20-8173

No. _____

Supreme Court, U.S.
FILED
AUG 12 2020
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

LENROY MCLEAN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lenroy Mclean #61524-054
(Your Name)

805 North ave F
(Address)

Post, Tx 79356
(City, State, Zip Code)

(Phone Number)

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Exhibit-1

QUESTION(S) PRESENTED

Question I

Whether the Government sought to diminish the likelihood of Petitioner's finding of a Brady violation, by interjected a manufactured declaration to mislead the machinery of the court?

Question II

Does the Court of Appeals denial of a Certificate of Appeal ability sanctioned the lower court's predisposition towards the benefit of the Government, call for an exercise of this court's supervisory power?

Question III

Did the lower courts applied the proper legal standards for Petitioner's Equitable Tolling before such denial, which conflicted with the decision of other Circuits?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[xk] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Attorney for the Government

1) Won S. Shin (AUSA)
U.S. Attorney's office
one St. Andrew's Plaza
New York, New York 10007

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[XX] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[XX] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[XX] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[XX] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was May 7th, 2020.

[ ] No petition for rehearing was timely filed in my case.

[XX] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 30th, 2020, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution Provides:

> No person shall be held to answer for a Capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall be compelled in any criminal case to be deprived of Life, Liberty or Property without Due Process of Law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution Provides:

> In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

Ninth Amendment to the Constitution Provides:

> The enumeration in the Constitution, or certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment to the Constitution Provides:

> All persons born to the naturalized in the United States, and subject to the reside. No state shall make or force any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without Due Process of Law; nor deny to any person without it's Jurisdiction the equal protection pf the law.

STATEMENT OF THE CASE

Petitioner was indicted back in November 5th, 2008 (U.S.D.C 08-cr-789(RJS)) along with several other co-defendants in a multi-count indictment charging the various defendants with violations of 21 U.S.C § 846 and 18 U.S.C § 924(c) in the SOuthern District of New York. Petitioner pled not guity to the only charge against him (conspiracy) and a jury trial was commenced on March 16th, 2009 and concluded on March 27th, 2009 where he was convicted of a violation of conspiracy to possess with the intent to distribute five kilograms or more of cocaine.

1. Prior to the arrest of petitioner, the government instituted an application for authorization to intercept wire communications under title III on June 26th, 2008, culminating in an order to intercept communications under title III for two cellular phones used by co-conspirators. During the course of the wire interception period, 13, 975 calls were intercepted by law enforcement agents. Only one call intercepted on July 11th, 2008 involved the petitioner, such was interpreted by the DEA to be regarding drugs. Ergo, there was no trial preparation by counsel (Jason Russo), no motion filed and counsel simply flew by the seat of his pants.
Such failure of petitioner trial counsel to undertake the proper steps to receive the government case file was almost certainly deficient. Rompilla v. Beard, 545 U.S 374, 387, 125 S.ct 2456, 162 L.ed 2d 360 (2005)("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case...The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities"(quoting the ABA standards)).

A. Title III requested was made to the Honorable Sidney H. Stein of the Southern District of New York, a 30 day order was granted, but was never filed and/or docketed in case #08-cr-789(RJS)[as required by DOJ policy and statue].

B. On or about July 15th, 2008, the government commenced another application for authorization to intercept wire communications and submitted the application to the Honorable Laura Taylor Swain with the Southern

District of New York, which was granted for a 30 day period. Again, no docketed entry under case #08-cr-789(RJS)[nor can this order or application or affidavit be found].

C. On June 7th, 2017, Petitioner sent a request to Judge Alvin K. Hellerstein seeking the law enforcement affidavit filed in support of the title III he had granted posted the above reference-such was required to be kept and produced under statutory and DOJ policy and procedure. Subsequently, Judge Hellerstein responded on the face of the request "denied without prejudice. Appl'n should be made to Judge Sullivan, the judge presiding over appellant's trial 6-13-17". See Appx. D

Apparently, Judge Hellerstein forwarded petitioner's request to judge Sullivan-by the 16th of June 2017, Judge Sullivan responded as well on the back of the document "The court is not in possession of the documents referred to in petitioner's, nor is it in possession of any information about where the document might be. A copy of this letter request will be forwarded to defense counsel and the government". See Appx. E

D. On or about August 1st, 2017, Petitioner, incompliance with judge Sullivan's instruction that "petitioner is free to contacted the government, former counsel (Jason Russo) and the agent via certify U.S. mail-his due diligence proven futile. See Appx. F

2. Petitioner obtained a declaration of a Peter C. Sprung a trial attorney in the criminal division for the U.S. Department of Justice-his declaration explains the title III process, the data bases, records and document maintained by the Department of Justice, pertaining to title III wiretaps. Petitioner then filed a motion under rule 60(b)(3) and/or (d)(3) on the 17th of January 2018 with the assertion of the government perpetrated "mis conduct and fraud" upon the court during his trial and attached Peter C. Sprung declaration with detail information of the whereabouts and/or storage of (June 26th & July 15th 2008) database, records and documents should be. The District court's ordered the government to respond by March 29th, 2018-approximately, 2 months post petitioner's filing of motion for relief pursuant to rule 60(b)(3) and/or (d)(3). Case #12-cv-1954; Doc #27).

3. On the 24th of April 2018, Petitioner moved to entering a default judgment pursuant to Fed. R. Civ. P. 55(a) which was entered into his criminal docket instead of the civil docket-Petitioner filings within the district court was convoluted between both his criminal and civil case

numbers such as to incite ill will. (See Doc. entry #374 (08-cr-789(RJS)) An extension of time mysteriously appeared in the docket (#34) for the Government to response, some four and a half months later (April 12th, 2018)-during the government response a declaration of petitioner's former trial counsel (Jason Russo) was attached. The Russo's declaration was undated and bare-a-forged signature, the fraudulent document was made to look genuine with the intent to deceive petitioner and the court's. See Appx. G

4. Petitioner immediately filed another motion pursuant to rule 60(b) and/or (d)(3) notice of fraud on the court and requested for the court's to order the government to show cause for the fraudulent document entered into the records (Doc #38 and #377).
By the 18th of April 2018, Petitioner filed a motion seeking permission to reply to the government erroneous response and the district court refuse to acknowledge such and denied both of Petitioner's motions-and order the clerk to "terminate the motions pending at docket #'s 23 & 25 in case No. 12-cv-1954 and docket #'s 359 & 362 in case no. 08-cr-789" by the 8th of May 2018 without any certificate of appealability (COA).

5. The District court alleged that petitioner prove was six years old and individuals signature changes through out the years-Petitioner set out to prove the court's ruling was erroneous, because a permutation of Russo signature incite ill will within the machinery of the court. See Appx H Amid of petitioner's extensive search for material evidence of present signature(s) of Russo-he was illegally apprehended and placed into a special housing unit (SHU), his legal material was confiscated approximate ~~ly six months (Jan. 31st thru June 26th 2019). During this time period~~ petitioner took it upon himself to put the district court on notice of the goverment impediment. (Doc #388)

6. Upon petitioner's released from the SHU (without any incident report) they had misplaced and confiscated his legal material with the additional evidence needed of the forged declaration of Russo. By the 16th of October 2019 Petitioner retrieved the additional evidence again and filed a motion to re-open his rule 60(b) which was subsequently denied has been untimely-hence, petitioner had demonstrated upon the court's, the reason he should be granted equitable tolling for the five and a half months spent in the

SHU, where his legal materials been confiscated that had hampered his filing which was any fault of his.

In addition to denying petitoner's motion to re-open his rule 60(b) motion the district court also decline to issue a certificate of appealability and a timely notice of appeal was filed. His petition to the Court of Appeal seeking a COA was denied to penumbras the fraudulent document (Russo Decl), the reason for a writ of certiorari which seeks review of the denial of petitioner's application for a COA by the courts.

REASONS FOR GRANTING THE PETITION

Question I

Whether the government sought to diminish the likelihood of Petitioner's finding of a brady violation, by interjected a manufactured declaration to mislead the machinery of the court

The government sought to diminish petitioner's concession by submitting an undated fraudulent document to conceal wiretap applications (June 26th & July 15th, 2008) that had been wrongfully witheld during his trial, evidence of such were essential to a a fair and proper consideration of the merits of petitioner's Rule 60(b) motion presented to the courts. Petitioner believed not only that the government had concealed the wiretaps application, but also that the attorneys had acted intentionally to hide evidence that was damaging to themself-making it impossible for petitioner to challenge the assertion of privilege. These accusations track the allegations in petitioner proposed Rule 60(b) claims that the government "intentionally" witheld certain key documents from the trial that should have been produced in discovery.

Specifically, "[A] 'fraud on the court' ocur where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. See Passlogix Inc. v 2FA Tech. LLC, 708 f.supp 2d 378, 383 (2nd cir 2010).

Significantly, courts within the second circuit have dismissed cases upon determining the actions were based on forged documents or fabricated evidence. See Shangold v Walt Disney Co. 275 Fed. Appx 72, 73-74 (2nd cir 2008); See also Universal Oil Products Co. v United States 328 U.S. 575, 580, 66 S.ct 1176, 90 L.ed 1447(1946)("The inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question"(citing Hazel-Atlas Glass Co; 322 U.S. 238, 64 S.ct 997, 88 L.ed 1250, 1944 Dec. Comm'r Pat. 675)).

Petitioner put emphasis on the fact that regardless of whether or not the government buried the wiretap application within the case file, reference as a ploy-those who managed the government's case knew of the wiretap

applications, chose to not entered such into the docket, wrongfully withheld it at trial and willfully entered a fraudulent declaration of petitioner's trial counsel (Russo) to deceive the petitioner. Here, petitioner could have found the wiretap application if he had been more diligent but, rather, unthinkable that he would have sought the middle ground between complete suppression and complete disclosure that an artfully disguised document can provide.

Ergo, [there was no trial preparation by counsel (Russo), no motion filed and Russo simply flew by the seat of his pants. Such failure of petitioner's trial counsel to undertake the proper steps to receive the government's case file was almost certainly deficient. See Rompilla v. Beard, 545 U.S. 374, 387, 125 S.ct 2456, 162 L.ed 2d 360(2005)("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case....The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities" (quoting ABA standards)).].

As the Supreme court noted in Hazel-Atlas Glass Co. v Hartford Co. 322 U.S. 238, 246, 88 L.ed 1250, 64 S.ct 997, reh'g denied, 322 U.S. 772, 88 L.ed 1596, 64 S.ct 1281(1944), a case that also involved an alleged fraudulent document: even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant.

UNDATED DECLARATION

The government's purported declaration fails, because of the statue requirement to substitute for an affidavit-the declaration must be given under the penalty of perjury and dated. Even if the court construes the government "affidavit" to be a declaration, the declaration does not meet the requirement as well. See Bonds v Cox, 20 F3d 697(6th cir 1994)(refusing to consider declarations which although subscribed under penalty of perjury were not dated as required by statue); See also Counts v Kraton Polymers., U.S. L.LC No. 2:05-cv-124, 2006 U.S. Dist. Lexis 65312 (S.D. Ohio Sept. 13, 2006)(it is appropriate to substitute a declaration for a Fed. R. Civ. P 56(e) affidavit, but its not permissible to present an undated declaration that lacks a discernible date of signing as summary judgment evidence).

Declarations must to be considered as evidence, by signed, dated and if executed within the United States, include a statement attesting that "under penalty of perjury". See Maior v Astrazeneca, 2006 WL 2640622 at *6 (N.D.N.Y. Sept. 13th, 2006)(holding undated declaration inadmissable). See also Wells v Cramer, 262 fed. appx. 184, 2008 WL 110088 at *3 (11th cir 2008)(stating "Federal law...does not provide an alternative to making a sworn statement, but requires that the statement include a handwritten averment, signed and dated, that the statement is true under the penalties of perjury").

The Russo's declaration (appx G) does not comport with the federal rules to be considered as evidence in this matter and refused was to allowed petitioner to litigate such-similarly, under 28 U.S.C. § 1746 a declaration submitted "under the penalty of perjury and dated" is admissible in lieu of a sworn affidavit on a motion for summary judgment. When the lower court has left factual issues such as assertion of fraudulet document with undated declaration used as evidence against petitioner unresolved, such demonstrate that the government have improperly influenced this court in its decision by a preordinated, cunning, unconscionable plan or scheme of defense based upon a great deal of misrepresentation and misconduct.

In short, the record here has establish that the district court erred not requiring proof of Russo's signature and/or complicity in the government manufacture declaration to mislead the machinery of the court without an evidentiary hearing. See Dopp v Franklin National Bank, 461 f.2d 873, 879 (2nd cir 1972)("a judge should not resolve a factual dispute on affidavits or depositions, for then he is merely showing a preference for "one piece of paper to another"".). See also Pham v United States., 317 F.3d 178 (2nd cir 2003)("Precedent of the United States Court of Appeals for the Second Circuit disapproves of summary dismissal of petitions where factual issues exits, but it permit a "middle road" of deciding disputed facts on the basis of written submissions").

Opinions from Circuit Courts in all eleven circuit held that the solemn testimony, under oath, judged for credibility by the fact finders, is more persuasive than affidavits recanting earlier testimony. Thus, a trier of facts can be evaluated...1) the testimony of Russo and the explanation of the wiretap warrants; 2)Petitioner's assertion of the fraudulent declaration and 3) make a determination as to credibility via an evidentiary hearing, such would have disintegated before the courts. Sherlock Holmes once said "...when you eliminated the impossible, whatever remains, however

improbable must be the truth".
A hearing was necessary to assess the credibility of witnesses, because "credibility determination cannot be based on affidavits or countered by conclusory statements, but may be resolved only by recourse to a full evid entiary hearing. (Quoting Newman 705 A.2d 246 (D.C. 1997)). See also Machibroda v United States, 368 U.S. 487, 495 (1962)(A district court, however must grant an evidentiary hearing if the petitioner "alleges facts that if proven, would entitle him to relief").

BRADY VIOLATION

Petitioner's trial counsel could not have uncovered the suppression of the material evidence that has now been exposed after more than a decade, as a result of Peter C. Sprung declaration-because the government had hitherto concealed them. The lack of access to these material evidence (wiretap application) had seriously impeded petitioner's ability to raise argruments of a brady violation. As articulated in Brady and its progeny, the government is required to disclose "evidence favorable to an accused... where the evidence is material, either toguilt or to punishment..." See Brady v Maryland, 373 U.S. 83, 87, 83 S.ct 1194, 10 L.ed 2d 215 (1963); also see Copa, 267 F.3d 132, 135 (2nd cir 2001)(citing Giglio v United States, 405 U.S. 150, 154, 92 S.ct 763, 31 L.ed 2d 104 (1972)) This duty to disclose favorable evidence includes "not only exculpatory material, but also information that could be used to impeach a key government witness". The government attorneys in this case intentionally witheld information, offered into evidence an intentionally misleading document demonizing the the process of petitioner's Rule 60(b), it can hardly be argued that such action do not constitute fraud on the court under Rule 60(b).

Question II

Does the Court of Appeals denial of a Certificate of Appealability sanctioned the lower court predisposition towards the benefit of the Government, call for an exercise of this court's supervisory power

This court should grant this petition for writ of certiorari because of the lower court's; 1) interpretation of the statute of limination regarding fraud on the court and 2) the government brought into the case a fraudulet document that went to the heart of the case. Petitioner had presented overwheling evidence that the declaration was forged and undated-the government had intentionally put forward this manufactured evidence and committed a fraud on the court. To be entitled to a COA, this court has stressed that "the decision to grant a COA is a "threshold inquiry" into whether "jurist of reason" could disagree with the district court's resolution ...or the jurist could conclude the issue presented are adequate to deserve encouragement to proceed further". See Miller-EL v. Cockrell, 537 U.S. 322,327, 123 S.ct 1029., 154 L.ed 2d 931 (2003); See also Barefoot v. Estelle, 463 U.S. 880, 893. N4. 103 S.Ct 3383, 77 L.ed 2d 1090 (1983).

Here, the District court had denied petitioner's Rule 60(b) motion and COA, because it determined that the motion was untimely-Typically, motions to set aside judgments are subjected to a one year bar (Rule 60(c)(1)). If however, a plaintiff alleges that a fraud was committed against the court, there is no such bar. Rule 60(d)(3) thus allows claimants to escape Rule 60 (c)(1) one year statute of limitations imposed on Rule 60(b)(3) motion for fraud , and allege fraud on the court regardless of the passage of time. See Parkhurst v. Pittsburg Paints Inc., 399 Fed. Appx 341, 2010 WL 4069430 at 1(10th cir 2010); Therefore, there is no statue of limitations for bringing a fraud upon the court claim. Hazel-Atlas Glass Co. v Hartford-Empire Co. 322 U.S. 238, 244, 64 S.Ct 997, 88 L.3d 1250, 1944 Dec. Comm'r Pat. 675(1944); See also Kenner v Comm'r of Internal Revenue, 387 F.2d 689, 692 (7th cir 1968)("A decision produced by fraud on the court is not in essence a decision at all and never becomes final").

Petitioner's COA should have been granted, because his Rule 60(b) motion was brought pursuant to subsections (b)(3) and (d)(3) of the Rule. The time limitation cited by the District court does not apply to a motion made under these subsections, which may be brought at anytime.
See Anderson v New York No. 07-cv-9599, 2012 U.S. Dist Lexis 142628, 2012 WL 4513410, at *4(S.D.N.Y. 2012)

In Liteky, this court stated that the "judges opinions or comments must demonstrate such high degree of favoritism or antagonism as to make fair judgment impossible. Liteky, 510 U.S. at 555.

Here, Petitioner was defy with a systematically abused of the judicial process in order to make it difficult and/or impossible for him to surpass the COA standards

Question III

Did the lower courts applied the proper legal standard for Petitioner's Equitably Tolling before such denial, which conflicted with the decision of other Circuits

Out of an abundance of caution, Petitioner avers that lack of access to his legal material constituted extraordinary circumstance beyond his control, when he was illegally apprehended and placed into an administrative segregation. This Supreme court has held that, under "extraordinary circumstances" court's may apply equitable tolling if the prisoner was prevented from filing a time petition by circumstances beyond her control and she demonstrated due diligence in pursuing her claim. See Lawerence v Florida, 549 U.S. 327, 336, 127 S.Ct 1079, 166 L.ed 2d 924(2007); See also Valverde v Stinson, 224 F.3d 129, 133-34(2d cir 2000) where prison official intentionally obstruct a [Plaintiff's] ability to file his [complaint] by confiscating his legal papers.

Lack of access to Petitioner's own legal materials must be coupled with due diligence to warran equitable tolling-In Petitioner's motion to reopen Rule 60(b), he had demonstrated his due diligence by putting the court's on notice while housed in segregation (Doc #388; 08-cr-789) and upon his released from such, his legal material was misplaced. See Appx I Petitioner had faced a host of procedural obstacles to have the lower courts consider his Rule 60(b) petition, he might have properly raise a claim for relief pursuant to Rule 60(b). See Gonzalez v Crosby, 545 U.S. 524, 535-536, 125 S.Ct 2641, 162 L.ed 2d 480(2005), to obtain such relief he must demonstrate both the motion's timeliness and more significant, that '"extraordinary circumstance' justif[y] the reopening of a final judment"Id., at 535, 125 S.Ct 2641, 162 L.ed 2d 480(quoting Ackerman v United States, 340 U.S. 193, 199, 71 S.Ct 209, 95 L.ed 2d 207(1950)).

B.

Furthermore, the Government was never given a chance to calculated the amount of untolled time that had passed and/or conceded that the motion to reopen Petitioner's Rule 60(b) was untimely, because the District court identified the supposed error, rasied the issue sua sponte and dismissed the motion. This court made it clear in Day v. Mc Donough, 547 U.S. 198, 210, 126 S.Ct 1675, 164 L.ed 2d 376(2006)([B]efore acting on its own initiative, a court must accord the parties fair notice and an

opportunity to present their positions). Greenlaw v U.S. 534 U.S. at 243 Here, Petitioner was illegally placed into segregation for a substanial period of time-his confiscated legal materials constituted "misconduct on the part of the Correction Officer" and this misconduct prevented him from filing his motion to reopen Rule 60(b) within the one year [period of] limitation supposedly.

There was no evidence in the record that rebutted these assertions and if "the underlying facts or circumstances relied upon by a Plaintiff maybe a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits". Forman, 371 U.S. at 182.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 8-11-2020