLACE

That by virtue of my then (time of alleged act) unknown disability based on my mental defects through the conditions of Dyslexia, to which under Public Law 94-142 classes me as disabled, the charges of the said Indictment cannot be proven.

8. The research findings of

- The Royal Academy of England,
- The Department of Public Health, United Kingdom,
- The British Dyslexia Society,
- The Orton Society (U.S.A.),
- The Mount Diablo Rehabilitation Center (U.S.A.),

as well as thousands of documented case histories, will show that the previously described charge is fallacious or has no grounds for criminal indictment.

9. Dyslexia is a mental disorder causing misunderstandings, in both verbal and written communications, among other impairments,^{1/} (refer to Attachments "A" and "B"), that it causes me not only to reverse letters and meanings of written matters, (refer to Webster Dictionary, "One who cannot understand that which is written"), but, also, understanding or misinterpreting verbal communication between parties, whether it be social or business. This results in total confusion to the dyslexic AT THE TIME OF EXPERIENCING COMPOUND STRESS WHICH IN FACT OCCURRED DURING FLUID PRESENTATION.

^{1/} Results of diagnostic testing at Mount Diablo Rehabilitation Center describe the further side-effect of "Adjust Reaction," that is, mental relapse brought on by anxiety causing verbal/oral confusion. (Reference: Diagnostic and Statistical Manual U.S.A. Also mentioned in Appeal Brief 84-1175 for subsequent Case No. 83-0639 WWS).

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JAMES G. DAVIES, PETITIONER-APPELLANT

VS

STATE OF ALABAMA, RESPONDENT-APPELLEE

596 F.2d 1214 (1979)

U.S. COURT OF APPEALS, 5TH CIRCUIT, JUNE 1979

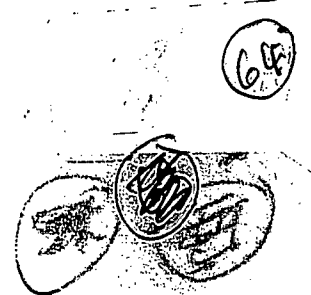
REHEARING AND REHEARING EN BANC

DENIED AUGUST 6TH, 1979

State prisoner sought habeas corpus.

The United States district Court for Birmingham, Clarence W. Allgood, dismissed the petition, and petitioner appealed. Following remand re hearing on issue of ineffective assistance of counsel, 545 F.2d 460, the Court of Appeals, Goldberg, Circuit Judge, held that: (1) Trial counsel in murder prosecution did not discharge duty owed to client when they knew that defendant had a history of mental problems and that insanity was his only possible defense and thought that defendant himself would be of little help in developing the defense, and knew what possible outside sources might be developed, yet made no effort to investigate or develop sources of evidence, but (2) further hearing was required to determine whether defendant was prejudiced by failure to adequately investigate insanity defense.

REVERSED AND REMANDED.



10. Defense counsel failed, in April and May of 1983, months before the guilty plea, to formulate a defense by refusing to return the telephone calls of Doctors Susman and Bedel, who had diagnosed my disability at the Mount Diablo Rehabilitation Center after the alleged act. Counsel thereby failed to formulate a defense of no intent by reason of mental defect. This, pursuant to Rule 12.2 (b), F.R.Cr.P.

11. Law quoted in Title 18, U.S.C., Section 1343, dictates that to convict for wire/mail fraud the government must prove a scheme was devised, with the intent to misrepresent facts with an objective of obtaining some end. Whether or not the devised scheme would eventually be successful or that the victim suffered a loss is immaterial.

12. In United States v. Whiting, 308 F.2d 537 (2nd Cir. 1962), cert. denied 372 U.S. 919, 9 Ed.2d 725, 83 S.Ct. 734 (1963), violation of this Section requires only that there be a scheme to defraud and that a telephone be used as a step in execution. Again, it is not essential that the scheme be successful. The elements of mail/wire fraud that must be proven are (1) the act, (2) the instrument, (3) the intent. Defense counsel stated on the record that Mr. Smeaton contemplated no intent. ^{REF TRANSCRIPT} This statement, therefore, causes the grounds on which counsel bases the guilty plea to be baseless. In fact, totally contradictory, because if, as counsel stated, I contemplated no intent, then by virtue of the essential element of specific intent which must be present for wire fraud, I am not guilty. United States v. McCarthy, 394 U.S. 459 (1969), holds, to wit:

"There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him."

I, in fact, did not. In fact, the court stopped me explaining what counsel had led me to believe the elements were.

Therefore, my plea was made unknowingly.

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13. By virtue of my disability, the government cannot prove in Count Five either one, two or three of the essential elements of any count of indictment.

14. At the entering of the guilty plea, the Court, during its interrogation of me, requested that I describe the alleged crime. When I started to speak the prosecutor interjected, without objection by defense counsel, or by the Court, for that matter, using manipulative terminology which misrepresented the facts, to describe the alleged crime. By not objecting at this point, defense counsel not only showed his ineffectiveness but also, and more importantly, violated Rule 11 of the Federal Rules of Criminal Procedure. The terminology used by the prosecutor left the court with the impression that I was, through my sales force, willfully representing to my clients that funds would be placed in a trust account when, in fact, it was not a trust account. When the Court asked me if that was correct, I replied on various occasions "Basically, yes." It was on this basis that the Court erred in accepting the guilty plea, while not interrogating me as to the meaning of the word, "Basically." This constitutes a further violation of Rule 11, F.R.Cr.F.

15. Courts have repeatedly stated specifically that the defendant must describe the crime to which he is pleading guilty, and no other person. A simple yes or now answer is not sufficient grounds on which to accept a guilty plea.

16. In this case, it was the prosecutor who described the crime, not I. As the law states in Rule 11, id., the Court erred by allowing this. The ineffectiveness of defense counsel was shown by his failure to raise objection at this point. When I answered #1 "Basically, yes, and #2 I must admit on this occasion yes, which was in answer to the Courts question, "that at the time you were doing this, did you recognize that the money was

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being used for purposes other than those that were being represented to investors?" I, when answering, became further confused by 1) adhering to counsels prior instructions on how to answer, and 2) in relating the courts meaning to the facts not shown as yet to the court, but as described hereafter, this caused me to answer as I did and incorrectly so. I, by virtue of my disability, self-incriminated. The Court there inadvertently misunderstood the meaning I attached to the word, "Basically," and I misunderstood the Court.

17. Due to both my ^{confused / replies} frame of mind and the meaning I attached to the word, "Basically," I could not have answered with the simple affirmative, "Yes," because I would then have lied.

18. In the attached Guy Grey Report (Exhibit "A") it states on Page five under possible implications for witness examination and interview; Pressure which might be acceptable to a non-dyslectic might in the case of a dyslectic trigger such a degree of emotional arousal as to cause a person to communicate inaccurately in any of the following ways.

- (a) he may not say the words he means to say;
- (b) he may say words he may not mean to say;
- (c) he may not write exactly what he means to convey;
- (d) he may write words he did not mean to write;
- (e) as he may not read with proper understanding documents placed before him, he may sign documents apparently signifying his agreement with their content (although this might not be the case at all).

19. Based on the above documentation, I wish the Court to understand the misuse, onmy part, 1) of the word, "Basically," in my reply, and 2) my confused conotation of meanings to the Courts question.

20. To clarify my position, so that the Court does not interpret this Affidavit to be based on a semantic argument, Doctor Beverly Hornsby further attests to the fact that Dyslexia causes misunderstandings in meaning and usage. (See, Attachment "B")

21. This is exactly what happened when I entered my guilty plea; specifically, that due to the relapse I was in, I misinterpreted the Courts question and I used the wrong word, "Basically," when I should have used the word, "But". What I had done was typical of the dyslectic, in that I had used one word and meant to use another. Had I used the word, "But," it would, of course, follow that the Court would ask, "But what, Mr. Ath?" since the word, "But," signifies that there are relevant facts material to the overall case. From my standpoint, it now seems that if the Court had known that there existed any theretofore unrecorded relevant facts which defense counsel had or the prosecutor should have disclosed material to my case, the Court would have asked, "But what, Mr. Ath?" to which I would have answered, "But, I sincerely believed at that time that the trust account was genuine and I therefore instructed my sales agents, acting as independant representatives, to advise their clients accordingly." The transcript shows that I did advise my staff so, but I did not qualify the statement to the Court. Had the Court asked me why I believed that, I would have simply stated that I based my belief on the historical events which occurred during the establishment of the account with the bank through their officers. The main point is, had I used the words or terminology correctly describing my thoughts and intenrions, it would have been imperative that the Court have further interrogated me regarding those facts (events) prior to accepting any plea. By not doing so, I respectfully submit that Rule 11, F.R.Cr.P was violated. To further prove my confused state of mind, why would I 1) initially describe to the Court the supposed illegal act. (elements) The Court stopped me. Then later when the Court asked if I had anything to say?, I answered "No". Why did I do this?

23. In Correals v. United States, 479 F.2d 944, (1st Cir. 1973), it is

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held, to-wit:

Defense counsel, as well as the prosecutor, must know or learn about relevant law and evaluate its application to the client with respect to any plea bargain. And in certain cases, failure to do so will amount to constitutionally ineffective assistance of counsel and undermine validity of plea.

(Violation of the Sixth Amendment). This is applicable in the determination of my case as a civil matter, which determination defense counsel was on record as supporting at an earlier hearing. However, counsel failed to investigate and research the case as such. Such an investigation would have revealed the case to be a civil matter based upon promissory estoppel - calling for dismissal on the ground of invalid indictment. Defense counsel's actions resulted in violation of Rules 12, 16 and 14, F.R.Cr.P. (reference pre-trial motions), by stating "No" in answer to the Court's question, "Will there be any pre-trial motions?" (or words to that effect). Motions for severance, discovery, suppression of evidence, should have been made, thereby enabling counsel to formulate a defense. The Court during the entry of the plea asked "Do you know of any reason why the Court should not accept this guilty plea today?" Counsel replied "No". If counsel had diligently researched the facts in their totality, he would have said "Yes". By virtue of civil law to wit: See Masterson v. Bouldin, Tex. Civ. App., 151 S.W. 2d 301; In re Sichoufield's Estate, 73 P.2d 1381:

Assertion of fact on which another relies, assumption of position which if not maintained would result in injustice to another.

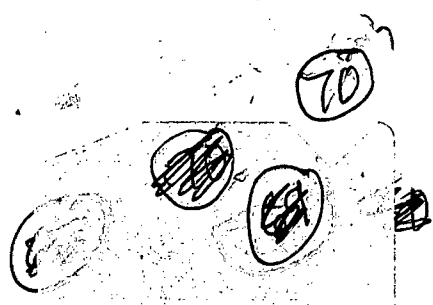
24. Estoppel at its broadest is misrepresentation sans criminal intent. To continue with the interrogation which would have been pursued had I used the words I meant to, the Court presumably would have asked, "Mr. Smeaton, what historical events are you referring to?" I would have answered, "Well,

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Your Honor, firstly, when opening the account I asked the Bank how do I handle a trust account. The Bank informed me, "We will handle it. Tell your clients to make their checks payable to the Bank (which they did). We will advance the funds to you." I gave them a copy of our new account application in which it states clients' funds will be deposited in a Wellingto Investment Marketing Group (hereinafter W.I.M.G.) trust account. The Bank knew what the funds were for. Due to my disability, I confused the meaning of the Bank's description of their role and genuinely believed them to be acting as trustee. Apparently the Bank assumed I understood how the account was to be set up and administered, when, in fact, I proceeded to conduct business with my clients upon a false understanding of my relationship with the Bank. It was upon the assumption of this position (the Bank as trustee) that my clients and I conducted business for approximately one (1) year.

25. During that year, the clients, after personally verifying the trust account with the Bank, attached the new-account application with the funds and enclosed them in pre-stamped and addressed envelope provided by the Bank for this purpose. The Bank received the funds and then forwarded the application to me. The Bank would then advance funds via the trust account to purchase our client's goods and to pay for the expenses of insured mailing, certification, gem printing, et cetera. The Banks, Bank of America and Lloyds, both entered the accounts at will. My client was instructed by me, via my sales agents, to personally verify with the Bank that there was indeed a trust account prior to forwarding his money - which he did. The Bank must have confirmed the existence of the trust account for my client to forward his funds in the first place. Therefore, the assumption of fact that I and my client relied upon, as stated by the Masterson v. Bouldin test, supra, was that the trust



account existed. This continued over many months with other clients, proving that there did indeed exist a trust account. My disability caused a misunderstanding as to whom was acting as trustee, which is mistaken for criminal intent. Therefore, I did not intentionally misrepresent my statements to my clients personally with regards to the trust account, hence my answer of "Basically, yes." Similarly, my clients were instructed to verify that Antwerp Diamond Distributors, San Francisco, California, had in fact secured and was holding my clients' gem prior to forwarding, as this one individual client did; thereby, debasing the intended scheme theory the government would have us believe. The fact that continuing prior business transactions were conducted by the three parties (the Bank, my client, and myself), with the mutual understanding that the Bank acted as trustee, would been brought out through interrogation prompted by the use of the word, "But," in answering the Court's question, "Is that correct, Mr. Smeaton?"

26. Three additional factors help to explain my state of mind not only during the guilty plea but through the entire proceedings:

(a) I had just recently come through local legal proceedings initiated to verify that a Mr. R.L. Abbott (the Controller of a company owned by my Father and myself) had embezzled funds from the company resulting in not only a loss of capital but damage to our credit rating. Ultimately, the death of my Grandfather leading to my Father suffering a stroke and severe emotional distress to my wife and children and myself, all created a stressful situation in which I was forced to function. As verification, I refer to court records of a Judgement I obtained against Mr. Abbott in Walnut Creek, California, Municipal Court, having worked for two (2) years with Mr. David Borton, Attorney-at-Law, to bring Mr. Abbott to justice. Prior to the guilty plea, counsel in this present matter failed to show or refer to this prior legal matter, even though counsel was in possession of the relevant documents and prior to the plea.

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(b) The continuing stress in running W.I.M.C. handicapped as I am with Dyslexia. (unusually)

(c) The pressure caused by the present legal proceeding in an environment characterized by inadequate legal representation caused the type of mental relapse referred to by Mr. Guy Grey in the attached report. (Exhibit "A").

27. Therefore, counsel by not investigation my Dyslexia and its effects failed to realize the nature of my disability in its totality before advising me to plead guilty. In addition, in the P.S.I Report of Ms. Rebecca Stuart Fontain, based upon an interview with Mrs. Alvire Bedel of the Mount Diablo Rehabilitation Center, she stated that a dyslectic will reverse letters. Mrs. Fontain gives the example of how this could occur in a matter as simple as misspelling my own name^{2/} with the same type of reversal of meaning occurring in both verbal and written communications. (Refer to Attachments "A" and "B" - Dyslexia Causes Misunderstandings, Dr. Beverly Hornsby; Mr. Guy Grey's Report).

28. It is my contention that accepting the answer, "Basically, yes," as sufficient ground for a guilty plea is a violation of Rule 11, F.R.Cr.P. In Broykin v. Alabama, 395 U.S. 238 (1969), it is held, to-wit:

"Consequently, this court has specified certain minimal requirements that should be satisfied when accepting a guilty plea. The record should affirmatively show:

1) An understanding waiver of constitutional rights and privileges.

2) Absence of coercion by threat or promise of leniency.

2/ The correct spelling of AYL was also made available to Banks, clients, business associates, et al., as readily.

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3) An understanding of the charge,
that is, the elements of the offense."

The record shows I was totally confused as to the elements. A correct understanding of my reply, "Basically, yes," would have resulted in further interrogation, revealing relevant material concerning the alleged crime and a total lack of understanding of the elements of the charge on my part, . . . grounds for not accepting the guilty plea.

29. To add to my confused state, defense counsel, as he stated on record, "recommended" my pleading guilty since a defense against the charge would be almost impossible to mount due to the broad nature of the wire fraud statute, and "a charge of misrepresenting a material fact is a technical violation." Therefore, defense counsel should have been specific by saying, "Mr. Smeaton understands the elements (which I did not, but thought I did) of the charged crime and agrees that they have been satisfied. The term, "broad and technical violations", which counsel used is not specific enough explanation on which I could knowingly, willingly and factually and rationally base a guilty plea upon. If counsel had researched my disability, he would have realized I, in fact, did not misrepresent the material fact relating to the trust account, which counsel in fact stated on record as saying I did. This is the act of a prosecutor not defense counsel.

I also state on record that the money (clients funds) were used for general expenses. I did not clarify this statement in relation to my reliance upon the fact that the bank was trustee. Coupled with the likelihood of a ten (10) year sentence, which counsel assured could otherwise occur, my plea was fear-induced and hardly the result of proper counsel and sound judgement.

30. The plea was, most importantly, influenced by the promise of proba-

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tion by counsel (and recommended in counsel's Pre-sentence Report). Why else would I answer on the record so categorically, "that I expected the minimum sentence" and "that Mr. Hanson assures me the court will read counsel's Pre-sentence Report", to which counsel interjected "not material." This statement of mine showed the Court my counsel's promise of probation prior to the guilty plea.

31. In Masher v. Lawlle, 471 F.2d 1346 (2nd Cir. 1974), it is stated, to-wit:

"Where state prisoner was induced to plead guilty, assurances given by defense counsel that judge give minimum sentence, no such promise had in fact been made by the judge, and state prisoner was denied effective assistance of counsel."

32. Furthermore, counsel states in his Pre-sentence Report that I falsely signed a letter to a Bank (Great Western Savings) as H.J. Kelly. Such was the action of a prosecutor, not for a defense counsel. A motion for discovery would reveal that the handwriting sample I willingly provided the Postal Inspector (approximately a week before I was arrested) proves I did not sign said letter. It is interesting to note that counsel mentioned Mr. Rudolph Mayers' letter to the Court admitting Mr. Rudolph Mayers' fraud against Great Western.

33. Because counsel, as stated on record, advised me to plead guilty, he led me to my prejudice. This advice was based upon his ineffective assistance during the preceeding months. That because of (a) my ingorance of the law, and (b) obvious confused state of mind, and (c) lack of finances at that point in time to seek a second opinion, so was I forced to place my trust in his advice and guidance. Therefore, I had no rule-of-thumb

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whereby to determine, at that time, his effectiveness and advice. I had to be victim of his representation as my advocate. As stated in People v. McDowell, 447 P.2d 97 (Cal. 1968), to-wit:

The easiest cases are those in which counsel's own statements or actions clearly indicate that alleged mistakes were the product of his ignorance of a legal rule "commonplace to any attorney engaged in criminal trials." In such cases, courts generally find a denial of effective assistance, even where a single mistake was made, provided it was substantial and related to a crucial issue in the case.

34. The courts recognize that "just as a conviction upon a charge not made would be sheer denial of Due Process, so is it a violation of Due Process to convict and punish a man without evidence of his guilt." This statement, rested on the 14th Amendment, fits this case at Bar.

35. If the Postal Inspector and the Probation Department had conducted a fair third-party unbiased investigation, as due process required, and if the prosecution had not suppressed favorable evidence to the defendant, I believe that I would not have been indicted, convicted, or sentenced. Also, if, as previously described, defense counsel had not been ineffective (see, Brief in support), I probably would not have found myself in this current embarrassing position in prison. ^{3/}

36. The Supreme Court held in Williams v. Hewy, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1948), that the sentencing judge may draw on varied

^{3/} The postal Inspector, by virtue of my comments to him, knew of my dyslexia prior to being indicted. He, I believe, failed to investigate it in its totality likewise, nor did the Probation Officer). Also, the Postal Inspector and/or the prosecutor, as previously stated, did not show that I willingly provided a handwriting sample proving I did not sign a letter misrepresenting my income to a Bank.

sources for information - including heresay. The only restriction that the Supreme Court has placed upon judges is that they cannot rely upon information which is materially false.

37. The P.S.I. Report is ^{also} materially false. The Trial court referred to its consultation with the probation department. The P.S.I. Report and/or the probation officer failed to disclose many relevant facts to the court, one being that I refused to disclose my financial state. I had in fact disclosed a credit debt of approximately \$15,000.00 and the reasons for it to Mr. Leo Macarthy (probation officer) at the arraignment hearing months before the sentencing procedure. This misled the trial court to believe, as the record reflects by the court's statement of "If Mr. Smeaton wished not to disclose his financial information he must take the consequences" (or words to that effect).

38. The point is: how may I not disclose what I have previously disclosed to the probation department and therefore to the trial court?

39. Therefore, the P.S.I. Report is materially incorrect (see, Motion for Expungement and Correction of P.S.I. Report - Exhibit "B")

40. At sentencing the trial court specifically asked defense counsel if he wished to cross-examine the witness, viz., the probation officer, Ms. Rebecca S. Fountain, who had made incorrect ascertains, under oath, as to my wife's conversations with Ms. Fountain regarding my wife's income (See, Mrs. Smeaton's affidavit on file). Defense counsel refused to do so, thereby not showing the full extent of the nature of the P.S.I. Report and Ms. Fountain's sworn testimony. Defense counsel failed to make timely motions for correction of same. This is a further example of ineffectiveness on the part of said defense counsel.

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41. Again, in Williams v. Hewy, supra, Mr. Justice Black noted, to-wit:

The accuracy of the statements made by the Judge as to appellant's background and past practices was not challenged by his counsel nor was the Judge asked to disregard any of them or to afford the appellant a chance to refute or discredit any of them by cross examination.

42. The trial court, being guided by (1) the probation officer's unchallenged (by cross-examination) assertions and (2) the materially incorrect P.S.I. Report, was led to assume an incorrect position toward me by stating on record "there is plenty in the record to show that Mr. Smeaton is a liar" (which I am not) and that "Dyslexia is no defense" (or words to that effect).

43. Defense counsel did not challenge those statements made by the court. ^{4/}

44. The Second Circuit has held in United States v. Robin, 545 F.2d 775, 779 (2nd Cir. 1976), to-wit:

Where there is a possibility that sentence was imposed on basis of false information or false assumptions concerning the defendant, an appeal will lie to the Court of Appeals and the sentence will be vacated.

Where the possibility of reliance on misinformation at sentencing is shown, defendant's right to state his version of the facts must be extended to permit that presentation by the defendant which will enable the sentencing judge to grasp the relevant facts correctly, and, in appropriate circumstances, this may mean that a defendant will be permitted to submit affidavits or documents, supply oral statements, or even participate in an evidentiary hearing; alternatively, FURTHER CORROBORATION OF SENTENCING DATA MAY BE REQUIRED.

^{4/}At sentencing counsel had become aware of the disability factor but failed to 1) fully disclose the facts then available to him or 2) to call witnesses to support it or 3) make motions to withdraw the guilty plea on the basis of new evidence, thereby protecting my constitutional right to a trial.

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45. Further, in United States v. Tobias 662 F. 2d 381 (5th Circuit, 1981) to wit:

Reliance upon inappropriate considerations of inaccurate information in the determination of the sentence to be imposed violates due process, and, therefore is plain error which the Court may review sua sponte. Further, the sentence in this Court must be vacated because the total Trial Court failed to designate the provisions under which the sentence was imposed and on the record. It appears that the defendant may be suitable for I. C. A. treatment. Thus making the ambiguity in the choices of sentencing provisions significant.

The petitioner is dialectic as the Court was aware at the time of sentencing, therefore the ambiguity regarding the U. S. v. Tobias test is applicable to this case at Bar.

46. Counsel failed to object to the lack of opportunity to review the PSI report which was made available to the defense counsel only hours before sentencing, therefore the issue in: U. S. v. Dunn, 661 F. 2d 820 (9th Circuit, 1981) to wit:

Failure of the defendant or counsel to object to the lack of opportunity to challenge the content of the PSI report waived any right to challenge the content of the PSI report, and that the issue could not be raised on appeal.

However, the failure of counsel to object to the lack of opportunity to challenge the PSI may constitute the ineffectiveness of counsel where substantial errors in the pre-sentence report can be demonstrated (Emphasis-added) are applicable to this case at Bar. Counsel did not object to the many other false and misleading statements contained in the PSI Report.

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