

A P P E N D I X A

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District for the Eastern District of Texas
Name (under which you were convicted): Frederick Allen	Docket or Case No.:
Place of Confinement: FCC P.O. Box 26020, Beaumont, Texas 77720	Prisoner No.: 30816-479
UNITED STATES OF AMERICA	Movant (include name under which convicted) V. FREDERICK ALLEN

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

U.S. District Court
San Angelo, Texas

(b) Criminal docket or case number (if you know): 6:17-CR-063-C-2

2. (a) Date of the judgment of conviction (if you know): _____

(b) Date of sentencing: July 20, 2018

3. Length of sentence: 188 months

4. Nature of crime (all counts):

21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(C): Conspiracy to Possess with Intent
to Distribute Cocaine

5. (a) What was your plea? (Check one)

(1) Not guilty

(2) Guilty

(3) Nolo contendere (no contest)

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one)

Jury

Judge only

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes No

APP A-01

8. Did you appeal from the judgment of conviction? Yes No

9. If you did appeal, answer the following:

(a) Name of court: U.S. Court of Appeals for the Fifth Circuit

(b) Docket or case number (if you know): 18-10958

(c) Result: Affirmed

(d) Date of result (if you know): May 1, 2019

(e) Citation to the case (if you know): _____

(f) Grounds raised:

Whether the District Court erred by Applying Sentencing Enhancements for
Obstruction of Justice and Organizer / Leader

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes No

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

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

APP A-02

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket of case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes No

(2) Second petition: Yes No

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

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Government Committed Giglio Error in Failing to Disclose Agreement with Its Sole Witness, Jesse James Scott, Who Tied Allen to Conspiracy.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Memorandum of Law in Support attached hereto.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

Defense Counsel was not familiar enough with federal drug laws to understand Scott was facing mandatory LIFE sentence but for cooperation.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

APP A-04

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: Ineffective Assistance of Counsel - Failure to Recognize Giglio Error

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Memorandum of Law attached hereto.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

The record was insufficient to raise this issue on direct appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No

APP A-07

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If you answer to Question (c)(1) is "Yes," state:

APP A-08

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

See explanation provided for Claims One through Three identified immediately above.

APP A-09

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes No
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

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

(a) At the preliminary hearing:

Maverick Ray, 310 Main Street, Ste 300, Houston, Texas 77002

(b) At the arraignment and plea:

Same

(c) At the trial:

X Same

(d) At sentencing:

X Same

(e) On appeal:

X Seth Kretzer, 440 Louisiana, Suite 1440, Houston, Texas 77002

(f) In any post-conviction proceeding:

Y N/A

(g) On appeal from any ruling against you in a post-conviction proceeding:

N/A

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

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes No

APP A-10

18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

X **This motion is timely filed within one year of the Judgment becoming final.**

* The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

APP A-11

Therefore, movant asks that the Court grant the following relief:

Vacate ~~Antonik's~~ convictions; permit ~~Antonik~~ to plea to the Government's plea offer or plead to the indictment; permit resentencing.

or any other relief to which movant may be entitled.


Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on July 23, 2020

(month, date, year)

Executed (signed) on July 23, 2020 (date)


Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

APP A-12

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

**MEMORANDUM OF LAW
IN SUPPORT OF
MOTION UNDER 28 U.S.C. § 2255 TO VACATE,
SET ASIDE, OR CORRECT SENTENCE BY A
PERSON IN FEDERAL CUSTODY**

Frederick Allen, Defendant / Movant pro se ("Allen"), moves for vacatur of his conviction and / or correction of his sentence based on the constitutional infirmities thereof.

STATEMENT OF FACTS

Allen submits the following relevant facts for consideration in support thereof:

1. Allen was charged with conspiracy to distribute and possession with intent to distribute controlled substances under 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C).
2. Allen proceeded to trial where he was ultimately convicted by a jury of two of the six counts; those related to cocaine.
3. On July 20, 2018, the Court sentenced Allen to 188 months in prison.
4. Allen took appeal therefrom, and the Fifth Circuit affirmed on May 1, 2019.

(1) APP A - 13

DISCUSSION

Allen presents claims of structural error and ineffective assistance of counsel related to his conviction and ultimate sentence imposed. The structural errors are founded in prosecutorial misconduct in violation of Allen's constitutional due process protections. The ineffective assistance of counsel errors are founded in the Sixth Amendment requirements of a reasonable performance of counsel on behalf of Allen and a duty to provide an unprejudiced result.

I. Government Committed Giglio Error In Failing to Disclose Agreement with Its Sole Witness, Jesse James Scott, Who Tied Allen to Conspiracy.

When the Government makes 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, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Failure to disclose an alleged promise made to the Government's key witness that he would not be prosecuted as severely if he testified for the Government is a structural error. Giglio, 405 U.S. at .

A conviction secured by the use of false evidence must fall under the due process clause where the state, although not soliciting the false evidence, allows it to go uncorrected. Under the due process clause, the prosecution's suppression of material evidence justifies a new trial irrespective of the prosecution's good faith or bad faith. Id.

A. The Government's Theory at Trial.

At trial, the Government's drum beat was consistent: one undeniable fact, "that Mr. Allen isn't just a drug dealer. He's the guy that sells drugs to drug dealers." [Tr. Vol 1, p. 72, ln. 4-5]. The Government presented the compartmentalization of three tiers of drug dealers in any Drug Trafficking Organization ("DTO"); the top tier consisting of the primary source of supply within the U.S. where top traffickers act as invisible go between sources of drugs from Mexican drug cartels; the middle tier where middle men serve to insulate the upper echelon from the street level drug dealers. [Tr. Vol 1, p. 86, ln. 1 through p. 113, ln. 17].

The Government's theory of the case was that Allen was the top level dealer who remained invisible to the lower level street dealers, Guy Jackson, Michael Harris, Lyrick Lawrence, and Jeanetta Smith. The middle man was Jessie James Scott, the key witness who tied Allen to the DTO. Without Scott's testimony that it was Allen who supplied him all of the drugs he sold to the lower level dealers, 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 to Allen. [Tr. Vol 1, p. 175, ln. 10-11; p. 252, ln. 14-20; p. 186, ln. 1-13; Vol 2, p. 170, ln. 7 through p. 175, ln. 9; p. 238, ln. 10-23].

There was ample evidence that Scott had distributed in excess of "over a pound" of crack cocaine. [Tr. Vol. 3, p. 245,

ln. 19-24; p. 246, ln. 3-15]. 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 cocaine base (crack cocaine), greater than 280 grams.

Moreover, the mandatory sentencing provisions of § 841(b)(1)(A) require a LIFE sentence for defendants who have been previously convicted of two serious drug offenses as had Scott. [Tr. Vol 2, p. 234, ln. 1-24]. The Government proffered from Scott that, "[o]ther than the agreement for the U.S. to allow you to plead to just that one count, have you received any other benefit, to your knowledge?" To which Scott replied, "No." [Tr. Vol 2, p. 228, ln. 19-21]. The "benefit" that Scott was pleading guilty to one count of a violation of § 841(b)(1)(B) with a mandatory minimum sentence of 120 months, the sentence he ultimately received, rather than to a count of § 841(b)(1)(A) with a mandatory LIFE sentence was withheld from everyone in clear violation of Giglio.

This structural error is particularly egregious in the context of Scott's admission that he was even willing to lie so he could be there for his kids, a statement that was completely glossed over and never again mentioned by any party during the entirety of the proceedings. [Tr. Vol. 2, p. 232, ln. 4-17]. In fact, this response was so astonishing, particularly in light of the fact that it was in response to a line of questions from the Government and was never mentioned by defense counsel, that it demands repeating here:

(4)

APP A-16

Q: Now, sir, if it was up to you, would you not want to be in jail?

A: Yes.

Q: And I assume that. I mean, you have children. Correct?

A: Excuse Me?

Q: You have children?

A: Yes, sir.

Q: And, sir, if it was up to you, you would want to be present in their lives?

A: Yes, sir.

Q: Would you even lie so you could be there for your kids?

A: 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 faced with a mandatory life sentence, was the ultimate impeachment of his credibility. That this went unnoticed by counsel rises to the level of ineffective assistance forming the basis of Allen's second claim.

The structural error founded in the Government's failure to disclose to counsel, the jury, or the Court that it had agreed to eliminate Scott's exposure to a life sentence is a violation of Allen's due process rights that justifies a new trial. Even were it somehow viewed that the Government's misstep were unintentional, allowing it to go uncorrected would support a manifest miscarriage of justice.

II. Counsel Provided Ineffective Assistance of Counsel Below Any Reasonable Standard. This Deficient Performance Prejudiced Allen Allowing Structural Errors to Persist.

A claim of ineffective assistance of counsel is evaluated against the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." Id. at 689. Second, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. See also, Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000).

The facts of this case, and the record in support thereof, clearly demonstrate that counsel was unaware of the federal drug laws. The fact that counsel never mentioned the fact that Scott, the only witness that tied Allen to the DTO at the center of this case, was facing a mandatory life sentence, was the epitome of ineffectiveness. The fact that he never once mentioned Scott's admitted willingness to lie in order to avoid that life sentence, only compounds counsel's constitutionally intolerable performance.

It is certainly reasonably probable that, had the jury been made aware of these facts, the verdict would have been different. Moreover, these errors compounded the error of the prosecution who railed about Allen's alleged ties to the Sinaloan Drug Cartel despite the admonishment of that error by the Court. Without these critical errors it is certainly reasonably probable that Allen would have been acquitted or the trial would have ended

with a different outcome.

CONCLUSION

WHEREFORE, for the above-stated reasons, and under these legal authoritites, Allen Prays this Honorable Court will vacate his conviction and remand this case for a new trial.

Executed, subscribed, and sworn to under penalty of perjury pursuant to 28 U.S.C. § 1746, on this 22nd day of July, 2020.

Respectfully submitted,

Fred Allen

FREDERICK ALLEN

Reg. No.
Federal Correctional Complex
F.C.I. - Low
P.O. Box 26020
Beaumont, Texas 77720-6020

(7)

APP A-19

A·P·P·E·N·D·I·C·T·B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FREDERICK ALLEN,
Petitioner,
v.

No. 6:20-CV-075-C
(6:17-CR-063-C (02))

UNITED STATES OF AMERICA,
Respondent.

RESPONSE TO 28 U.S.C. § 2255 MOTION

Allen moves the Court to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255. The government opposes Allen's motion because his claim that the government committed *Giglio*¹ error is procedurally defaulted and meritless and because he fails to prove that he received ineffective assistance of counsel.

1. BACKGROUND

A. Statement of the Case

On March 19, 2018, a jury found Allen guilty of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(C), and distribution and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). (CR No. 169.)² On July 20, 2018, the Court sentenced him to 188 months' imprisonment. (CR No. 211.) Allen filed a direct appeal, but the Fifth Circuit affirmed his conviction and sentence on May 1, 2019. *United States v. Allen*, 769

¹ *Giglio v. United States*, 92 S. Ct. 763, 766 (1972) (requiring the government to disclose any evidence affecting the credibility of its witnesses, including any promises of leniency).

² Citations to "CR No. __" refer to the docket of the underlying criminal proceeding. Documents filed in the Section 2255 action are cited as "CV No. __." Other documents will be referenced by title.

APP B-01

F. App'x 138 (5th Cir. 2019). Allen timely filed the instant motion on July 30, 2020.

(CV No. 1.) *See* 28 U.S.C § 2255(f)(1).

B. Statement of the Issues

Allen claims that the government violated the tenets of *Giglio* when it did not "disclose to counsel, the jury, or the Court that it had agreed to eliminate Scott's exposure to a life sentence." (CV No. 2 at 5.) Relatedly, he contends that his trial attorney was constitutionally ineffective for failing to "mention[] the fact that Scott, the only witness that tied Allen to the [drug trafficking organization] at the center of this case, was facing a mandatory life sentence." (CV No. 2 at 6.) Allen's substantive claim of *Giglio* error is procedurally defaulted because he did not raise it on direct appeal. Further, it is meritless because no such agreement existed and because the government disclosed all of the required information about Scott. His ineffective-assistance claim is likewise meritless.

The Court should deny Allen's Section 2255 motion.

C. Statement of Facts

i. Offense Conduct

In November 2016, the Drug Enforcement Administration (DEA) and the San Angelo Police Department began investigating a drug trafficking organization (DTO) that was distributing pharmaceutical pills and other narcotics in the San Angelo area. (PSR ¶ 12.) A confidential source (CS) told law enforcement that he/she had observed multiple pharmaceutical pills at co-defendant Jeannetta Smith's house. (PSR ¶ 15.) The CS arranged for an undercover DEA agent to purchase pills from Smith. (PSR ¶ 15.) The undercover agent purchased 100 Lortab pills, 84 Xanax pills, and 100 Flexeril pills.

APP B-02

(PSR ¶ 16.) Smith also told the undercover agent that she had connections with local doctors and had a source of supply for MDMA (3, 4-methylenedioxy-methamphetamine).

(PSR ¶ 16.) A few months later in February 2017, Smith sold another 100 Lortab pills to the undercover agent. (PSR ¶ 17.)

Smith introduced the undercover agent to codefendant Guy Allen Jackson—her source for MDMA. (PSR ¶ 20.) Jackson sold the undercover agent 27 methamphetamine pills. (PSR ¶ 21.) As the investigation continued, agents learned that codefendant Jesse James Scott was Jackson's source of supply. (PSR ¶ 24.) An undercover agent met with Scott in August 2017. (PSR ¶¶ 25-26.) Scott told the undercover agent that his supplier was in Houston and sold the undercover agent 30 MDMA pills. (PSR ¶ 27.) The undercover agent began buying directly from Scott. (PSR ¶ 28.) Between August and October 2017, Scott sold the undercover agent various pills four separate times. (PSR ¶¶ 28-32.)

On October 17, 2017, the undercover agent called Scott to confirm that their latest transaction was still on. (PSR ¶ 33.) Scott confirmed that he had just "talked to the guy with the other stuff" and that "we good." (PSR ¶ 33.) The last phone call Scott received before talking to the undercover agent was from Allen. (PSR ¶ 33.) On October 21, 2017, Scott met with Allen and paid him \$7,000 for a quarter kilogram of cocaine and approximately 3,000 MDMA pills. (PSR ¶ 35.) The next day Allen delivered the cocaine and MDMA to Scott's house in Baytown, Texas. (PSR ¶¶ 36-38.) Scott then sold the narcotics to the undercover agent. (PSR ¶ 39.)

APP B-03

Scott and Allen were both arrested during the buy/bust operation. (PSR ¶ 42.) In a post-arrest interview, Allen consented to a search of his apartment. (PSR ¶ 51-52.) Agents found almost \$8,000 in currency wrapped in a sock and placed inside a duffle bag along with a heat sealer in the master bedroom closet. (PSR ¶ 52.)

ii. Conviction and Sentencing

Following the jury's verdict, a PSR was prepared. The PSR held Allen accountable for 1,007.03 kilograms of marijuana-equivalent and assigned him a base offense level of 30. (PSR ¶ 60.) After considering the government's objections, the PSR Addendum added the following enhancements: 1) a two-level enhancement for being a leader or organizer of one or more participants, and 2) a two-level enhancement for obstruction of justice based on Allen's false testimony at trial. (CR No. 201-1 (PSR Addendum) at 4.) Allen's total offense level was 34. (CR No. 201-1 at 4.) With a criminal history category of I, the resulting advisory guideline range was 151 to 188 months' imprisonment. (CR No. 201-1 at 5.) The Court sentenced Allen within the applicable guideline range to 188 months' imprisonment. (CR No. 223 at 8.)

2. STANDARD OF REVIEW

Under 28 U.S.C. § 2255, a prisoner may move the convicting court to vacate, set aside, or correct his conviction or sentence. It provides four grounds: "(1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is otherwise subject to collateral attack."

APP B-04

28 U.S.C. § 2255(a); *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996) (citation omitted).

After a guilty verdict and exhaustion of a defendant's right to appeal, the court is "entitled to presume that the defendant stands fairly and finally convicted." *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991). "Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect." *United States v. Frady*, 456 U.S. 152, 164-65 (1982).

Consequently, issues that can be presented in a Section 2255 motion are limited. A defendant can challenge a final conviction only on issues of constitutional or jurisdictional magnitude. *See Shaid*, 937 F.2d at 232. As the Fifth Circuit has stated:

Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding.

United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992) (citations omitted).

Claims that counsel was ineffective allege a constitutional violation that can be raised under Section 2255. *Massaro v. United States*, 538 U.S. 500, 504 (2003). To prevail on an ineffective assistance of counsel claim, the movant must show (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S.

APP B-05

668, 687 (1984). This standard applies regardless of whether the movant pled guilty or not guilty. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Both prongs of the *Strickland* test must be met to demonstrate ineffective assistance. *Strickland*, 466 U.S. at 697.

The movant must first prove his counsel's performance was deficient. Simply making "conclusory allegations" is insufficient. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000). He must identify specific acts or omissions that were not the result of reasonable professional judgment. *Strickland*, 466 U.S. at 690. This "scrutiny . . . must be highly deferential" and "requires that every effort be made to eliminate the distorting effects of hindsight[.]" *Id.* at 689. This is because it is "all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission . . . was unreasonable." *Id.* The Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case" and "evaluate [that] conduct from counsel's perspective at the time." *Id.* at 689-90. To that end, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotations and citations omitted).

Second, a movant must prove that his attorney's deficient performance prejudiced his case. *Id.* This requires showing "counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). There is no prejudice if the deficient performance did not

APP B-06

“deprive the defendant of any substantive or procedural right to which the law entitles him.” *Id.* Put another way, a movant must prove that but for counsel’s errors, “there is a reasonable probability that” the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693-94; *United States v. Bartholomew*, 974 F.2d 39, 41-42 (5th Cir. 1992).

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). The claim fails if the movant does not satisfy either the deficient-performance prong or the prejudice prong. *United States v. Stewart*, 207 F.3d 750, 751 (5th Cir. 2000). And a court need not address both components if there is an insufficient showing on one. *Id.*

Additionally, Section 2255 motions do not automatically require a hearing. *United States v. Hughes*, 635 F.2d 449, 451 (5th Cir. Unit B Jan. 1981); *see also* Rule 8 Governing Section 2255 Proceedings. “When the files and records of a case make manifest the lack of merit of a section 2255 claim, the trial court is not required to hold an evidentiary hearing.” *Hughes*, 635 F.2d at 451.

3. ARGUMENT AND ANALYSIS

Allen’s claim that the government failed to disclose *Giglio* information about its witness, Jesse James Scott, is procedurally barred and meritless, and his related ineffective-assistance-of-counsel claim is likewise unavailing.

Allen claims that the government violated the tenets of *Giglio* when it did not “disclose to counsel, the jury, or the Court that it had agreed to eliminate Scott’s exposure to a life sentence.” (CV No. 2 at 5.) Relatedly, he contends that his trial attorney was constitutionally ineffective for failing to “mention[] the fact that Scott, the only witness

APP B-07

that tied Allen to the [drug trafficking organization] at the center of this case, was facing a mandatory life sentence.” (CV No. 2 at 6.)

As an initial matter, Allen’s substantive claim of *Giglio* error is procedurally defaulted because he did not raise it on direct appeal. Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in collateral proceedings only if the defendant can demonstrate cause for his default and actual prejudice, or that he is “actually innocent.” *Bousley v. United States*, 523 U.S. 614, 622 (1998). “A defendant must meet this cause and prejudice test even when he alleges a fundamental constitutional error.” *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). Only after satisfying the heavy burden to show cause and prejudice may a petitioner obtain a ruling on the merits of a defaulted claim presented in his motion. *United States v. Bondurant*, 689 F.2d 1246, 1250 (5th Cir. 1982). Allen has not alleged, much less proven, cause and prejudice or actual innocence, and the Court should deny his claim as procedurally defaulted.

Further, Allen’s claim is substantively meritless because the only agreement that existed between the government and Scott was fully and properly disclosed to Allen and presented to the jury at trial. The *Giglio* disclosure rule—an extension of *Brady*—requires the prosecution to timely disclose to the defendant all evidence “which impeaches the testimony of a [prosecution] witness where the reliability of the witness may be determinative of guilt or innocence.” *Porretto v. Stadler*, 834 F.2d 461, 464 (5th Cir. 1987). Such evidence includes all plea, sentencing, cooperation, immunity, fee and

APP B-08

other agreements, all promises, inducements and understandings, and all criminal records. *Giglio*, 92 S. Ct. at 766.

Here, as required by *Giglio*, the government timely (in fact, quite early) disclosed Scott's plea agreement, factual resume, plea agreement supplement, proffer agreement, and criminal history. (See CR No. 148 at 3-9 (describing the government's discovery disclosures to Allen's counsel and providing documentation of those disclosures in attached exhibits).) Furthermore, at trial, the government questioned Scott about his plea arrangement with the government. (CR No. 220 at 226-32.) Scott testified that he was allowed to plead guilty to one count of the indictment, that he still faced up to 40 years in prison, that no specific sentence had been promised to him, and that he hoped to receive a recommendation from the government for a lower sentence but he had not been promised one. (CR No. 220 at 226-32.)

Allen argues that the government's "agreement" with Scott, 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 bodily injury. Here, Scott did not meet that criteria, as there was no allegation of death or serious bodily injury. Further, neither the grand jury nor the government charged Scott with any enhanced penalty. Quite simply, a mandatory life sentence was never on the table for Scott; therefore, there would have been no need for such an agreement, and no such agreement existed.

APP B-09

“To establish a due process violation under *Brady*, a habeas petitioner must satisfy three elements.” *In re Raby*, 925 F.3d 749, 759–60 (5th Cir. 2019) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). “First, the evidence suppressed must be favorable to the defendant.” *Id.* at 760. “Second, the [Government] must have suppressed the evidence,” either willfully or inadvertently. *Ibid.* “Third, prejudice must have ensued—*i.e.*, the suppressed evidence must have been material.” *Ibid.* (quotation omitted). For evidence to be material, Allen must show “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). Allen has wholly failed to demonstrate these elements, and in fact, as discussed above, the record shows that the government properly disclosed all required information about Scott. Accordingly, Allen’s claim is meritless in substance.

Finally, because Allen’s substantive claim is meritless, his ineffective-assistance claim fails. An attorney is not constitutionally required to raise meritless arguments or objections. *See Clark v. Collins*, 19 F. 3d 959, 966 (5th Cir. 1994) (“Failure to raise meritless objections is not ineffective lawyering, it is the very opposite.”). “An attorney’s failure to raise a meritless argument [] cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue.” *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999).

APP B-10

4. CONCLUSION

For the foregoing reasons, the government respectfully asks the Court to deny Allen's Section 2255 motion because he fails to demonstrate any constitutional claim warranting relief.

Respectfully submitted,

ERIN NEALY COX
United States Attorney

s/Amy J. Mitchell

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CERTIFICATE OF SERVICE

I certify that on October 2, 2020, I filed this response with the clerk of court for the U.S. District Court, Northern District of Texas. I also certify that a copy of this response was sent to Frederick Allen, Register Number 30816-479, Beaumont FCI-Low, P.O. Box 26020, Beaumont, Texas 77720, by certified mail.

s/Amy J. Mitchell

AMY J. MITCHELL
Assistant United States Attorney

APP B-11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FREDERICK ALLEN,

Petitioner-Defendant;

v.

UNITED STATES OF AMERICA,

Respondent-Plaintiff.

§
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APPENDIX C

CIV. NO. 6:20-cv-075

CRIM. NO. 6:17-063-C-2

REPLY TO RESPONDENT'S ANSWER

Comes FREDERICK ALLEN, Petitioner in the above styled proceedings, and serves this Reply addressing the Government's Answer. Allen will show the record is incomplete, belying the notion that full disclosure was made in accordance with Brady and its progeny. Further, he will show the decision to undercharge Scott violated internal policy of the Attorney General's office; or, in the alternative, was the product of an undisclosed deal with the only witness who purported to link Allen to the alleged conspiracy. For these reasons, the Court should order a new trial.

STATEMENT OF FACTS

- [1] The Government filed its answer on October 02, 2020; and it reached Allen via certified mail on October 09, 2020.
- [2] In the Court's ORDER for service, it provided Allen twenty-one days from the date of the Government's filing in which to file a reply.
- [3] Allen requested an extension in a motion received on October 16, 2020 by this Court. He has not yet heard back.

- [4] In a May 10, 2017 Memorandum, then-Attorney-General Jeff Sessions directs ALL prosecutors under his command to "charge and pursue the most serious, readily provable offense." [Exhibit 1 at 1, ¶ 2].(emphasis added).
- [5] On October 23, 2017, when the sealed criminal complaint was initially filed, Sessions was still the Attorney General and this policy was still active throughout.
- [6] The Government failed to disclose during trial or prior to trial that this policy would not be followed in charging Jesse James Scott.
- [7] Document 148-13 of the underlying criminal docket is incomplete, bearing a header that's paginated sequentially but which disagrees with U.S. Attorney Lorffing's non-sequential paginating skipping page two.
- [8] When reading from page one to page two (as filed and labeled in the record), a non-sequitor manifests.

.....

A memorandum in support is attached.

Respectfully Submitted,

Frederick Allen

Frederick Allen, pro se
Reg. No. 30816-479
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

DECLARATION

I, FREDERICK ALLEN, do hereby declare under penalty of perjury purusant to 28 U.S.C. § 1746 this (con) day of October, 2020, that the foregoing is true and correct to the best of my knowledge.

Executed this (con) day of October, 2020.

Frederick Allen

Frederick Allen, pro se

MEMORANDUM

Frederick Allen ("Allen") submits the Government has mischaracterized its deal with Jesse James Scott, and offers the controlling policy memorandum governing United States Attorneys during the time of arrest, indictment, and trial. [see Exhibit A]. This directive is entitled "Department Charging and Sentencing Policy" and it exhorts that, "[A]ttorneys who implement this policy will meet the high standard of the Department of Justice for charging and sentencing." [id. at 2, ¶ 4]. Indeed, the Government's misconduct in this case reveals a failure to fully and properly charge Scott, thus constituting a breach of this policy.

Sessions, though, provides, "There will be circumstances in which good judgment would lead a prosecutor to conclude that a strict application of the above charging policy is not warranted." [id. at 1, ¶ 3]. However, this deviation must be thoroughly documented, and must "be approved by a United States Attorney or Assistant Attorney General, or a supervisor designated by the United States Attorney or Assistant Attorney General, and the reasons must be documented in the file." [id., ¶ 3]. (emphasis added).

The record fails to reveal this requisite documentation, thus demonstrating that Scott was undercharged. Had he been properly and dutifully charged in accordance with policy, he would have been facing mandatory life; and indeed the record suggests this to be the case because the underlying reasoning is missing. Its absence supports Allen's contention that Scott and the Government failed to disclose the removal of Scott's exposure to a mandatory life sentence.

Such information missing from the record undermined the integrity of the trial and produced too much uncertainty, thereby questioning the validity of the verdict. The result of a trial lacking this information is most certainly a violation of due process.

Allen was unable to raise this issue because he was unable to obtain the Memorandum-in-question until recently; and, the Government failed to disclose it before or during trial, thus constituting cause and prejudice.

Yet, it was upon his attorney to know about this memorandum. So, either the United States Attorney is concealing information, or Allen's counsel was ineffective for failing to raise this issue. Either way, Allen was prejudiced, and should receive a new trial.

THE INCOMPLETE RECORD

Perhaps this missing information is memorialized on page two of Docket Number 148-13 (of the underlying criminal docket); however, that page is not only gone from the record, but was covered up by the Government. [see Document 148-13, revealing Docket pagination as "1 of 3," "2 of 3," and "3 of 3"; however, the Government's self-stylized pagination shows "Page 1," "Page 3," and then "Page 4."] [id., throughout]. Further, a non-sequitor manifests when reading from page one to page "two," supporting Allen's contention of missing information.

This governmental lapse may be the source of the very information upon which the government asserts Scott was properly charged. The information inferred from this missing page likely relates to Allen's alleged rejection of a plea offer (which Allen discovered,

only recently for the first time) and the Government's contention regarding Allen's sentence exposure; as well as Scott's:

As I disclosed, I believe that Mr. Allen qualifies for a mandatory minimum of twenty years in prison as to the drug counts if he is found guilty...I am notifying you at this time there is no other crime, wrong, or act that the Government intends to use at trial...Stipulations...

[see Doc. 148-13 at 1].

From what the document does disclose, it's reasonable to understand prejudicial information against the Government was not disclosed. There is simply too much uncertainty to brush this aside or to assume it did not prejudice Allen because Allen contends he was prejudiced by withheld information regarding Scott's sentence exposure. The irony, of course, is that the document that's missing pages is from the Government's omnibus response alleging it "has met its discovery obligations timely and ethically....[and] has performed its duties diligently and made disclosures in good faith." The Government's alleged diligence is belied by the incomplete record, as well as its ethics are undercut by the Sessions' Memorandum. [see Exhibit A, holding "[P]rosecutors must disclose to the sentencing court all facts that impact the sentencing guidelines or mandatory minimum sentences...Recommendations for sentencing departures or variances require supervisory approval, and the reasoning must be documented in the file."; also see Exhibit 2, article entitled, "Sessions Tell Prosecutors To Seek 'Most Serious' Charges, Stricter Sentences" and offering, "[I]n his speech Friday, Sessions asserted that the policy change is aimed not a low-level drug users,

but rather drug dealers and traffickers... 'If you're a drug trafficker,' [Sessions] said, 'we will not look the other way. We will not be willfully blind to your misconduct.'" see <http://www.npr.org/sections/thetwo-way/2017/05/12/528086525/sessions-tells-prosecutors-to-seek-most-serious-charges-stricter-sentences>, accessed Oct. 16, 2020].

Allen's co-defendant, and the only person who linked Allen to the conspiracy, was labeled a "big player" during trial testimony by the FBI while on cross:

Q: ...So now you're testing to see what else can Jesse James Scott produce. Is that fair to say?

A: That's fair.

Q: ...he tells you...that's [cocaine] what I fuck with; that's my drug. Is that fair?

A: Yes.

Q: All right, before you did this, though, you now have realized that Jesse James Scott is a big player...and so you do something in your investigation when you realize you've got a target, and you know eventually that you're going to want to bust this target, is that fair?

A: That's fair. [see Tr. Vol. 2, p.57, ln. 13-26].

He also saw a need to make a deal with Scott, even though Scott arrived to, at least, one drug deal with his wife/girlfriend in the front seat and his children in the back seat:

Q: And when Mr. Scott showed up, he showed up with his wife in the passenger's seat? Correct?

A: ...[Y]es, it was his girlfriend or companion, yes, sure.

Q: And he had his children in the back seat of the car, correct?

A: Yes.

Q: ...So he brought the whole family up to do his transaction with you. Correct?

A: Yes.

[see id., p.55, ln. 10-19].

These are the same children whom Scott professed a willingness for to lie in order to "be there for" them. [see Tr. Vol. 2, p.232, ln. 4-17]. Yet, by dealing drugs with them in tow, Scott demonstrated he was an unfit parent, as well as he was committing felonies by doing so. In discovering this, the investigating agents had a civic duty to remove immediately those children from Scott, as well as to charge and try him for felony child endangerment. Does the DEA/FBI care to proffer the sanctity of the investigation over the safety of the children? As in response (or lack thereof) to the Sessions' Memorandum, it appears the U.S. Attorney failed society and allowed children suffering abuse to continue as so in order to win.

The Government flashed its contempt for these children by using them as pawns in eliciting Scott's willingness to lie, as well as allowing them to remain with a deadbeat dad demonstrating wonton abuse. Sessions' related speech, however, demanded the U.S. Attorney "not look the other way" in the face of misconduct by a drug trafficker. Rather, said looking seems selective, apparently blind to the needs of helpless children. The tragedy is not Allen's excessive sentence and unfounded conviction, but that Government misconduct of this type was implemented as sound trial strategy. [see Exhibit B at 3].

Regardless, the record supports charging Scott in accordance with the memorandum, facing mandatory life. [see Organized Crime, Exh.C].

Regarding Allen's initial memorandum filed in support of his motion under § 2255, he concedes he committed a scrivener's error on page three, mistakenly labeling the trial volume as "3" when it should be "Tr. Vol. 2" (emphasis added). This reference addresses that Scott was the be held responsible for over a pound of crack cocaine, thus triggering the mandatory life for a third+ time felon like Scott. It is factual, and when considering Sessions' memorandum, it reveals Scott was undercharged, and the reasoning for doing so was withheld and/or concealed by the Government.

SCOTT'S SENTENCE EXPOSURE

Allen agrees with the United States Attorney that "An attorney's failure to raise a meritless argument [] cannot form the basis of a successful ineffective assistance of counsel claim...." [Gov't Res'p at 9]. Allen, however, has revealed his claim does have merit because the record was incomplete, as well as the Government engaged in misconduct in relation to the failure to follow policy and/or failure to properly disclose.

Allen cannot understand why the Government even relied upon Scott in light of the following exchange between a DEA Agent and Allen's attorney:

Q: Because Guy Jackson...couldn't get the large amounts ...but you quickly figured out that Jesse James Scott could, correct?

A: Yes, correct.

...

Q: But this whole conspiracy and...these charges against Mr. Allen, it's your theory and the United States' theory that this is the man supplying Mr. Jesse James Scott?

A: One of Mr. Scott's suppliers.

...

APP C-08

A: Drug dealers, they lie. So I don't know.

[see Tr. Vol. 2, p.51, ln. 9-12; p.52, ln. 14-17; p.54, ln.13, 14].

From the Government's own words is it determined that no faith was held in Scott to be truthful. With this in mind, what is the Government doing making a deal with a man whom it says it cannot believe, and with a man who demonstrated aggravated child abuse but was also not held accountable (despite Session's memo requiring maximum accountability for drug traffickers)? The Government goes on to expand:

A: ...[O]nce again, I'm not Mr. Scott, but that's typical... just like I'm pulling the wool over his eyes, he could be pulling the wool over my eyes, sir.

[id., p.62, ln. 19-21].

Moreover, why is an inquisition into truth predicated upon so much deception? Does this Court honestly believe the Government has not succumbed to such duplicity in order to win? Allen already has demonstrated the Government has done so, with the Government's own words convicting itself, as it later backtracks:

Q: Okay, and how would you described Jesse James Scott?

A: Middle. Middle-level.

[id., p.40, ln. 10, 11].

And yet, while attesting Scott is "middle-level," the Government also attests Scott is a "big player," a "supplier," a "trafficker," and someone who can score "readily [a] large amount." [see id., p.57, ln. 18; p.44, ln.16; p.48, ln. 9; p.66, ln. 17]. The New Testament addresses such duplicity:

⁸But the tongue can no man tame; it is an unruly evil, full of deadly poison.

9 Therewith bless we God, even the Father; and therewith curse we men, which are made after the similitude of God.

10 Out of the same mouth proceedeth blessing and cursing. My brethren, these things ought not so to be.

11 Does a fountain send forth at the same place sweet water and bitter?

12 Can the fig tree, my brethren, bear olive berries? either a wine, figs? so can no fountain both yield salt water and fresh.

[The General Epistle of James, Ch.3,
v. 8-12, Authorized King James Version,
The Scofield Reference Bible, (c) 1909,
1917, renewed 1937, 1945; Oxford Univ.
Press, New York, Inc.].

The principle of estoppel is intended to prevent the Government from attesting as it has, playing multiple and contradictory positions. It's little wonder why the following statement by the Government is unbelievable:

Quite simply, a mandatory life sentence was never on the table for Scott.

[Gov't Res'p at 9].

Is Amy J. Mitchell actually defending the Government's decision to cut a deal with a child abuser in order to secure a win?

CONCLUSION

WHEREFORE, under principles of structural error, ineffective assistance of counsel, and estoppel, this Court should vacate Allen's convictions and order a new trial, and/or other relief.

Respectfully Submitted,

Fred Allen

Frederick Allen, pro se
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FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

DECLARATION

I, FREDERICK ALLEN, do hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 20 day of October, 2020.

Fred Allen
FREDERICK ALLEN, pro se

LIST OF EXHIBITS

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>NO. OF PAGES</u>
A	MEMORANDUM FOR ALL FEDERAL PROSECUTORS FROM: THE ATTORNEY GENERAL JEFF SESSIONS Date: May 10, 2017	2
B	NATIONAL PUBLIC RADIO NEWS ARTICLE "SESSIONS TELLS PROSECUTORS TO SEEK 'MOST SERIOUS' CHARGES, STRICTER SENTENCES	5
C	RELATED CRIMINAL HISTORY INFORMATION RE: JESSE JAMES SCOTT AND MEANS TO HOLD ATTORNEYS ACCOUNTABLE	1

APP C-12



E•X•H•I•B•I•T A

Office of the Attorney General
Washington, D. C. 20530

May 10, 2017

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: THE ATTORNEY GENERAL *[Signature]*
SUBJECT: Department Charging and Sentencing Policy

This memorandum establishes charging and sentencing policy for the Department of Justice. Our responsibility is to fulfill our role in a way that accords with the law, advances public safety, and promotes respect for our legal system. It is of the utmost importance to enforce the law fairly and consistently. Charging and sentencing recommendations are crucial responsibilities for any federal prosecutor. The directives I am setting forth below are simple but important. They place great confidence in our prosecutors and supervisors to apply them in a thoughtful and disciplined manner, with the goal of achieving just and consistent results in federal cases.

First, it is a core principle that prosecutors should charge and pursue the most serious, readily provable offense. This policy affirms our responsibility to enforce the law, is moral and just, and produces consistency. This policy fully utilizes the tools Congress has given us. By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.

There will be circumstances in which good judgment would lead a prosecutor to conclude that a strict application of the above charging policy is not warranted. In that case, prosecutors should carefully consider whether an exception may be justified. Consistent with longstanding Department of Justice policy, any decision to vary from the policy must be approved by a United States Attorney or Assistant Attorney General, or a supervisor designated by the United States Attorney or Assistant Attorney General, and the reasons must be documented in the file.

Second, prosecutors must disclose to the sentencing court all facts that impact the sentencing guidelines or mandatory minimum sentences, and should in all cases seek a reasonable sentence under the factors in 18 U.S.C. § 3553. In most cases, recommending a sentence within the advisory guideline range will be appropriate. Recommendations for sentencing departures or variances require supervisory approval, and the reasoning must be documented in the file.

APP C-13

Memorandum for All Federal Prosecutors
Subject: Department Charging and Sentencing Policy

Page 2

Any inconsistent previous policy of the Department of Justice relating to these matters is rescinded, effective today.¹

Each United States Attorney and Assistant Attorney General is responsible for ensuring that this policy is followed, and that any deviations from the core principle are justified by unusual facts.

I have directed the Deputy Attorney General to oversee implementation of this policy and to issue any clarification and guidance he deems appropriate for its just and consistent application.

Working with integrity and professionalism, attorneys who implement this policy will meet the high standards required of the Department of Justice for charging and sentencing.

¹ Previous policies include: *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (August 12, 2013); and *Guidance Regarding § 851 Enhancements in Plea Negotiations* (September 24, 2014).

APP C-14

HOURLY NEWS

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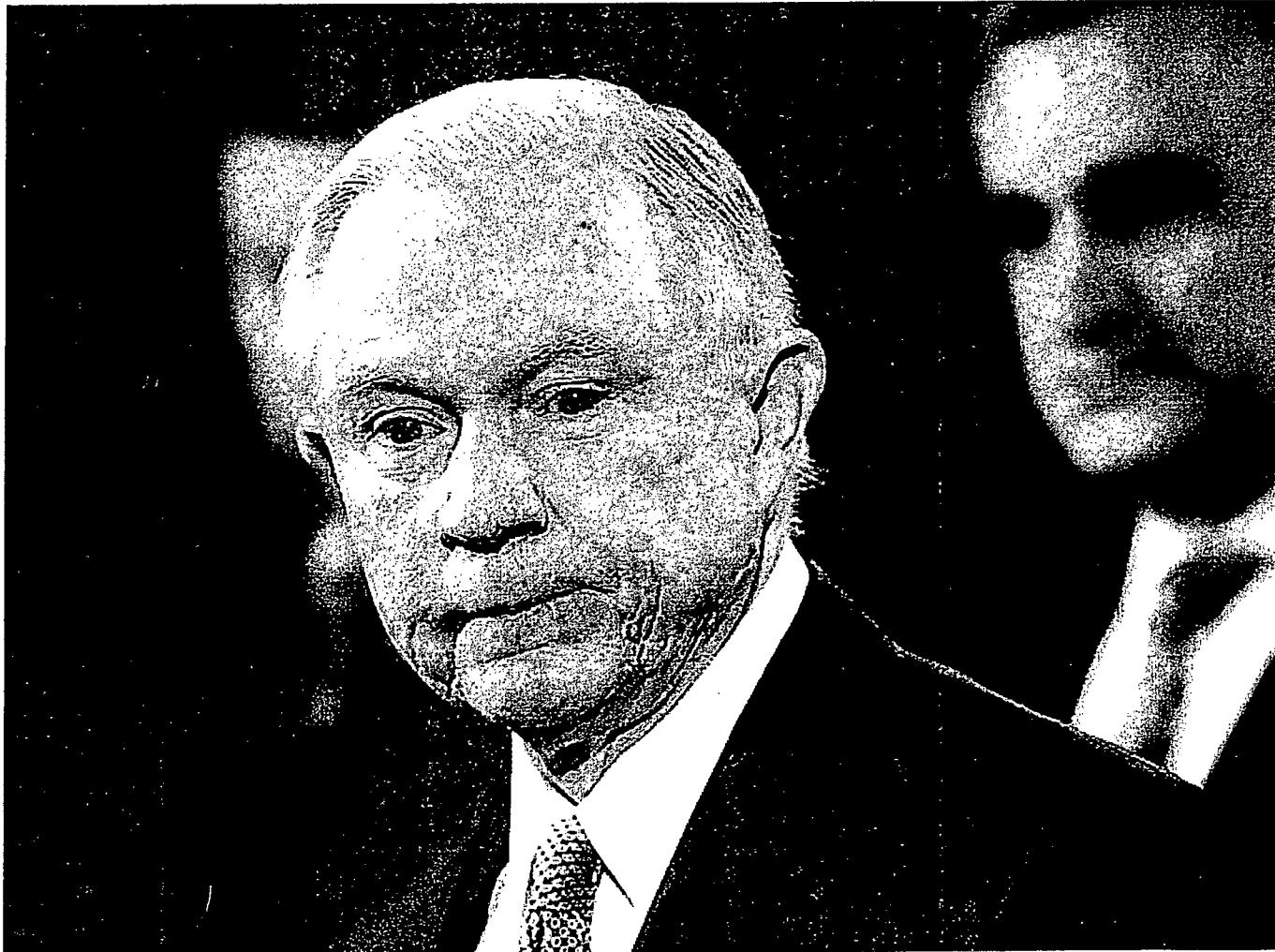
AMERICA

Sessions Tells Prosecutors To Seek 'Most Serious' Charges, Stricter Sentences

May 12, 2017 · 7:45 AM ET



COLIN DWYER



Attorney General Jeff Sessions addresses the Sergeants Benevolent Association of New York City at an event Friday in Washington, D.C. During his speech, Sessions said federal prosecutors "deserve to be unhandcuffed and not micromanaged from Washington."

APP C-15

Win McNamee/Getty Images

Updated at 12:10 p.m. ET**E•X•H•I•B•I•T B**

In a memo to staff, Attorney General Jeff Sessions ordered federal prosecutors to "charge and pursue the most serious, readily provable offense" — a move that marks a significant reversal of Obama-era policies on low-level drug crimes.

The two-page memo, which was publicly released Friday, lays out a policy of strict enforcement that rolls back the comparatively lenient stance established by Eric Holder, one of Sessions' predecessors under President Barack Obama.

"This policy affirms our responsibility to enforce the law, is moral and just, and produces consistency. This policy fully utilizes the tools Congress has given us," Sessions told thousands of assistant U.S. attorneys in the memo. "By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences."

He elaborated on the memo in a brief speech to the Sergeants Benevolent Association of New York City, which honored him with an award Friday in Washington, D.C.

"Charging and sentencing recommendations are bedrock responsibilities of any prosecutor. And I trust our prosecutors in the field to make good judgments," Sessions said. "They deserve to be unhandcuffed and not micromanaged from Washington."

Article continues below

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APP C-16

Holder had asked prosecutors to avoid slapping nonviolent drug offenders with crimes that carried mandatory minimum sentences, practices that, as NPR's Tamara Keith

explains, "give judges and prosecutors little discretion over the length of a prison term if a suspect is convicted." Holder's recommendation had been aimed partly at helping reduce burgeoning prison populations in the U.S.

E•X•H•I•B•I•T B



THE TWO-WAY

Holder Decries 'Draconian Mandatory Minimum Sentences'



THE TWO-WAY

Holder Backs Reduced Sentences For Some Drug Traffickers

Now, if prosecutors wish to pursue lesser charges for these low-level crimes, they will need to obtain approval for the exception from a U.S. attorney, assistant attorney general or another supervisor.

But in his speech Friday, Sessions asserted that the policy change is aimed not at low-level drug users, but rather drug dealers and traffickers.

"If you are a drug trafficker," he said, "we will not look the other way. We will not be willfully blind to your misconduct."

Keith notes this marks a return to the "tough-on-crime philosophy" of the 1980s and '90s — a return that advocacy groups have feared for some time.



POLITICS

DEA Seeks Prosecutors To Fight Opioid Crisis; Critics Fear Return To War On Drugs

"This is a disastrous move that will increase the prison population, exacerbate racial disparities in the criminal justice system, and do nothing to reduce drug use or increase public safety," Michael Collins, deputy director at the Drug Policy Alliance, said in a statement emailed to NPR. "Sessions is taking the country back to the 1980s by escalating the failed policies of the drug war."

APP C-17

The memo also drew a long, scathing rebuke from Holder himself.

E•X•H•I•B•I•T B

"The policy announced today is not tough on crime. It is dumb on crime," he said in a statement. "It is an ideologically motivated, cookie-cutter approach that has only been proven to generate unfairly long sentences that are often applied indiscriminately and do little to achieve long-term public safety."

Eric Holder 
@EricHolder



DOJ has taken an unwise step backward to discredited criminal justice policies. The need for reform still exists.

10:50 AM · May 12, 2017

(i)

 5.5K  3.7K people are Tweeting about this

APP C-18

But Sessions argues the shift in policy is a means of fulfilling the Justice Department's "role in a way that accords with the law, advances public safety and promotes respect for our legal system. It is of the utmost importance to enforce the law fairly and consistently."

E•X•H•I•B•I•T B

And Sessions made it clear that he wants this shift in policy to be immediate.

"Any inconsistent previous policy of the Department of Justice relating to these matters is rescinded, effective today," he wrote.

You can read the full text of Sessions' memo to prosecutors at this link or by scrolling below.

AG Memo on Department Charging and Sentencing Policy

To print the document, click the "Original Document" link to open the original PDF. At this time it is not possible to print the document with annotations.

Explore This Document In Full-Screen Mode(<https://apps.npr.org/documents/document.html?id=3719268>)

E•X•H•I•B•I•T C

RELATED CRIMINAL HISTORY INFORMATION

Records from the Harris County Sheriff's Department reveals the following about Jesse James Scott:

SPN 01121668 • 248TH DISTRICT COURT, STATE OF TEXAS

F.NCIC 909701 COUNTY OF HARRIS

CAUSE NO. 1491589

STATE OF TEXAS

v.

JESSE JAMES SCOTT [DOB: 1972-9-9]

CHARGE: ORGANIZED CRIME

NOTE: SCOTT HAS MORE
THAN ENOUGH
PREDICATE CRIMES;
BOTH DRUG AND
VIOLENT.

BOND: \$100,000

.....

The Government offers, "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 bodily injury." The Government is misrepresenting the law. PRIOR to the First Step Act of 2018, a defendant in Scott's position faced MANDATORY LIFE:

The First Step Act of 2018 [passed in December, long after these proceedings] amended 21 U.S.C. § 841(b)(1)(A) to require a mandatory minimum of 25 years, rather than life imprisonment, for offenders who had two or more prior convictions for a serious drug felony or a serious violent felony.

Many Fifth Circuit Cases footnote this statement, including cases that involve(d) Amy J. Mitchell, the U.S. Attorney who misrepresented this position in the Government's Answer. This suggests she did so deliberately in order to obfuscate. Will this Court hold her accountable for this material and willful misrepresentation?

APP C-20

CERTIFICATE OF SERVICE

I, FREDERICK ALLEN, do hereby certify that on the copy day of October, 2020, I deposited this, in accordance with the Prison Mailbox Rule, into the outgoing legal mail for my institution, with postage prepaid and affixed and addressed to the following:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION
33 EAST TWOHIG, ROOM 202
SAN ANGELO, TX 76903

I respectfully request electronic service upon the Attorney for the United States in light of my pro se, prisoner litigant status.

Fred Allen

FREDERICK ALLEN, pro se
Reg. No. 30816-479
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

APP C-21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

APPENDIX D

FREDERICK ALLEN,)	
)	
Movant,)	CIVIL ACTION NO.
)	6:20-CV-075-C
v.)	CRIMINAL NO.
)	6:17-CR-063-C-2
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER

Frederick Allen, ("Allen"), proceeding *pro se*, filed an amended Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on July 30, 2020. Respondent filed its Response on October 2, 2020.

I. FACTUAL BACKGROUND

In November 2016, the Drug Enforcement Agency (DEA), along with the San Angelo Police Department, started an investigation into a drug trafficking organization suspected of distributing pharmaceutical pills and other narcotics in the San Angelo area. Through the investigation, Allen, and another man named Scott, were arrested during an undercover operation. On March 19, 2018, a jury found Allen guilty of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(C), and distribution and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). The Court sentenced Allen to 188 months' imprisonment on July 20, 2018.

APP D-01

Allen filed a direct appeal, but on May 1, 2019, his conviction and sentence were affirmed by the Fifth Circuit. *United States v. Allen*, 769 F. App'x 138 (5th Cir. 2019). Thereafter, Allen timely filed his Section 2255 motion on July 30, 2020.

Allen claims the following two claims for relief: (1) the government violated the tenets of *Giglio* by not disclosing “to counsel, the jury, or the Court that it had agreed to eliminate Scott’s exposure to a life sentence,” and (2) his trial attorney provided ineffective assistance of counsel by failing to “mention the fact that Scott, the only witness that tied Allen to the [drug trafficking organization] at the center of this case, was facing a mandatory life sentence.” (CV No. 2 at 5-6).

II. STANDARD

A prisoner may move the convicting court to vacate, set aside, or correct a conviction or sentence under 28 U.S.C. § 2255 if “(1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is otherwise subject to collateral attack.” *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996) (internal marks omitted).

“It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.” *United States v. Addonizio*, 442 U.S. 178, 184 (1979). “Section 2255 does not offer recourse to all who suffer trial errors,” and it “may not do service for an appeal.” *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. Unit A Sept. 1981); *United States v. Frady*, 356 U.S. 152, 165 (1982). After conviction and the exhaustion or waiver of all appeals, the Court is “entitled to presume” that a prisoner “stands fairly and finally convicted.” *United States v. Frady*, 456 U.S. 152, 165 (1982).

“A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude, . . . and may not raise an issue for the first time on collateral review without showing both ‘cause’ for his procedural default, and ‘actual prejudice’ resulting from the error.” *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (internal citations omitted).

Motions under § 2255 are “reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.” *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. Unit A Sept. 1981).

III. ANALYSIS

A. Allen’s claim that the government violated *Giglio* is without merit.

Allen alleges that the government violated the tenets of *Giglio* by not disclosing “to counsel, the jury, or the Court that it had agreed to eliminate Scott’s exposure to a life sentence.” Allen’s claim fails for two reasons: (1) a claim is procedurally defaulted if not raised on direct appeal; and (2) even if his claim was not procedurally defaulted, he fails to satisfy the elements for a due process violation.

First, Allen procedurally defaulted his claim by failing to raise his claim on direct appeal. “It is hornbook law that a Section 2255 motion is not a substitute for appeal.” *Brown v. United States*, 480 F.2d 1036, 1038 (5th Cir. 1973). To receive collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) “cause” excusing his double procedural default, and (2) “actual prejudice” resulting from the errors of which he complains.” See *United States v. Frady*, 456 U.S. 152, 159 (1982).

Allen did not argue this claim on appeal and he has not explained why. Therefore, Allen has not demonstrated cause and his claim fails.

Second, even if Allen did not procedurally default his claim, he fails to satisfy the elements for a due process violation. “To establish a due process violation under *Brady*, a habeas petitioner must satisfy three elements.” *In re Raby*, 925 F.3d 749, 759-60 (5th Cir. 2019) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). “First, the evidence suppressed must be favorable to the defendant. *Id.* at 760. “Second, the state must have suppressed the evidence,” either willfully or inadvertently. *Id.* “Third, prejudice must have ensued—i.e., the suppressed evidence must have been material.” *Id.* (internal quotation marks omitted). “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). Allen has failed to meet these elements. Therefore, even if Allen’s claim was not procedurally defaulted, his claim would still fail as it is meritless in substance.

B. Allen’s claim that he received ineffective assistance of counsel is without merit.

Allen claims that the government made an agreement with Scott that spared Scott from a mandatory life sentence. Based on this claim, Allen alleges that he received ineffective assistance of counsel during his trial because his counsel failed to “mention the fact that Scott, the only witness that tied Allen to the [drug trafficking organization] at the center of this case, was facing a mandatory life sentence.” Allen’s claim for ineffective assistance of counsel fails because his allegation is meritless.

Failure to raise meritless objections is not ineffective lawyering, it is the very opposite.” *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994). “An attorney’s failure to raise a meritless argument cannot form the basis of a successful ineffective assistance of counsel claim because

the result of the proceeding would not have been different had the attorney raised the issue.” *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999). 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 bodily injury. 21 U.S.C. § 841(b)(1)(A).

Here, there were no allegations that Scott’s conduct resulted in death or serious bodily injury. Accordingly, Scott did not meet the criteria necessary to face a mandatory life sentence. In addition, Scott was not charged by the jury or the government with any enhanced penalty. Therefore, Scott never faced a mandatory life sentence and Allen’s counsel did not provide ineffective assistance because raising such an objection would have been meritless. Thus, Allen’s claim of ineffective assistance of counsel fails.

IV. CONCLUSION

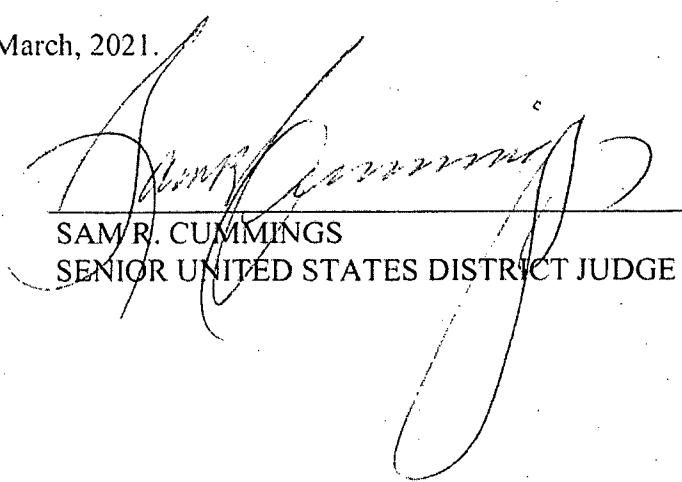
For these reasons, as well as those argued in the government’s well-written Response, it is **ORDERED** that Allen’s Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is hereby **DENIED**.

Certificate of Appealability

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. For the reasons set forth herein, Movant has failed to show that a reasonable jurist would find (1) this Court’s “assessment of the constitutional claims debatable or wrong,” or (2) “it debatable whether the petition states a

valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

SO ORDERED this 8th day of March, 2021.


SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

APP 6
D-06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

FREDERICK ALLEN,)
v.)
Movant,) CIVIL ACTION NO.
v.) 6:20-CV-075-C
UNITED STATES OF AMERICA,) CRIMINAL NO.
v.) 6:17-CR-063-C-2
Respondent.)

JUDGMENT

For the reasons stated in the Court's Order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is **DENIED** and **DISMISSED** with prejudice.

SIGNED this 8th day of March, 2021.

~~SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE~~

APP D-07

A. P. P. E. N. D. I. X C

DUE TO THE COVID-19 PANDEMIC, ALLEN WAS FORCED TO SEND
THE ONLY COPY OF HIS NOTICE OF APPEAL TO THE COURT.
IT MAY BE ACCESSED AT:

ALLEN v. UNITED STATES, CASE NO. 6:20-cv-075-C,
DOC. 12 (N.D. Tex., April 2021)

A. P. P. E. N. D. I. X. J

DUE TO THE COVID-19 PANDEMIC, ALLEN WAS FORCED TO
SEND THE ONLY COPY OF HIS MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS TO THE COURT.

IT MAY BE ACCESSED AT

ALLEN v. UNITED STATES, CASE NO. 6:20-CV-075-C,
DOC. 13 (N.D. TEX., MARCH 26, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FREDERICK ALLEN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

A.P.P.E.N.D.I.X G

) Civil Action No.

) 6:20-CV-075-C

) 6:17-CR-063-02-C

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A. P. P. E. N. D. I. X Jl

DUE TO THE COVID-19 PANDEMIC, ALLEN WAS FORCED TO
SEND THE ONLY COPY OF HIS MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 59(e)
TO THE COURT.

IT MAY BE ACCESSED AT:

ALLEN v. UNITED STATES, CASE NO. 6:20-cv-075-C,
DOC. 16 (N.D. TEX., MARCH 31, 2021)

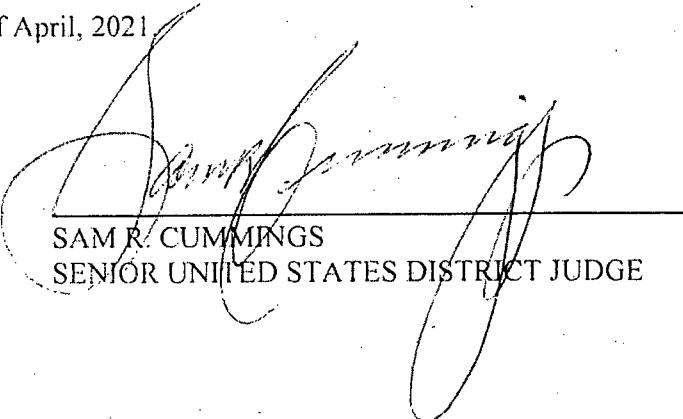
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FREDERICK ALLEN,) A.P.P.E.N.D.I.X d
v.)
Movant,)
v.) Civil Action No.
UNITED STATES OF AMERICA,) 6:20-CV-075-C
Respondent.) 6:17-CR-063-02-C

ORDER

The Court, having considered Movant's Motion to Alter or Amend Judgment pursuant to Federal Rule of Civil Procedure 59(e), received March 31, 2021, is of the opinion that the same should be **DENIED**.

SO ORDERED this 5th day of April, 2021.


SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

APP I-01

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FREDERICK ALLEN,

Movant;

v.

UNITED STATES OF AMERICA,

Respondent.

A.P.P.E.N.D.I.X *J*

CIV. NO. 6:20-cv-075

CRIM. NO. 6:17-063-C-2

MOTION FOR RECUSAL
PURSUANT TO
28 U.S.C. §§ 144 & 455

Comes FREDERICK ALLEN, Movant ("Allen"), and seeks the recusal of the Hon. Samuel R. Cummings from these proceedings in light of questionable judicial behavior. Allen will show this Court harbors a personal bias in favor of the Government, as well as this Court has demonstrated partiality in favor of the same. Such bias is evinced primarily through the Court's plagiarism of an untenable Government argument-and-obfuscation, as well as the Court's refusal to cure the incomplete record. Despite these glaring infirmities, the Court went on to label the Government's submissions as "well-written" and refused to entertain a Rule 59(e) motion seeking to correct the misstatement and incomplete record, ruling in only a three-line denial lacking explanation.

For these reasons, this Court should recuse the Honorable Samuel R. Cummings and should seat a non-biased fact-finder in his place.

A memorandum in support is attached.

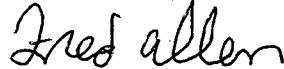
App J-01

STATEMENT OF FACTS

- [1] In a March 08, 2021 ORDER, this Court plagiarized a 31 count word-for-word misstatement attributable to AUSA Amy J. Mitchell. [Civ. Doc. 10 at 5; compare with Civ. Doc. 6 at 9]. The Court failed to cite from where this came.
- [2] Unfortunately for the Court, this misstatement was a conflation of pre- and post-First Step Act law. It can be shown the Government intentionally misrepresented the law because it argued converse positions simultaneously in other cases.
- [3] The Court also refused to memorialize the fact of the timely Reply. [Civ. Doc. 10 at 1]. Nor did the Court respond to the incomplete record. [id. at 1-6].
- [4] Despite these Government missteps and obfuscatory actions, this Court went on to label it, the Government's Response [Civ. Doc. 6], as "well-written," and ceded its authority and duty to the Government by writing, "For these reasons, as well as those argued in the government's well-written Response...." [Civ. Doc. 10 at 5, §IV. Conclusion]. (emphasis added)
- [5] The Court permitted a distinct criminal act to be committed by AUSA Russell Lorffing and DEA Agent Winston during the pendency of the proceedings. This crime concerned the failure of those two "covered individuals" to report child abuse in violation of 42 U.S.C. § 13031.
- [6] AUSA Russell Lorffing intentionally violated internal Department of Justice policy by selectively prosecuting Allen's cooperating co-defendant, Jesse James Scott. Despite being made aware of this, and despite being provided copies of the internal policy memorandum, the Court refused so much as to respond.

.....

Respectfully Submitted,



Frederick Allen, pro se

Reg. No. 30816-479
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

DECLARATION

I, FREDERICK ALLEN, do hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 20 day of April, 2021.

Fred Allen

Frederick Allen, pro se
Reg. No. 30816-479

03

APP y-03

MEMORANDUM

Frederick Allen seeks a new judge be seated to adjudicate matters as they pertain to his criminal case. 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 will show removal is warranted in light of the Court having plagiarized a Government misstatement upon which relief was denied, as well as in light of the Court's refusal to cure the incomplete record. Moreover, by refusing to memorialize the timely Reply [Civ. Doc. 9 was not accounted for in this Court's March 08 ORDER], and by improperly labeling the Government's Response as 'well-written' [Civ. Doc. 10 at 5], despite knowing it misrepresented the law, this Court darkened the shade of its partiality for the Government. For these reasons, the Hon. Samuel R. Cummings should be replaced with a non-biased factfinder.

BACKGROUND

Allen submitted a timely motion under 28 U.S.C. § 2255 on July 30, 2020, to vacate, set aside, or otherwise correct his sentence. [Civ. Doc. 1]. He raised several grounds, most notably that his cooperating co-defendant had been selectively prosecuted in violation of internal Department of Justice ("DOJ") policy, and that such selective prosecution spared that co-defendant of a mandatory life sentence. [id.]. Allen couched this as a due process violation and as an ineffective assistance of counsel argument, as well as structural error. [Civ. Doc. 1, 2, and 9].

In response, the Government submitted that the cooperating

co-defendant never faced a life sentence, and qualified the misrepresentation by arguing:

Allen argues that the government's "agreement" with Scott, 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.

Civ. Doc. 6 at 9.

The Court then wrote the following in its ORDER denying relief:

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.

Civ. Doc. 10 at 5.

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"...

21 U.S.C. § 841, Amendment Note
2018.

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.

id.

Allen then filed a timely motion under Fed. R. Civ. P. 59(e) that sought correction of this error [Civ. Doc. 15], that this Court denied on April 05, 2021. [Civ. Doc. 16]. This denial re-

fused to offer an explanation or statement of reasons, but instead issued a denial through a three-line ORDER. [id.].

Allen also has filed a notice of appeal in order to seek a certificate of appealability [Civ. Doc. 12], and has sought leave to proceed in forma pauperis [Civ. Doc. 13] that this Court granted [Civ. Doc. 14].

Additionally, the record is incomplete, as document 148-13 of the underlying criminal case is missing a page. Specifically, the document bears a court-issued header that's paginated sequentially but that disagrees with AUSA Russell Lorfing's non-sequential paginating skipping page two. Ironically, the document that's missing pages is from the Government's OMNIBUS Response alleging it "met its discovery obligations timely and ethically...[and] performed its duties diligently and made disclosures in good faith." [Crim. Doc. 148].

STANDARD OF REVIEW

Judicial recusal is a heavy topic and rare remedy. In this case, however, it is 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.

Tejero v. Portfolio Recovery Assocs.,
L.L.C., 955 F.3d 453, 463 (5th Cir.
2020) (internal citations and quotations removed).

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)].

.....

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

ADPP 04
J-07

"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)].

ANALYSIS

Frederick Allen submits this motion and affidavit seeking the replacement of his district court judge in light of personal bias and questionable partiality in favor of the Government. Allen will show the Court, in ruling on his motion under § 2255, did both plagiarize the Government's Response and disregard Allen's Reply. The record, too, was and remains incomplete. Additionally, it was revealed during Allen's trial that both Assistant U.S. Attorney Russell Lorfing and DEA Special Agent Winston committed distinct criminal acts in failing to report the revealed child abuse. Both of these culprits are named as "covered individuals" to whom mandated applies.

For these reasons, personal bias and prejudice, as well as questioned impartiality, are present thus warranting a different district court judge be seated.

I. The Court's plagiarism of an untenable Government argument-and-obfuscation amounts to personal bias, prejudice, and questionable impartiality warranting removal

The Federal Bench is designed to be comprised of unbiased fact-finders. Though, from time-to-time, personal bias and questionable impartiality do arise. In the case at hand, the Court copied, word-for-word/comma-for-comma, a 31-word-length Government

misrepresentation upon which relief was denied. 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.

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].

II. By disregarding the Reply, the Court demonstrated questionable impartiality, prejudice, and personal bias

The first paragraph of the Court's ORDER denying relief holds:

Frederick Allen, ("Allen"), proceeding pro se, filed an amended Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on July 30, 2020. Respondent filed its Response on October 2, 2020.

Civ. Doc. 10 at 1.

Indeed, there is no mention about Allen's timely Reply - the very document that provided the Department of Justice Memorandum that impeached the credibility of the Government. Failure to account for this document is cause rising to personal bias.

III. By failing to cure the incomplete record, the Court demonstrated prejudice in favor of the Government and against Allen

The record is incomplete, a fact Allen presented in the Reply

that was also disregarded by this Court. Specifically, Criminal Docket 148-13 is incomplete, bearing a header that's paginated sequentially but that disagrees with Assistant United States Attorney Lorfing's self-styled non-sequential paginating skipping page two. When reviewing this record, a non-sequitor manifests when reading from page one to page two (as filed and labeled in the record). [Civ. Doc. 9 at 2-3]. By disregarding the Reply, the Court was, apparently, not aware of this incomplete record. Yet, awareness or not, the Court is required to ensure the completeness of the record. By refusing to address and/or cure this error, the Court further demonstrated bias and prejudice against Allen, and behaved in such a way as to call into question by any lay-person this Court's impartiality.

IV. During the course of Allen's proceedings, Assistant United States Attorney Lorfing and DEA Special Agent Winston each violated 42 U.S.C. § 13031 (now 34 U.S.C. § 20341) with impunity

In the United States, certain governmental employees are required by law to report witnessed or suspected child abuse. Failure to do so carries criminal penalties for "covered professionals," the likes of which AUSA Lorfing and SA Winston (DEA) satisfy. [see 34 U.S.C. § 20341; compare Lorfing and Winston with subsection (b)(6): "Covered Professionals. Persons engaging in the following professions...: Law enforcement personnel...criminal prosecutors..."]. By attempting to use the cooperating co-defendant's children as pawns in this Government "investigation" (evident by such abuse never being reported and/or concealed), Lorfing and Winston each violated mandated reporting. By this Court permitting such behavior to have

occurred during the pendency of Allen's proceedings and trial, this Court demonstrated further bias and prejudice in favor of the Government. Indeed, any entity that permits, whether explicitly or implicitly, the abuse of children is unfit to argue and consider justice in any American courtroom. The sad irony is that officers and agents tasked with upholding the Code of the United States were simultaneously breaking it in order to allegedly uphold that very law. The greater irony is that these actions occurred in a federal courthouse. Why does the District Court permit the AUSA and DEA to disregard the law (while allegedly upholding it), while at the same time accusing another of having broken it? As the AUSA is the only person who can bring charges, his having broken the law creates such an imperative for the Court to have acted in protecting the children.

Any court that allows such misconduct is unfit to consider the proceedings.

V. This motion and affidavit seeking judicial recusal is timely

The applicable law holds that any request for recusal be submitted "not less than ten days before the beginning of the term [session] at which the proceeding is to be heard." [28 U.S.C. § 144]. Allen concedes he is untimely in this regard.

Yet, a remedy to toll that deadline exists should "good cause... be shown for failure to file it within such time." [id.]. This is the means by which Allen's motion and affidavit become timely, as Allen did not become aware of the court's plagiarism until he received the Court's ORDER denying relief. [Civ. Doc. 10, 11]. He, too, did not become aware of the disregarded Reply until receiving

that same ORDER. For these reasons, the Court should toll the ten day deadline and permit timely filing of this motion and affidavit seeking recusal.

VI. An affidavit under 28 U.S.C. § 1746 is attached that presents Allen's issues as they relate to recusal

Attached as Appendix 1 is the required affidavit. [28 U.S.C. § 144].

CONCLUSION

WHEREFORE, the Hon. Samual Cummings should be recused and an unbiased factfinder should be seated.

Respectfully Submitted,

Fred Allen

Frederick Allen, pro se
Reg. No. 30816-479
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

DECLARATION

I, FREDERICK ALLEN, do hereby declare the foregoing is true and correct to the best of my knowledge.

Executed this 20 day of April, 2021.

Fred Allen

Frederick Allen, pro se
Reg. No. 30816-479

DECLARATION
(AFFIDAVIT)
UNDER
28 U.S.C. § 1746

STATE OF TEXAS

§
§
§

COUNTY OF JEFFERSON

I, FREDERICK ALLEN, do hereby declare that the following factual material statement is true and correct to the best of my knowledge.

I further declare:

- [1] My name is FREDERICK ALLEN. I submit this of my own volition and am of sound mind.
- [2] I am submitting this in light of perceived personal bias by the Court.
- [3] When I received the Court's ORDER denying relief under § 2255 in mid-March 2021, I noticed that the Court had incorporated a 31-count word-for-word recitation initially submitted by the Government in its Response.
- [4] That recitation conflated pre- and post-First Step Act law in an apparently deliberate attempt to mislead the Court; which the Court parrotted sans citation.
- [5] The Government, too, concealed the fact of an incomplete record - a fact I submitted in my Reply.
- [6] The Court failed to correct these errors, while having allowed AUSA Lorfing and DEA Special Agent Winston to have committed criminal acts during the proceedings. [Criminal Failure to Report Child Abuse, 34 U.S.C. § 20341].
- [7] Any Court that plagiarizes a Government obfuscation-and-argument without independent research demonstrates bias in favor of the Government.
- [8] I hereby incorporate all arguments and facts thus proffered in the attached motion seeking recusal.

.....

App J-13

EXECUTED, SUBSCRIBED, AND SWORN TO UNDER PENALTY OF PERJURY
PURSUANT TO 28 U.S.C. § 1746 THIS 20th DAY OF APRIL, 2021.

Fred Allen

Frederick Allen, pro se

Reg. No. 30816-479
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

APP 58-14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

FREDERICK ALLEN,

A·P·P·E·N·D·I·X K

Movant,

)

) Civil Action No.

) 6:20-CV-075-C

) 6:17-CR-063-02-C

v.
UNITED STATES OF AMERICA;

)

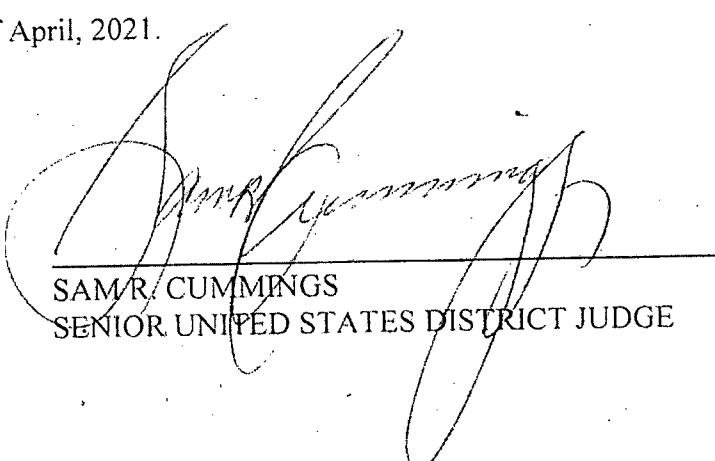
Respondent.

)

ORDER

The Court, having considered Movant's Motion for Recusal pursuant to 28 U.S.C. §§ 144 and 455, received April 27, 2021, is of the opinion that the same should be **DENIED**.

SO ORDERED this 28 day of April, 2021.


SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

APP K-01

FREDERICK ALLEN,

Petitioner;

v.

UNITED STATES OF AMERICA

Respondent.

§
§
§
§
§
§

IN THE COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

REQUEST FOR COA

Comes FREDERICK ALLEN, Petitioner ("Allen"), and submits this request for a certificate of appealability ("COA"). Allen will show that the District Court, rather than conduct an independent inquiry, instead plagiarized a 31-count word-for-word/comma-for-comma misrepresentation-and-obfuscation originally attributable to Assistant U.S. Attorney Amy J. Mitchell. Allen will show that this Government submission was a conflation of pre- and post-First Step Act law, was proffered in an attempt to mislead the Court, and was the basis upon which relief was denied. Additionally, Allen will show the endurance of an incomplete record that the same District Court refuses to cure.

As the issues presented herein are debatable among jurists of reason and could be resolved differently by another court, this Court should encourage this appeal to proceed by granting a COA.

STATEMENT OF FACTS

Allen presents the following relevant facts for consideration in support thereof:

- [1] Allen's motion under 28 U.S.C. § 2255 was denied on the merits on March 08, 2021. [Civ. Doc. 10]* He timely appealed.

*Civ. Action No. 6:20-cv-075-C

- [2] The District Court denied him a COA, but later granted the privilege to proceed in forma pauperis on appeal.***
- [3] Allen recently filed a motion and required affidavit under 28 U.S.C. §§ 144, 455 seeking recusal of the District Court judge in light of that court having plagiarized a 31-count word-for-word/comma-for-comma misrepresentation originally attributable to U.S. Attorney Amy J. Mitchell [see Civ. Doc. 10 at 5; compare with Civ. Doc. 6 at 9], and then denying relief on that basis. [Civ. Doc. 10 at 5, "For these reasons, as well as those argued in the government's well-written Response, it is ORDERED that Allen's motion...is hereby denied."]

Allen does not yet know the status of this filing.**

- [4] The record remains incomplete. Specifically, Crim. Doc. 148-13 is incomplete, bearing a header that's paginated sequentially but that disagrees with Assistant U.S. Attorney Lorfing's non-sequential paginating skipping page two. [Crim. Doc. 148-13 at 1-4]*. A non-sequitor manifests when reading from page one to page two (as filed and labeled in the record).

STANDARD OF REVIEW

To obtain a certificate of appealability ("COA"), a movant must make a "substantial showing of the denial of a constitutional right." [28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483 (2000)]. He or she will satisfy this standard by "demonstrating that jurists of reason could conclude the issues presented herein are adequate to deserve encouragement to proceed further."

Miller-El v. Cockerell, 537 U.S. 322, 327 (2003).

In the instant case, because the District Court rejected Allen's motion on the merits, he must "demonstrate that a jurist of reason would find the district court's assessment of the constitutional claim debatable or wrong." Slack v. McDaniel, 529 U.S. at 484; see also Miller-El, 537 U.S. at 388].

*Crim. Action No. 6:17-cr-063-C-02
**Recusal Motion denied on April 05, 2021 [Civ. Doc. 18]
***Civ. Doc. 14

STATEMENT OF THE ISSUES

In Allen's motion under 28 U.S.C. § 2255, he raised the following issues:

1. Allen's 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.

.....

Following the Court's order denying relief, the following issue became manifest:

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 upon which relief was denied.

.....

[PAGE BREAK]

STATEMENT OF THE CASE

On March 19, 2018, a jury found Allen guilty of Conspiracy to Possess with Intent to Distribute Cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and (b)(1)(C), and of Distribution and Possession with Intent to Distribute Cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). [Crim. Doc. 169]. On July 20, 2018, the Court sentenced him to 188 months in prison. [Crim. Doc. 211]. Allen timely appealed; 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)]. Allen then filed a timely motion under 28 U.S.C. § 2255 [Civ. Doc. 1], to which the Government responded on October 10, 2020, [Civ. Doc. 6], and to which Allen replied on or about October 25, 2020. [Civ. Doc. 9]. The District Court denied Allen's § 2255 on March 08, 2021. [Civ. Doc. 10 and 11].

Allen then filed a timely Notice of Appeal ("NOA") in mid-March 2021 [Civ. Doc. 12], and sought leave to proceed in forma pauperis on appeal shortly thereafter. [Civ. Doc. 13]. The District Court granted this motion on March 26, 2021 [Civ. Doc. 14].

Allen next filed a timely motion under Rule 59(e) on March 31, 2021 [Civ. Doc. 16], but the Court denied it on March 31, 2021. [Civ. Doc. 17]. Lastly, Allen sought recusal of the District Court judge for personal bias pursuant to 28 U.S.C. §§ 144 and 455 [not on docket but attached as Appendix 3]. The Court denied this on April 05, 2021. [Civ. Doc. 18].

This Request for a COA follows.

04
APP L-04

GOVERNMENT'S THEORY AT TRIAL

At trial, the Government proffered, "Mr. Allen isn't just a drug dealer. He's the guy that sells to drug dealers." [Tr. Vol. 1, p. 72, ln. 4-5]. The Government 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-between 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 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

** Although the Government's theory alleged Allen was in the Top Tier, the AUSA later admitted the following: "Your Honor, when I ended my testimony earlier, I had asked the defendant 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 to double-check my work, and the number I had typed in was inadvertently the wrong number. We do not believe the defendant...is tied to the cartel in any way."

[Tr. Vol. 4, p. 138, ln. 15-22]
(emphasis added).

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]. 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.

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 admitting:

We do not believe the defendant...is tied to the cartel in any way.

[Tr. Vol. 4, p. 138, ln. 15-22].

THE ISSUES

- [1] ALLEN'S 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.

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 an alleged promise made to the Government's key witness 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 ("Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.").

Here, and at the time of trial, 21 U.S.C. § 841 required for:

[A]fter 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.

[id., prior to passage of Amendment 2018].

This meant that if Jesse James Scott had been properly charged [see Appendix 2 for Scott's criminal history], he would have faced a mandatory life sentence. [also see Allen's Reply, Civ. Doc. 9 at Exhibit A, "Department Charging and Sentencing Policy," holding, "[P]rosecutors should charge and pursue the most serious, readily provable offense...By definition, the most serious offenses are those that carry the most substantial guidelines sentences, including mandatory minimum sentences."]. When the Government submitted its response to Allen's § 2255, it argued a conflation of pre- and post-First Step Act law:

Allen argues that the government's "agreement" with Scott, 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 bodily injury.

[Civ. Doc. 6 at 5](emphasis added).

The Court then plagiarized this misrepresentation-and-obfuscation and cited it as the reason Allen's claim warrented no relief:

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 bodily injury.

[Civ. Doc. 10 at 5](cf. supra).

Allen's attempt at redress through a Fed. R. Civ. P. 59(e) was

also denied in a three-line order. [Civ. Doc. 17].

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 or did so out of negligence, it matters not for due process. Yet, the evidence shows the Government was placed on notice by then-Attorney General Jeff Sessions, and failing to follow internal policy by the Government indicates an intentional and volitional act by the Government to undercharge Scott [see Civ. Doc. 9, Exhibit A].

Ultimately, a conviction secured by the use of false evidence must fall under the due process clause where the Government, although not soliciting the false evidence, allows it to go uncorrected. Under the due process clause, the Government's suppression of material evidence warrants a new trial. Giglio, 405 U.S. at 154-155.

This error is particularly egregious in the context of Scott's admission that he was willing to lie so he could be there for his kids - a statement that remained glossed over and never again was mentioned by any party during the proceedings. [Tr. Vol. 2, p. 232, ln. 4-17]. Scott stated in response to the AUSA:

Q: Would you even lie so you could be there for your kids?
A: Truthfully, I mean, yes.

[Tr. Vol. 2, p. 232, ln. 15-17].

App 08
L-08

[2] ALLEN'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS TRIAL COUNSEL FAILED TO RECOGNIZE AND OBJECT TO THE GIGLIO ERROR AS EXPOUNDED IN CLAIM 1, *supra*.

A claim of ineffective assistance of counsel is evaluated against the two-pronged test established in Strickland v. Washington, 466 U.S. 668 (1984). First, a petitioner must show "[C]ounsel's representation fell below an objective standard of reasonableness." [id. at 689]. Second, the petitioner must show "[T]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." [id. at 694; see also Chandler v. United States, 218 F. 3d 1305, 1313 (11th Cir. 2000)].

The facts of this case, and the record thereof in support, demonstrate that Allen's counsel was unaware of, or did not understand, federal drug laws. The fact that counsel never mentioned the fact that Scott, the only witness who tied Allen to the DTO at the heart of this case, was facing a mandatory life sentence, is indicative of representation that fell below an objective standard of reasonableness. This ineffectiveness was exemplified by his, trial counsel's, failure to press Scott on his willingness to lie to be there for his children.

It is probable that had the jury been made aware of these facts, the verdict would have been different. These errors, also, are compounded in light of the Government's initial attempt to link Allen to the Sinaloan Drug Cartel, as well as its later admission that the Government "Do[es] not believe [Allen]...is tied to the cartel in any way." [Tr. Vol. 4, p. 138, ln. 15-22].

Lacking these critical errors, it is probable the outcome of the trial would have been different. [Note: Allen was acquitted by the jury of all the additional counts the Government attempted to substantiate against him.]

[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 ATTRIBUTABLE TO THE GOVERNMENT UPON WHICH RELIEF WAS DENIED.

The Government, in its response, submitted that Jesse James Scott never faced a life sentence, and qualified that misrepresentation by arguing a conflation of pre-and-post-First Step Act law (see Issue 1, supra). The District Court denied relief to Allen based on this misrepresentation, even going so far as to re-proffer it sans correction or citation. [see Civ. Doc. 6 at 9; cf. Civ. Doc. 10 at 5].

Yet, this reasoning 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"...

[21 U.S.C. § 841, Amendment Note 2018].

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.

[id.].

Here, it is revealed that prior to December 21, 2018, there

were, in fact, other provisions of 21 U.S.C. § 841(b)(1)(A) that carried a mandatory life sentence, such as when a defendant (like Scott) had "two or more convictions for a felony drug offense." [id.].

At that time, 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)].

From this, it is gleaned that it was the First Step Act of 2018 that ushered in these changes; however, such changes are irrelevant here because that Act did not become law until long after Allen's proceedings that concluded on July 20, 2018, at his sentencing.

Even more is the Court's reliance on the U.S. Attorney rather than conducting an independent inquiry. For example, on May 10, 2017, the Department of Justice issued a policy memorandum (the "Sessions' Memo") that mandated all federal prosecutors to "charge and pursue the most serious, readily provable offense." [Civ. Doc. 9, Exhibit A at 1]. The Memo clarified that holding:

By definition, the most serious offenses are those that carry the most substantial guidelines sentences, including mandatory minimum sentences.

[id.].

Therefore, prior to the First Step Act (Dec. 21, 2018), but after the Sessions' Memo (May 10, 2017), all assistant U.S. Attorneys were required to seek the most provable charges that carried the most time. [id.].

This was not done; nor was the proper standard utilized in

answering Allen's § 2255. Instead, the Government has demonstrated it cannot be taken at its word.

CONCLUSION

WHEREFORE, this Court should grant Allen a Certificate of Appealability.

Respectfully Submitted,

Fred Allen

Frederick Allen, pro se

Reg. No. 30816-479

FCI Beaumont Low

P.O. Box 26020

Beaumont, TX 77720

DECLARATION

I, FREDERICK ALLEN, do hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this (Com) day of (Com), 2021.

Fred Allen

Frederick Allen, pro se

Reg. No. 30816-479

FCI Beaumont Low

P.O. Box 26020

Beaumont, TX 77720

APP L-12

CERTIFICATE OF SERVICE

I, FREDERICK ALLEN, do hereby certify that on the (copy) day of (copy), I deposited a true and correct copy of the foregoing into the outgoing legal mail for this institution with postage prepaid and affixed, and addressed to the following:

United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

In light of my pro se, prisoner litigant status, I respectfully request electronic service upon the attorney for the United States.

Fred Allen

Frederick Allen, pro se
Reg. No. 30816-479
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

APP L-13

LIST OF APPENDICES

<u>APP'X</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
[1]	Trial Testimony Excerpts of Jessee James Scott [Crim. No. 220, beginning at 232] [4 PAGES]	1-01
[2]	Chart Summarizing Jessee James Scott's Criminal History [as drawn from Crim. No. 220] [1 PAGE]	2-01
[3]	Motion for Recusal Pursuant to 28 U.S.C. §§ 144 & 455 [devoid from docket of civ. matter] [14 PAGES]	3-01

A·P·P·E·N·D·I·X 1

TRIAL TESTIMONY EXCERPTS OF JESSE JAMES SCOTT

DOC 220 - PG. 232+

...

22 Q. Mr. Scott, are you a drug dealer?

23 A. Yes, sir.

24 Q. How long have you been selling drugs?

25 A. Since early nineties.

PG. 233

1 What kind of drugs did you sell in the early nineties?

2 Crack.

3 And "crack" being crack cocaine?

4 Yes, sir.

5 And where would you sell crack cocaine in the nineties?

6 San Angelo, Texas.

7 To your knowledge, had anyone else sold crack in the San Angelo
8 area before you started selling it?

9 No, sir.

10 So would it be a fair representation to say that you were one of the
11 first people to bring crack cocaine to San Angelo?

12 Yes, sir.

13-14 Now, Mr. Scott, have you ever been convicted of a felony offense?

15 Yes, sir.

16 Do you recall your first felony offense?

17 Not right off.

18 Would it be a fair characterization to say that in 1992, you
19 received a--you were convicted of a felony criminal mischief?

20
21 Yes, sir.

22 Do you recall your sentence in that case?

23 Ten years' probation.

APP 1 - 01

App L-15

24 Q. Okay. No jail time?

25 A. No jail time.

PG. 234

1 In 1993, you were convicted of a felony offense again for selling
2 drugs; is that correct?

3 Yes, sir.

4 Do you recall what drug you were selling in 1993?

5 Crack cocaine.

6 And do you recall the sentence you received?

7 Twelve years.

8 In what city were you convicted, sir?

9 San Angelo, Texas.

10 And how much time did you actually serve, roughly?

11 About five and a half years.

12 In 2000, were you convicted of another drug offense?

13 Yes, sir.

14 What drug was that, sir?

15 Crack cocaine.

16 Do you recall the sentence you received in that case?

17 A 15-year sentence.

18 In 2007, were you convicted of another felony drug offense?
19

20 Yes, sir.

21 And what type of drug were you selling in 2007?

22 Crack cocaine.

23 What sentence did you receive in that case, sir?

24 A 15-year sentence.

25 In 2012, did you receive another felony conviction?

APP 1 - 02

APP L-16

1 Yes, sir.

2 And what crime was that?

3 Organized crime.

4 Would it be a fair characterization to say, in 2012, you were
5 convicted of a felony offense of engaging in organized crime?

6 Yes, sir.

7 And do you recall the sentence you received in that case?

8 Probation.

9 Sir, you received substantial sentences in nearly all
10 those cases. Would you agree?

11 Yes, sir.

12 Prior to this case, have you ever agreed to cooperate with
13 the government for a reduced sentence?

14 No, sir.

15 Would this be the first time you've ever entered into a plea
16 agreement and agreed to cooperate?

17 Yes, sir.

18 Have you ever acted as an informant for this government or
19 a law enforcement agent before agreeing to cooperate with us?

20 No, sir.

21 [...]

22 Can you make a lot of money selling drugs?

23 Yes.

24 How many times a month would you have to sell drugs to
make \$3,500?

25 One day.

1 In one day? So in one day, you can make as much money as
2 you did working 70 hours a week for a month?

3 Yes, sir.

4 I know you have a lengthy history of selling drugs, but I
5 want us to specifically focus on 2016 and 2017. Are you okay
6 with that?

7 Yes, sir.

1 When--You had mentioned that you could sell \$3,500 worth
2 of drugs in a day. Did you ever do something like that
3 in San Angelo?

4 Yes

5 Where would you go if you wanted to sell drugs in San Angelo?

6
7 19th and 22nd Street.

8 And how long would it take you to sell the supply you
9 had?

10 Just to pull up.

11 When you say "just pull up," what do you mean?

12 I'd just drive up and it's gone.

13 Just like magic, or what--

14 I'd just drive up in there, and I guess they say Jesse in
15 town, and next thing you know, it's all gone.

16 Did you have a reputation in San Angelo for having a good
17 product?

18 Yes.

19 And could you supply cocaine in San Angelo for cheaper
than what the going price was there at the time?
[...]

1 Okay. No, I understand. I appreciate you asking me to
2 clarify. Could you sell your products cheaper than what other
3 dealers could do in San Angelo?

4. Yes.

A•P•P•E•N•D•I•X 2

CRIM. NO. 6:17-cr-063-C-2
TESTIMONY OF JESSE JAMES SCOTT

YEAR	OFFENSE	FELONY #	DRUG CRIME?	SENTENCE	SOURCE/CITATION
1992	Felony Crim. Mischief	1	NO	10 YEARS Probation	Tr. Tran. 2 at 233 ln. 16-25
1993	Felony Drug Offense (crack cocaine)	2	YES	12 YEARS In Prison	Tr. Tran. 2 at 234 ln. 1-11
2000	Felony Drug Offense (crack cocaine)	3	YES	15 YEARS In Prison	Tr. Tran. 2 at 234 ln. 12-17
2007	Felony Drug Offense (crack cocaine)	4	YES	15 Years In Prison	Tr. Tran. 2 at 234 ln. 18-24
2012	Organized Crime	5	NO	?? YEARS Probation	Tr. Tran. 2 at 234 ln. 25; at 235, ln. 1-8

APP L-19

NOTE: See Appendix 1 for Transcription of Trial Transcript 2 (Tr. Tran. 2), selected portions.

A•P•P•E•N•D•I•X 2

United States Court of Appeals
for the Fifth Circuit

APPENDIX M

No. 21-10274

United States Court of Appeals
Fifth Circuit

FILED

November 8, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

FREDERICK ALLEN,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Northern District of Texas

USDC No. 6:20-CV-75

USDC No. 6:17-CR-63-2

ORDER:

Frederick Allen was convicted by a jury of conspiracy, distribution, and possession with intent to distribute cocaine in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1), and he was sentenced to 188 months of imprisonment, concurrent, and three years of supervised release. He moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion. Allen argues that the Government violated *Giglio v. United States*, 405 U.S. 150, 154 (1972), because it failed to disclose that its key witness had been spared a mandatory life sentence in exchange for his

App M-01

No. 21-10274

cooperation, and he also argues that his counsel was ineffective for failing to recognize or object to the *Giglio* error.

To obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where a district court has denied claims on the merits, a movant must show “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Allen has not met this standard and has therefore not shown an entitlement to a COA.

COA DENIED.

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.
United States Circuit Judge

FREDERICK ALLEN,

Petitioner-Appellant;

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

IN THE COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NEW ORLEANS, LOUISIANA

MOTION FOR RECONSIDERATION/PANEL REHEARING

PURSUANT TO

FEDERAL RULE OF APPELLATE PROCEDURE

40

Comes FREDERICK ALLEN, Petitioner-Appellant ("Allen"), and submits this motion for reconsideration/panel rehearing pursuant to Federal Rule of Appellant Procedure 40. 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. In light of the above, this Court should reconsider the denial of Allen's request for a COA.

STATEMENT OF FACTS

[1] In an ORDER issued November 08, 2021, the Fifth Circuit denied Allen's request for a COA by holding:

Where a district court has denied claims on the merits, a movant must show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Allen has not met this standard and has therefore not shown an entitlement to a COA.

[Doc. 00516084578 at 2].

[2] Prior to that, Allen's motion under 28 U.S.C. was denied on the merits on March 08, 2021. [Civ. Doc. 10].^{**} He timely appealed, which led to his COA request.

[3] Allen similarly filed a timely motion under Federal Rule of Civil Procedure 59(e) in order to correct the District Court's error in denying his § 2255 [Civ. Doc. 16]; however, it was denied on or about April 05, 2021. [Civ. Doc. 17]. No reason was given for the denial. [id.].

STANDARD OF REVIEW

The Federal Rules of Appellate Procedure afford parties in civil matters the option to seek reconsideration if "filed by any party within 45 days after entry of judgment." [Fed. R. App. P. 40(a)(1)]. The petition must state with "particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." [id., 40(a)(2)].

The sole purpose of this rule is to give the Court a chance to be reminded of possible errors. The petition addresses points of law and/or facts that were overlooked.

^{**}Civ. Action No. 6:20-cv-075-C

STATEMENT OF THE CASE

On March 19, 2018, a jury found Allen guilty of Conspiracy to Possess with Intent to Distribute Cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and (b)(1)(C), and of Distribution and Possession with Intent to Distribute Cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). [Crim. Doc. 169]. On July 20, 2018, the Court sentenced him to 188 months in prison. [Crim. Doc. 211]. Allen timely appealed; 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)]. Allen then filed a timely motion under 28 U.S.C. § 2255 [Civ. Doc. 1], to which the Government responded on October 10, 2020 [Civ. Doc. 6], and to which Allen replied on or about October 25, 2020. [Civ. Doc. 9]. The District Court denied Allen's § 2255 on March 08, 2021. [Civ. Doc. 10 and 11].

Allen then filed a timely Notice of Appeal ("NOA") in mid-March 2021 [Civ. Doc. 12], and sought leave to proceed in forma pauperis on appeal shortly thereafter. [Civ. Doc. 13]. The District Court granted this motion on March 26, 2021. [Civ. Doc. 14].

Allen next filed a timely motion under Rule 59(e) on March 31, 2021 [Civ. Doc. 16], but the Court denied it on March 31, 2021. [Civ. Doc. 17]. Lastly, Allen sought recusal of the District Court judge for personal bias pursuant to 28 U.S.C. §§ 144 and 455. The Court denied this without explanation on April 05, 2021. [Civ. Doc. 18].

Lastly, Allen sought a COA, which was denied in an ORDER dated November 08, 2021.

This reconsideration/panel rehearing follows.

ARGUMENT

When the Government establishes a deal with a 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). [see also Giglio v. United States, 405 U.S. 150 (1972)]. Failure, whether inadvertent or intentional, to disclose an alleged promise to Government's key witness of reduced sentence exposure is structural error and a violation of due process. [Giglio, 405 U.S. at 154, "Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor."].

In the case at hand (occurring in early 2018 - long before the passage of the First Step Act of 2018), the statute under which the cooperating codefendant was charged read as follows:

[A]fter 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(b)(1)(A)].

The United States Attorney, however, interpreted this statute as reading the following:

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 bodily injury.

[Civ. Doc. 6 at 5].

The Court, in denying relief, restated this word-for-word. [Civ. Doc. 10 at 5]. Moreover, the Court similarly described this as a:

[W]ell-written Response...

[id.].

Ultimately, the Government and the Court submitted that the cooperating codefendant never faced a life sentence; however, each relied upon a conflation of pre-and-post-First Step Act of 2018 law. This conflation is the error manifest which warrants correction by this Court. [see COA Request at 10-11].**

In correcting that error by relying on the correct statute, it becomes clear that Allen's codefendant indeed did face a life sentence, but was accordingly undercharged. Allen provided evidence substantiating this claim by (a) providing the Department of Justice's policy memorandum in effect at the time requiring the Government to "charge and pursue the most serious, readily provable offense" [Civ. Doc. 9, Exhibit A at 1; see also COA Request at 11]; (b) providing the cooperating codefendant's criminal history and testimonial admissions during trial [see COA Request at 7; see also id., Appendix 1 and 2]; and (c) addressing the statutory changes manifest via the First Step Act of 2018 in which 21 U.S.C. § 841(b)(1)(A) was amended to remove the mandatory "three-strikes" life sentence for repeat drug offenders. [see COA Request at 10-11].

a. Related Questions

So, when faced with this impeaching argument, why did the Government conflate pre-and-post-First Step Act law? Why did the Court copy it word-for-word and use it to deny relief while calling it "well-written"? Why did the Court similarly prevent the recusal motion from appearing on the public docket until such mention was made to this Court? Why did the Government allege Allen was connected

** The Court's description of this conflation as "well-written" was alarming enough for Allen to have sought recusal. [Civ. Doc. 18]. The District Court attempted to conceal this from the docket until Allen pointed out its absence. [see COA Request at 4].

to the "cartel," only to later refute its own claim? [see Tr. Vol. 4, p. 138, ln. 15-22; see also COA Request at 5, footnote **]. Why was the cooperating codefendant undercharged in violation of internal DOJ policy to "charge and pursue the most readily provable offense"?**

As shown above, over and over again has 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 appeal, and the Government has resorted to, for lack of a better descriptor, deception in responding to his 2255. He prays this Court enact relief and afford him an opportunity to brief a full appeal before this Court.

CONCLUSION

WHEREFORE, this Court should re-hear Allen's COA Request before a panel or should reconsider his COA Request.

Respectfully Submitted,



Frederick Allen, pro se
Reg. No. 30816-479
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

DECLARATION

I, FREDERICK ALLEN, do hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this [wry] day of December, 2021.


Frederick Allen, pro se

** Then-Attorney General Jeff Sessions clarified this mandate with, "By definition, the most serious offenses are those that carry the most substantial guidelines sentences, including mandatory minimum sentences." [Civ. Doc. 9, Exhibit A at 1].

United States Court of Appeals
for the Fifth Circuit

No. 21-10274

A.P.P.E.N.D.I.X 0

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

FREDERICK ALLEN,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:20-CV-75

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges.*

PER CURIAM:

This panel previously DENIED appellant's motion for a certificate of appealability. The panel has considered appellant's motion for reconsideration/panel rehearing.

IT IS ORDERED that the motion is DENIED.

APP O-01

IN THE OFFICE OF
PROFESSIONAL RESPONSIBILITY
WASHINGTON, D.C.

FREDERICK ALLEN,

Complainant;

v.

RUSSELL LORFING (U.S. Attorney)
& PETTIE WINSTON, J.R. (Drug
Enforcement Agency),
Respondent.

name
A-P-P-E-N-D-I-X P
USDC CRIM. NO. 6:17-cr-063-02

COMPLAINT ADDRESSING GOVERNMENT MISCONDUCT

Comes Frederick Allen, Complainant, and files this complaint in the Office of Professional Responsibility ("OPR") addressing misconduct by the United States Attorney for the San Angelo, Texas, office, and by Special Agent Pettie Winston, Jr., of the Drug Enforcement Agency ("DEA"). Allen will show these involved persons violated 34 U.S.C. § 20341 during the pendency of his trial and the underlying investigation. For these reasons, the OPR should investigate, and, if warranted, apply sanctions and/or criminal charges in accordance with the applicable law.

STATEMENT OF FACTS

Allen presents the following relevant facts for consideration in support thereof:

- [1] On March 19, 2018, a jury convicted Allen of violating 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. He was subsequently sentenced on July 20, 2018, to 188 months' imprisonment to be followed by three (3) years of Supervised Release.

APP 1-
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- [2] The Government's key witness, Allen's co-defendant Jesse James Scott, was on parole in the State of Texas during the time of the alleged offenses, as well as during trial.
- [3] During Scott's testimony, it was revealed he had subjected his children to wonton abuse while in the direct supervision of Drug Enforcement Agency (DEA) Special Agent Pettie Winston ("Winston").
- [4] Winston failed to report the abuse as required by law. [see 34 U.S.C. § 20341, "Child Abuse Reporting"].
- [5] Assistant United States Attorney Russell Lorfing also failed this duty, despite being a "Covered Individual" per the same statute.

.....

During the pendency of Allen's trial in 2018, the following exchange occurred between Allen's counsel, Maverick J. Ray, and DEA Special Agent Pettie Winston:

- Q: And when Mr. Scott showed up, he showed up with his wife in the passenger's seat. Correct?
- A: I'm not sure if that's his wife, but yes, it was his girlfriend or companion, yes sure.
- Q: And he had his children in the back seat of the car. Correct?
- A: Yes.
- Q: All right. So he brought the whole family up to do this transaction with you? Correct?
- A: Yes.

.....

[see Tr. Vol. 2, pg.55, ln. 10-19]

This exchange reveals that DEA Special Agent Pettie Winston had become aware of child abuse, but instead directed his focus on the size of the alleged pills:

- Q: And when you first opened the bag, you complained about the size of the pills. Correct?
- A: Yes

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[see id., In. 20-22].

The United States Code provides for the reporting of witnessed and suspected child abuse:

(a)(1) **Covered Professionals.** A person who, while engaged in a professional capacity as described in subsection (b) on federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d).

...

(b)(6) **Covered Individuals.** Law enforcement personnel, criminal prosecutors...

...

(c)(1) "Child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.

[see 34 U.S.C. § 20341(a)(1), (b)(6), and (c)(1)].

Simply, as the law reads, both the DEA Agent and the United States Attorney (Winston and Lorfing, respectively) had a duty to report Jesse James Scott to the appropriate authorities [see 34 U.S.C. § 20341, generally]. As no person filed any reports, and especially given the content of the memorialized exchanges, both Agent Winston and AUSA Lorfing, then these persons are guilty of violating the above law. For punishment, the statute calls for up to one year imprisonment. Due to the nature of this offense involving the above law. For punishment, the statute calls for up to one year imprisonment. Due to the nature of this offense involving continued harm to children, a sentence of one year would be appropriate, but not more than necessary, to obtain the objectives of sentencing: retribution, deterrence, and rehabilitation.

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In light of the above, I respectfully request an investigation be performed into the above-named persons for the above-alleged actions.

CONCLUSION

WHEREFORE, the Office of Professional Responsibility (OPR) should investigate Assistant United States Attorney Russell Lorfing and DEA Special Agent Pettie Winston for allegations of suspected failure to report child abuse.

Respectfully Submitted,

Fred Allen

Frederick Allen, pro se

Reg. No. 30816-479
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

DECLARATION

I, FREDERICK ALLEN, do hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this (Copy) day of October, 2020.

Fred Allen

Frederick Allen, pro se



U.S. Department of Justice

Office of Professional Responsibility

*950 Pennsylvania Avenue, NW Room 3266
Washington, DC 20530*

May 12, 2021

Frederick Allen
Reg. No. 30816-479
FCI Beaumont Low
Federal Correctional Institution
P.O. Box 26020
Beaumont, TX 77720

A-P-P-E-N-D-I-X Q

Dear Mr. Allen:

This is in response to your correspondence to the Office of Professional Responsibility (OPR) in which you alleged misconduct by an Assistant United States Attorneys for the Northern District of Texas in connection with your 2017 criminal case. In your correspondence, you also complained about a Drug Enforcement Administration agent.

OPR has jurisdiction to investigate allegations of misconduct involving Department of Justice (DOJ) attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct within the jurisdiction of OPR. It is, however, the policy of this Office to refrain from investigating issues or allegations that could have been or still may be addressed in the course of litigation, unless a court has made a specific finding of misconduct by a DOJ attorney or law enforcement agent. Based on our review of your correspondence, we have determined that your allegations fall into this category. Accordingly, we concluded that no action by this Office is warranted.

We regret that we are unable to be of assistance to you in this matter.

Sincerely,

Office of Professional Responsibility

APP Q - 01