No. 21-7814

IN THE

SUPREME COURT OF THE UNITED STATES

JULIA ANN POFF, Petitioner

v.

WARDEN WARREN SMITH, Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the complete deprivation of Ms. Poff's fundamental rights to determine how to protect her liberty related to Structural error violated multiple times throughout the trial process?

LIST OF ALL PARTIES

Julia Ann Poff, Petitioner
Warden Warren Smith, Respondent
United States of America

RELATED CASES

The original judgment of conviction in Case no. 4:17-CR-669 of Petitioner in the United States District Court for the Southern District of Texas was not reported and is attached hereto as "Appendix A."

The original order of dismissal for the "Petition for Writ Of Habeas Corpus," in the United States District Court for the Southern District of Texas under case no. 4:18-cv-04450 was not reported and is attached hereto as "Appendix B."

The Appellate order of affirment in the United States Appeals Court for the Fifth Circuit under case no. 20-20647 was not reported to Ms. Poff's knowledge and is attached hereto as "Appendix C."

The "Petition for Rehearing," was also denied by the United States Court of Appeals for the Fifth Circuit and is attached hereto as "Appendix D."

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JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 10, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

"No person shall be... deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

3. The Fourteenth Amendment of the United States Constitution provides:

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

4. Article 1, Section 9, Clause 2 of the United States Constitution states:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in the cases of rebellion or invasion the public safety may require it."

5. The rules involved and under review are Fed.R.Crim.P. 12(b)(2)

"(2) Motions that may be made at any time. A motion that the court lacks jurisdiction may be made at any time while the case is pending."

6. The rules involved and under review are Fed.R.Crim.P. 12(d).

"Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal."

7. The Statutes involved and under review are Title 18, United States Code Section 3161(h)(1), (C), (d), (H), which states in part:

"(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to---"

(C) delay resulting from any interlocutory appeal

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."

8. The Statutes involved and under review are Title 18, United States Code Section 3162(a)(2) which states in part:

"Failure of the defendant to move for dismissal prior to the trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section."

STATEMENT OF THE CASE

On or about October 3, 2016 someone mailed three (3) potentially explosive devices to: 1) former President Barack Obama; 2) Governor of Texas, Greg Abbott; and 3) Acting Commissioner of Social Security Carolyn Colvin. These packages were made using trash left over from an illegal eviction of the Poff family home. Thirteen months later Ms. Poff is indicted using a fraudulent videotape. After false statements were made at her bond hearing, she was ordered to be detained. Ms. Poff has maintained her innocence the entire time. After many structural errors and the denial of her Constitutional rights Ms. Poff files a "Petition for Writ of Habeas Corpus," challenging her detention and seeking dismissal of her indictment for Fifth and Sixth Amendment violations. The government demands Ms. Poff dismiss the petition, she refuses and they retaliate. Ms. Poff is then forced to plead to one count of 18 U.S.C. Section 844 (d) - " Transportation of Explosives With the Intent to Kill, Injure, or Intimidate. She is erroneously sentenced for attempted murder at sentencing and given the statutory maximum of 10 years. Ms. Poff continued pursuing her petition for habeas corpus and almost two (2) years after it was filed, it was dismissed as moot violating Ms. Poff's due process rights.

REASONS FOR GRANTING THE WRIT

On November 23, 2018 after being unconstitutionally detained for over one (1) year as a pretrial detainee, Ms. Poff filed a "Petition for Writ of Habeas Corpus," under 28 U.S.C. § 2241. The function of the writ of habeas corpus ad subjiciendum at common law is to call upon the jailor to bring a prisoner before the Court to justify the restraint on the person's liberty. Within her petition, Ms. Poff seeked dismissal of her indictment for several reasons: (1) due process violations, (2) the Speedy Trial Act, and (3) multiple violations under the Sixth Amendment (structural errors). The proper procedure to attack a person's detention is to file an appeal under the Bail Reform Act. Ms. Poff asked her attorney to file an appeal many times and she refused to honor her request, which is a structural error. This issue should have been decided and separated from the criminal trial process. Ms. Poff's 2241 petition was assigned to the Honorable Alfred Bennett, where it sat on his docket for 175 days with no action taken on it. The original criminal Judge was the Honorable Vanessa Gilmore who was recently removed from Ms. Poff's case and replaced by the Honorable Keith Ellison. The removal alone suggests that the Fifth Circuit agreed with Ms. Poff that she was being denied an impartial tribunal - another violation.

Some circuits, along with the Speedy Trial Act state, "that extraordinary writs," are analgous to an interlocutory appeal. So if it is enough to toll the clock, then wouldn't that demand a ruling on it before the case could proceed? This ruling would also concur with Fed.R.Crim.P. 12(d) that states, "the Court must decide every pretrial motion before trial." However, that isn't what happened in Ms. Poff's case. The prosecutors used the delay in the habeas to punish Ms. Poff in the original criminal case, by threatening to extort family members into criminal charges and retaliate with more charges against Ms. Poff until Ms. Poff was coerced into pleading guilty. Therefore, the collateral habeas petition could then be ruled as moot, two (2) years after it was filed. See Judicial Misconduct rules using delay to avoid judicial responsibilities.

Structural errors affect the framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself. An error may be ranked structural if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest, such as the fundamental legal principle that a defendant must be allowed "to make his own choices about the proper way to protect his own liberty." The below issues identify how structural errors infected every phase of Ms. Poff's trial process.

SUMMARY OF ARGUMENT

"The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty and they understood the writ of habeas corpus as a vital instrument to secure that freedom." Price v. Johnston, 68 S.Ct. 1049 (1948). As stated in Johnson v. Zerbst, 58 S.Ct. 1019 (1938), "Congress has expanded the rights of a petitioner for habeas corpus ... there being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus ... it results that under the sections cited a prisoner in custody ... may have a judicial inquiry ... into the very truth and substance of the causes of his detention ..." Such a judicial inquiry involves the reception of testimony, as the language of the statute shows. "It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." Moore v. Dempsey, 43 S.Ct. 2651 (1923); Mooney v. Holohan, 55 S.Ct. 340 (1935). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." Harris v. Nelson, 89 S.Ct. 1082 (1969); Preiser v. Rodriguez, 93 S.Ct. 1827 (1973). The fundamental requirement of due process is an opportunity to be heard. Parratt v. Taylor, 101 S.Ct. 1908 (1981). That right along with many others Ms. Poff was denied.

Question 1: Was the Complete Deprivation of Ms. Poff's Fundamental Rights to Determine How to Protect Her Liberty Related to Structural Error Violated Multiple Times Throughout The Trial Process?

So many errors have happened in this case, Ms. Poff reminds this Court that they "have the authority to make their own assessment of the harmlessness of a constitutional error in the first instance." Yates v. Evatt, 500 U.S. 391, 407 (1991) (citing Rose v. Clark, 478 U.S. 570, 584 (1986)). From the moment of the first raid on their home, October 7, 2016, Ms. Poff has maintained her innocence throughout the process. She has reiterated her innocence in every legal document she has filed irrespective of severe prosecutorial misconduct in extorting a plea agreement from Ms. Poff because her counsel refused to put on the case Ms. Poff wanted to present to the jury. The fraud committed in this case by the prosecutor has caused Ms. Poff significant duress which has lead to a heart attack, documented in medical records by the BOP Cardiologist, Dr. Geoffrey Kline (See, Ex. E)

Violation of a defendant's Sixth Amendment - secured autonomy - ranks as error the kind the U.S. Supreme Court decisions have called "structural." These errors are not subject to harmless-error review. Autonomy gives the Defendant the right to make decisions like: (1) whether to plead guilty, (2) waive the right to a jury trial, (3) testify on one's own behalf, (4) the right to represent one's self, (5) call witnesses in their favor, and

(6) forgo an appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983); Rock v. Arkansas, 483 U.S. 44 (1987); and McCoy v. Louisiana, 138 S.Ct. 1500 (2018).

At Ms. Poff's bond hearing, after listening to perjury and false statements being said from the only one allowed to testify that day, Officer Terry Young, deputized as the FBI to give hearsay testimony. Ms. Poff begged and pleaded with her attorney, Ashley Kaper to allow her or one of her family members to testify and she refused Ms. Poff's request. Rock (1987); and McKaskle v. Wiggins, 465 U.S. 168 (1984)(failure to secure witnesses in your favor - structural error). Blatantly false statements violate Giglio v. United States, 405 U.S. 150 (1972). To prevail on a Giglio claim the petitioner must prove (1) that the statement was actually false, Corpus v. Beto, 469 F.2d. 953 (5th Cir. 1972), cert. denied 414 U.S. 932 (1973), (2) that it was material, Luna v. Beto, 395 F. 2d. 35 (5th Cir. 1968)(en banc), cert. denied 394 U.S. 966 (1969), and (3) that the prosecution knew it was false, Luna v. Beto, supra at 41 (Brown C.J., concurring). "Poff used fake license plates to park in a handicap spot." This statement is not only false but also irrelevant but was first used that day and has been incorporated in every legal document the government has filed. A simple search on Texas Department of Public Safety's website showing Ms. Poff's driver's license information under her name and number (14299859) would show

Ms. Poff was issued a blue permanent handicap placard and had legal permission to park in those spots. Is the Government actually going to deny during their 13-month investigation and following Ms. Poff that they never bothered to look at her driving record? Especially, since they went through the trouble of pulling her military record from 30 years ago. They knew it was false but yet still continue to use it. It should also be said, that the vehicle in question was purchased at least six months after the alleged crime happened. An error is structural if it is not designed to protect the defendant from erroneous conviction, but instead protects some other interest, such as the fundamental legal principle that a defendant must be allowed to testify on her behalf or secure witnesses on her behalf, and to make her own choices about the proper way to protect her own liberty. Weaver v. Massachusetts, 137 S.Ct. 1899 (2017)(citing Faretta v. California, 95 S.Ct. 2525 (1975)). Ms. Poff did not meet any of the qualifications under 18 U.S.C. Section 3142 to be detained, so the government had to create reasons to keep her detained. "18 U.S.C. Section 3142 does not permit the detention of a defendant who does not satisfy any of the conditions of Section 3142(f) regardless of dangerousness to the community or to specific others." United States v. Byrd, 969 F.2d. 106 (5th Cir. 1992). This caused Ms. Poff to be unconstitutionally detained and denied the ability to get the evidence to prove her innocence that her attorney's refused to do. Another violation was the denial of Ms. Poff's MANY requests to file an appeal under the Bail Reform Act. Rebuttal information in regards to why Ms. Poff was ordered detained was available but never given to a Judge. A defendant does not need to surrender complete control of their case, but Ms. Poff was forced to. Anything she said or asked for didn't matter, and she couldn't have represented herself even if she wanted to. McCoy (2018)(citing Faretta (1975)). Ms. Poff's counsel NEVER presented her with a trial strategy, they were more interested in forcing her to plead guilty to a crime she didn't commit so they wouldn't have to go to trial. Florida v. Nixon, 125 S.Ct. 551 (2004); and Brookhart v. Janis, 86 S.Ct. 1245 (1966). These additional structural errors deprived Ms. Poff of the right to determine the best way to protect her liberty interests. United States v. Gary, 954 F.3d. 194 (4th Cir. 2019).

To try and take back some control over her defense, Ms. Poff filed a "Petition for Writ of Habeas Corpus," challenging the legality of her detention and stating her constitutional rights under the Fifth and Sixth Amendments had been violated. This was Ms. Poff's only option because the Judge was trying to usurp control over Ms. Poff's defense in violation of the Sixth Amendment - another structural error. McCoy (2018). Even then she was ignored and received no answers. "To deny plaintiff a trial on the merits and to deny him even the power to require the government to meet his allegations by an answer is a denial of justice and of due process of law." Joint Anti-Fascist Refugee Committee v. McGrath, 71 S.Ct. 624 (1951). Shortly, after she filed, her attorneys came to her and orally stated, "the Government is demanding you dismiss the habeas or they are going to retaliate." Ms. Poff refused their demand so they did retaliate and filed a second Superseding indictment. They duplicated charges already filed, stacked more 924(c) charges (violating the recently filed First Step Act), changed the wording from disjunctive to conjunctive and made their threat of extorting family members a reality by adding her husband to the indictment but only under counts 12 & 13, "False statement in Bankruptcy." But the punishment didn't stop there they attacked her minor child by refusing to allow him to visit his mother. At her husband's bond hearing, the Judge wrote on his orders, "he may still see his wife." Her husband had been bringing her young son with him every Sunday to visit his mother. He was now being denied visitation. The Prosecutor told Ms. Poff's attorney, "we did that to punish Ms. Poff. Why, because she filed a writ of habeas corpus and refused to dismiss it or for pleading "Not Guilty." for the third time in the original case? This punishment lasted 12 weeks before they extorted Ms. Poff to take a plea agreement against her wishes, if she wanted to be able to see her family again." Denial of contact visitation is very traumatic treatment." Rutherford v. Pitchess, 457 F.Supp. 104 (9th Cir. 1978).

Title 18 U.S.C. Section 3553(a) factors promise better health care. Ms. Poff was getting excellent health care before she was incarcerated and was in remission. She was pre-trial detained, denied her lupus medication for 315 days after her detention and as a result suffered a heart attack. The care Ms. Poff has received at FMC Carswell has been abysmal. Carswell FMC is licensed as a nursing home, not a medical center. In addition Carswell FMC carries a $100,000 life insurance policy on each inmate, to which they are the sole beneficiary. That explains the amount of senseless deaths at FMC Carswell. This insurance policy is a conflict of interest in housing an inmate. Ms. Poff has been told she needs to have an angioplasty procedure done to open a 70% blockage in Ms. Poff's heart. Being incarcerated usurps this emergency situation.

As additional structural error, Ms. Poff's attorneys told Ms. Poff that the Government was fighting going to trial; CJA Counsel told Ms. Poff the government witnesses would be vouched for by the government. Nevada v. Jackson, 569 U.S. 505 (2013)(citing Chambers v. Mississippi, 410 U.S. 284 (1973) ("the vocher rule has been condemned as archaic, irrational, and potentially destructive of the truth-gathering process"). The government stated that they would discredit any or all of Ms. Poff's witnesses on the basis of personal bias.

Against Ms. Poff's wishes, appointed CJA counsel moved for multiple continuances to access Rule 16 discovery the government was mandated to produce immediately after arraignment. Ms. Poff told her attorneys she wanted to invoke her speedy trial rights. This demand is located in several parts of the record which Ms. Poff has yet to receive from CJA Counsel. CJA counsel's usurpation over Ms. Poff's speedy trial rights constituted another structural error. The lack of discovery so Ms. Poff strategize the best way to protect her liberty constituted another structural error. Gary (4th Cir. 2019) and McCoy (2018).

Barker v. Wingo, 407 U.S. 514 (1972) contemplated that a speedy trial challenge may be raised by a petitioner prior to trial, but Bracken v. 30th Judicial Court of Kentucky, 410 U.S. 484 (1973), makes clear that a federal district court has jurisdiction to hear a petition for habeas relief on a speedy trial claim prior to trial on a pending criminal charge. See also Kane v. State of Virginia, 419 F. 2d. 1369 (4th Cir. 1970) and May v. State of Georgia, 409 F. 2d. 203 (5th Cir. 1969). Certain kinds of habeas corpus claims that may be brought before trial include speedy trial claims which are NOT mooted by conviction because they challenge not only the legality of the pretrial detention but also the legality of the postconviction detention or the fairness of the procedure that lead to the conviction.

Preiser v. Rodriguez, 93 S. Ct. 1857 (1973).

After Ms. Poff filed her habeas petition, the Government as aforesaid, retaliated. Ms. Poff's second set of attorneys Gus Saper and Brent Mayr, came to Ms. Poff again and reiterated the fact, "the Government is not going to allow you to have a trial, they will make you sit in detention and keep punishing you until you plead to something; in spite of the fact that Ms. Poff's attorneys were mandated to put on the defense Ms. Poff desired and requested - another structural error. McCoy (2018). At this point, Ms. Poff had already been pretrial detained and punished (for lack of medical care, etc.) for over 18 months.

Further, Ms. Poff's attorneys deceptionally told Ms. Poff that the sentencing guidelines would be 37-46 months, so with good time credits she had already done close to 50% of the projected sentence conveyed by CJA Counsel. After the projected sentencing guidelines were given, Ms. Poff still insisted on a trial. Ms. Poff's CJA Counsel filed a motion for funds. Judge Gilmore denied Ms. Poff's trial demand and funding requests for witnesses. The biased trial Judge was allowing the CJA Counsel to "usurp" control over Ms. Poff's defense by a denial of CJA funds - another structural error.

In the habeas case, 175 days later (emphasis added), the habeas Judge, as an additional prejudicial factor of delay, on or about May 17, 2019, sent out an "Order to Answer." The time limits set forth in 28 U.S.C. Section 2243 and Fed. R. Civ. P 81(a)(2) provide 20 days to respond once the Order to Answer is served. Several federal courts have addressed the issue of delay once the petition is served. Witt v. State ex rel. Eyman, 343 F. Supp. 392, 394 (D. Ariz. 1972)(cited in Troglio v. Clanon, 378 F. Supp. 273 (N.D. Ca 1974)("A petitioner who states specific factual allegations which if believed would entitle him to immediate release from illegal confinement, should not have to suffer a delay in either being heard or obtaining the relief to which he is entitled, merely because a response is delayed without good cause or beyond the limits set by law"); Bleby v. United States, 341 F. 2d. 585, 587 (9th Cir. 1965), cert. denied, 86 S. Ct. 1877 (1966)(" The application for the writ usurps the attention and displaces the calendar of the judge or justice who entertains it and receives prompt action from him within the four corners of the application. The ordinary rules of civil procedure are not intended to apply thereto, at least in the initial emergency attention given as prescribed by statute to the application of the writ"); Van Buskirk v. Wilkinson, 216 F. 2d. 735, 737-38 (9th Cir. 1954)("habeas corpus is a speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination");

McClellan v. Young, 421 F.2d. 690, 691 (6th Cir. 1970)(same); Glynn v. Donnelly, 470 F.2d. 95, 99 (1st Cir. 1972)("28 U.S.C. Section 2243 manifests policy that habeas petitions are to be heard promptly"); Jones v. Shell, 572 F.2d. 1278, 1280 (8th Cir. 1978)("the writ of habeas corpus, challenging detention, is reduced to a sham if the trial courts do not act within a reasonable time")(quoted by Johnson v. Rogers, 917 F.2d. 1283 (10th Cir. 1990); Fay v. Noia, 83 S.Ct. 822 (1963)("a swift and imperative remedy in all cases of illegal restraint or confinement") (quoting Secretary of State for Home Affairs v. O'Brien, (1923) A.C. 603, 609 (H.L.); and Johnson v. Avery, 89 S.Ct. 747 (1969) ("court has constantly emphasized fundamental importance of the writ"). In consideration of the "fundamental importance" of the writ, and the neccessity that it provides an "efficacious remedy" for intolerable restraints, the Supreme Court has cautioned and commanded that "there is no higher duty than to maintain it unimpaired." Bowen v. Johnston, 59 S.Ct. 442 (1939). The intentional judicial delay also violated the "Suspension Clause" (Art. 1, Section 9) of the United States Constitution. See Henry J. Friendly, "Is Innocense Irrelevant? Collateral Attack on Criminal Judgments," 38 U. CHI. L. REV. 142, 170 (1970)("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it, or, more pertinently, as the Supreme Court has interpreted what Congress did"). If there is grave doubt that a petitioner's detention is lawful, then habeas relief should be granted as quickly as possible. O'Neal v. McAninch, 513 U.S. 432, 445 (1995).

The question as to the time within which a response is to be filed is now provided by 28 U.S.C. Section 2072 which states that a court can, given good cause extend the time for the response up to 40 days. Neither this nor Fed. R. Civ. P. 81(a)(2) allows a Judge the discretion to grant a 60-day return on the response. "This [these rules] enjoins the Judge to proceed in a summary way to hear the cause and dispose of the petition; it is difficult to see how the comparitively cumbersome and time consuming procedure of reference, report, and hearing upon the report, can be thought a more expeditious method than that prescribed by the statute." Holiday v. Johnston, 61 S.Ct. 1015 (1941). In fact, looking to Congressional intent, some courts have held that the 40 days prescribed in Fed. R. Civ. P. 81(a)(2) as the time in which an answer must be filed, is a mandatory deadline not to be exceeded." Mattox v. Scott, 507 F. 2d. 919, 923 (7th Cir. 1974); and Allen v. Perini, 291 F. Supp. 144 (N.D. Ohio 1970).

In Ms. Poff's habeas petition the 60 days came and went with no response from the Warden. During this time the Government refused Ms. Poff's request in the criminal proceedings to wait for resolution in the habeas case. The Judge in the criminal case should have followed the doctrine of comity and allowed resolution as well, since she knew the habeas petition was pending. Darr v. Burford, 339 U.S. 200 (1950)("a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter"). Other Circuits interpreting the statutory language of 18 U.S.C. Section 3161, have found that "an extraordinary writ such as a petition for writ of habeas corpus was functionally equivalent to an interlocutory appeal, because an interlocutory appeal and a petition for a writ serve the same underlying purpose." United States v. Hohn, 8 F.3d. 1301 (8th Cir. 1993)(quoting United States v. Davenport, 935 F.2d. 1223 (11th Cir. 1991). In Davenport, the Court held, "the petition for writ of habeas corpus in this case seeking dismissal of the indictment for violation of the Speedy Trial Act is an 'other proceeding' analgous to an interlocutory appeal." The purpose of Section 3161 (h)(1)(c) is to remove from the Speedy Trial Act calculation periods when the district court justifiably cannot (emphasis added) try the defendant's case. This reasoning and interpretation also concurs with

Fed. R. Crim. P 12(d) that "the Court must decide every pretrial motion before trial." If this Court should agree then the Judge in the original criminal case would have been without jurisdiction until resolution of the habeas case. Ex Parte: Tom Tong, 108 U.S. 556 (1883)("The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts"(quoting Ex Parte Bollman and Ex Parte Swartout, 8 U.S. 75 (1807)("The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus and this writ must always be for the purpose of revising that decision, and, therefore appellate in its nature"). As observed in United States v. Brooks, 145 F. 3d. 446 (1st Cir. 1998): "like most rules, the rule that either the trial or appellate court -- but not $\boxed{\text{both}}$ -- may have jurisdiction over a case at any given point."

Completely against Ms. Poff's wishes, Ms. Poff's CJA Counsel compelled Ms. Poff to sign a plea agreement to avoid their responsibilities of going to trial. Ms. Poff's attorneys reiterated to Ms. Poff the guidelines range would be honored by the Government. The calculation base for the offense was 21 and then minus the 3-points for accepting responsibity resulted in a level of 18. At sentencing the Court illegally held a side bar conference with the probation officer only; the result of which were to enhance Ms. Poff's "alleged intimidation crime" into an "alleged attempted murder" crime which doubled Ms. Poff's level to a 36. The guidelines range for level 36 exceeded the criminal statutory maximum, so the Court believed that she was forced to apply the 10-year maximum incarceration penalty under the criminal statute. United States v. Booker, 543 U.S. 220 (2005)("when the sentencing court treats the guidelines as mandatory rather than advisory"). Holding a side bar conference without participation of CJA Counsel was another structural error. Prior to sentencing Ms. Poff had requested her counsel to withdraw her plea and he refused. He stated, "it was too late." McCoy (2018). At sentencing, Ms. Poff also broke down crying and told the Judge, "she did not do this," and the Judge refused to allow her to withdraw the plea agreement - another structural error. Another structural error at sentencing was the denial of Ms. Poff's request to have witnesses testify on her behalf. Rock, (1987). James Wiedemer, an attorney who has known Ms. Poff for years and was familiar with the circumstances that lead to this crime requested to be at Ms. Poff's sentencing and speak on her behalf and was denied by Ms. Poff's CJA Counsel.

Ms. Poff was forced to plead on July 1, 2019 and her sentencing hearing was setoff until November 18, 2019.

In the interim, Ms. Poff continued to pursue her habeas petition believing that the Court in a timely manner (emphasis added) would sua sponte correct the obvious structural errors within the criminal case. Ms. Poff filed a "Motion for Default," in August 2019, in response the Judge in the habeas case realized that service was not perfected on the Warden. The Judge then issued a "Supplemental Order to Answer," giving the Warden another 60 days to respond. In September of 2019, the Government filed a "Motion to Dismiss," the habeas case as moot because Ms. Poff had pled on July 1, 2019 and had now been convicted. The habeas Judge waited another year and finally almost two (2) years after the habeas corpus petition had been filed, he dismissed it on November 19, 2020. Johnson v. Rogers, 917 F.2d. 1283 (10th Cir. 1990)("A Judge's delay of 14 months in hearing a prisoner's petition for a writ of habeas corpus was impermissable"). Ms. Poff never got the opportunity to be heard in her habeas case before the untimely and significantly delayed dismissal order. The issue was not lost forever, however, because the dismissal converted to structural error in the criminal case as above stated when CJA counsel usurped control over Ms. Poff's plea agreement through gross deception in not explaining to Ms. Poff the elements to the charge of Count 7, that Ms. Poff was pleading to - again structural error. See Gary (4th Cir. 2019).

"Justice delayed is always justice denied, when the delay establishes prejudice." Teague v. Mayo, 553 F.3d. 1068 (7th Cir. 2009). This constitutional violation / structural error was even more offensive when the Judge structurally erred by now not allowing Ms. Poff to withdraw her plea agreement after Ms. Poff realized the entire premise of the agreement had been aborted by the Judge. The entire case has been a fundamental miscarriage of justice. Murray v. Carrier, 477 U.S. 478 (1986); Schlup v. Delo, 513 U.S. 298 (1995); House v. Bell, 547 U.S. 518 (2006), citing Wainwright v. Sykes, 433 U.S. 72 (1977). "A conviction following a trial or on a plea of guilty based on a confession extorted by violence or by mental or physical coercion is invalid under the federal due process clause." Watts v. Indiana, 69 S.Ct. 1347 (1949) ("Since defendant's confession was procured by illegal detention, protracted questioning over a period of 72 hours, threats to himself and family, and physical abuse, his conviction must be upset"); Turner v. Pennsylvania, 69 S.Ct. 1352 (1949). "It is error for a federal district court to deny a prisoner's application for habeas corpus, where it is shown that the prisoner was convicted by the use of a confession obtained from him through physical or mental coercion." Leyra v. Denno, 74 S.Ct. 716 (1954). This court also held in Herman v. Claudy, 76 S.Ct. 223 (1956), that "the sound premises upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy regardless of the time lapse."

WHEREFORE, Ms. Poff prays this Honorable Court will grant certiorari, vacate her conviction and sentence under McKaskle, McCoy, Rock, Watts supra and remand to the district court to effect the vacation of the conviction and conduct further proceedings in line with this Order.

Respectfully Submitted,

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