No. ~~21-7117~~

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



FREDERICK ALLEN - PETITIONER
pro se

VS.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS

• PETITION FOR WRIT OF CERTIORARI •

• U.S.D.C. FOR THE W.D.T.X.
  ↳ CIV. NO. 6:20-CV-075-C

• U.S.C.A. FOR THE FIFTH CIRCUIT
  ↳ CASE NO. 21-10274

FREDERICK ALLEN
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## QUESTIONS PRESENTED

[1] WAS FREDERICK ALLEN'S CONSTITUTIONAL RIGHT TO DUE PROCESS VIOLATED WHEN THE DISTRICT COURT PLAGIARIZED A 31-COUNT WORD-FOR-WORD/COMMA-FOR-COMMA MISREPRESENTATION ORIGINALLY ATTRIBUTABLE TO THE GOVERNMENT UPON WHICH RELIEF WAS DENIED?

[2] WAS FREDERICK ALLEN'S CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL VIOLATED WHEN HIS TRIAL COUNSEL FAILED TO RECOGNIZE AND OBJECT TO A GIGLIO ERROR MANIFEST WHEN THE GOVERNMENT FAILED TO DISCLOSE DURING OR BEFORE TRIAL THAT THE KEY WITNESS HAD BEEN SPARED A MANDATORY LIFE SENTENCE IN EXCHANGE FOR HIS COOPERATION?

## List of Parties

All parties appear in the caption on the cover page.

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## Cases



## Statutes and Rules

# On 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

Cases from Federal Courts:

- The ORDER of the District Court for the Northern District of Texas appears at Appendix D and is unpublished. (Denying §2255 Relief).
- The ORDER of the Fifth Circuit Court of Appeals appears at Appendix M and is unpublished. (Denying a Certificate of Appealability).
- The ORDER of the Fifth Circuit Court of Appeals appears at Appendix O and is unpublished. (Denying Rehearing).
- The ORDER of the District Court for the Northern District of Texas appears at Appendix L. (Denying Rule 59(e) Relief). (and is unpublished).
- The ORDER of the District Court for the Northern District of Texas appears at Appendix K and is unpublished. (Denying Recusal).

## JURISDICTION

THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS ENTERED ON NOVEMBER 08, 2021. [APPENDIX M].

REHEARING WAS DENIED ON JANUARY 07, 2022. [APPENDIX O].

THIS PETITION FOR WRIT OF CERTIORARI IS TIMELY, PROVIDED THE CERTIFICATE OF SERVICE AVERS DELIVERY TO PRISON OFFICIALS ON OR BEFORE FEBRUARY 07, 2022, WHICH IS 91 DAYS AFTER THE FIFTH CIRCUIT'S DENIAL OF ALLEN'S COA REQUEST. (THE 90TH DAY FALLS ON A SUNDAY, THUS AFFORDING ALLEN ONE ADDITIONAL DAY TO UTILIZE THE PRISON MAILBOX RULE.)

JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. § 1254(1), WHICH HOLDS:

> CASES IN THE COURT OF APPEALS MAY BE REVIEWED BY THE SUPREME COURT BY THE FOLLOWING METHODS:
>
> (1) BY WRIT OF CERTIORARI GRANTED UPON THE PETITIONER OF ANY PARTY TO ANY CIVIL OR CRIMINAL CASE, BEFORE OR AFTER RENDITION OF JUDGMENT OR DECREE.
>
> [id.].

REVIEW OF THE DISTRICT COURT'S DENIAL OF THE PETITIONER'S MOTION FOR RECUSAL [APPENDIX K FOR DENIAL, ENTERED APRIL 28, 2021] IS UNTIMELY UNDER 28 U.S.C. § 2101, LEST THE COURT ALLOW THE CONTINUATION OF THAT CLAIM, IN THAT IT WAS INCORPORATED INTO THE REQUEST FOR COA [APPENDIX L] AND IGNORED BY THE FIFTH CIRCUIT. [APPENDIX M].

## Constitutional and Statutory Provisions Involved

- Constitution of the United States - Fourteenth Amendment

  Section 1. All persons born or naturalized in the United States and subject to the jurisdiction there of, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- 21 U.S.C. § 802(13) - Definitions

  The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

- 21 U.S.C. § 841(b)(1)(A) - Prohibited Acts A - Penalties

  Except as otherwise provided in section 409, 418, 419, or 420 [21 U.S.C. § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

  (1)(A) In the case of a violation of subsection (a) of this section involving -

  (iii) 280 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] which contains cocaine base;

  such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life... If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420... after 2 or more prior convictions for a

SERIOUS DRUG FELONY OR SERIOUS VIOLENT FELONY HAVE BECOME FINAL, SUCH PERSON SHALL BE SENTENCED TO A TERM OF IMPRISONMENT OF NOT LESS THAN 25 YEARS....

[ ]

ACT DEC. 21, 2018 (APPLICABLE TO ANY OFFENSE COMMITTED BEFORE 12/21/2018, IF A SENTENCE HAS NOT BEEN IMPOSED AS OF SUCH DATE... SUBSTITUTED "AFTER 2 OR MORE PRIOR CONVICTIONS FOR A SERIOUS DRUG FELONY OR SERIOUS VIOLENT FELONY HAVE BECOME FINAL, SUCH PERSON SHALL BE SENTENCED TO A TERM OF IMPRISONMENT OF NOT LESS THAN 25 YEARS" FOR "AFTER TWO OR MORE PRIOR CONVICTIONS FOR A FELONY DRUG OFFENSE HAVE BECOME FINAL, SUCH PERSON SHALL BE SENTENCED TO A MANDATORY TERM OF LIFE IMPRISONMENT WITHOUT RELEASE"....

- 28 U.S.C. § 144 - BIAS OR PREJUDICE OF A JUDGE

WHENEVER A PARTY TO ANY PROCEEDING IN A DISTRICT COURT MAKES AND FILES A TIMELY AND SUFFICIENT AFFIDAVIT THAT THE JUDGE BEFORE WHOM THE MATTER IS PENDING HAS A PERSONAL BIAS OR PREJUDICE EITHER AGAINST HIM OR IN FAVOR OF ANY ADVERSE PARTY, SUCH JUDGE SHALL PROCEED NO FURTHER THEREIN, BUT ANOTHER JUDGE SHALL BE ASSIGNED TO HEAR SUCH PROCEEDING.

THE AFFIDAVIT SHALL STATE THE FACTS AND THE REASONS FOR THE BELIEF THAT BIAS OR PREJUDICE EXISTS, AND SHALL NOT BE FILED LESS THAN TEN DAYS BEFORE THE BEGINNING OF THE TERM [SESSION] AT WHICH THE PROCEEDING IS TO BE HEARD, OR GOOD CAUSE SHALL BE SHOWN FOR FAILURE TO FILE IT WITHIN SUCH TIME. A PARTY MAY FILE ONLY ONE SUCH AFFIDAVIT IN ANY CASE. IT SHALL BE ACCOMPANIED BY A CERTIFICATE OF COUNSEL OF RECORD STATING THAT IT IS MADE IN GOOD FAITH.

• 28 U.S.C. § 455 - DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

(a) ANY JUSTICE, JUDGE, OR MAGISTRATE OF THE UNITED STATES SHALL DISQUALIFY HIMSELF IN ANY PROCEEDING IN WHICH HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED.

(b) HE SHALL ALSO DISQUALIFY HIMSELF IN THE FOLLOWING CIRCUMSTANCES:

(1) WHERE HE HAS A PERSONAL BIAS OR PREJUDICE CONCERNING A PARTY, OR PERSONAL KNOWLEDGE OF DISPUTED EVIDENTIARY FACTS CONCERNING THE PROCEEDING;

...

(d) FOR THE PURPOSES OF THIS SECTION THE FOLLOWING WORDS OR PHRASES SHALL HAVE THE MEANING INDICATED:

(1) "PROCEEDING" INCLUDES PRETRIAL, TRIAL, APPELLATE REVIEW, OR OTHER STAGES OF LITIGATION[.]

• 28 U.S.C § 2253(c)(2) - APPEAL, CERTIFICATE OF APPEALABILITY ("COA")

(c)(1) UNLESS A CIRCUIT JUSTICE OR JUDGE ISSUES A [COA], AN APPEAL MAY NOT BE TAKEN TO THE COURT OF APPEALS....

(c)(2) A [COA] MAY ISSUE UNDER PARAGRAPH (1) ONLY IF THE APPLICANT HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

• 28 U.S.C. § 2255 - FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE

(a) A PRISONER IN CUSTODY UNDER A SENTENCE OF A COURT ESTABLISHED BY ACT OF CONGRESS CLAIMING THE RIGHT TO BE RELEASED UPON THE GROUND THAT THE SENTENCE WAS IMPOSED IN VIOLATION OF THE CONSTITUTION OR LAWS OF THE UNITED

STATES ... OR IS OTHERWISE SUBJECT TO COLLATERAL ATTACK, MAY MOVE THE COURT WHICH IMPOSED THE SENTENCE TO VACATE, SET ASIDE OR CORRECT THE SENTENCE.

- FEDERAL RULE OF APPELLATE PROCEDURE 40 - PETITION FOR PANEL REHEARING

(a) TIME TO FILE; CONTENTS; RESPONSE; ACTION BY THE COURT IF GRANTED.

(1) TIME. UNLESS THE TIME IS SHORTENED OR EXTENDED BY ORDER OR LOCAL RULE, A PETITION FOR PANEL REHEARING MAY BE FILED WITHIN 14 DAYS AFTER ENTRY OF JUDGMENT. BUT IN A CIVIL CASE, UNLESS AN ORDER SHORTENS OR EXTENDS THE TIME, THE PETITION MAY BE FILED BY ANY PARTY WITHIN 45 DAYS AFTER ENTRY OF JUDGMENT IF ONE OF THE PARTIES IS:

(A) THE UNITED STATES

...

(2) CONTENTS. THE PETITION MUST STATE WITH PARTICULARITY EACH POINT OF LAW OF FACT THAT THE PETITIONER BELIEVES THE COURT HAS OVERLOOKED OR MISAPPREHENDED AND MUST ARGUE IN SUPPORT OF THE PETITION. ORAL ARGUMENT IS NOT PERMITTED.

(3) RESPONSE. UNLESS THE COURT REQUESTS, NO RESPONSE TO A PETITION FOR PANEL REHEARING IS PERMITTED. ORDINARILY, REHEARING WILL NOT BE GRANTED IN THE ABSENCE OF SUCH A REQUEST. IF A RESPONSE IS REQUESTED, THE REQUIREMENTS OF RULE 40(b) APPLY TO THE RESPONSE.

(4) ACTION BY THE COURT. IF A PETITION FOR PANEL REHEARING IS GRANTED, THE COURT MAY DO ANY OF THE FOLLOWING:

(A) MAKE A FINAL DISPOSITION OF THE CASE WITHOUT

REARGUMENT;

(B) RESTORE THE CASE TO THE CALENDAR FOR REARGUMENT OR RESUBMISSION; OR

(C) ISSUE ANY OTHER APPROPRIATE ORDER.

(b) FORM OF PETITION; LENGTH. THE PETITION MUST COMPLY IN FORM WITH RULE 32. COPIES MUST BE SERVED AND FILED AS RULE 31 PRESCRIBES. EXCEPT BY THE COURT'S PERMISSION:

...

(2) A HANDWRITTEN OR TYPEWRITTEN PETITION FOR PANEL REHEARING MUST NOT EXCEED 15 PAGES.

- FEDERAL RULE OF CIVIL PROCEDURE 59(e)-NEW TRIAL; ALTERING OR AMENDING A JUDGMENT

(a) IN GENERAL

(1) GROUNDS FOR NEW TRIAL. THE COURT MAY, ON MOTION, GRANT A NEW TRIAL ON ALL OR SOME OF THE ISSUES-AND TO ANY PARTY-AS FOLLOWS:

...

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A MOTION TO ALTER OR AMEND A JUDGMENT MUST BE FILED NO LATER THAN 28 DAYS AFTER ENTRY OF THE JUDGMENT.

## Statement of the Case

On March 19, 2018, a jury in Lubbock, Texas, found the Petitioner, Frederick Allen, guilty of Conspiracy to Possess with Intent to Distribute Cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C), and of Distribution and Possession with Intent to Distribute Cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). [Crim. Doc. 169].** On July 20, 2018, the District Court sentenced him to 188-months in federal prison after alleging he must have lied when testifying to his own innocence. The jury acquitted him of all other counts. [Crim. Doc. 211].

Allen timely appealed through counsel; however, the Fifth Circuit affirmed his conviction and sentence on May 01, 2019. [United States v. Allen, 769 F. App'x 138 (5th Cir. 2019)].

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**• Allen's Criminal Case No. 6:17-cr-063-C-02 (N.D. Tex.)
↳ Criminal Appeal Case No. 18-10958 (5th Cir.)
• His Civil Case No. 6:20-cv-075-C (N.D. Tex)
↳ Civil Appeal Case No. 21-10274 (5th Cir.)

THE PETITIONER NEXT SUBMITTED A TIMELY MOTION UNDER 28 U.S.C. § 2255 ON JULY 30, 2020, TO VACATE, SET ASIDE, OR OTHERWISE CORRECT HIS SENTENCE. [APPENDIX B]. HE RAISED SEVERAL GROUNDS, MOST NOTABLY THAT HIS COOPERATING CO-DEFENDANT HAD BEEN SELECTIVELY PROSECUTED IN VIOLATION OF INTERNAL DEPARTMENT OF JUSTICE POLICY [SEE APPENDIX C AT 13-14], AND THAT SUCH SELECTIVE PROSECUTION SPARED THAT CO-DEFENDANT, THE GOVERNMENT'S KEY WITNESS, OF A MANDATORY LIFE SENTENCE. [APPENDIX B AT 16]. THE PETITIONER COUCHED THIS AS A DUE PROCESS VIOLATION THAT HE NOW CONCEDES IS PROCEDURALLY BARRED, AND AS AN INEFFECTIVE ASSISTANCE OF COUNSEL VIOLATION AND RELATED STRUCTURAL ERROR, BOTH OF WHICH REMAIN COLORABLE. [SEE APPENDIX A AT 4-5; id. AT 14-18].

IN RESPONSE, THE GOVERNMENT SUBMITTED A CONFLATION OF PRE-AND-POST FIRST STEP ACT OF 2018 LAW ARGUING THE KEY WITNESS NEVER FACED A LIFE SENTENCE, AND FURTHER QUALIFIED THE MISREPRESENTATION BY ARGUING:

ALLEN ARGUES THAT THE GOVERNMENT'S "AGREEMENT" WITH SCOTT [[THE KEY WITNESS]], IN ACTUALITY, SPARED HIM FROM A MANDATORY LIFE SENTENCE. HE IS MISTAKEN. THE ONLY PROVISION OF 21 U.S.C. § 841(b)(1)(A) THAT CARRIES A MANDATORY LIFE SENTENCE INVOLVES A DEFENDANT WHO HAS A QUALIFYING PRIOR CONVICTION AND WHOSE DRUG TRAFFICKING RESULTED IN DEATH OR SERIOUS INJURY.

[APPENDIX B AT 9].

YET, THIS IS FALSE, CONSIDERING THE 2018 AMENDMENT TO 21 U.S.C. § 841 THAT EXPLAINED THE NEWLY MODIFIED STATUTE (VIA THE FIRST STEP ACT OF 2018):

> ACT DEC. 21, 2018 ... SUBSTITUTED "AFTER 2 OR MORE PRIOR CONVICTIONS FOR A SERIOUS DRUG FELONY OR SERIOUS VIOLENT FELONY HAVE BECOME FINAL, SUCH PERSON SHALL BE SENTENCED TO A TERM OF IMPRISONMENT OF NOT LESS THAN 25 YEARS"...

AND THEN SPECIFIED WHAT WAS REMOVED:

> ... FOR "AFTER TWO OR MORE PREVIOUS CONVICTIONS FOR A FELONY DRUG OFFENSE HAVE BECOME FINAL, SUCH PERSON SHALL BE SENTENCED TO A MANDATORY TERM OF LIFE IMPRISONMENT WITHOUT RELEASE."
>
> [21 U.S.C. § 841, AMENDMENT NOTE 2018].

WHEN HE REPLIED, ALLEN PROVIDED THE DEPARTMENT OF JUSTICE

MEMORANDUM SHOWING THE GOVERNMENT HAD BEEN REQUIRED TO "CHARGE AND PURSUE THE MOST SERIOUS, READILY PROVABLE OFFENSE." [APPENDIX C AT 13-14; SEE ALSO id. AT 3-6]. HE, ALLEN, ALSO PROVIDED TRIAL TRANSCRIPT EXCERPTS EVINCING THAT KEY WITNESS'S ADMITTED CRIMINAL HISTORY, BUT WAS NOT ABLE TO DO SO UNTIL HIS RULE 59(e) MOTION, AND LATER HIS COA REQUEST. [APPENDICES H AND I AT 15-19]. NEVERTHELESS, THIS INFORMATION PERMEATED THE RECORD.

THE COURT THEN PLAGIARIZED THE GOVERNMENT'S MISCHARACTERIZED CONFLATION OF PRE-AND-POST FIRST STEP ACT LAW THROUGH A 31-COUNT WORD-FOR-WORD, COMMA-FOR-COMMA UNCITED RECITATION UPON WHICH RELIEF WAS DENIED. [CF. APPENDIX D AT 5]. GOING A STEP FURTHER, THE COURT LABELED THIS GOVERNMENT TRICK AS "WELL-WRITTEN." [id.].

THE PETITIONER SOUGHT CORRECTION OF THIS ERROR THROUGH A MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 59(e) [APPENDIX H], WHICH THAT SAME DISTRICT COURT DENIED IN A THREE-LINE DENIAL LACKING EXPLANATION. [APPENDIX J]. THIS PROMPTED THE PETITIONER TO SUBMIT A MOTION SEEKING RECUSAL

PURSUANT TO 28 U.S.C. §§ 144 AND 455 FOR PERSONAL BIAS. [APPENDIX 5]. IN THIS MOTION, ALLEN SUBMITTED "THE COURT'S PLAGIARISM OF AN UNTENABLE GOVERNMENT ARGUMENT-AND-OBFUSCATION AMOUNTS TO PERSONAL BIAS, PREJUDICE, AND QUESTIONABLE IMPARTIALITY WARRANTING REMOVAL." [Id. AT 05]. THE PETITIONER ARGUED:

> THIS GOVERNMENT MISREPRESENTATION, COUPLED WITH THE SUBSEQUENT PLAGIARISM BY THE COURT, AMOUNTS TO A PERSONAL BIAS AGAINST ALLEN AND IN FAVOR OF THE GOVERNMENT.
> [ ]
> NEEDLESS TO SAY, ANY COURT THAT RIPS A PARTY OFF SANS CITATION OR INDEPENDENT RESEARCH DEMONSTRATES BIAS IN FAVOR OF THAT VERY ENTITY. BY ESPOUSING THE GOVERNMENT'S OUTRIGHT LIE AS "WELL-WRITTEN" AND THE BASIS OF DENYING RELIEF, THIS COURT DEMONSTRATED AN ULTIMATE FORM OF PERSONAL BIAS.
>
> [id. AT 06].

THE PETITIONER CONCLUDED BY ASKING:

> HOW EXACTLY DOES SUCH GOVERNMENTAL MISREPRESENTATIONS AMOUNT TO "WELL-WRITTEN"? RATHER, THE "WELL-WRITTEN" MODIFIER THUS PROFFERED BY THE COURT INDICATES THAT DENYING RELIEF IS FAVORED OVER THE QUEST FOR JUSTICE AND TRUTH. AGAIN, WHY IS THIS COURT'S INQUISITION INTO TRUTH PREDICATED UPON SO MUCH DECEPTION? [CIV. DOC. 9 AT 7].
>
> [id.].

The District Court denied the Motion for Recusal in a two-line order also lacking explanation. [Appendix 15].

The District Court did grant Allen's Request for leave to proceed in forma pauperis in the Court of Appeals. [Appendix G].

Following the District Court's denial of the Petitioner's §2255 motion, he (a) submitted a timely Notice of Appeal [Appendix C]; and (b) subsequently submitted a Request for a Certificate of Appealability ("COA"). [Appendix 2]. In the COA Request, Allen submitted the following claims:

> [1] His Constitutional right to due process was violated when the Government failed to disclose during-or-before trial that its key witness had been spared a mandatory life sentence in exchange for his cooperation.
>
> [2] Allen's Constitutional Right to Effective Assistance of Counsel was violated when his trial counsel failed to recognize the Giglio error as expounded in §1, supra.
>
> [id. at 03].

Moreover, following the District Court's order denying relief, the following issue manifested:

[3] ALLEN'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE DISTRICT COURT PLAGIARIZED A 31-COUNT WORD-FOR-WORD/COMMA-FOR-COMMA MISREPRESENTATION ORIGINALLY ATTRIBUTABLE TO THE GOVERNMENT, AND UPON WHICH RELIEF WAS DENIED.

[APPENDIX L AT 03].

ALLEN ALSO AGAIN PROVIDED AS APPENDICES TO HIS COA REQUEST:

[1] TRIAL TESTIMONY EXCERPTS OF JESSEE [SIC] JAMES SCOTT [CRIM. NO. 220, BEGINNING AT 232] [4 PAGES]

[2] CHART SUMMARIZING JESSEE [SIC] JAMES SCOTT'S CRIMINAL HISTORY [AS DRAWN FROM CRIM. NO. 220] [1 PAGE] **

[3] MOTION FOR RECUSAL PURSUANT TO 28 U.S.C. §§ 144 & 455 [DEVOID FROM DOCKET OF CIV. MATTER] [14 PAGES] ***

[APPENDIX L AT 14].

THE FIFTH CIRCUIT @) BLANKETLY HELD THAT ALLEN DID "NOT ME[E]T" THE STANDARD OF 28 U.S.C. §2253(c)(2), BUT EXPLAINED NOT ANY FURTHER; AND (b) IGNORED HIS PERSONAL BIAS CLAIM. [APPENDIX M].

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** DURING ALLEN'S TRIAL, A FELONY DRUG OFFENSE WAS DEFINED AS A DRUG-RELATED FELONY THAT "ANY FEDERAL OR STATE OFFENSE CLASSIFIED BY APPLICABLE FEDERAL OR STATE LAWS AS A FELONY." [PUB. L. NO. 91-513, § 102(13), 84 STAT. 1236, 1244 (1970); 21 U.S.C. § 802(13)]. A MANDATORY LIFE SENTENCE ONLY REQUIRED TWO BEFORE THE FSA OF 2018.

*** THIS MOTION WAS WITHHELD FROM THE PUBLIC E.C.F. ("PACER") DOCKET UNTIL ALLEN COMPLAINED OF ITS ABSENCE TO THE FIFTH CIRCUIT.

The Petitioner then filed a timely Motion for Reconsideration/Panel Rehearing Pursuant to Federal Rule of Appellate Procedure 40 that argued:

> Allen will show his request for a COA presented reversible error, including his attorney's failure to have preserved it, that is debatable among jurists of reason. Specifically, Allen will show his cooperating codefendant was spared a mandatory life sentence in exchange for his testimony implicating Allen.
> [ ]
> Yet, during briefing in the District Court, the Government conflated pre-and-post - First Step Act of 2018 ("FSA") law by arguing a life sentence was contingent upon a showing of drug trafficking that resulted in "death or serious bodily injury."
> [ ]
> Similarly, the Court referenced this argument as "well written" and denied Allen's motion on this basis. While this is true today, it was not the law during Allen's pre-trial and trial proceedings.

[Appendix N].

The Fifth Circuit stated simply and without explanation:

> The panel has considered appellant's motion for reconsideration/panel rehearing... the motion is Denied.**

[Appendix O].

---

** This order also falsely claimed "this panel previously denied" the COA request; however, this is a lie considering only Judge Graves did so.

THIS PETITION FOR WRIT OF CERTIORARI FOLLOWS.

## Reasons for Granting the Writ

When the Government lands a deal with a major drug dealer to implicate others in exchange for a dramatic reduction in his ultimate sentence exposure, that deal is considered evidence under the bounds of Brady v. Maryland, 373 U.S. 83 (1963), and under the bounds of Giglio v. United States, 405 U.S. 150 (1972). Failure to disclose that he would not be prosecuted (or charged) as severely if he testified for the Government is structural error, Giglio, 405 U.S. at 154, as was the case for the Government's key witness, the only person who allegedly linked the Petitioner to the case.

At trial, the Government theorized that Allen, the Petitioner, "[I]sn't just a drug dealer. He's the guy that sales to drug dealers." [Tr. Vol. 1, p. 72, ln. 4-5]. The Government then presented the compartmentalization of three tiers of drug dealers in any Drug Trafficking Organization ("DTO"):

- TOP TIER: PRIMARY SOURCE OF SUPPLY WITHIN THE UNITED STATES WHERE TOP TRAFFICKERS ACT AS INVISIBLE GO-BETWEENS SOURCES OF DRUGS BETWEEN MEXICAN DRUG CARTELS;

- MID TIER: WHERE MIDDLEMEN SERVE TO INSULATE THE UPPER ECHELON FROM THE STREET LEVEL DRUG DEALERS;

- LOW TIER: STREET-LEVEL DRUG DEALERS.

[TR. VOL. 1, P. 86, LN. 1- THROUGH- P. 113, LN. 17].

THE GOVERNMENT'S THEORY WAS THAT ALLEN WAS THE TOP LEVEL WHO REMAINED INVISIBLE TO THE LOWER-LEVEL STREET DEALERS GUY JACKSON, MICHAEL HARRIS, LYRICK LAWRENCE, AND JEANETTA SMITH. THE MIDDLEMAN WAS JESSE JAMES SCOTT - THE KEY WITNESS WHO TIED ALLEN TO THE DTO. WITHOUT SCOTT'S TESTIMONY THAT NAMED ALLEN AS HIS SO-CALLED SUPPLIER, ALL THAT REMAINED WAS A SERIES OF VAGUE COMMUNICATIONS WITH INDIVIDUALS WHO HAD A REPUTATION OF BEING INVOLVED IN THE DRUG TRADE - BUT WHO ALSO HAPPENED TO BE CLOSE RELATIVES OF ALLEN. [TR. VOL. 1, P. 175, LN. 10-11; P. 252, LN. 14-20; P. 186, LN. 1-13; TR. VOL. 2, P. 170, LN. 7-THROUGH-P. 175, LN. 9; P. 238, LN. 10-23].

THERE, TOO, WAS PRESENTED AMPLE EVIDENCE, INCLUDING A PERSONAL

ADMISSION, THAT SCOTT HAD DISTRIBUTED IN EXCESS OF OVER A POUND OF CRACK COCAINE. [TR. VOL. 2, P. 245, LN. 19-24; P. 246, LN. 3-15; APPENDIX L AT 05-06, 14-19].** THAT LEVEL OF DISTRIBUTION FALLS SQUARELY INTO THE THRESHOLDS TRIGGERING THE UPPER SENTENCING PROVISIONS OF 21 U.S.C. § 841(b)(1)(A), WHICH REQUIRES ONLY AN AMOUNT OF CRACK COCAINE IN EXCESS OF 280 GRAMS. [cf. APPENDIX B AT 9; cf. ALSO APPENDIX D AT 5].

SIMPLY, THE GOVERNMENT THEORIZED THAT ALLEN WAS THE TOP LEVEL SUPPLIER, AND PROVIDED THE TESTIMONY OF SCOTT IN AN ATTEMPT TO SUBSTANTIATE THIS CLAIM. YET, THE GOVERNMENT LATER DEBUNKED ITS OWN THEORY BY LAUNCHING INTO THE FOLLOWING OUTRAGEOUS MISCHARACTERIZATION:

> YOUR HONOR, WHEN I ENDED MY TESTIMONY EARLIER, I HAD ASKED [ALLEN] ABOUT IF HE HAD ANY TIES TO CARTELS OR IF HE KNEW A SPECIFIC PERSON TIED TO A CARTEL. I CONFERRED WITH DEFENSE COUNSEL AND WENT UP TO MY OFFICE

---

** ALTHOUGH THE GOVERNMENT'S THEORY ALLEGED THE PETITIONER WAS IN THE TOP TIER, THE AUSA LATER ADMITTED:

> WE DO NOT BELIEVE THE DEFENDANT... IS TIED TO THE CARTEL IN ANY WAY.
>
> [TR. VOL. 4, P. 138, LN. 15-22].

TO DOUBLE-CHECK MY WORK, AND THE NUMBER I HAD TYPED IN WAS INADVERTENTLY THE WRONG NUMBER.

[TR. VOL. 4, P. 138, LN. 15-22].

## THE ISSUES

[1] WAS FREDERICK ALLEN'S CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL VIOLATED WHEN HIS TRIAL COUNSEL FAILED TO RECOGNIZE AND OBJECT TO A GIGLIO ERROR MANIFEST WHEN THE GOVERNMENT FAILED TO DISCLOSE DURING OR BEFORE TRIAL THAT THE KEY WITNESS HAD BEEN SPARED A MANDATORY LIFE SENTENCE IN EXCHANGE FOR HIS COOPERATION?

WHEN THE PETITIONER'S COOPERATING CO-DEFENDANT WAS ARRESTED, HE SHOULD HAVE BEEN FACING A MANDATORY LIFE SENTENCE. [SEE STATEMENT OF THE CASE, SUPRA]. DURING TRIAL, THE GOVERNMENT CONCEALED THIS FACT (AND HAS, ALONG WITH THE DISTRICT COURT, ACTIVELY OBFUSCATED IT, WHICH WILL BE DISCUSSED AT LENGTH IN ISSUE 2, INFRA). YET, AS THIS IS CONSIDERED EVIDENCE IRRESPECTIVE OF THE GOVERNMENT'S GOOD-OR-BAD FAITH [BRADY, 373 U.S. AT 87], AND WHETHER NON-DISCLOSURE WAS THE "RESULT OF NEGLIGENCE OR DESIGN, IT IS THE RESPONSIBILITY OF THE PROSECUTOR... [AND] [T]HE PROSECUTOR'S OFFICE IS AN ENTITY AND AS SUCH [] IS THE SPOKESMAN FOR THE GOVERNMENT." [GIGLIO, 405 U.S. AT

154]. So, WHETHER THE AUSA INTENTIONALLY UNDERCHARGED SCOTT [AS ALLEN CONTENDS (a) THE EVIDENCE SHOWS; AND (b) VIOLATED THE GOVERNMENT'S PRESUMPTION OF REGULARITY] OR DID SO OUT OF NEGLIGENCE, IT MATTERS NOT FOR DUE PROCESS (OR, AS ARGUED BELOW, FOR A SUCCESSFUL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM). THE EVIDENCE SHOWS, HOWEVER, THAT THE GOVERNMENT HAD BEEN PLACED ON NOTICE BY THEN-ATTORNEY GENERAL JEFF SESSIONS, AND FAILING TO FOLLOW INTERNAL POLICY IMPLICATES THE GOVERNMENT'S UNDERCHARGING AS VOLITIONAL.

ULTIMATELY, A CONVICTION SECURED BY THE USE OF FALSE EVIDENCE MUST FALL UNDER THE DUE PROCESS CLAUSE.

A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ("I.A.C.") IS EVALUATED AGAINST THIS COURT'S TWO-PRONGED TEST ESTABLISHED IN STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984). FIRST, A PETITIONER MUST SHOW REPRESENTATION THAT FELL BELOW AN "OBJECTIVE STANDARD OF REASONABLENESS." [Id. AT 689]. SECOND, ABSENT THE ERRORS, THE RESULT WOULD PROBABLY BE DIFFERENT. [Id. AT 694].

THE FACTS AND RECORD OF THIS CASE DEMONSTRATE THE PETITIONER'S COUNSEL WAS UNAWARE OF, OR DID NOT GRASP FEDERAL DRUG LAWS. COUNSEL'S

FAILURE TO HAVE MENTIONED SCOTT'S TRUE SENTENCING EXPOSURE OF A MANDATORY LIFE SENTENCE, ESPECIALLY WHEN THAT CO-DEFENDANT WAS THE ONLY WITNESS TYING ALLEN TO THE DTO, IS REPRESENTATION FALLING BELOW THE OBJECTIVE STANDARD. THIS IS EXEMPLIFIED BY THE FOLLOWING ADMISSION BY THE COOPERATING CO-DEFENDANT ("SCOTT"):

GOV'T: NOW, SIR, IF IT WAS UP TO YOU, WOULD YOU NOT WANT TO BE IN JAIL?

SCOTT: YES.

GOV'T: AND I ASSUME THAT, I MEAN, YOU HAVE CHILDREN. CORRECT?

SCOTT: EXCUSE ME?

GOV'T: YOU HAVE CHILDREN?

SCOTT: YES, SIR.

GOV'T: AND IF IT WAS UP TO YOU, YOU WOULD WANT TO BE PRESENT IN THEIR LIVES?

SCOTT: YES, SIR.

GOV'T: WOULD YOU EVEN LIE SO YOU COULD BE THERE FOR YOUR KIDS?

SCOTT: TRUTHFULLY, I MEAN, YES.

[TR. VOL. 2, p. 232, Ln. 4-17].

THE FACT THAT THE GOVERNMENT'S KEY WITNESS ADMITTED HE WAS WILLING TO LIE SO HE COULD BE THERE FOR HIS KIDS, WHEN HE WAS FACING A MANDATORY LIFE SENTENCE, WAS THE ULTIMATE IMPEACHMENT OF HIS CREDIBILITY. IT GOING UNNOTICED BY COUNSEL RISES TO IAC.

THE STRUCTURAL ERROR FOUNDED IN THE GOVERNMENT'S FAILURE TO DISCLOSE TO COUNSEL, THE JURY, OR THE COURT THAT IT AGREED TO ELIMINATE THE CO-DEFENDANT'S EXPOSURE TO A LIFE SENTENCE IS A VIOLATION OF ALLEN'S DUE PROCESS WARRANTING A NEW TRIAL. EVEN IF IT WERE VIEWED THAT THE GOVERNMENT'S "MISSTEP" WAS UNINTENTIONAL, ALLOWING IT TO GO UNCORRECTED WOULD SUPPORT A MANIFEST MISCARRIAGE OF JUSTICE.

CONSEQUENTLY, THE MUCH LOWER COA STANDARD REQUIRING A "SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT" IS MORE THAN MET. [28 U.S.C. § 2253(c)(2)]. THIS COURT SHOULD ISSUE A COA.

[2] WAS FREDERICK ALLEN'S CONSTITUTIONAL RIGHT TO DUE PROCESS VIOLATED WHEN THE DISTRICT COURT PLAGIARIZED A 31-COUNT WORD-FOR-WORD/COMMA-FOR-COMMA MISREPRESENTATION ORIGINALLY ATTRIBUTABLE TO THE GOVERNMENT UPON WHICH RELIEF WAS DENIED?

RECUSAL IS REQUIRED WHEN A JUDGE HARBORS A "PERSONAL BIAS" CONCERNING A PARTY [28 U.S.C. §§ 144, 455(b)(1)], OR WHEN HIS OR HER IMPARTIALITY MIGHT REASONABLY BE QUESTIONED. [Id., § 455(a)]. ALLEN ARGUED IN A RECUSAL MOTION [APPENDIX 1 AT 04-09] THAT RECUSAL OF THE HON. SAMUAL R. CUMMINGS WAS WARRANTED IN LIGHT OF THE COURT HAVING PLAGIARIZED A GOVERNMENT MISSTATEMENT UPON WHICH RELIEF WAS DENIED. [Id. AT 4]. THIS RECUSAL MOTION WAS FURTHER SUPPORTED WHEN THE COURT CALLED THE GOVERNMENT'S RESPONSE AS "WELL-WRITTEN" DESPITE FOREKNOWLEDGE THAT IT MISREPRESENTED THE LAW.

JUDICIAL RECUSAL IS A HEAVY TOPIC AND RARE REMEDY, BUT VERY WARRANTED:

> [I]F A JUDGE HAS A PERSONAL BIAS CONCERNING A PARTY, IF HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED, OR IF HE HAS PERSONAL KNOWLEDGE OF THE DISPUTED EVIDENTIARY FACTS CONCERNING THE PROCEEDING.

[Jejero v. Portfolio Recovery Assocs., L.L.C., 995 F.3d 453, 463 (5th Cir. 2020)].

The relevant section addressing judicial disqualification holds that, "any... judge... of the United States shall disqualify himself in any proceeding in which his partiality might reasonably be questioned." [28 U.S.C. §455(a)]. Moreover:

> [The judge] shall also disqualify himself... where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> [id., subsection (b)(1)].

"'Proceeding' includes pretrial, trial, appellate review, or other stages of litigation" [id., subsection (d)(1)], and where waivers are possible under specific circumstances. [id., subsection (e)].

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The sister section addressing the bias or prejudice of a judge holds:

> Whenever a party to any proceeding in a District Court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice

EITHER AGAINST HIM OR IN FAVOR OF ANY ADVERSE PARTY, SUCH JUDGE SHALL PROCEED NO FURTHER THEREIN, BUT ANOTHER JUDGE SHALL BE ASSIGNED TO HEAR SUCH PROCEEDING.

[28 U.S.C. § 144].

THIS SECTION GOES ON TO DELINEATE THE REQUIREMENTS OF THAT VERY AFFIDAVIT:

> THE AFFIDAVIT SHALL STATE THE FACTS AND THE REASONS FOR THE BELIEF THAT BIAS OR PREJUDICE EXISTS[.]
>
> [id.].

IT ALSO ESTABLISHES A DEADLINE THAT SUCH "SHALL BE FILED NOT LESS THAN TEN DAYS BEFORE THE BEGINNING OF THE TERM [SESSION] AT WHICH THE PROCEEDING IS TO BE HEARD" [id.], BUT PROVIDES A REMEDY TO TOLL THAT DEADLINE SHOULD "GOOD CAUSE... BE SHOWN FOR FAILURE TO FILE IT WITHIN SUCH TIME." [id.].

THE TEST OF WHETHER TO RECUSE UNDER 28 U.S.C. § 455(a) IS ONE OF "OBJECTIVE REASONABLENESS." [UNITED STATES V. CERCEDA, 139 F.3d 847, 852 (11TH CIR. 1948)]. SPECIFICALLY, THIS IS A TEST OF WHETHER "AN OBJECTIVE, DISINTERESTED, LAY OBSERVER FULLY INFORMED OF THE FACTS UNDERLYING THE GROUND ON WHICH

THE RECUSAL WAS SOUGHT WOULD ENTERTAIN A SIGNIFICANT DOUBT ABOUT THE JUDGE'S IMPARTIALITY. [id.].

LASTLY, SECTIONS 144 AND 455(b)(1) ARE GOVERNED BY THE SAME PRINCIPLES. [LITEKY V. UNITED STATES, 510 U.S. 540, 548-51 (1994)].

a. THE COURT'S PLAGIARISM OF AN UNTENABLE GOVERNMENT ARGUMENT AND OBFUSCATION AMOUNTS TO PERSONAL BIAS, PREJUDICE, AND QUESTIONABLE IMPARTIALITY WARRANTING REMOVAL

IN THIS CASE, THE DISTRICT COURT YIELDED ITS SWORN DUTY TO THE GOVERNMENT BY PLAGIARIZING A 31-COUNT, WORD-FOR-WORD, COMMA-FOR-COMMA MISREPRESENTATION ORIGINALLY SUBMITTED BY THE GOVERNMENT IN ITS RESPONSE TO ALLEN'S §2255 MOTION. [SEE APPENDIX B AT 09; cf. APPENDIX D AT 5].

THE PETITIONER SHOWS IN THE "STATEMENT OF THE CASE" SECTION, SUPRA, HOW THIS WAS A CONFLATION OF PRE-AND-POST FIRST STEP ACT LAW, HOW HE REPEATEDLY SOUGHT CORRECTION OF THE ERROR, AND LATER ACCOUNTABILITY, WHICH WAS DENIED BY THE FIFTH CIRCUIT, WHO REFUSED TO EVEN ACKNOWLEDGE ALLEN'S PROTEST THEREOF. [APPENDIX L AT 10-12; cf. APPENDICES M AND O]. INDEED, IF THE HON. CUMMINGS DID NO WRONG, THEN WHY DID HE INITIALLY CONCEAL THE

RECUSAL MOTION FROM THE E.C.F. ("PACER") DOCKET, ONLY TO ADD IT FOLLOWING ALLEN'S COMPLAINT TO THE FIFTH CIRCUIT? [APPENDIX L AT 14; SEE E.C.F. DOCKET FOR CASE NO. 6:20-CV-075-C (N.D. TEX.) ON APRIL 28, 2021; cf. WITH SAME E.C.F. DOCKET FOR PRESENT DAY]. THIS ACT ALONE SHOULD PROMPT THIS COURT TO TAKE THIS CASE; FOR THE FEDERAL BENCH DESERVES MORE, AND NOT LESS, TRANSPARENCY AND ACCOUNTABILITY.

## FINAL QUESTIONS

SO, WHEN CONFRONTED WITH THE WITNESS-IMPEACHING ARGUMENT, WHY DID AUSA AMY J. MITCHELL CONFLATE PRE-AND-POST FIRST STEP ACT LAW? WHY DID THE DISTRICT COURT COPY IT WORD-FOR-WORD AND USE IT TO DENY RELIEF WHILE CALLING IT "WELL-WRITTEN"? WHY DID THAT SAME COURT SIMILARLY PREVENT THE RECUSAL MOTION FROM APPEARING ON THE PUBLIC E.C.F. DOCKET UNTIL MENTION THEREOF WAS MADE TO THE FIFTH CIRCUIT? WHY DID THE GOVERNMENT ALLEGE THE PETITIONER WAS CONNECTED TO THE "CARTEL," ONLY LATER TO REFUTE ITS OWN CLAIM? WHY WAS THE COOPERATING

CO-DEFENDANT UNDERCHARGED IN VIOLATION OF MANDATORY D.O.J. POLICY TO "CHARGE AND PURSUE THE MOST READILY PROVABLE OFFENSE"? WHY DID THE FIFTH CIRCUIT TWICE REFUSE TO ACKNOWLEDGE ALLEN'S RECUSAL CLAIM AND MOTION?

WHAT ON EARTH ARE THOSE COURTS UP TO? AS SHOWN ABOVE AND REPEATEDLY THROUGHOUT THE RECORD, OVER AND OVER AGAIN HAS THE PETITIONER, FREDERICK ALLEN, BEEN SUBJECTED TO PROCEEDINGS WHOLLY UNFAIR. HE POINTS OUT THAT THE JURY ACQUITTED HIM OF ALL OTHER CHARGES SAVE FOR THE TWO FORMING THE BASIS OF THIS PETITION FOR A WRIT OF CERTIORARI, AND THE GOVERNMENT HAS RESORTED TO, FOR LACK OF A BETTER DESCRIPTOR, DECEPTION IN RESPONDING TO HIS §2255. HE PRAYS THE SUPREME COURT OF THE UNITED STATES INTERVENES AND RESTORES JUSTICE IN THE FORM OF A CERTIFICATE OF APPEALABILITY, EITHER BY WAY OF DIRECT RELIEF OR A WRIT OF CERTIORARI. IN THE ALTERNATIVE, AND IN LIGHT OF THE RAMPANT MISCONDUCT OF BOTH THE DISTRICT AND APPELLATE COURT, HE ASKS THE SUPREME COURT TO ISSUE BOTH A C.O.A. AND A WRIT OF CERTIORARI TO HEAR HIS CASE.

THANK YOU.

# Conclusion

The Court should issue a Certificate of Appealability (COA) and remand to the Fifth Circuit for further proceedings; however, due to the Fifth Circuit's repeated refusal to cure the record and hold the District Court accountable, this Court should issue the COA and a writ of certiorari to hear Allen's appeal.

The Court should determine whether sanctions against the following entities are appropriate: Assistant United States Attorney (AUSA) Russell Lorfing; AUSA Amy J. Mitchell; United States District Judge Samuel R. Cummings; Fifth Circuit Judges Southwick, Graves, and Costa.

Respectfully Submitted,

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