20-7789
Case no. 21-

IN THE SUPREME COURT OF THE UNITED STATES

IN RE MICHAEL K. CIACCI

ON PETITION FOR EXTRAORDINARY WRIT TO THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

WRIT OF MANDAMUS

ORIGINAL

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QUESTIONS PRESENTED

Whether the scope of the savings clause under District of Columbia Code Section 23-110(g) is open to a claim supported by judicial failure to recuse?

Whether petitioner's ineffective assistance of counsel claim has exhausted District of Columbia state remedies?

LIST OF PARTIES

Michael K. Ciacci, the pro se petitioner,

and defendant in case no. 2011-CF2-012334, United States v. Michael K. Ciacci, in Superior Court of the District of Columbia

United States, the respondent,

represented by the United States Attorneys Office for the District of Columbia

RELATED CASES

Ninth Circuit Court of Appeals, case no. 20-16338, Michael K. Ciacci v. United States Probation Office, certificate of appealability denial entered August 18, 2020.

United States District Court for the District of Hawaii, case no. 1:20-CV-00271, Michael K. Ciacci v. United States Probation Office, 28 U.S.C. Section 2254 dismissal entered June 26, 2020.

Ninth Circuit Court of Appeals, case no. 19-16896, Michael K. Ciacci v. United States Probation Office, certificate of appealability denial entered February 26, 2020.

United States District Court for the District of Columbia, case no. 1:19-CV-03795, Ciacci v. United States Parole Commission, 42 U.S.C. Section 1983, filed December, 11, 2019, pending disposition of motion to dismiss; excessive sentence violation.

United States District Court for the District of Hawaii, case no. 1:19-CV-00476, Michael K. Ciacci v. United States Probation Office, 28 U.S.C. Section 2254 dismissal

entered September 16, 2019.

District of Columbia Court of Appeals, case no. 15-CO-334, Michael K. Ciacci v. United States, affirmance entered September 21, 2016.

United States District Court for the Eastern District of North Carolina, Western Division, case no. 5:15-HC-2062-F, Michael K. Ciacci v. Tripp, 28 U.S.C. Section 2254 dismissal entered December 15, 2015.

Supreme Court of the United States, case no. 15-6247, Writ of Certiorari to District of Columbia Court of Appeals order denying motion for leave to withdraw, petition denial entered November 2, 2015.

District of Columbia Court of Appeals, case no. 13-CF-1359, Michael K. Ciacci v. United States, Memoranda Order and Judgment entered July 10, 2015.

District of Columbia Court of Appeals, case no. 14-OA-0030, Michael K. Ciacci v. Honorable Michael Ryan, petition for writ of mandamus entered October 3, 2014.

District of Columbia Court of Appeals, case no. 13-OA-0058, Michael K. Ciacci v. Honorable Michael Ryan, petition for writ of mandamus entered December 18, 2013.

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EXTRAORDINARY WRIT OF MANDAMUS

Petitioner respectfully prays that a Writ of Mandamus issue to review the judgment below.

Opinion below, case no. 2011-CF2-012334, United States v. Michael K. Ciacci in the Superior Court of the District of Columbia, second D.C. Code Section 23-110(a) motion to vacate, set aside or correct sentence and judgment (Appendix A) is pending disposition and is unpublished, and the further related opinions and orders below are also unpublished.

Jurisdictional statement

The basis for jurisdiction in this Court is 28 U.S.C. 1651(a), Rules of the Supreme Court of the United States Rule 20 extraordinary writ of mandamus to the Superior Court of the District of Columbia. Petitioner's second D.C. Code Section 23-110(a) motion to vacate, set aside, or correct sentence and judgment, is an original motion, pending action since it has been entered on June 30, 2020.

Constitutional provisions - see Appendix H

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District of Columbia Code Section 22-4502 While armed

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STATEMENT OF THE CASE

Exceptional circumstances in aid of this Court's jurisdiction

The scope of District of Columbia Code Section 23-110(g) has confront a claim of judicial failure to recuse. Judge Michael Ryan (hereinafter trial court) had preside over petitioner's pretrial, trial, sentencing, first collateral motion, and has preside now over petitioner's pending second collateral motion. Trial court had acknowledge at sentencing, he had reasonable doubt as to guilt, but had thought he could not set aside the verdict. Trial court had left uncorrected, perjured testimony and altered trial evidence. District of Columbia Court of Appeals has been silent on all raised issues.

Proceedings material to federal questions presented

Judicial failure to recuse procedural issue had been first raised in 28 U.S.C. Section 2254(a) petition, case no. 19-00476 to U.S. District Court, District of Hawaii under an ineffective assistance of trial counsel claim; dismissed September 16, 2019 for, "[w]here such relief is available it must be sought in the United States District Court for the District of Columbia." (Appendix E). Case no. 19-16896, Ninth Circuit Court of Appeals February 28, 2020, denial of certificate of appealability, "appellant has not shown that 'jurists of reason would find it debatable whether the petition 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." (Appendix D). Petitioner had refile the petition, case no. 20-00271, in order to amplify towards

certificate of appealability issue, dismissed June 26, 2020 for, "[i]mportantly the D.C. Circuit has concluded that the Section 23-110 remedy is neither inadequate nor ineffective to test the legality of a D.C. prisoner's conviction where, as here, he raises a claim of actual innocence." (Appendix C). Case no. 20-16338 to the Ninth Circuit, August 18, 2020 denial of certificate of appealability, citing the same standard as the previous Ninth Circuit denial (Appendix B).

Judicial failure to recuse had subsequent first attempt, in the Superior Court for the District of Columbia (hereinafter Superior Court), case no. 2011-CF2-012334 entered October 9, 2019, under second D.C. Code Section 23-110(a) motion to vacate, set aside or correct sentence and judgment (hereinafter second Section 23-110 motion), an ineffective assistance of trial counsel claim, as amended June 20, 2020 (Appendix A), on grounds supported by trial counsel errors, and supported by actual innocence and judicial failure to recuse procedures; and has been pending for over seven months. Trial court notified petitioner on September 3, 2020 (Appendix J), that the trial court had been reviewing his second Section 23-110 motion and petitioner's two other related pending motions.

Trial counsel waiver of discoverable exculpatory evidence had first been raised under petitioner's first Section 23-110(a) motion, as amended filed May 22, 2014 (Appendix I), an ineffective assistance of counsel claim grounded on sufficiency of the evidence. Waiver of discoverable exculpatory evidence next appeared as an electronic

mail correspondence (Appendix Q) addendum to 28 U.S.C. Section 2254(a) petition case no. 5:15-HC-2062-F, in United States District Court for the Eastern District of North Carolina, Western Division, under an ineffective assistance of appellate counsel claim grounded on counsel's omission of available claims. December 15, 2015 entered dismissal states, "[p]etitioner's Section 23-110 motion is still pending before the D.C. Superior Court." (Appendix F).

Background

Petitioner had been arrested on a July 3, 2011 criminal information, charge of assault with dangerous weapon; indicted April 4, 2012 on assault with intent to kill, aggravated assault while armed, assault with dangerous weapon, and assault significant bodily injury charges. Petitioner had receive a plea offer: plead guilty to assault with dangerous weapon in exchange the government would dismiss all other pending charges at the time of sentencing, and reserve the right to recommend sentence to the court. Petitioner had refuse plea offer and pled not guilty on all charges. Trial held September 9-12, 2013. Government argued motive that petitioner was upset at perception of relationship with complainant; their case based primarily on complainant testimony. Petitioner, through court appointed counsel, had argue sufficiency of the evidence and self defense case. Key dispute, petitioner attacked complainant and vice-versa. Not guilty verdict on assault with intent to kill, guilty on the remaining three charges. Sentenced November 15, 2013, to thirteen total years based on criminal history

score of zero, mandatory eight years prison term, no parole or probation, five years statutory supervised release to follow.

Direct appeal to District of Columbia Court of Appeals (hereinafter Court of Appeals), case no 13-CF-1359, raising issues that the trial court committed several errors requiring reversal and merger of counts issue. July 10, 2015 entered Memoranda Order and Judgment per curiam (Appendix G), affirmed aggravated assault while armed judgment, ruled trial court committed no reversible error, cited trial counsel's suppression arguments, and remanded with instruction to merge the remaining two convictions.

Pro se case no. 15-6247 petition for writ of certiorari to the Supreme Court of the United States to reverse the Court of Appeals December 1, 2014 dated per curiam order denying petitioner's motion for leave to withdraw appellate counsel. Petition denied November 2, 2015.

Pro se case no. 13-CF-1359 motion to recall the mandate to the Court of Appeals; November 5, 2015 dated order denying motion without discussion.

Case no. 2011-CF2-012334, first pro se Section 23-110 motion to Superior Court under D.C. Code Section 23-110(a); filed December 3, 2013, amended February 24, 2014, second amended and supplemented May 22, 2014; March 9, 2015 entered order denying Section 23-110 motion summarily on the merits; both standard of review prongs.

Case no. 15-CO-334, appeal order denying first Section 23-110(a) motion to the Court of Appeals, appointed counsel; September 22, 2016 entered summary affirmance.

Material facts - raised under first Section 23-110 motion

Aggravated assault - serious bodily injury / loss of consciousness

D.C. Code Section 22-404.01, aggravated assault requires serious bodily injury, and required element of serious bodily injury, loss of consciousness.

The complainant in petitioner's case testified at trial that he lost consciousness (case no 13-CF-1359 in the Court of Appeals, Michael K. Ciacci v. United States, filed supplemental record, Trial Transcript, pg. 144), and testified he did not recall telling his hospital physician treating his injury that he had not lost consciousness (T. Tr., pg. 178). He testified the petitioner had beaten him repeatedly for twenty minutes (T. Tr., pg. 176). Complainant testified he had deflected blows by petitioner with his arms (T. Tr., pg. 141-142). Moreover, complainant testified at grand jury hearing that he had sustained a concussion (Gr. Tr., pg. 23) (Appendix T); there was no testimony of concussion at trial; and further testified at grand jury that he had sustained three large lacerations (Gr. Tr., pg. 22-23) (Appendix T).

Complainant's George Washington University Hospital treating physician (hereinafter treating physician) of the underlying incident, testified under his standard medical procedures, complainant experienced no loss of consciousness (T. Tr., pg. 249, 252), and that complainant had been conscious and stable upon examination (T. Tr., pg.

247-249). The treating physician testified he observed one laceration overlapped by one abrasion on complainant's head (T. Tr., pg. 247-249), testified he observed no internal injuries, no injuries to his arms, legs or extremities (T. Tr., pg. 248-249).

Petitioner testified complainant had been conscious and sitting up when petitioner had left the scene of the incident (T. Tr., pg. 297-298).

Petitioner's Third District Metropolitan Police Department, District of Columbia arresting police officer (hereinafter arresting officer), testified (T. Tr., pg. 62, 82-83) that the complainant had been conscious when he had arrived at the scene of the incident; the investigative officer had testify complainant had been conscious at the scene when he arrived (T. Tr., pg. 275). Moreover, the arresting officer testified at suppression hearing to have observed only one injury to the back of complainant's head (MTS. Tr., pg. 56) (Appendix P).

Complainant's (residential) neighbor testified complainant had been conscious when he knocked on her door asking her to call the police (T. Tr., pg. 207-208), and her testimony, that she heard one loud voice from her apartment, indicated the incident had last ten minutes (T. Tr., pg. 208); the neighbor had not constitute an eye witness of the incident. Court of Appeals Memoranda Order and Judgment ruled the incident had last ten minutes (MOJ, pg. 2) (Appendix G), and made no reference to complainant or his treating physician's testimonies. Trial court ruled at motion for judgment of acquittal, difference between ten and twenty minutes had been "negligible" (T. Tr., pg. 372-373).

Thus, trial court held, a voice witness of the incident established an inference that loss of consciousness and serious bodily injury had occur, since there had been no difference between 10 and 20 minutes, corroborating complainant's testimony, and amounting to legal sufficiency under acquittal motion standard.

The government inferred at closing arguments that complainant had not lost consciousness (T. Tr., pg. 178-179) and that he was conscious when petitioner left the scene (T. Tr., pg. 404). The government in their direct appellee brief conceded that complainant testimony he lost consciousness had been impeached by his treating physician's testimony (Appellee Brief, pg. 6, footnote 5). The government had elicit testimony from the arresting officer showing the officer's police report had documented that the officer observed only one injury to the head and no other injuries (T. Tr. pg. 98)

Trial counsel at closing arguments, inferred complainant's testimony to no loss of consciousness had been inconsistent (T. Tr., pg. 411-413, 423). Trial counsel had elicit testimony from the arresting officer showing that the officer's police report had documented that the officer observed only one injury to the head and no other injuries (T. Tr., pg. 84-86).

Aggravated assault - serious bodily injury / extreme physical pain

D.C. Code Section 22-404.01, aggravated assault requires serious bodily injury, and required element of serious bodily injury, extreme physical pain.

Complainant testified he needed a cane for leg pain (T. Tr., pg. 141-142), that he had experienced no pain three to four days after the incident (T. Tr., pg. 161-162), and that he had been immediately mobile after the incident had occur (T. Tr., pg. 145-147). His treating physician testified no cane or special care item were administered or necessary (T. Tr., pg. 265). The government at closing arguments made no inference complainant sustained extreme physical pain. Trial counsel at closing arguments made several inferences that complainant's testimony, regarding extreme physical pain, had been inconsistent (T. Tr., pg. 407, 409-410, 413, 425).

While armed - Dangerous weapon

The indictment included D.C. Code Section 22-4502, while armed enhancement of aggravated assault charge. D.C. Code Section 22-402, assault with dangerous weapon requires a dangerous weapon.

Trial counsel in her opening arguments (T. Tr., pg. 55) stipulated petitioner had been armed and used a weapon, the government alleged to be dangerous, in self defense. Counsel presented two differing defenses at opening arguments; sufficiency of the evidence defense also presented. The government nor any police officer, including crime scene officer, discovered nor produced any alleged weapon under the government's physical evidence; and no alleged weapon had been physically presented to the jury at trial (Appendix L, S). Trial court had ordered a DNA test of all physical evidence seven months after the indictment, no alleged weapon tested.

Assault with significant bodily injury

D.C. Code Section 22-404(a)(2), assault significant bodily injury, requires significant bodily injury, defined as including necessary hospitalization and bruising.

The treating physician testified he observed no bruising (T. Tr., pg. 268), testified that the duration of complainant's hospitalization was under twenty-four hours (T. Tr., pg. 253), and that the hospitalization had been classified as lowest trauma white and not life threatening (T. Tr., pg. 247, 257). The physician testified surgery had not been performed or necessary (T. Tr., pg. 265). The complainant testified he had sustained bruising (T. Tr., pg. 160-161). The arresting officer corroborated, for the first time, he observed bruises at the scene of the incident before the complainant had depart to the hospital (T. Tr., pg. 83-86). During cross-examination of the treating physician, the government, in response to the treating physician's direct testimony that he had observed no bruising, had infer during his lines of questioning, that bruising from trauma could have appeared subsequent the medical examination, and the treating physician responded the possibility had exist (T. Tr., pg. 267); but in doing so, the government also inferred the arresting officer could not have observed bruising before the medical examination.

Self defense

Petitioner testified he had respond reasonably to complainant's aggressive manner in self defense (T. Tr., pg. 295-296, 299-300, 314, 318). Complainant had testify

that he had been taller, and roughly a hundred pounds heavier (T. Tr., pg. 177). Trial court had grant the petitioner, several self defense jury instructions (T. Tr., pg. 355-356). Petitioner had testify, subsequent the incident, he walked to the police station, filed an assault report, and voluntarily waited in the lobby (T. Tr., pg. 298); defense written suppression motion had argue custodial interrogation in the police station lobby (Appendix R). Trial counsel had infer at closing arguments that petitioner reported to police he had defend himself against an attempted assault (T. Tr., 420). The government had not dispute petitioner's actions subsequent the incident. During early pretrial discussion, counsel advised petitioner self defense had not been appropriate defense for him under District of Columbia Code., and months later, both began practicing possible self defense testimony lines of questioning at her office.

Stipulation

The arresting officer had infer at suppression hearing, that the clothes and shoes were taken by a fourth police officer, subsequent the custodial arrest and the right to counsel invocation (MTS Tr., pg. 75) (Appendix P).

Trial counsel stipulated to government trial exhibits 2-6, 28-32; stipulated to black markings on petitioner's jeans that were drawn in by the government's DNA expert, and stipulated to conclusions produced by the government's DNA test expert (T. Tr., pg. 6-7, 28-29); and the stipulations were read in open court to be indisputable (T. Tr., pg. 100-103).

Neither the government nor defense DNA tests found any blood on petitioner's long-sleeve shirt shown in government trial exhibit 31. Trial counsel moved the trial court to order DNA testing be done. The DNA tests by both parties had occur subsequent the suppression hearing completion. The government's DNA test stated that specks of blood were found on petitioner's jeans and one shoe, and concluded the complainant's DNA probably match blood found on the jeans and one shoe. The defense DNA test stated that the presence of blood had been found, and also stated that complainant's DNA had not been involved in the test (Appendix O). Counsel had not object to admission of exhibit 31. Counsel had not elicit testimony from petitioner explaining he had taken off his clothes he had been wearing during the incident and had not been wearing shoes in the apartment either, and then changed into new clothing and pair of shoes, which had hours later, been taken by the police officer.

The arresting officer testified to observing blood on petitioner's jeans on the day of the incident, and noted that his recollection of blood had been due to remembering he also observed the black markings next to the blood on the day of the incident, when shown the jeans in government trial exhibit 28-A, (T. Tr., pg. 78). An ex parte bench conference ensued (T. Tr., pg. 79-80), not explicitly discussing the black markings had been drawn on the jeans years later by the government's DNA expert, during test analysis for blood, and that fact of the expert drawing the black markings on the jeans was explicitly stated in the defense stipulation to the governments DNA expert

conclusions (Appendix M). The stipulation had subsequently followed the arresting officer's testimony to the black markings, and the arresting officer had later been recalled (T. Tr., pg. 191) to testify further as well. The trial record, regarding the arresting officer testimony to observing blood and black markings on the day of the incident, had never been corrected to the jury by the trial court, the government nor trial counsel.

The government alleged a couple of spots on the wall of complainant's apartment, had inferred blood splatter, during authentication by the arresting officer of government trial exhibits 9-12 (T. Tr., pg. 64). Counsel had not object to color photographs inferring blood splatter on complainant's wall. The government made inferences at closing arguments to blood splatter establishing further inferences toward elements of the charges under the indictment (T. Tr., pg. 398-399, 403). Complainant's grand jury testimony included his description of blood splatter on his apartment wall while shown color photographs by the government (Gr. Tr., pg. 25-27) (Appendix T).

The treating physician had testify the complainant had lost a moderate amount of blood (T. Tr., pg. 261).

Expert witness testimony limitation

During preliminary questions (T. Tr., pg. 10-11) counsel had notify to trial court the treating physician would be the defense' witness, but "not for his expert testimony", and trial counsel would limit his testimony to "what treatment he provided to

[complainant] and the condition of [complainant] when [complainant] entered the hospital".

Counsel had elicit treating physician's medical qualifications on direct examination (T. Tr., pg. 246). However, treating physician testimony to blood alcohol level of the complainant lines of questioning were halted by the government; sustained objections (T. Tr., pg. 252-253). The medical records show the complainant had been legally intoxicated; medical procedure defining intoxication show complainant had been over twice the level of intoxication (Appendix U). Counsel had not attempt to elicit from the treating physician whether he had observed, during his medical examination, the depictions in government trial exhibits 20-23, the government alleged were of the complainant sustained during the underlying incident. Complainant's face is not shown in any of the four exhibits, and there are no dates or time indicated on the color photographs.

The government on cross examination of the treating physician had however, elicit expert opinion regarding, the difference between a laceration and abrasion (T. Tr., pg. 258), had elicit expert opinion regarding the different layers of skin on a person's scalp (T. Tr., pg. 258-259), had elicit the definition of the force of trauma (T. Tr., pg. 259), and the definition of evulsion (T. Tr., pg. 260). Counsel had object unsuccessfully to the governments' lines of questioning that had elicit medical expert opinion from the treating physician.

Second motion for judgement of acquittal

Trial motion for acquittal on all counts had been raised after the defense completed its case (T. Tr. 370-383), and discussion centered on the legal sufficiency pertaining to loss of consciousness; trial court stated, the "light most favorable to the government" standard of review would affirm his decision to deny acquittal on aggravated assault while armed count; and trial court noted that complainants neighbor's testimony had been the determinative factor. The trial court had omit discussion regarding extreme physical pain, a required element under aggravated assault statute, and trial counsel had not raised the element based on legal sufficiency grounds.

Trial court's comments during sentencing hearing show he had decided to send the case to the jury despite his reservations. He stated, "I thought the bean count could go either way. I'm not sure whether I could have found evidence beyond a reasonable doubt on that, but I didn't have to make that decision because it was a jury trial and not a bench trial" (Sn. Tr., pg. 27) (Appendix K).

Discoverable exculpatory evidence

An electronic mail (email) correspondence between trial counsel and the government, dated two days before the suppression hearing had occur, states that he had to give notice that the government had been aware of the existence of exculpatory evidence, a prior hospitalization that the complainant had sustained, but the medical

records of that prior hospitalization had not been in the government's possession (Appendix Q).

The government also inferred in the email, that he had more color photographs to produce under discovery and would need to know how many color photographs trial counsel had already received.

A motion to subpoena discoverable exculpatory evidence nor motion for new trial has never been attempted by any of the court appointed counsels.

Color photographs

Complainant testified that color photographs he had given to the government, showing serious bodily injuries he alleged occurred, were produced on a cellphone by his friend at complainant's apartment immediately while being discharged from the hospital (T. Tr., pg. 185).

Trial court had advised counsels in pretrial hearings, that these color photographs produced by the complainant had been probative and admissible, regardless if complainant's friend had left the city permanently, and the cellphone and original images had both been destroyed, however, trial counsel had never object to its admission and complainant had need only testify to the representations as authentic.

The arresting officer testified the Third District Metropolitan Police Department, District of Columbia crime scene police officer (hereinafter crime scene officer), had taken color photographs (government trial exhibit 16-19) of the complainant at the

hospital (T. Tr., pg. 157). Crime scene officer report states she left the hospital at 230 am on July 3rd, 2011 (Appendix V) and could not have produced several color photographs in discovery, four (government trial exhibits) of which were allegedly produced more than seven hours subsequent administer of sutures (Appendix U). Crime scene officer had not testify.

There are two sets, produced by different sources, of color photographs. Color photographs authenticated at trial by the complainant had been the only documentary or demonstrative evidence that show injuries beyond one small laceration overlapping one small abrasion, and no other injuries; complainant's medical records and the entire police report only corroborate crime scene officer produced set of photographs.

Copies of two color photographs, disclosed under discovery, and one government trial exhibit, are addendum to petitioner's February 5, 2015 entered correspondence filing in the Superior Court; and copies of color photographs are also addendum to petitioner's writ of mandamus under case no. 14-AO-30, entered October 3, 2014, in the Court of Appeals. The two color photographs provided the defense under discovery, show and indicate the complainant wearing two different neck braces; the three color photographs together, side by side, indicate and show the government trial exhibits had been an alteration of their discovery evidence.

The government had duplicated as trial exhibits, original color photographs submitted to the defense under discovery. The duplication however, had altered the

original, depicting and presenting facts that possibly do not exist. The image had been duplicated with a color printing format that altered white pixels into red pixels. Complainant's caucasian white skin complexion had been depicted as dark red skin complexion. The dramatic difference can be visualized when the trial exhibits are placed side by side with the corresponding color photographs in discovery; and also by examining the purple hue completely covering each image and the purple shading around object, on all the government trial exhibits, especially where a white color image should have been depicted - the walls are a flat white paint color and not lavender, and hospital lighting does not produce blue shadows reflected on white surfaces (Appendix N). Trial counsel had not at any point explicitly object to the alteration, and no indication in the record whether any officer of the court had notice the alteration.

Early discovery communication dated June 27, 2012 (Appendix S), stated the government had produced twenty-three color photographs. Nineteen color photographs were presented as exhibits at trial (Appendix L). The government's discovery produced to the defense a total of fifty-three color photographs, not including mug-shots. At July 11, 2011 grand jury hearing testimony, the government had shown complainant two grand jury exhibits; exhibit no. 1, had nine pages of color photographs, and exhibit no. 2, had twenty-one pages of color photographs; and complainant testified his friend produced both exhibits (Gr. Tr., pg. 23-24) (Appendix T).

Trial counsel had raised concerns during preliminary questions, to the government presenting color photographs at opening arguments, (T. Tr., pg. 8-9). Trial court had respond that authentication would not be necessary if the complainant testified and vouched for their representations. Counsel had not object, she only raised concern regarding the photographs being presented at opening arguments, and raised nothing further on the matter of color photographs. At no point in the entire proceeding, pretrial and at trial, had counsel raise an objection to any of the color photographs in discovery. Counsel had only begun to investigate into the color photographs subsequent the suppression hearing being held.

Appellate counsel would argue chain of custody issue related to trial counsel's concern in the appellant brief, however, since trial counsel had completely waive the issue, appellate counsel's attempt had been rejected on its face, under the Court's precedent against taking an opposite position on appeal from that taken at trial (MOJ, pg. 5-6) (Appendix G).

Direct appeal

An unopposed motion for leave to withdraw appellate counsel stated that the petitioner had "lost all trust and confidence" and had been "unable to cooperate with him" and appellate counsel had not comment on the merits of the appeal. Attorney-client communication subsequent Court of Appeals affirmance of the sentence, stated

that appellate counsel advised petitioner, he had "no valid basis" to file Petition for Writ of Certiorari to the Supreme Court of the United States.

Admission of defense trial exhibits

Trial counsel had not, at any point show the jury, the police report (Appendix W) showing one small injury and no other injuries, nor had trial counsel read to the jury the complainant's medical records (Appendix U), which document the actual injury to be one small injury and no other injuries; no large posters to display diagrams or the like.

Subsequent completing defense case in chief, counsel attempted admission of all eight defense trial exhibits together "used through the course of the trial" (T. Tr., pg. 350). The government had object to four exhibits (Appendix L), discussion ensued.

Counsel argued a record of medical discharge instructions (Appendix U) presented during examination of the treating physician constituted hearsay under business records exception (T. Tr., pg. 352). Counsel reminded trial court "[she] did neglect to ask the doctor whether or not the records were taken in the ordinary course of business" although he testified about the records (T. Tr., pg. 352). Counsel had not refreshed the treating physician's recollection of the medical record, only marked the record for identification, and had the treating physician read the discharge instruction in open court (T. Tr., pg. 254-257).

The Trial court ruled inadmissible (T. Tr., pg. 350-360): two exhibits counsel had attempted to admit in order to show the government's motive and theory of their case

had been false (government's theory had been plainly stated in defense exhibit 4 the court had admit unopposed into evidence); trial court had rule inadmissible, an exhibit of a statement (MTS Tr., pg. 56) (Appendix P) the arresting police officer made under his motion to suppress hearing testimony, and inadmissible an exhibit of a statement the investigative police officer wrote in his case summary portion of the police report; trial court had rule that counsel had not complete refreshment of the statement to the complainant and the government could not "rehabilitate the impeachment" on cross examination (T. Tr., pg. 191) of the arresting officer recalled by counsel as rebuttal witness; and regarding the investigative officer's statement, trial court had rule that the officer did not record the statement in police notes (T. Tr., pg. 271), counsel had not elicit suppression testimony of the statement she marked for identification (MTS Tr., pg. 81) (Appendix P) in the case summary report; the investigative officer had declined counsel's attempt (T. Tr., pg. 276) to refresh his memory of the statement at trial. The government at suppression hearing had elicit the contents of the investigative officer's portion of the police report (MTS. Tr., pg. 86-87) (Appendix P).

Trial court had not admit into evidence, defense exhibit 1, the arresting officer's supplemental portion of the police report (T. Tr., pg. 390) (Appendix W), which shows diagrams depicting one injury to the head; denial of admission without discussion. Counsel marked the exhibit for identification (T. Tr., pg. 84) to impeach the arresting officer's testimony (T. Tr., pg. 63) that the complainant "had several contusions and cuts

along his head and body". At motion to suppress hearing, counsel had marked the supplemental police report for identification only, she had not elicit from the officer his contents of the police report, but confirmed he had authored those portions (MTS Tr., pg. 63). Counsel redacted and provided trial court, the supplemental police report to include only diagrams representing testimony she had elicit earlier at trial (T. Tr., pg. 457-458). The government had object (T. Tr., pg. 460) arguing if counsel had attempted to admit at the time of this introduction he would have object since counsel had not conformed with hearsay exceptions. Counsel had respond (T. Tr., pg. 460) she "didn't actually impeach [arresting officer] with his notes at all". Trial court ruled the impeachment of the officer using his portion of the police report was "unsworn" and could be admitted if with the instruction: "not for the truth of the matter" (T. Tr., pg. 461). A redacted supplemental police report, amended defense trial exhibit 1, had been sent with instructions to the jury after deliberation had begun (T. Tr., pg. 477).

REASONS FOR GRANTING THE WRIT

Petitioner is seeking a Supreme Court of the United States mandamus order directing Michael Ryan, Associate Judge, answer his pending motions, mandamus order directing Superior Court of the District of Columbia reassign review of his pending motions, and or rule whether petitioner's second D.C. Code Section 23-110(a) motion to vacate, set aside, or correct sentence and judgment is an inadequate or ineffective remedy to test the legality of his sentence. The three questions presented constitute exceptional circumstances squarely adjudicated by this Court in aid of its jurisdiction.

Standard of review - inadequate or ineffective remedy

Petitioner raises a claim his second D.C. Code Section 23-110(a) motion to vacate, set aside or correct sentence and judgment (hereinafter second Section 23-110 motion) in Superior Court of the District of Columbia (hereinafter Superior Court) is an inadequate remedy based on failure of the trial judge (hereinafter trial court) to recuse himself from reviewing petitioner's collateral motions.

First a discussion regarding whether the remedy is inadequate and second, whether trial court failed to recuse.

Raising claims that at remedy is inadequate or ineffective to test the legality of the sentence have been subject to an unobstructed procedural shot test. see *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998).

The inquiry under an unobstructed procedural shot test discerns adequacy and

to determine adequacy in this context requires looking back into the essential function of habeas corpus and whether that essential function is impaired by the limitations on the use of Section 23-110 motion. *Id.* Determining whether a fundamental defect has occurred is a condition under the test. *Ibid.* Several Circuit Court of Appeals subsequently adopted *In re Davenport* qualifications into various standards of review.

To determine whether there has been an obstructed procedural shot at presenting the claim courts consider "(1) whether the legal basis for petitioner's claim did not arise until after he had exhausted his direct appeal and first [Section 23-110] motion; and (2) whether the law changed in any way relevant to petitioner's claim after that first [Section 23-110] motion, e.g., *Abdullah v. Hedrick,* 392 F.3d 957 (8th Cir. 2004).

The judicial failure to recuse issue had first been appropriately raised by petitioner, pro se ,under his second Section 23-110 motion. A mandamus petition had not been attempted during the pendency of petitioner's first Section 23-110(a) motion. District of Columbia Court of Appeals (hereinafter Court of Appeals) appointed appellate counsel whom had omit judicial failure to recuse. The second Section 23-110 motion is an ineffective assistance of counsel claim on the grounds petitioner's Sixth Amendment to the United States Constitutional right to effective assistance of counsel had been violated, supported by trial counsel errors, and Due Process Clause of the Fourteenth Amendment to the United States Constitutional violation, supported by actual innocence and judicial failure to recuse procedures. None of the retroactivity

conditions under *In re Davenport* qualifications or adopted standards by other Circuits apply to petitioner's motion. An unobstructed procedural argument under the standard can be made.

Furthermore, Trial court shall review Section 23-110(a) motions unless the motion is held to be inadequate under Section 23-110(g). Petitioner argues that his Section 23-110(a) motion is an inadequate remedy, once trial court failed to recuse himself in accordance with standards that constitute judicial recusal. see post. Petitioner's trial court judge presided over his pretrial, trial, sentence, first habeas collateral motion, and now second habeas collateral motion.

When trial court has made critical decisions at pretrial or trial proceedings, trial court should not subsequently review his own critical decisions. Otherwise, the remedy for Superior Court sentences to seek relief under an ineffective assistance of counsel claim could not be a reasonable procedure for correcting fundamental legal errors in the criminal process.

D.C. Code Section 23-110(g) requires that the remedy be inadequate before petitioner can seek relief in another court; three attempts in two different federal District Courts under 28 U.S.C. Section 2254(a) have been dismissed for want of jurisdiction and exhaustion of state remedies.

Scope - inadequate or ineffective remedy

Section 23-110(g) adopts 28 U.S.C. Section 2255(e) language and scope. see *Swain v. Pressley*, 430 U.S. 372, 381, 384 (1977).

"Inadequate or ineffective" is broad language under Section 2255(e), and Congress did not intend 2255(e) to be any different than the scope of writ of habeas corpus under the Judiciary Act of 1789. *United States v. Hayman*, 342 U.S. 205 (1952) (Section 2255(e) remedy "shall remain open to afford the necessary hearing"). The scope of habeas corpus under "Section 2241 does not limit the boundaries of custody nor limit situations habeas corpus could be used". *Jones v. Cunningham*, 371 U.S., at 238 (1963).

Circuits' opinions in the Court of Appeals, are not clear on the issue of whether the scope of 2255(e) is open to judicial failure to recuse claims. The Seventh Circuit, in *Brown v. Caraway*, 719 F.3d 583, 597 (7th Cir. 2013), thinks the savings clause does not limit the scope of 2255(e); and the Eleventh Circuit in *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999), held "savings clause intended to apply in some circumstances...other than practical ones associated with the location of the court.". That same Eleventh Circuit in *Gilbert v. United States*, 640 F.3d 1293 (en banc) denied on finality of judgment reasons. Consider, "[i]n appropriate cases the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration.". *Schlup v. Delo*, 513 U.S., at 320-321, quoting *Murray v. Carrier*, 477 U.S., at 495 (internal quotations omitted). The Fifth Circuit in *In re*

Bradford, 660 F.3d 226, 230, determined the scope of 2255(e) should only apply to cases where a nonexistent crime had convict. A fundamental defect is the underlying condition that triggers the scope's gateway, even in circumstances when a guilty verdict holds up and is not in question, so long the petition is unobstructed procedurally.

The question whether petitioner's motion may pass through under Section 23-110(g) requires clarity in aid of the this Court's jurisdiction.

Judicial failure to recuse

This Court held judicial recusal is required when the "likelihood of bias on the part of the judge is too high to be unconstitutionally tolerable". *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (internal quotations omitted). "The objective inquiry is not whether the judge is actually biased but whether the average judge in his position is likely to be neutral or there is an unconstitutional potential bias.". *Id.,* citing *Mayberry v. Pennsylvania,* 400 U.S. 455, 466 (internal quotations omitted).

Material facts - judicial failure to recuse

At pretrial hearing, trial court advised both parties that the government's color photographs, produced by the complainant, were probative and admissible. The source of the color photographs had not been available for testimony and the original images, including the cellphone, were no longer available. Trial court held that the government could present the complainant to vouch for its authenticity. Trial counsel had not argue the color photographs produced by the complainant: were inconsistent with color

photographs produced by the crime scene police officer, had not argue were inconsistent with the contents of the complainants medical records of the underlying incident, and had not argue were inconsistent with the contents of petitioner's arresting officer's police report. Trial counsel only raised authenticity at preliminary questions regarding the government's specific use of color photographs during opening arguments. Trial counsel had not object to color photographs and otherwise had waive the admissibility of evidence that had represent facts that had not exist anywhere else in the government's evidence in discovery.

After the underlying incident had occur, petitioner immediately gathered his belongings, changed into different clothing items, walked to the police station, reported a self defense incident, and waited in the lobby where he would later be arrested. Trial counsel had been aware of petitioners' actions following the incident. Trial counsel's entire suppression motion centered on clothing items that she knew to be improperly alleged evidence. Trial counsel had instead argue a variance to the stop and frisk police procedure establishes grounds to suppress those clothing items. The Court of Appeals had reason that appellate counsel's issues raised could not completely disassociate itself from trial counsel's suppression argument. Trial counsel's misplaced effort to suppress the clothing items, had consequently omit a reasonable effort to address the remaining evidence the government would present at trial.

Moreover, trial counsel had completely omit raising discoverable exculpatory evidence provided her two days prior to the suppression hearing. Discoverable exculpatory evidence had been provided under Superior Court Rules of Criminal Procedure, Rule 16, requiring the government notify counsel of its existence. see e.g *United States v. Agurs*, 427 U.S. 97 (1976). Complainant's medical records clearly document a statement that show complainant had sustained a previous hospitalization in 2009 describing serious injuries involving the surgical insertion of metal plates. The government thought the discoverable evidence could not only show the complainant had presented false statements to the police and the government, but also would undermine the outcome of the trial. Trial counsel had instead, ignored a rule required by this Court, a rule promulgated to protect the presumption of a fair trial. Trial counsel had consequently omit an effort to act on discoverable exculpatory evidence, that she should have presumed would undermine the outcome. The purpose of the rule should not only apply to the government. see *Johnson v. Zerbst*, 304 U.S 458 (given the circumstances trial court has a constitutional duty).

At the start of trial, counsel had stipulate to the petitioner holding an alleged weapon and using it in self defense. Trial counsel had chosen to waive the government's burden to prove all facts beyond a reasonable doubt in order to argue self defense case. The alleged weapon not in physical evidence or produced at trial, had been required be proven under the indictment for assault with dangerous weapon and

an enhancement charge to aggravated assault. Counsel should not presume petitioner acquiesced by reasoning the wide latitude afforded counsel to argue strategic choices, could excuse her burden shifting away from the government without first discussing her strategy with petitioner. see *D.H. Overmyer Co., Inc., of Ohio et al. v. Frick Co.*, 405 U.S., at 186 (1972), quoting *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (not all waivers by counsel can presume petitioner's consent); see also, *Mullaney v. Wilbur*, 421 U.S. 684, 703-704 (in accordance with *In re Winship*, 397 U.S. 358 (1978), the government has the burden to prove all facts beyond a reasonable doubt).

At trial, counsel had omit crime scene police officer testimony and had waive a reasonable defense to all color photographs; and had also omit defense DNA expert testimony and had instead stipulate to all blood related evidence. The government had fail chain of custody procedures and the defense DNA test had not confirm the government's DNA test conclusions. Both omissions of testimony and subsequent waiver of issues had been due to negligence and lack of preparing witnesses for trial. see *Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir. 2005) (Circuit Court upheld District Court ruling that an omission of effort to obtain expert forensic examination amounts to ineffective assistance).

The government had alter, whether intentional or not, all color photographs and presented facts to the jury that had not exist in the government's evidence. The

alteration had not been noticed nor corrected. see *Pyle v. Kansas,* 317 U.S. 213 ; *Mooney v. Holohan,* 294 U.S. 103.

Trial court had allow the arresting officer's perjured testimony to go uncorrected before the jury after realizing the testimony to be false. see *Alcorta v. Texas,* 355 U.S. 28; see also *Mooney v. Holohan,* 294 U.S. 103.

Trial counsel had elicit testimony from the treating physician, who authorized the facts stated in the medical records, that had impeach the government's key witness testimony, the complainant, and the government's only corroborating eye witness testimony, the arresting officer.

However, trial counsel had attempt to admit into the trial record, all eight defense trial exhibits, used through the course of the trial, subsequent completing the defense' case. Trial counsel had believe her pretrial actions and omissions could justify that strategy. During the attempt, trial counsel had fail to execute the rules of evidence trial procedure. Counsel had openly acknowledge her negligence to the trial court. Trial court had rule that five of eight exhibits were inadmissible to the trial record under several execution errors. Moreover, the arresting officer's police report, which corroborates the petitioner's testimony, had been denied admission after the jury had already weighed the favorable evidence. Compounding her error trial counsel had subsequently redact the police report. The trial court had later admit the police report

with the instruction to the jury: not for the truth of the matter. Cf. *Strickland v. Washington*, 466 U.S. 668 (1984).

Trial counsel had subsequently move for judgment of acquittal on all counts. Trial court had reason the "light most favorable to the government" standard of review would affirm his decision to send the case to the jury, notwithstanding the mountain of testimony establishing inferences that show the government had not proven legal sufficiency on all counts.

One small laceration overlapping one small abrasion, centimeters in size, and no other injuries, all documented in complainant's medical records, observed by his treating physician to be injuries of lowest trauma and in his medical expert opinion, hospitalization had not been necessary, altogether corroborated by testimony to the arresting officer's un-redacted police report, had nevertheless convict petitioner of aggravated assault while armed, assault with dangerous weapon, and assault with significant bodily injury.

The trial court had allow the trial mode to test whether the jury could discern the facts as to guilt under a circumstance where true and false evidence had been presented.

At sentencing hearing, trial court would make a statement in open court that he had reasonable doubt as to guilt, but since the proceeding had been by jury and not a bench trial, he had not need to make that decision.

Trial court's statement at sentencing had also infer that he could omit a decision that he is clearly empowered to make after the verdict. His trial court duty to send the case to the jury should not be confused with the trial court duty to set aside the verdict.

The color photographs weighed heavily on the jury. Trial counsel had forced upon herself strategic choices, she had made at trial and subsequently had fail to execute those strategies. The trial court's statement at sentencing had infer that he could allow an omission to investigate color photographs and discoverable exculpatory evidence based on trial counsel's wide latitude for presenting the defense.

Trial court had preside over a case, where trial counsel's acts and omissions had resolve the government's lack of legal sufficiency, and where the government's acts and omissions had resolve trial counsel's strategic choices. The trial court should be able to identify the prejudice to the jury caused by those actions and omissions. see *Chambers v. Mississippi,* 410 U.S., at 302 (under facts and circumstances of the case the rulings of the trial court deprived petitioner of a fair trial).

Whether trial court's functionary role to administer all pretrial proceedings, should not be any different whether under a bench trial or under a jury trial, is a question in aid of this Court's jurisdiction.

Whether trial court thought he could neither intervene nor acquit is a trial court determination that should be scrutinized. Whether trial court's decision not to acquit after the verdict should also be scrutinized.

Trial court has a duty to intervene. see *Johnson v. Zerbst*, 304 U.S., at 465.

Trial court's decisions' presented circumstances at trial that cannot be ignored. see *Glasser v. United States*, 315 U.S. 60.

Trial court decisions not to have intervene had been critical decisions. Trial court decision not to have correct the trial record had been a critical decision. Trial court decision not have set aside the verdict had been a critical decision. These critical decisions are wedded to the trial court and thus, the *Caperton* Court required he recuse himself from subsequent participation. Trial court's subsequent participation in petitioner's collateral motions had violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This Court should rule petitioner's pending remedy under Section 23-110(g), is inadequate to test the legality of his sentence.

Exhaustion of state remedies

Petitioner's first Section 23-110(a) motion had present all material facts and had not been a mixed petition, since Superior Court had retain collateral review. see *Rose v. Lundy*, 455 U.S. 509.

The Court of Appeals appear to have had determine trial court decisions had not been critical by their silence on the issue. The Court of Appeals had two bites at judicial failure to recuse under petitioner's appeal to his Superior Court order denying his first Section 23-110(a) motion and his subsequent motion to recall the mandate.

Direct appeal counsel should have had to raise available claims. Appellate brief had omit that the trial court had omit action on trial counsel's omission of discoverable exculpatory evidence, the brief had omit that the trial court had omit action when perjured testimony had gone uncorrected and when the government had alter trial evidence, and the brief had omit trial court's decision to have not set aside the verdict. Petitioner had express his dissatisfaction.

Appellate counsel subsequently filed motion for leave to withdraw citing "irreconcilable differences" before the government filed their brief in opposition. Court of Appeals denied the motion and ordered petitioner "cooperate" with appellate counsel. Petitioner's pro se Petition for Writ of Certiorari to this Court to the order denying motion for leave to withdraw appellate counsel had been denied. Appellate counsel had advised petitioner not to appeal the affirmance of his Superior Court sentence to this Court. Petitioner agreed omitted claims had been waived and the affirmance had not been ripe for an appeal.

Court of Appeals had three bites on the issue that trial counsel had omit discoverable exculpatory evidence, that the trial record left uncorrected when the arresting officer had commit perjury and when the government had alter trial evidence, and on the issue that whether the trial court had omit his duty by not addressing these issues. Consequently, petitioner had been accorded recourse under stringent recall of the mandate procedure.

Moreover, petitioner's April 24, 2015, filed, as amended filed October 13, 2015, 28 U.S.C. Section 2254(a) in the United States District Court for the Eastern District of North Carolina, Western Division, had been grounded on appellate counsel's refusal to raise available claims. The dismissal order had misconstrue the pendency of the judgment to the first Section 23-110 motion, which had been entered March 9, 2015. The direct appeal had had been pending until July 10, 2015.

United States District Court, District of Hawaii first dismissal order had misapprehend petitioner's immediate custody; and the second dismissal order had misconstrue procedural actual innocence to be petitioner's attempt at passing through the savings clause, and had omit judicial failure to recuse entirely from their discussion.

United States District Court, District of Hawaii, had consequently tie petitioner's claims' to stringent certificate of appealability standard.

Furthermore, petitioner had attempt to address several issues not raised at trial but had been part of his case file forwarded him by trial counsel subsequent her withdrawal. Subsequent trial at October 23, 2013 hearing, petitioner had demand and had been granted hybrid self representation, co-counsel in order to communicate directly with trial court during sentencing. Trial court had deny additional evidence at sentencing.

Petitioner's case file had an email communication regarding discoverable exculpatory evidence and several pages of complainant's medical records and discovery

documents, none of which had been part of the trial record. On several occasions, petitioner had attempt to address and include these material documents in the trial record. Petitioner had file pro se, February 6, 2014, entered Superior Court motions to compel hearing on motion to vacate sentence and motion to expand the record, August 28, 2014, motion to compel evidentiary hearing, and February 5, 2015, entered motion to schedule evidentiary hearing to expand trial record; and correspondences to trial court entered, December 11, 2013, May 9, 2014, May 14, 2014, September 19, 2014, January 27, 2015, March 27, 2015, and April 14, 2015.

Petitioner's had entertain a pro se subpoena duces tecum request for medical records of the complainant's previous hospitalization, discoverable exculpatory evidence referenced in the email correspondence between trial counsel and the government.

Petitioner also had raise his concerns regarding both trial court and trial counsel handling of his trial in January 29, 2015, entered correspondence to the Court of Appeals, and had send a correspondence to the Supreme Court clerk briefly raising the same concerns.

Petitioner's pro se motions to expand the record and to compel hearings, had not been explicitly construed in the docket as a motion for new trial. May 7, 2014, entered Court of Appeals order, had deny petition for rehearing; the order is only entered in the Superior Court docket. Also, two subsequent pro se motions had not been addressed.

Whether petitioner's pending motion for a new trial is his first Superior Court Rule 33 motion is not clear.

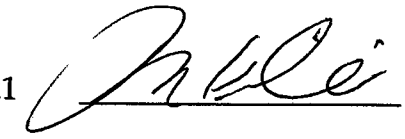
Petitioner had file motions to the Court of Appeals construed as Writ of Mandamus; case no. 13-OA-0058 entered December 18, 2013, and order denying petition for writ of mandamus/prohibition entered December 20, 2013; and case no 14-OA-0030 entered October 3, 2014, and order denying petition for writ of mandamus/prohibition entered November 25, 2014. The motions had include color photographs showing trial counsel waiver of government evidence and prosecutorial misconduct.

This Court should rule the petitioner has exhausted his state remedies.

Conclusion

The petition for Extraordinary Writ of Mandamus should be granted.

Respectfully submitted,

March 31, 2021 

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