No. 22-6501

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL HAGAR - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE

The Sixth Circuit Court of Appeals erred when it did not issue a Certificate of Appealability as the Petitioner met the requirement under 28 U.S.C. § 2253(c)(2), Miller-El v Cockrell 537 US 322 (2003), Slack v McDaniel 529 US 473 (2000), and Bracy v Gramley 520 US 899 (1997).

QUESTION TWO

Does Kaufman v United States 394 US 217 (1969) and Barker v Wingo 407 US 514 (1972) control the petitioner's Sixth Amendment speedy trial claim under § 2255, when raised in a pretrial motion, but not on direct appeal. If no, can the Appeals Court consider sua sponte the speedy trial claim procedurally defaulted, when the Government waived the specific defense of procedural default for failure to raise the claim on direct appeal.

QUESTION THREE

The Petitioner's Section 2255 remedy by motion and proceedings rendered inadequate and ineffective when denied the fair administration of justice, due to judicial misconduct, which violated due process.

LIST OF PARTIES

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

RELATED CASES

Hagar v United States No. 1:21-cv-1336, U.S. District Court for the Northern District of Ohio. Judgment entered February 2, 2022. Reported on criminal docket 1:16-cr-273.

Hagar v United States No. 22-3171, U.S. Court of Appeals for the Sixth Circuit. Judgment entered July 26, 2022. Petition for Rehearing En Banc judgment by three judge panel entered September 16, 2022. Petition for Rehearing En Banc judgment entered October 3, 2022.

United States v Hagar No. 1:16-cr-273, U.S. District Court for the Northern District of Ohio. Amended judgment entered June 11, 2019.

United States v Hagar No. 19-3591, U.S. Court of Appeals for the Sixth Circuit. Judgment entered August 3, 2020.

Hagar v United States No. 20-6394, Supreme Court of the United States. Judgment entered January 11, 2021.

Hagar v FBI, Case No. 1:22-cv-101, Eastern District of Texas, Beaumont Division.

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STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to the petition and is unpublished. The opinion of the United States District Court for the Northern District of Ohio appears at Appendix D to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Sixth decided my case was July 26, 2022. A timely petition for rehearing en banc was denied by the three judge panel of the United States Court of Appeals for the Sixth Circuit on September 16, 2022 and a copy of the order appears at Appendix B. The petition for rehearing en banc was denied by the United States Court of Appeals for the Sixth Circuit on October 3, 2022 and a copy of the order denying rehearing en banc appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO THE CONSTITUTION

In all criminal prosecution, 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 defense.

18 U.S.C. § 115(a)(1)(A), see Appendix V

18 U.S.C. § 115(c)(2), see Appendix V

18 U.S.C. § 875(c), see Appendix V

18 U.S.C. § 1503(a), see Appendix V

18 U.S.C. § 1512(c)(2), see Appendix V

18 U.S.C. § 2261A(2), see Appendix V

18 U.S.C. § 3162(a)(2), see Appendix V

28 U.S.C. § 2071(a), see Appendix V

28 U.S.C. § 2253(c)(2), see Appendix V

28 U.S.C. § 2255(a), see Appendix V

28 U.S.C. § 2255(b), see Appendix V

28 U.S.C. § 2255(e), see Appendix V

FEDERAL RULES OF CRIMINAL PROCEDURE 12(b)(3), see Appendix V

FEDERAL RULES OF CRIMINAL PROCEDURE 12(d), see Appendix V

STATEMENT OF THE CASE

The petitioner, Michael A. Hagar, ("Hagar"), was found guilty by a jury on March 1, 2019 of (1) cyberstalking in violation of a protective order, in violation of 18 U.S.C. §§ 2261A(2)(B), and 2261(b)(6), and (2) two counts of interstate threatening communication, in violation of 18 U.S.C. § 875(c). On June 7, 2019, the Court sentenced him to 180 months in prison. Hagar timely appealed: however, the Sixth Circuit affirmed his conviction on August 3, 2020. [United States v Hagar 822 F. App'x 361 (6th Cir. 2020)]. Hagar filed a petition for a writ of certiorari in the Supreme Court which was denied on January 11, 2021. [cert. denied, 141 S. Ct. 1115, 208 L. Ed. 2d 557 (2021)]. Hagar filed a timely motion under 28 U.S.C. § 2255, on August 16, 2021, Doc #: 148. The Government responded on September 16, 2021, Doc #: 150. Hagar filed a reply on October 25, 2021, Doc #: 153. Hagar filed a Motion to Conduct Discovery on January 3, 2022, Doc #: 156. The Government filed a response on January 18, 2022, Doc #: 157. Hagar filed a reply on January 31, 2022, Doc #: 158. The District Court denied Hagar's Motion to Conduct Discovery and his § 2255 motion on February 2, 2022, Doc #: 159 and 160.

Hagar filed a Notice of Appeal on February 28, 2022, Doc #: 161. In late March of 2022, Hagar filed a Request for a Certificate of Appealability, ("COA"), in the Sixth Circuit Court of Appeals. The Sixth Circuit denied Hagar's Request for a COA on July 26, 2022. Hagar filed a Petition for Rehearing En Banc in late August. The three judge panel affirmed the denial of the COA on September 16, 2022. The Sixth Circuit denied the Petition for Rehearing En Banc

on October 3, 2022.

The petitioner's §2255 motion raised the following grounds:

1. The Petitioner is being held in violation of the laws of the United States, the Speedy Trial Act, 18 U.S.C. §§ 3161, et. seq., and the Fifth Amendment Due Process Clause, when the District Court did not dismiss the Petitioner's second Motion to Dismiss for violation of a speedy trial, Doc #: 81.

2. The Petitioner is being held in violation of the Fifth Amendment Due Process Clause and the Separation of Powers Doctrine, when the Sixth Circuit Court of Appeals concluded the Petitioner waived his right to dismissal, usurping Congress's legislative authority, creating a new waiver provision for the Speedy Trial Act, when he did not request a ruling on the motion to dismiss for violation of Speedy Trial.

3. The Petitioner is being held in violation of the Fifth Amendment Due Process Clause, when the Government committed Prosecutorial Misconduct, using false information, (the I.P. address for Eaton's server) to obtain an arrest warrant, and later an indictment against Mr. Hagar violating the Petitioner's Sixth Amendment right to effective assistance of counsel, when the Government concealed the true location of Eaton's server for over a two year period.

4. The Petitioner is being held in violation of his Sixth Amendment right to a speedy trial, when the Government intentionally concealed the true location of Eaton's server for over two years.

5. The Petitioner is being held in violation of the Sixth Amendment right to effective assistance of counsel, when the Petitioner's attorneys, Mr. Jenkins and Ms. Serrat, provided ineffective assistance of counsel for the following reasons:

A. Mr. Hagar's attorneys did not obtain a copy of the June 2, 2016 email for count 3 of the Superseding Indictment, Doc #: 77, PageID #: 242, with the complete header information, referred to in paragraph 13 of the affidavit for the Complaint, Doc #: 1-1, PageID #: 6.

B. Mr. Hagar did not instruct his attorneys to pursue a "Jurisdiction" argument. Mr. Hagar did instruct his attorneys to pursue an improper venue argument for his violation of the Sixth Amendment right to a speedy trial and for violation of the Speedy Trial Act. Mr. Hagar instructed his attorneys to pursue an improper venue defense at trial. Mr. Hagar's attorneys did not use an improper venue defense at trial.

C. Mr. Hagar's attorney failed to establish that C.B. is not an immediate family member to R.G. as defined by 18 U.S.C. § 115(c)(2)(B) for count 1 of the Superseding Indictment, Doc #: 77, PageID #: 240-241.

D. Mr. Hagar's attorneys failed to request the District Court to rule on Mr. Hagar's two Motions to Dismiss for Violation of Speedy Trial.

E. Mr. Hagar's attorney did not subpoena the Oregon Employment Department and obtain the information Eaton Corporation provided the Department including the separation information the company is required to provide.

F. Mr. Hagar's attorneys failed to obtain the invoices from Eaton's security company to show that Marc Elliot and Joseph Raulino gave false testimony at Mr. Hagar's trial.

G. Mr. Hagar's attorneys failed to subpoena T-Mobile for the Ping Data for Mr. Hagar's Prepaid Cellphone and to obtain a copy of the Spread Sheet detailing the expenses incurred by Goodyear from the private security firm Goodyear hired to observe Mr. Hagar.

The Government in its Response in Opposition to Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, Doc #: 150, ("Response"), did not address the merits of Hagar's motion. Hagar provided numerous documents to support his claims when he filed his Reply to the Government's Response. The District Court denied Hagar's § 2255 motion as well as his motion for discovery concluding: "the files and records in this case conclusively show that the Petitioner is entitled to no relief under § 2255, no evidentiary hearing is required to resolve the pending Motion." See Docket #: 159.

The District Court also denied a Certificate of Appealability. Hagar submitted a Request for a COA, ("Request"), based on the original grounds listed above and included the following two additional grounds:

6. Hagar's Constitutional right to Due Process was violated when the District Court relied on the Sixth Circuit's erroneous statement that venue was proper, which was a result of AUSA James Ewing's prosecutorial misconduct:

the false statement made by AUSA Ewing in the Appellee brief.

7. The District Court abused its discretion when it denied Hagar's Motion to Conduct Discovery, Doc #: 156.

The Sixth Circuit denied Hagar's Request for a COA, agreeing with the District Court's conclusions. Both the District and Appellant Courts relied on the false statement made by the judges for Hagar's direct appeal to deny Hagar's claim for 5B. "Hagar sent threatening emails to C.B.'s Eaton email address. She received and reviewed them at her office in Beachwood, Ohio. Thus, venue was proper because the emails were sent from Oregon to C.B. in the Northern District of Ohio." Hagar 822 F. App'x at 370.

In both the district and appellant courts Hagar responded that the trial court record clearly demonstrates that Hagar's email transmissions to Eaton email addresses never entered the Northern District of Ohio, ("NDOH").

Hagar then filed a Petition for Rehearing En Banc based in part on the fact that the denial of both his § 2255 motion and Request for a COA were based on the judicial misconduct of the three judges' false statement that C.B. received the emails. Hagar also based the Rehearing petition on the judicial misconduct of the judge who denied the COA, as he relied on the false statement to justify denying the COA. The Sixth Circuit denied Hagar's Petition for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals erred when it did not issue a Certificate of Appealability as the Petitioner met the requirement under 28 U.S.C. § 2253(c)(2), Miller-El v Cockrell 537 US 322 (2003), Slack v McDaniel 529 US 473 (2000), and Bracy v Gramley 520 US 899 (1997).

> "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a COA should issue when the prisoner shows, at least, that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurist of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v McDaniel 579 US 473, 484 (2000).

There are two components the Appeals Court needs to determine for the issuance of a COA to the petitioner; (1) "one directed at the underlying constitutional claims;" and (2) "one directed at the district court's procedural holding." Slack 579 US at 485.

The Appeals Court only focused on one condition this Court identified when considering the second component. The record.

> "[A] court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Id.

The Appeals Court ignored Hagar's arguments as well as the documents Hagar submitted with the Appendices of his Reply to the Government's Response in Opposition to Motion to Vacate, ("Reply"), Doc #: 153, and the Petition for Rehearing En Banc. Both the district and appeals courts relied on the record from the direct appeal of Hagar's criminal case to procedurally deny the § 2255 motion and the Request for a COA.

This Court has said:

> "When a movant asserts [] that a previous ruling regarding one of [the] grounds was in error [] he is making a habeas corpus claim." Gonzalez v Crosby 545 US 524, n.4 (2005).

Several of Hagar's claims are premised on the fact that the conclusions of the direct appeal were wrong and the Appeals Court should have considered the first component of Slack: the underlying constitutional claims.

> "[W]hen a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to the threshold inquiry into the underlying merits of his claims. Slack v McDaniel, 529 US 473, 481, 146 L Ed 2d 542, 120 S Ct 1595 (2000). Consistent with our prior precedent and the text of the habeas statute, we reiterate that a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right' 28 USC § 2253(c)(2)." Miller-El v Cockrell 537 US 322,327 (2003).

In Kaufman v United States 394 US 217 (1969), this Court adopted Judge Wright's dissenting opinion in Thornton v United States 368 F.2d 822, 831 (D.C. Cir. 1966), thereby integrating when a federal court must grant a hearing to a § 2255 prisoner, as provided in Townsend v Sain 372 US 293 (1963).

> "Although Townsend involved a § 2254 petition, the Supreme Court made clear in Kaufman v United States 394 U.S. 217, 227, 89 S. Ct. 1068, 22 L. Ed. 2d 227 (1969), that the same standard applied to both state and federal prisoners. While AEDPA amended the fact-finding procedures for petitions under § 2254, it did not amend those for petitions under § 2255." United States v Batamula 823 F.3d 237, 248, n.3 (5th Cir. 2016) (Dennis dissenting).

As Judge Wright said:

> "What if the trial or appellate court based its ruling on finding of fact made after a hearing not 'full and fair' within the meaning of Townsend v Sain, 372 US 293 (1963)?" Kaufman 372 US at 230.

What if the three judges on the direct appeal lie about a fact not in the record to influence the defendant's future proceedings? This would fall under the Townsend circumstance of; the factual determination is not fairly supported by the record as a whole.

As Hagar did provide documents with his Reply, Doc #: 153, as well as his Petition for Rehearing En Banc, Hagar has made "a substantial showing of the denial of a constitutional right." Therefore if the Appeals Court had considered Hagar's arguments and supporting documents, "jurist of reason would find it debatable whether the

petition states a vaild claim of the denial of a constitutional right and that jurist of reason would find it debatable whether the district court was correct in its procedural ruling." Slack 529 US at 484.

The District Court acknowledged: "Mr. Hagar does make specific allegations," Doc #: 159, PageID #: 1600, but the court concluded Hagar was not entitled to relief. The Court of Appeals should have granted the COA as this Court said:

> "[A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." Miller-El 537 US at 337.
>
> "[A] COA determination is a separate proceeding, one distinct from the underlying merits.(citation omitted). The Court of Appeals should have inquired whether a 'substantial showing of the denial of a constitutional right' had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate." Id. at 342.
>
> "'[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.'" Bracy v Gramley 520 US 899, 908-909 (1997) (quoting Harris v Nelson 394 US 286, 300 (1969)).

Hagar is "entitled to careful consideration and plenary processing of [his] claims including full opportunity for presentation of the relevant facts." Harris 394 US at 298.

All the grounds raised in Hagar's § 2255 motion fall under question one. As specific issues of the grounds fall under the other two questions, those grounds will be discussed under those questions. The considerations for question one are to be considered for the other grounds as well.

GROUND ONE: SPEEDY TRIAL CLAIM UNDER THE SPEEDY TRIAL ACT

Judge Nugent relied on the record to deny ground 1. Judge Clay affirmed Judge Nugent's conclusion. The record demonstrates that the "Sixth Circuit found that Mr. Hagar waived his speedy trial claims." Doc #: 159, PageID #: 1598. Judge Clay relied on the same determination.

> "On appeal, we determined that Hagar had waived his speedy trial claims by failing to request and obtain rulings on his motions to dismiss before trial. Hagar 822 F. App'x at 368-69." See Order denying COA, ("Order"), p. 3.

Both Judges stated: "a § 2255 motion may not be used to relitigate an issue raised on appeal." Dupont v United States 76 F.3d 108, 110 (6th Cir. 1996), Doc #: 159, PageID #: 1598; Order, p. 4. But Dupont continues: "absent highly exceptional circumstances," Dupont 76 F.3d at 110. Hagar in both his Reply, Doc #: 153, and his Request, p. 5 stated that this Court "in Hill v United States 368 US 424, 429 (1962) identified Escoe v Zerbst 295 U.S. 490 (1935) as an example of an 'exceptional circumstance,'" where this Court "decided the word 'shall' 'is the language of command' Id at 493 and the Courts do not have the power to dispense 'the will of Congress.' Id."

Both Judge Nugent and Judge Clay did not address the merits of the argument, and did not explain why it was not an exceptional circumstance for the court to not obey the command of Congress.

The jurist of the Ninth Circuit would find this ground debatable and it is likely they would disagree, as the Ninth Circuit recognizes a defendant preserves a claim under the Speedy Trial Act, ("Act"), for appeal when he asserts his speedy trial right. See United Sates v Henry 984 F.3d 1343,1350 (9th Cir. 2020); United

States v Lam 251 F.3d 852, 858 (9th Cir. 2000) (reported under U.S. v Lam 2001 U.S. App. LEXIS 18826 (9th Cir. 2001)); and United States v Hall 181 F.3d 1057, 1061 (9th Cir. 1999). The relevant part of 18 § 3162(a)(2) of the Speedy Trial Act provides:

> "If a defendant is not brought to trial within the time limits required by section 3161(c) as extended by 3161(h), the ... indictment shall be dismissed on motion of the defendant."

The relevant reasons for Ground 2 are relevant to the exceptional circumstances for Ground 1 and are herein incorporated for Ground 1.

GROUND TWO: THE SIXTH CIRCUIT VIOLATED THE FIFTH AMENDMENT DUE PROCESS CLAUSE AND THE SEPARATION OF POWERS DOCTRINE

In Boumediene v Bush 533 US 723 (2008), this Court said:

> "Because the Constitution's separation of powers structure, like the substantive guaranties of the Fifth and Fourteenth Amendments, (citation omitted), protects persons as well as citizens, foriegn nationals who have the privalege of litigating in our courts can seek to enforce separation-of-powers principles." Id. at 743.

Hagar as a citizen as well as a prisoner still retains the privalege of litigating his separation of powers claim. Judge Nugent did not address Hagar's claim, he ignored it, just as he ignored Hagar's motions to dismiss for violations of speedy trial.

The Government in its Response claimed this ground was "Fully Litigated On Direct Appeal." Doc #: 150, PageID #: 1471-1472. Judge Clay in denying the claim relied on the record of the direct appeal.

> "We recognized that claims under the Speedy Trial Act are waived unless raised before trial and held that failure to obtain a pre-trial ruling on a motion raising such claims 'is the functional equivalent of failing to bring the claims in the first place.' Hagar, 822 F. App'x at 368. Our ruling is consistent with the Speedy Trial Act's waiver provision." Order, p. 4.

Hagar raised the claim of a violation of the separation of powers doctrine because there is nothing in the Act's waiver provision that

supports the Sixth Circuit's conclusion. Judge Clay's statement is an example of what this Court said in Lynch v Alworth-Stephen Co. 267 US 364, 370 (1925):

> "[T]he plain obvious and rational meaning of a statute is always preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and ingenuity and study of an acute and powerful intellect would discover."

Judge Clay discovered the waiver provision in the statute where a defendant waives the right to dismissal if the defendant fails to obtain a ruling before trial. Judge Clay did not address the merits of the argument. He could not consider Judge Nugent's procedural holding, there was none. This left only the underlying constitutional claim. The Sixth Circuit relied on cases that involved Rule 12 of the Fed. R. Crim. P., not the Speedy Trial Act. Hagar in his Reply said:

> "Rule 12(b)(3) list the motions that must be made by pretrial motion. A motion to dismiss for violation of the Speedy Trial Act is not one of them." Doc #: 153, p. 7.

The Court's rule making power under 28 U.S.C. § 2071 does not apply to the Act as the relevant part provides: "Such rules shall be consistent with the Acts of Congress." Hagar in his Request:

> "The STA is an Act of Congress with its own procedures. See United States v Brainer 691 F.2d 691, 697 (4th Cir. 1982). The Sixth Circuit in United States v Satterwhite 893 F.3d 352, 359 (6th Cir. 2018) identified the 'thirty day speedy indictment rule' as a 'claims-processing rule.' This would also apply to the seventy day speedy trial rule as well as the waiver provision. 'If properly invoked mandatory claim-processing rules must be enforced ... (citation omitted)' Hamer v Neighborhood Hous. Servs. 138 S. Ct. 13, 17-18, (2017). Request, p. 7.

The legislative history shows:

> "The provision requiring the defendant to make an affirmative showing that the time limits have been exceeded is intended to preclude frivolous motions for dismissal

> and sua sponte dismissals by the court without having heard both parties on issue." Explanation of Proposed Amendment in Letter to Senator Ervin from Assistant Attorney General William H. Rehinquest, Oct. 19, 1971 at 1971 Senate Hearing, reprinted in A. Partridge Legislative History of Title I of the Speedy Trial Act of 1974, 199 (Fed. Judicial Center, 1980).

Congress did not enact the Speedy Trial Act to provide defendants with a literal Monopoly Game "Get Out Of Jail Free" card. It was directed at the prosecution and the courts.

> "The sanction against the U.S. attorney and the court for failure to comply with speedy trial time limit is the dismissal with prejudice of the prosecution." 1972 Draft Senate Committee Report, at 1973 Senate Hearing 54-55, Id. at 201.

The jurist of the Ninth Circuit would find this ground "debatable" and it is likely they would disagree with the Sixth Circuit.

The relevant reasons for Ground 1 are herein incorporated for Ground 2.

INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS FIVE E, FIVE F, AND FIVE G

> "As a matter of due process, an offender may not be sentenced on the basis of mistaken facts or unfounded assumptions. Townsend v Burke, 334 U.S. 736, 740-741, 92 L. Ed. 1690, 68 S. Ct. 1252 (1948)." Robert v United States, 445 US 552, 563 (1980).

Hagar in his § 2255 motion stated:

> "Because Mr. Hagar's attorneys did not obtain the information from the Oregon Employment Department, the invoices from Eaton's private security firm, the Ping Data from T-Mobile and the Spread Sheet from Goodyear, Mr. Hagar did not have them as information for the court to consider at the sentencing hearing on June 7, 2019." Doc #: 148, p. 20.

The relief Hagar requested in his § 2255 motion for these grounds: "conduct a sentencing hearing to consider additional factors for sentence," Doc #: 148, p. 12. Hagar in his Reply to Government's Response In Opposition To Defendant's Motion to Conduct

Discovery, ("Discovery Reply"), Doc #: 158, stated the documents were for the court to consider to correct his sentence. Judge Nugent repeatedly deflects to the trial instead of the correction of the sentence when he denies Hagar's claims.

> "Mr. Hagar's counsel, during discovery, had no reason to believe that false testimony would be given at trial. Further, even if this information had been introduced at trial, overwhelming evidence, such as the emails sent by Mr. Hagar himself, still existed for the jury to find Mr. Hagar guilty of cyberstalking and making interstate threatening communications. As a result, Mr. Hagar cannot show that a failure to procure this information deprived him of a fair trial and led to an unreliable result." Doc #: 159, PageID #: 1596.

For Hagar's discovery request Judge Nugent concluded:

> "The overwhelming evidence presented against Mr. Hagar at trial would not be refuted by the documents requested by Mr. Hagar in his Motion to Conduct Discovery. Doc #: 159, PageID #: 1600.

As Judge Nugent ignored the purpose Hagar claimed the documents were for; correcting the sentence, "jurist of reason would find it debatable whether the district court was correct in its procedural ruling." Hagar in his Request stated:

> "The Court relied on the information Hagar desires to refute while considering the 3553 factors. [] Because Hagar's attorneys ineffective assistance at the sentencing hearing, he was unable to refute the information." Request, p. 18.

Judge Clay denied these ineffective assistance claims because Hagar "failed to establish a reasonable probability that his sentence would be different," Order, p. 6. Judge Clay's denial is in conflict with what this Court said:

> "[A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." Miller-El 537 US at 337.

QUESTION NUMBER TWO

Does Kaufman v United States 394 US 217 (1969) and Barker v Wingo 407 US 514 (1972) control the petitioner's Sixth Amendment speedy trial claim under § 2255, when raised in a pretrial motion, but not on direct appeal. If no, can the Appeals Court consider sua sponte the speedy trial claim procedurally defaulted, when the Government waived the specific defense of procedural default for failure to raise the claim on direct appeal.

GROUND FOUR: SIXTH AMENDMENT SPEEDY TRIAL CLAIM

In Kaufman v United States 394 US 217 (1969), this Court held:

> "failure to appeal from conviction did not deprive a federal postconviction court power to adjudicate the merits of constitutional claim."

Hagar raised a Sixth Amendment speedy trial claim, a right this Court in Barker v Wingo 407 US 514 (1972) said: "the right to a speedy trial is fundamental." Id. at 515.

> "The right to a speedy trial is generically different from any of the other rights enshrined in the constitution for the protection of the accused." Id. at 519.

If Kaufman still controls Hagar's claim, the fact that it was not raised on direct appeal would not procedurally bar Hagar from raising the claim in his § 2255 motion. This Court in Massaro v United States 538 US 500 (2003) determined the cause and prejudice doctrine did not apply to ineffective assistance of counsel claims, explaining:

> "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by courts to conserve judicial resources and to respect the laws important interest in the finality of judgments." Id. at 504.

But Kaufman relied on Sanders v United States 373 US 1 (1963).

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Id. at 8.

This Court in United States v Frady 456 US 152 (1982), adopted

the "cause and actual prejudice" standard:

> "Under this standard to obtain 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 which he complains." Id. at 167-168.

Hagar however, did file a Motion to Dismiss for Violation of Speedy Trial under the Sixth Amendment of the Constitution, (as well as the Speedy Trial Act), as required by Fed. R. Crim. P. Rule 12(b)(3)(A)(iii), Doc #: 81, see Appendix E. Hagar did not have a double default, Hagar complied with the procedural rule. Judge Nugent however, did not. The relevant part of Fed. R. Crim. P. Rule 12(d) provides: "The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling."

The doctrine of "cause and prejudice" is applied to State habeas petitioners because they have "deprived the state courts" "a fair 'opportunity to pass upon [his claims].'" O'Sullivan v Boerckel 526 US 838, 854 (1999). Hagar did provide the court "a fair opportunity" to determine his speedy trial claim. Judge Nugent did not give Hagar a full and fair hearing.

The "cause and prejudice" standard Frady adopted came from Wainwright v Sykes 433 US 72 (1977), which based the decision in part from the Court's earlier decision of Davis v United States 411 US 233 (1973). Davis did not challenge the grand jury-selection method until three years after his conviction. It was concluded that under then Fed. R. Crim. P. 12(b)(2), he had waived the right as he did not demonstrate "cause shown" as required by the rule. The Court determined that Davis' waiver was the same as in Shotwell Mfg. Co. v United States 371 US 341 (1963), and distinguished from

Kaufman.

The case Barker v Wingo was a result of the denial of a petition for a writ of habeas corpus. The Court concluded:

> "[B]y presuming waiver of a fundamental right from inaction is inconsistent with this court's pronouncements on waiver of constitutional rights. The Court has defined waiver as 'an intentional relinquishment or abandonment of a known right or privilege.' Courts should 'indulge every reasonable presumption against waiver,' and they should 'not presume acquicsence in the loss of fundmental rights.'" Barker 407 US at 525-526, (citations omitted).

Barker provided the procedural rules for a speedy trial claim.

> "We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right." Id. at 528.

The Court established the four Barker factors, (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of his right; (4) prejudice to the defendant. Like the cause and prejudice doctrine, the Barker factors have a prejudice prong. No prejudice, generally, no relief.

If the Court determines the cause and prejudice doctrine applies to Hagar's speedy trial claim the Court can examine the question it left unanswered in Trest v Cain 522 US 87 (1997), is the Court of Appeals permitted to raise the procedural default issue.

The Government in its Response claimed the Sixth Amendment speedy trial claim was "PROCEDURALLY BARRED FROM RAISING CLAIMS ALREADY LITIGATED ON DIRECT APPEAL." Doc #: 150, PageID #: 1471. "'Ground 4' of Hagar's motion is an additional argument concerning his right to a speedy trial," PageID #: 1472. Hagar litigated the Speedy Trial Act on direct appeal, not the Constitutional right to a speedy trial. See Appendix F. If Hagar had litigated the Constitutional right

the Sixth Circuit could not conclude Hagar waived his right by not requesting a ruling on the motion.

Judge Nugent lumped all of Hagar's speedy trial claims together when he denied Hagar's motion, deciding Hagar was "procedurally barred" and "the issue was already litigated on direct appeal." Doc #: 159, PageID #: 1598. Judge Clay denied the claim, but like a magician with the slight of hand, pulled out of the hat, Hagar was procedurally barred as: "Hagar did not raise this argument on direct appeal." Order, p. 4.

The Government did not raise this defense and waived it, just like in Trest. Judge Clay did not provide Hagar with an opportunity to provide cause and Judge Clay ignored that Hagar wrote in his Request for this claim, "'Ineffective assistance of counsel claims are an exception to the procedural default doctrine.' Massaro 538 US at 504." Request, p. 9.

Just because Hagar cited the wrong authority does not preclude the assertion of ineffective assistance as cause.

Jurist of reason would find Judge Nugent was wrong in his procedural ruling as it was based on the wrong default. This Court should examine the question presented by this claim.

QUESTION NUMBER THREE

The Petitioner's Section 2255 remedy by motion and proceedings rendered inadequate and ineffective when denied the fair administration of justice, due to judicial misconduct, which violated due process.

"To prevail on a judicial misconduct claim a party must show that (1) the judge acted improperly, (2) there by causing him prejudice." United States v Marequez-Perez 835 F.3d 153, 158 (1st Cir. 2016).

"[A] judge's conduct would have to be significantly adverse to the defendant before it violated the constitutional

requirement of due process[.]" Garcia v Warden, Dannemora Correctional Facility 795 F.2d 5, 8 (2nd Cir. 1986).

GROUND FIVE C: INEFFECTIVE ASSISTANCE FOR NOT ESTABLISHING C.B. IS NOT AN IMMEDIATE FAMILY MEMBER AS DEFINED BY 18 U.S.C. § 115(c)(2)(B)

18 U.S.C. § 115(c)(2)(B) provides: "'immediate family member'of individual means, any other person living in his household and related to him by blood or marriage." The Court of Appeals, when it determined venue was proper, included note number five.

> "Additionally, Count 1 of the supeseding indictment referenced those messages because R.G., the cyberstalking victim, was related to C.G. (sic)." Hagar 822 F. App'x at 370 n. 5, see Appendix F.

C.B. living in the NDOH is the only factor the Court of Appeals used to determine proper venue in the NDOH for count 1. At trial C.B. testfied she was R.G.'s stepaunt, that she lived in Ohio and R.G. lived in Oregon. See Doc #: 102, PageID #: 536-538, 558-559; P.G. 177, ln. 16-20; P.G. 178, ln. 12-25; P.G. 179, ln. 15-23; P.G. 199, ln. 19-25; P.G. 200, ln. 1-5. See Appendix G for Trial Transcript excerpts of C.B.'s testimony.

Both Judge Nugent and Judge Clay denied Hagar's claim based on the record of the direct appeal. Hagar has argued that C.B. does not qualify as an immediate family member, as she does not meet the condition of the statute. The word "household" is the qualifier of an immediate family member, of which two types of individuals will meet this condition.

> "any other person living in his household and related to him by blood."
>
> "any other person living in his household and related to him by marriage."

C.B. does not qualify as an immediate family member under 18

U.S.C. § 115(c)(2)(B), and is not an immediate family member to R.G. for the purpose of the cyberstalking charge. The Courts corruptly maintain the use of C.B. to defeat Hagar's claim for the purpose of continuing to hold him in violation of the Constitution.

Due to the corrupt determination of the judges on this issue Hagar is forced to use what occurred to Justice Kavanaugh in the first half of 2022 as an analogy of the inappropriate use of the statute against Hagar's claim. 18 U.S.C. § 115(c)(2) defines a member of the immediate family for 18 U.S.C. § 115(a)(1)(A). If an offender, who has the intention of influencing a judge by targeting an immediate family member of the judge, the offender would be prosecuted under § 115(a)(1)(A). If C.B. was Justice Kavanaugh's step-aunt, and she lived in Ohio, the U.S. Attorneys Office in the NDOH would prosecute the offender, and upon conviction the Sixth Circuit would affirm, because C.B. is related to Justice Kavanaugh even though they do not live in the same household.

For a decision to be erroneous it signifies a mistake. The judges have corruptly applied § 115(c)(2)(B) against Hagar to deprive him of his liberty and that is judicial misconduct.

> "See Shaman, Lubet & Alfini, supra, § 2.02 at 36 ("In some instances ... legal error may amount to judicial misconduct calling for sanctions ranging from admonishment to removal from office.") accord Obeholzer v Comm'n on Judicial Performance, 20 Cal. 4th 371, 84 Cal. Rptr. 2d 466, 975 P.2d 663, 679 (Cal. 1999)(legal error "can constitute misconduct if it involves 'bad faith, bais, abuse of authority, disregard for fundamental rights, intentional disregard of the law or any purpose other than the faithful dicharge of judicial duty'" (citing cases)); In re Quirk, 705 So. 2d at 178 ("egregious legal error, legal error motivated by bad faith, and a continuing pattern of legal error" can also constitute misconduct)." In re Complaint 425 F.3d 1179, 1184 (9th Cir. 2005)(Ezra Dissenting)(citing Jeffrey M. Shaman, Steven Lubert & James J. Alfini, Judicial Conduct and Ethics, (3d ed. 2000)).

The performance of Hagar's attorneys was deficient and he did suffer prejudice for Ground 5C. Jurist of reason would find it debatable the courts were correct.

GROUNDS THREE: PROSECUTORIAL MISCONDUCT AND FIVE A: INEFFECTIVE ASSISTANCE OF COUNSEL

Section 13 of Hagar's § 2255 motion provides:

> "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:" Doc #: 148, p. 11.

The section relates to the "cause" for a procedural default. Hagar answered for Ground 3.

> "Ground 3 was discussed with the Petitioner's attorneys, but not pursued and was not raised due to their ineffective assistance of counsel." Id.

> "Ineffective assistance of counsel, [], is cause for a procedural default." Murry v Carrier 477 US 478, 488 (1986).

Judge Nugent acknowledged Hagar provided cause for the procedural default, Doc #: 159, PageID #: 1599. Judge Clay ignored Hagar's "cause" and determined Hagar was procedurally barred. Order, p. 5. Judge Clay ignored Hagar's argument in his Request including:

> "Hagar cannot prove the Government committed misconduct without the documents that prove the Government committed misconduct." Request p. 8.

Hagar cannot demonstrate the "prejudice" without discovery to prove the government concealed the location of Eaton's server and that it violated Hagar's Sixth Amendment right to effective assistance of counsel.

> "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independant decisions about how to conduct the defense." Strickland v Washington 466 US 668, 686 (1984).

Judge Nugent intentionally proceeded in a manner that was intended to deny Hagar the fair administration of justice and deny him the full and fair opportunity to develop the facts to demonstrate that he is entitled to relief. Judge Nugent concluded:

> "Mr. Hagar has failed to prove that the Government committed misconduct. Therefore, Mr. Hagar cannot prove that he was prejudiced by counsel's failure to obtain the information allegedly concealed by the Government." Doc #: 159, PageID #: 1598.

As stated above Hagar needs documents to prove the government committed misconduct. Those documents are in the possession of the government. Judge Nugent continued:

> "Mr. Hagar's counsel was not ineffective in failing to obtain the information allegedly concealed by the Government. As a result, this Court finds that Mr. Hagar waived his claim of prosecutorial misconduct by not raising it on direct appeal and is procedurally barred from bringing it for review under § 2255." Doc #: 159, PageID #: 1599.

With regard to Hagar's discovery request, Judge Nugent concluded:

> "Mr. Hagar claims that discovery will allow him to support his claims of prosecutorial misconduct and ineffective assistance of counsel. (ECF # 156). As discussed above, Mr. Haggar's (sic) prosecutorial misconduct claims are procedurally barred and as a result he fails to make a showing of good cause." Doc #: 159, PageID #: 1599-1600.

Judge Nugent acknowledged with respect to Ground 5A of the ineffective assistance claim:

> "Mr. Hagar seeks to discover a copy of an email with the header listing the IP address, ... in order to fully support his ineffective counsel claim. As discussed above, although Mr. Hagar does make specific allegations, these allegations do not establish that if the facts were developed fully he would be entitled to relief." Doc #: 159, PageID #: 1600.

The email with the IP address is the document that will prove the government committed misconduct. Judge Nugent acknowledged and concluded:

"Mr. Hagar claims that the email with the header listing the IP address would have established his burden of proof for his second motion to dismiss[.] ... The location of the server outside of the Northern District of Ohio was irrelevant and knowledge of the location would not have resulted in a different outcome in terms of the motion." Doc #: 159, PageID #: 1595-1596.

Hagar's motion to dismiss is premised on the waivers:

"Should be set aside as they were signed under the mistaken belief that the federal government had evidence of the emails ... having traveled through this Court's jurisdiction." Doc #: 81, PageID #: 253, see Appendix E.

The email with the IP address is that evidence. The relevant part of ¶ 13 of the affidavit for the complaint provides:

"The header information revealed that the email was ... received by a server with domain etn.com, registed to Eaton with IP address, 151.110.126.183, located in Beachwood, Ohio." Doc #: 1-1, PageID #: 6.

Paragraph 7 of the Indictment alleges:

"E-mails sent to Goodyear and Eaton employees were routed through Goodyear and Eaton data centers located in the Northern District of Ohio." Doc #: 10, PageID #: 35.

Paragraph 14 of the Indictment alleges:

"The e-mails that HAGAR sent to Eaton and Goodyear employees travelled through Eaton and Goodyear data centers located in the Northern District of Ohio." Doc #: 10, PageID #: 36.

The relevant part of counts 2 and 3 of the indictment allege:

"[T]he e-mail travelled to data centers maintained by Eaton in the Northern District of Ohio," Doc #: 10, PageID #: 38-39.

Hagar provided the following information in his Petition for Rehearing En Banc, and provided documents from which the information came from. The information from these documents date from around June 2022 to August 2022. If the information was the same on June 7, 2016, the government knew Eaton's server was not located in the NDOH when it obtained the arrest warrant on June 14, 2016.

A trace-route of the domain listed in ¶ 13 of the affidavit, etn.com, using DomainChecker.org, displays an IP address of 192.104.67.8, see Appendix H. Information from Domain.glass for etn.com displays the same IP address, 192.104.67.8, with a location of Kalamazoo, Michigan, see Appendix I. The information Domain.glass displays for the IP address 151.110.126.183, is a location in Cleveland, Ohio, see Appendix J. Using reverse IP address look-up Viewdns.info, the IP address 192.104.67.8, host the domain etn.com, see Appendix K. The IP address 151.110.126.183, does not host a domain, see Appendix L.

The elements to prove prosectorial misconduct are: (1) the evidence the prosecution presented was false; (2) the prosecution knew it was false; (3) the false evidence was material. Workman v Bell 178 F.3d 759, 766 (6th Cir. 1988).

> "The petitioner [has] ma[d]e a substantial showing of the denial of a constitutional right." Slack 579 US at 483.

A jurist of reason would find it debatable the district and appeals courts were correct in their ruling.

> "See Shaman, Lubet & Alfini, supra, § 2.02, at 38 (Intentional refusal to follow the law are another manifestation of unfitness for judicial office.")" In re Complaint 425 F.3d at 1195.

GROUND FIVE B: INEFFECTIVE ASSISTANCE OF COUNSEL FOR IMPROPER VENUE; GROUND SIX: THE SIXTH CIRCUIT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS

> "[A] court must intially identify the conduct constituting the offense (the nature of the crime) and discern the location of the commission of the criminal acts." United States v Rodriquez-Moreno 526 US 275, 279 (1999).

> "Only 'essential conduct elements' can provide the basis for venue; 'circumstance elements' cannot. United States v Bowens, 224 F.3d 302, 310 (4th Cir. 2000)." (relying Rodriquez-Moreno 526 US at 280 & n. 4) United States v Auernheimer 748 F.3d 525, 533 (3rd Cir. 2014).

Judge Nugent determined Hagar's attorney was not ineffective and denied the claim of improper venue for the following reasons:

> "[T]he recipient of the email was in the Northern District of Ohio." Doc #: 159, PageID #: 1595-1596.
>
> "The improper venue claim was raised on direct appeal and decided against Mr. Hagar. Mr. Hagar cannot relitigate an issue already raised on appeal unless 'highly exceptional circumstances' exist," Doc #: 159, PageID #: 1596-1597.
>
> "Even if Mr. Hagar had not already raised the venue issue on direct appeal, his improper venue claim would fail because one of the victims received the threatening emails in the Northern District of Ohio." Doc #: 159, PageID #: 1597.

Hagar in his Request argued the Appeals Court determined that he forfieted the venue argument, Hagar 822 F. App'x at 370, see Appendix F, and only that was binding on his § 2255 motion and the rest of the Appeals Court conclusion was dicta. Request, p. 10-11. Hagar also raised Ground 6 in his Request, p. 19-20.

Judge Clay affirmed Judge Nugent's conclusion on the ineffective assistance claim for improper venue and concluded the appeals court conclusion is an alternative holding and not dicta. Order, p. 2-3. Judge Clay then provides the following conclusion for Ground 6:

> "Hagar also argues in his motion for a certificate of appealability that this court erred in stating C.B. received and reviewed Hagar's emails at her office in Beachwood, Ohio because C.B. testified that she first saw the emails during her trial preparation. But we went on to state: 'That C.B. did not see all of the messages because Eaton's security office shielded her from them also does not matter.'" Order, p. 3.

Because C.B. never saw any of the emails, as she never received them, Hagar argued in the Petition for Rehearing En Banc, that Judges Suhrheinrich, Gibbons, and Bush committed judicial misconduct. The Sixth Circuit denied the Petition for Rehearing En Banc,

see Appendix C.

The trial record supports Hagar's position, not the direct appeal opinion. Under Townsend Hagar is entitled to an evidentiary hearing; the court of appeals factual determination is not fairly supported by the record as a whole; and for any reason it appears that the appeals court did not afford the petitioner a full and fair hearing.

Whether the appeals court conclusion is dicta or an alternative holding, the law of the case doctrine still allows "a court [to] revisit earlier issues." Howe v City of Akron 801 F.3d 718, 740 (6th Cir. 2015), in the case "of extrordinary circumstances such as where the intitial decision was 'clearly erroneous and would work a manifest injustice.' (citation omitted)." Christianson v Colt Industries 486 US 800, 817 (1988).

Hagar's case is an "exceptional circumstance," there is a "fundamental defect which inherently results in a complete miscarriage of justice," a "manifest injustice" occurred, and under Sanders the "ends of justice" would be served by "permiting the redetermination of the ground." Sanders 373 US at 16-17.

Judges Suhrheinrich, Gibbons, and Bush decided to cheat in their conclusion when they decided to lie in order to fulfill the constitional requirement of proper venue.

> "Hagar sent threatening emails to C.B.'s Eaton email address. She received and reviewed them at her office in Beachwood, Ohio. Thus, venue was proper because the emails were sent from Oregon to C.B. in the Northern District of Ohio." Hagar 822 F. App'x at 370, see Appendix F.

But C.B. testified: "[A]t the time they were sent did you actually review them?"

A. "No." Doc #: 102, PageID #: 555; P.G. 196, ln. 4-7, see Appendix G.

C.B. during Cross-Examination.

Q. When was the first time that you saw these e-mails that you just reviewed with the Government in your capacity at Eaton Corporation?

A. When the District Attorney showed them to me.

Q. And, when would that have been?

A. 2018.

Q. So prior to 2018, you had no knowledge that Mr. Hagar had sent any of these e-mails to your Eaton e-mail address is that correct?

A. That's correct. Doc #: 102, PageID #: 557, P.G. 198, ln. 13-18, see Appendix G.

C.B. during Redirect-Examination.

Q. So you weren't aware of any of these e-mails until 2018 from Michael Hagar to your Eaton Corporation e-mail, correct?

A. That's correct. Doc #: 102, PageID #: 560, P.G. 201, ln. 12-15, see Appendix G.

The reason why C.B. never received any emails from Hagar was explained by Matthew Coberly, Eaton's head of corporate security, during Direct-Examination.

Q. Okay. Did Eaton take any steps at any point in the interim to handle all the e-mail traffic coming to its employees?

A. We did. Because of the frequency of the e-mails and then the recipient list, the frequency was increasing and addressee list or the recipient list kept getting broader, employees were finding them disconcerting so we made the decision, I made the decision to redirect the e-mails as they came in so that we could monitor them but not have them going to all of the employees and disrupting work flow.

Q. Okay. And as you were monitoring them, where were you monitoring them?

A. Ryan Keen was monitoring them and forwarding them to me. Doc #: 102, PageID #: 485, P.G. 126, ln. 20-25; PageID #: 486, P.G. 127, ln. 1-9, see Appendix M.

Matthew Coberly during Cross-Examination.

Q. You used the word "Forwarded" a lot. Were all the e-mails that

you looked at regarding Mr. Hagar forwarded to your office in Beachwood?

A. That's correct. Doc #: 102, PageID #: 503, P.G. 144, ln. 16-20, see Appendix M.

Q. How were you given the e-mail to him in Government's Exhibit 110?

A. It had been redirected to the box where we were capturing the e-mail from Mr. Hagar.

Q. And regarding this redirection, was it an automatic filter set up for certain e-mail addresses, or how did that work with the redirection?

A. Yes. That's correct. If it -- when -- the e-mail address that was coming in from Mr. Hagar was automatically redirected to a box where we could review them. Doc #: 102, PageID #: 505, P.G. 146, ln. 4-14, see Appendix M.

Q. Okay. Who is Ryan Keen?

A. Ryan Keen is an HR manager for Eaton. Doc #: 102, PageID #: 506, P.G. 147, ln. 11-12, see Appendix M.

Matthew Coberly during Redirect-Examination.

Q. Okay. And Ryan Keen, you were asked some questions about him. Do you know physically where his offices are?

A. His -- you know, I actually don't know exactly where he is. I think he currently resides in South Carolina. Doc #: 102, PageID #: 510, P.G. 151, ln. 20-25; PageID #: 511, P.G. 152, ln. 1, see Appendix M.

Hagar in his Reply provided a copy of the email for count 3 that Ryan Keen forwarded to Mr. Coberly, Doc #: 153, Appendix D, see Appendix N. All the other reasons Judge Clay relies on to deny Hagar's claim are based on the substantial contacts test. The Second Circuit has said the substantial contacts test "is not a 'formal Constitutional test.' United States v Saavedra 223 F.3d 85, 93 (2nd Cir. 2000)." United States v Tang Yuk 885 F.3d 57, 70 (2nd Cir. 2018). All the other reasons Judge Clay and the Sixth Circuit rely on are not even circumstance elements, but are circumstantial

fies the mail server as etn.com. Hotmail transmits the email in "packets" (the header information) to etn.com. The transmission is completed at 6:13:28 PM, see Appendix Q, when it arrives at the box that Mr. Coberly testified he set up to redirect the emails to. The email is still in the mail server etn.com. Ryan Keen then "pulled" the email from the etn.com server and reads the email in North Carolina, see Appendix N. At 3:19 PM PDT (6:19 PM EDT), Mr. Keen "forwarded" the email to Mr. Coberly by transmitting it to Mr. Coberly in the NDOH. Hagar's transmission began, continued and was completed outside the NDOH.

The Sixth Circuit concluded Hagar forfieted the venue claim. His attorneys were ineffective. The transmission of his emails to Eaton Corporation never entered the NDOH. Hagar suffered prejudice. Judge Nugent's and Judge Clay's denials were based on the lie from the direct appeal's decision. A reasonable jurist would find it debatable the Courts were correct in their ruling. Hagar has shown there is reason to believe that, if the facts are fully developed he will be able to demonstrate he is entitled to relief.

GROUND FIVE D: INEFFECTIVE ASSISTANCE FOR FAILING TO OBTAIN A RULING ON MOTIONS TO DISMISS FOR VIOLATION OF SPEEDY TRIAL

When Judge Nugent denied this claim he said:

> "[T]he Sixth Circuit did not reach the merits on the speedy trial grounds because they found Mr. Hagar waived his claim by failing to request a ruling," Doc #: 159, PageID #: 1597.

Judge Clay however, said: "[W]e went on to address and reject Hagar's speedy trial arguments on the merits." Order, p. 4. The Sixth Circuit said as Judge Nugent cited: "Even if we ruled on Hagar's claims he would still lose." Hagar 822 F. App'x at 368, Doc #: 159, PageID #: 1597. The Sixth Circuit opinion of Hagar's

speedy trial claims are dicta and have no binding force on the ineffective assistance claim, other than establishing Hagar's attorneys were ineffective for not obtaining a ruling.

The claim made in Hagar's second motion to dismiss:

> "His waivers of Speedy Trial should be set aside as they were signed under the mistaken belief that the federal government had evidence of the emails ... having traveled through this Court's jurisdiction. As proof that the government had no such evidence, a superseding indictment was filed September 11, 2018. To this day, defendant believes that the subject emails had absolutely no nexus to this Court's jurisdiction." Doc #: 81, PageID #: 253, see Appendix E.

The Sixth Circuit never explained why it would not set aside the waivers and continuances which were issued as a result of the waivers. As stated above for Ground 3 the email with the IP addresses is the evidence the government used to claim the emails traveled to the NDOH.

Both Judge Nugent and Judge Clay conclude: "knowledge of the location of the server would not have resulted in a different outcome in terms of the motion." Doc #: 159, PageID #: 1596; see Order, p. 5. It is not the location of the server that is at issue, the government admitted it is not located in the NDOH, thus the superseding indictment, it is when did the government know it was not located in the NDOH. Was it before they obtained the arrest warrant? Before they obtained the indictment? Did AUSA Riedl know on May 30, 2018 when the court asked the government: "I would assume that you're prepared to go forward if we were to start trial Monday?" Mr. Riedl replied: "Yes, your Honor." Doc #: 131, PageID #: 1259, ln. 2-4, see Appendix R.

As this Court said in Barker: "A deliberate attempt to delay the

trial in order to hamper the defense should be weighted heavily against the government." Barker 407 US at 531.

When the courts consider the three factors whether to dismiss with or without prejudice; see 18 U.S.C. § 3162(a)(2), the second and third factors favor dismissal of the second motion with prejudice. (2)"the facts and circumstances of the case which led to dismissal" (3)"the impact of reprosecution on the administration of [the speedy Act] and the administration of justice."

> "Regarding the second factor, this Circuit considers whether there was 'any attempt to take advantage of the delay,' and whether 'defendant can show a pattern of negligence on the part of the United States Attorneys Office.' (citation omitted)." Sylvester v United States 868 F.3d 503, 512 (6th Cir. 2017).

> "Regarding the third and final factor, '[t]he main consideration that courts have taken into account ... are whether the defendant suffered actual prejudice as a result of the delay and whether the government engaged in prosecutorial misconduct that must be deterred to ensure compliance with the Act.' (citation omitted)." Id.

AUSA Riedl statement at the beginning of Voir Dire demonstrates how he tried to take advantage of the delay:

> "Pursuant Frye and Lafler, the Government would like to make a record of the fact that the Government did attempt to make a good faith effort to negotiate a plea agreement with Mr. Hagar with the current counsel as well as his previous attorneys.
> We heard back repeatedly that Mr. Hagar was not interested in any plea agreement; that he only wished to have a trial. Therefore, no formal offers were made." Doc #: 101, PageID #: 362, P.G. 3, ln. 4-11, see Appendix S.

When Hagar moved for dismissal, a total of 175 days were not excluded from the Act. Judge Nugent did not make an "ends of justice" finding on September 19, 2018 during the arraignment on the superseding indictment, Doc #: 133. He also did not do one on November 27, 2018 at the last status hearing before trial, Doc #: 80. If the

government had been prepared to commence trial as AUSA Riedl claimed on May 30, 2018, then they would not have needed to supersede the indictment. Hagar's attorney would not have needed a continuance, Doc #: 75, PageID #: 234. And the trial would have commenced on September 17, 2018. The continuance Hagar's attorney filed on September 6, 2018, Doc #: 75, is evidence of the government violating Hagar's Sixth Amendment right to effective assistance of counsel.

The Courts have deprived Hagar the opportunity to fully develop the facts to demonstrate that he is entitled to relief. Jurist of reason would find it debatable the Courts rulings were correct.

IMPORTANCE OF THE QUESTIONS

> "The duty of this Court to make its own independant examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. (citations omitted)." Napue v Illinois 360 US 271 (1959).

For question number one, Hagar has made a substantial showing of the denial of a constitutional right and the procedural rulings of the district and appeals courts were wrong.

> "[I]n 28 U.S.C. § 2255 Congress has chosen to afford every federal prisoner the opportunity to launch at least one collateral attack to any aspect of his conviction or sentence." Prost v Anderson 636 F.3d 578, 583 (10th Cir. 2011) (Gorsuch, J.).

Hagar has been deprived of that opportunity as he was not provided "the necessary facilities and procedures for an adequate inquiry." Bracy 520 US at 909, "for presentation of the relevant facts." Harris 394 at 298.

For question number two, the Court should decide if the Sixth Amendment right to a speedy trial falls under the "cause and prejudice" doctrine. Whether or not Kaufman is still controlling over

a speedy trial claim. Whether Frady's double default applies or if the procedural default applies to the speedy trial claim not raised on direct appeal. In Massaro v United States 538 US 500 (2003) the Court cited United States v Frady 456 US 152, 167-168 (1982), which emphasises a double default, and Bousley v United States 523 US 614, 621-622 (1998), which dealt with failing to directly appeal a guilty plea. Direct appeal being the first opportunity to challenge such a claim.

If the Court decides a speedy trial claim is procedurally defaulted, the Court should resolve the question whether a court of appeals is permitted to raise a procedural default issue.

The third question, the Court can determine if Hagar's § 2255 motion was "inadequate or ineffective" as provided in 28 U.S.C. § 2255(e), the savings clause. As Justice Gorsuch wrote while an Appellant Judge in Provst v Anderson:

> "Congress has provided only one exception: a federal prisoner may resort to § 2241 to contest his conviction if, but only if the § 2255 remedial mechanism is 'inadequate or ineffective to test the legality of his detention.'" Provst 636 F.3d at 800.
>
> "When trying to ascertain whether something is 'inadequate or ineffective,' after all, we usually ask: inadequate or ineffective to what task? Dictionaries define 'inadequate' to mean 'not equal to requirement' and 'ineffective' as '[o]f such a nature as not to produce any or the intended effect.' See 7 Oxford English Dictionary 770, 902 (2d ed. 1989). Both definitions presuppose some metric or measure - some 'requirement' or 'effect' - that should be but isn't met." Id. at 584.
>
> "[T]he clause emphisizes its concern with ensuring the prisoner an opportunity or chance to test his argument." Id. at 585.
>
> "To invoke the savings clause, there must be something about the initial § 2255 procedure that itself is inadequate or ineffective for testing a challenge to detention." Id. at 589.

Judge Nugent did not comply with the procedure of the statute 28 U.S.C. § 2255(b) with his capricious and arbitrary denial of Ground 3 and Ground 5A, the claims dealing with the prosecutorial misconduct.

> "The statute requires a District Court to 'grant a prompt hearing' when such motion is filed, and to 'determine the issues and make findings of fact and conclusions of law with respect thereto' unless 'the motion and files and records of the case conclusively show that the prisoner is entitled to no relief.'" Machibroda v United States 368 US 487, 494 (1962).

There is nothing in the record to show that the government did not use false information to obtain the arrest warrant and the indictment, as Judge Nugent has obstructed Hagar's ability to obtain the email with the IP addresses. Hagar is "entitled to a hearing on his allegation because the record [does] not 'conclusively show' that he [can] not establish facts warranting relief under 28 USCS § 2255." Fontaine v United States 411 US 213 (1973). Hagar is currently litigating under the Freedom of Information Act, to obtain the email with the IP addresses, see Hagar v FBI, Case No. 1:22cv101, Eastern District of Texas. Hagar will be able to demonstrate his remedy by motion and proceedings were inadequate and ineffective.

> "See Jeffrey M. Shaman, Steven Lubet & James Alfini, Judicial Conduct and Ethics, § 2.07 at 50 (3d ed. 2000) [herein after Shaman, Lubet & Alfini]("Judges abuse the power of the judicial office when they abbreviate or change critical aspects of the adversary process in ways that run counter to the scheme established by relevant constitutional and statutory law.")." In re Complaint 425 F.3d at 1184.

> "Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack. The right then is not merely to a federal forum but to full and fair consideration of constitutional claims." Kaufman 394 US at 228.

Judge Nugent's bias and prejudice against Hagar is evident from

his statement during Hagar's sentencing hearing.

"[T]he public has to be protected from what you did." Doc #: 135, PageID : 1315, P.G. 40, ln. 9-10.

"I don't see any acceptance of responsibility for acting badly and committing crimes." Id., ln. 13-14.

"And so I don't see any assurance that if you were on the street, that the public would be protected at all. In fact, I see just the opposite." Id., ln. 17-20. See Appendix T.

Judge Nugent's comments on May 30, 2018 during the hearing on Hagar's motion to replace counsel, suggest he does not believe Hagar has a right to effective assistance of counsel.

> "Well, this is what I'm going to do. I will grant this request, and I'm going to appoint a new lawyer. But this is it, right? I hope you get along with this other lawyer. I'll look at the list of lawyers that we have and people who are very experienced in this type of case. But that will be it."
>
> The Defendant: "Okay."
>
> The Court: "If you don't like him or her, then to bad." Doc #: 131, PageID #: 1259, ln. 5-13, see Appendix R.

Both Judge Nugent and Judge Clay denied Hagar's improper venue claim based on the lie that Judges Suhrheinrich, Gibbons and Bush wrote in the direct appeal opinion. C.B. "received and reviewed [the emails] at her office in Beachwood, Ohio." Hagar 822 F. App'x at 370. When Hagar raised the misconduct claim in the Petition for Rehearing En Banc, Chief Judge Sutton and the rest of the Sixth Circuit did nothing to address the misconduct, thereby becoming complicite in the misconduct.

> "'A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.'" Napue 360 US at 269-270.

Did AUSA Riedl correct the record? Did Judge Nugent? Did Judge Clay? Did Chief Judge Sutton or the rest of the judges on the Sixth

Circuit? No, not a single one of them performed their "DUTY" to correct a lie.

> "[M]en are more often bribed by their loyalties and ambitions than by money." United States v Wunderlich 342 US 98, 103 (1951) (Jackson dissentng).

The lie about C.B. receiving the emails is not the only one in the opinion. The judges put words into Hagar's mouth that he never said. Justice Sutherland wrote about prosecutors doing the same in Berger v United States 295 US 78 (1935) and it applies to Judges Suhrheinrich, Gibbons and Bush.

> "[T]he United States prosecuting attorney overstepped the bounds of [] propriety and fairness which should characterize the conduct of such an officer in the prosecution of criminal offense is clearly shown by the record. He was guilty of mistaking the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said;" Id. at 84.

In the opinion it is written:

> "In support he points to his trial testimony stating that he never intended to act on his threats and sent the messages simply to scare his victims because '[h]e was frustrated by that time.'" Hagar 822 F. App'x at 373, see Appendix U.

But the transcript shows the judges conflated AUSA Riedl's question with Hagar's answer.

Q. And you sent that message and those messages because you wanted to scare them, is that right?

A. No. I was frustrated by that time.

Q. You were frustrated, I understand that. Doc #; 104, PageID #: 1002, P.G. 643, ln. 7-10, see Appendix U.

> "[T]he concern of due process is with the fair administration of justice." Mayberry v Pennsylvania 400 US 455, 465 (1971).

> "1 C.J. 1239, has adopted from an early case the statement that the administration of justice 'includes everything connected with the determination of the rights of person and property, every agency provided by law for the accom-

plishment of that purpose, and every step in the proceeding *** according to the established law of the land,'" Rosner v United States 10 F.2d 675, 676 (2nd Cir. 1926).

Judges Suhrheinrich, Gibbons, and Bush have violated the law and Judge Nugent, Judge Clay, Chief Judge Sutton and the entire Sixth Circuit are complicite for their acts.

"Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242," Imbler v Pachtman 424 US 409, 429 (1976).

"In the first place, there is no officer with respect to whose integrity and character the people in this country are more particular than they are in respect to that of a judge. The people insist upon purity of life and integrity of character in the incumbent of that office, and they are as jealous of that as of any other right. ... [H]e is very loth to place a man in any judicial position as to whose integrity of character he has even a suspicion. Not only that, but the moment that one holding judicial office is suspected of corruption, or of being actuated by malice, he becomes rapidly socially ostracized. ... [H]e is just as amenable to the criminal law as any private citizen. There is no judge, from the judge of the supreme court of the United States at Washington, to a justice of the peace in the smallest township of the state, who, acting on any judicial matter from corruption or from malice, but becomes amenable to the criminal law the same as any other man, any may also be removed from office by proper proceedings. So there is no danger of judges as a class feeling that they are above the law, or becoming independant of the law, or indifferent to the rights of others. This rule, which is founded on experience, is upheld with uniformity by the authorities so far as superior courts are concerned." Cooke v Bangs 31 F. 640, 642 (Cir. Court D. MN 1887).

"[A] section 1503 offense is complete when one corruptly endeavors to obstruct or impede the due administration of justice; the prosecution need not prove that the due administration of justice was actually obstructed or impeded." United States v Silverman 745 F.2d 1386, 1395 (11th Cir. 1984)(relying on Osborn v United States 385 US 323, 333 (1966)).

By deciding what Judge Clay, Chief Judge Sutton and the entire Sixth Circuit accepts as an "alternative holding" the three judges

did accomplish obstructing the due administration of justice, when they established the "law of the case." Federal Judges can obstruct the due administration of justice for the proceedings they are overseeing. Hagar has found two Federal District Court Judges who have been convicted under 18 U.S.C. § 1503. Judge Alcee L. Hastings, United States v Hastings 681 F.2d 706 (11th Cir. 1982) and Judge Robert F. Collins, United States v Collins 972 F.2d 1385 (5th Cir. 1992). The omnibus clause of 18 U.S.C. § 1503 provides:

> "Whoever corruptly endeavors to influnce, obstruct or impede, the due administration of justice shall be punished as provided in subsection (b)."
>
> "The term 'corruptly' means for an improper motive, or 'an evil or wicked purpose.' Its use together with 'endeavor,' charges an intentional act. It is interchangable with the term 'willful.' (citation omitted)." United States v Banks 942 F.2d 1576, 1578 (11th Cir. 1991).

Judges Suhrheinrich, Gibbons and Bush used their special skill and position as appellant court judges to establish the "law of the case" to obstruct Hagar's § 2255 remedy by motion and proceedings. Their conclusion Hagar forfeited the venue argument and waived the speedy trial claims obviously implicated a future ineffective assistance of counsel claim. As the opinion states:

> "He merely mentioned venue in his second speedy trial motion." Hagar 822 F. App'x at 370, see Appendix F.

The three judges foresaw Hagar's § 2255 motion, and have also violated 18 U.S.C. § 1512(c)(2), which provides:

> "Whoever corruptly otherwise obstructs, influences, or impedes any official proceeding or attempts to do so, shall be fined under this title or imprisoned not more than 20 years or both."

The judicial misconduct and lawlessness of Judges Suhrheinrich, Gibbons, and Bush and the complicity of Judge Nugent, Judge Clay and

Chief Judge Sutton, plus all of the judges on the Sixth Circuit have obstructed Hagar's § 2255 remedy by motion and proceedings. They have deprived Hagar the fair administration of justice and violated due process.

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Marbury v Madison 1 Cranch 137, 163 (1803).

As the judges involved in Hagar's cases are a law unto themselves, Hagar's § 2255 remedy by motion and proceedings are rendered "inadequate and ineffective" by their judicial misconduct.

> "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Hazel-Atlas Glass Co v Hartford-Empire Co. 322 US 238, 246 (1944).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael A. Hagar

Michael A. Hagar

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