

22-7300

No. _____

FILED
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SUPREME COURT, U.S.

ORIGINIAL

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES D. SULLIVAN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

James D. Sullivan, Reg. #63990-060
(Your Name)

F.C.I. Otisville
P.O. Box 1000
(Address)

Otisville, NY 10963
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. Will this Court remand with a certificate of appealability in a case where a district court perverted the habeas corpus process by ignoring specific bona fides claims of misconduct by a favored attorney slated for appointment to the federal bench?
2. Will this Court provide Petitioner his last chance at obtaining a full and fair review of his prima facie habeas corpus claims, uncontested by the Government, of:
 - a) counsel's abandonment at a critical plea withdrawal hearing where he told his client "It's your motion. You argue it."
 - b) Petitioner being compelled to argue his motion pro se involuntarily without any waiver of counsel or a Faretta warning.
 - c) counsel's standing by silently as a judge ridiculed Petitioner's meritorious argument, and her refusal to acknowledge or comply with the law, and then
 - d) counsel's testifying against his client and calling him a liar.which represent just a sample of the unrefuted factual allegations presented in Petitioner's § 2255 motion showing de facto bad behavior of the court and the misfeasance of counsel, resulting in a miscarriage of justice that begs for a fair review.

LIST OF PARTIES

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

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

RELATED CASES

- United States v. Sullivan, No. 1:16;CR;00155, U.S. District Court for the Eastern Division of the Northern District of Ohio. Judgment entered November 21, 2017
- Sullivan v. United States, No. 174251, U.S. Court of Appeals for the Sixth Circuit. Judgment of trial court affirmed October 24, 2018. Motion for rehearing denied November 20, 2018.
- United States v. Sullivan, No. 18-8364, U.S. Supreme Court. Petition for Writ of Certiorari denied April 15, 2019.¹⁶
- In Re: James Sullivan. No. 21-3803, U.S. Court of Appeals for the Sixth Circuit. Petition for Writ of Mandamus denied as moot November 19, 2021.
- United States v. Sullivan, No. 1:16-CR-00155/20-CV-846, U.S. District Court for the Eastern Division of the Northern District of Ohio. Judgment denying § 2255 Motion to Vacate Sentence entered December 27, 2021
- In Re: James Sullivan, No. 21-3803, U.S. Court of Appeals for the Sixth Circuit. Petition for Rehearing granted. Petition for Writ of Mandamus is denied January 21, 2021.
- Sullivan v. United States, No. 22-3108, U.S. Court of Appeals for the Sixth Circuit. Request for Certificate of Appealability denied August 24, 2022. Rehearing en banc denied January 11, 2023

TABLE OF AUTHORITIES CITED

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APPENDIX N - United States District Court for the Northern District of Ohio. Transcript of Plea Hearing. ECF 68 (May 3, 2017)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from federal courts:

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

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

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

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

[] For cases from state courts:

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

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

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

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

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 24, 2022.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 11, 2023, and a copy of the order denying rehearing appears at Appendix C.

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

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

For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Amendments

Amendment IV - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V - No person shall... be deprived of life, liberty, or property, without due process of law.

Amendment VI - In all criminal prosecutions the accused shall... be informed of the nature and cause of the accusation... and to have the Assistance of Counsel for his defence.

Statutes

28 U.S.C. § 2255

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*

b) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Rules Governing § 2255 Proceedings in the U.S. District Courts

Rule 8 - Evidentiary Hearings

a) Determining Whether to Hold a Hearing. If the motion is not dismissed, the judge must review the answer, any transcripts and records of the proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

Federal Rules of Criminal Procedure

Rule 11 - Pleas

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d) Withdrawing a Guilty Plea or Nolo Contendre Plea. A Defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5);
(B) the defendant can show a fair and just reason for requesting the withdrawal.

Federal Rules of Civil Procedure

Rule 56 - Summary Judgment

a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense - or part of each claim - on which summary judgment is sought. The court shall grant summary judgment if the movant shows there is not genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

*

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*

e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may

- 1) give an opportunity to properly support or address the fact;
- 2) consider the fact undisputed for purposes of the motion;
- 3) grant summary judgment if the motion and supporting materials - including the facts considered undisputed - show the movant is entitled to it.
- 4) issue any other appropriate order.

PREFACE

This application implicates the current debate concerning the practise of entrusting district court judges to fully and fairly review § 2255 petitions that include claims that allege that court's error, or the questionable conduct of its staff and officers, that would subject the judge to potential scrutiny. The debate argues that under this practice it is conceivable that a judge would desire crafting a decision that would gloss over, or even avoid addressing, an unseemly error in order to avoid any scrutiny. Further, a judge's denial of an evidentiary hearing would avoid the necessity of recusal where he or she would necessarily be required to testify.

STATEMENT OF THE CASE

The following facts were sworn to in the verified § 2255 Motion to Vacate Sentence (Appendix D), the affidavit in support (Appendix E), and sworn to herein.

The Initial Misdemeanor Investigation

On Saturday, July 16, 2015, the Ohio State Highway Patrol was tasked to investigate a reported incident at the Geneva State Park [GSP] campground shower facility in Ashtabula, Ohio, where a 46 year old female reported seeing a camera positioned above a ceiling tile in a shower stall. Up to six (6) males were reported being present in and around the facility at the time. Petitioner was not one of them. Investigators recovered DNA evidence in the form of semen from the attic space above the shower that was analyzed and associated with the Petitioner. Petitioner was subsequently arrested and held for suspicion of Voyuerism, a misdemeanor.

Investigators obtained and executed a search warrant (the first of nine search warrants in the case) for Petitioner's apartment that he shared with several roommates looking for any evidence of the GSP incident. In that search, a Dell laptop computer was seized from a common area of the apartment. Another search warrant was obtained to search the Dell for any image evidence related to the GSP incident. None were found. However, a "secondary search" of the device conducted under that same warrant yielded an indication that the device had recently accessed an electronic storage device that contained suspicious file path titles, including one titled "little girl porn".

Based on the suspicious file path titles, another search warrant was issued to forensically analyze the Dell's hard drive for evidence of child pornography. That analysis yielded 97 thumbnail images of child pornography from the unallocated (deleted) space of the hard drive, space that is not accessible to a user without the use of forensic software. The file size and type of the images indicated that they were never viewed and were likely placed there by the Dell's operating system: without the knowledge of the user.

The Federal Case

The United States Attorney for the Northern District of Ohio adopted the case and a complaint-was sworn out charging the Petitioner with violating 28 U.S.C. § 2252A(a)(5)(B), Possession or Accessing With Intent To View Any Image of Child Pornography based on the thumbnail images found in the Dell's harddrive. After declining an offer to plead to a Bill of Information, Plaintiff was indicted for Accessing With Intent To View (Count 1) and

Attempted Production of Child Pornography, 28 U.S.C. § 2251(e). (Count 2) relating to the GSP campground incident.

On May 3, 2017, after the loss of pre-trial motions to suppress evidence, Petitioner agreed to enter a conditional guilty plea to the Accessing charge (Count 1). The plea was taken by a magistrate who subsequently issued a Report and Recommendation that the district court accept the plea. However, on June 28, 2017, Petitioner directed his attorney to withdraw the unaccepted guilty plea. Counsel strenuously objected. After a contentious meeting, counsel persuaded Petitioner to delay the filing of the motion until counsel could consult with another attorney first.

Counsel's Misfeasance and Conflict of Interest

In the days following the June 28th meeting, Petitioner made countless efforts to contact his attorney and order him to file the plea withdrawal. Petitioner began to suspect that counsel would betray his effort to withdraw the plea by contacting the court to get it to accept the plea. On July 5, 2017, Petitioner sent the judge a letter to withdraw his guilty plea and proceed to trial. See Appendix F. On July 6th, Petitioner finally reached his attorney and advised him that Petitioner had withdrawn the guilty plea himself. Counsel informed Petitioner that it was too late, that the judge had accepted the guilty plea. When Petitioner asked counsel how that happened, counsel stated that he had contacted the court and requested the plea be accepted under the pretext that he needed a copy of the "marked" plea agreement which could not be provided until after the plea was accepted. Abiding by counsel's request, the court accepted the guilty plea on July 5th (Appendix G), the same day Petitioner moved to withdraw it.

The Confrontation

On July 13, 2017, counsel and Petitioner met. Petitioner confronted counsel's betrayal and apparent collusion with the court. Counsel proceeded to curse at the Petitioner and said "Good luck proving that". Petitioner contacted counsel's supervisor and fired his attorney on July 16, 2017, and wrote another letter to the judge advising her of counsel's misconduct and conflict of interest. Appendix H. In that letter, Petitioner also asked the judge to appoint new counsel to assist him in withdrawing his plea. However, while this letter was en route, the judge held a hearing on Petitioner's plea withdrawal motion.¹

Counsel's Abandonment at the Crutial Plea Withdrawal Hearing

Upon entering the courtroom and being seated at the defense table, Petitioner provided counsel a draft of arguments Petitioner prepared. While counsel was reading the draft, court was called to order. Appendix J. The judge recognized counsel for the record but then proceeded to address the Petitioner regarding his pro se motion. Id., PID 1462. The judge asked the Petitioner to explain what he believed would allow him to withdraw his plea. Id., 1465. Though not recorded in the record, Petitioner turned to counsel and asked him, "Aren't you going to argue the motion?" to which counsel replied. "It's your motion. You argue it."

Having no choice, Petitioner proceeded to argue his motion pro

1. This letter was received by the judge but was never docketted despite copies being sent to all parties and its citation by the judge in her written ruling on the plea withdrawal motion.

se without having waived counsel or any warning by the court against doing so. Petitioner argued that the factual basis provided by the Government for the Accessing charge, as well as the indictment, were insufficient, citing on-point authorities. Id., 1469-71. The judge criticized the argument as meritless and proceeded to accuse the Petitioner of parsing statutes and of trying to "beat" the case. Id.. 1471-72.

Petitioner continued on with the argument that his motion to withdraw the plea was filed/sent on the same day as the court's acceptance of the plea which, Petitioner argued, entitled him to withdraw the plea for any or no reason. Id., 1476-78. The judge vigorously opposed saying "Absolutely not. Absolutely not." that the timing of the pro se motion "made no difference. No difference at all." Id.

"So, you shouldn't think that before I adopted that recommendation [to accept the plea], that I would have allowed you to withdraw that plea because you made it before another judicial officer and not me. No."

Id., PID 1477.

Petitioner tried to show that the law required her to allow the Petitioner to withdraw his plea freely without having to give a reason. Id., 1477-78. The judge stated flatly, "You're wrong. You're wrong." Id.

Counsel's Testimony Against His Client

Instead of stepping up to tell the judge the Petitioner was correct on the law and correct the court's clear error, Counsel instead proceeded, at the judge's invitation, to rebut his client's claims, attack his credibility, and call his client a liar twice. Id.. 1478-94. At no point did counsel ever speak up to defend

his client despite the court's procedural errors, misstatements of fact, and errors of law.

The Court's Breach of the Restitution Plea Agreement

Upon entering the courtroom at sentencing, new counsel advised the Petitioner for the first time of there being a demand for restitution. It was obvious that counsel had not reviewed the plea hearing transcript which clearly stated in open court that there was no victim or restitution in the case. Counsel did not object to the court's imposing of \$7,500.00 in restitution in breach of the plea agreement.

The Sixth Circuit's Erroneous Affirmance

Petitioner was appointed counsel for the direct appeal to the Sixth Circuit. Appellate counsel raised the trial court's error in denying the motion to withdraw guilty plea. The Sixth Circuit issued an erroneous affirmance of the trial court's denial of the motion when it conflated the facts regarding the date of the approval of the plea agreement with the date of the acceptance of the guilty plea which were two days apart.

"After holding a hearing, the district court denied Sullivan's motion to withdraw his guilty plea. Sullivan first argues that he filed his motion to withdraw on the same day that the district court accepted his plea. He asserts that because his motion is dated July 5, the prison mailbox rule applies to permit his withdrawal 'for any or no reason'. Fed.R.Crim.P. 11(d)(1). But even accepting that Sullivan mailed his motion on July 5, he submitted it **two days after** the district court approved and filed the plea agreement on July 3. As a result, the 'any reason' standard does not come into play.

Appendix K (Emphasis added).

Petitioner petitioned the Sixth Circuit Panel for a rehearing due to this clear error but was denied. This Court denied Certiorari.

The § 2255 Motion to Vacate Sentence

In June 2020, Petitioner filed a 28 U.S.C. § 2255 Motion to Vacate Sentence. Appendix D. The petition presented multiple claims based on specific factual allegations of constitutional violations that were supported by evidence both on and off the record. Id. All of the claims were either confirmed by the record or were uncontested by the Government in its response. This fact prompted Petitioner to suggest to the district court in his reply brief that an evidentiary hearing was not necessary. Appendix L, PID 2050. In light of the Government not contesting certain claims, Petitioner filed a Fed.R.Civ.P. 56 Motion for Summary Judgment demanding relief as a matter of law. Appendix M. The Government did not file any opposition to the motion.

15 months later the district court denied the § 2255 in its entirety without a hearing, denied a certificate of appealability to all claims, and denied the unopposed summary judgment motion. Appx. B. PID 2111. The court deemed Petitioner's suggestion that a hearing was not necessary as having "rescinded his request" for a hearing. Id., 2096. Furthermore, the court summarily denied the unopposed motion for summary judgement without any findings of fact or a reason. Id., 2111.

Curiously, the district court stated that it analyzed the claims "as presented in [the] Petitioner's Second Amended Memorandum in Support of Motion". Id., 2099 n. 3. Thus, the court's findings were based solely on a non-dispositive memorandum which contained only citations and arguments of law in support of the petition, not the facts and allegations presented in the actual § 2255 petition.

This method of analysis is confirmed by the fact that the court's written decision never once referred to the actual petition, its evidence, the factual allegations contained therein, or its citations to the record that clearly supported the grounds for relief. This method may also explain why the court did not order an evidentiary hearing to determine the facts of those specific allegations, to wit:

a) INEFFECTIVENESS AT THE SUPPRESSION HEARING

Trial counsel failed to subpoena any witnesses to testify at the suppression hearing who would have debunked any probable cause by showing:

1. the affidavits misled the magistrate with an impossible theory of the GSP campground crime. This witness would have tended to exonerate the Petitioner's involvement.
2. the Dell laptop found in the common area of the city shelter which contained incriminating images was not password protected and that dozens of residents had access to the device.
3. the Dell's hard drive was illegally accessed while in the custody of law enforcement prior to the forensic search.
4. the scope of the initial search of the Dell for image evidence was exceeded.

Appx. D, PID 1933-34.

The Government did not rebut these factual claims. None the less, the court made no findings other than the Petitioner "made no colorable argument that raising any of these argument would have changed the outcome." Appx. B, PID 2103. The § 2255 motion belies this finding. A hearing and certificate of appealability was warranted.

b) INEFFECTIVENESS AT THE PLEA HEARING

Trial counsel misadvised Petitioner to plead guilty after a colloquy that clearly failed to advise him of the elements of the Accessing charge to which he pleaded guilty, i.e. the scienter element. Appx. D., PID 1937. Likewise, counsel was ineffective in failing to object to the non-compliant Crim.R. 11 proceeding. Id.

Despite this misadvisement being clear from the plea transcript, the court found the claim "not supported by fact". Appx. B, PID 2104. A hearing and COA were both warranted.

c) COUNSEL'S MISFEASANCE, BETRAYAL, AND CONFLICT OF INTEREST

Trial counsel committed misfeasance and became burdened with a conflict of interest after he manipulated the Petitioner into delaying the filing of a motion to withdraw his unaccepted guilty plea, then proceeded to contact the court and got it to accept that plea knowing that it would sabotage the Petitioner's strategy to freely withdraw that plea and proceed to trial. Appx. D, PID 1938.

Neither the Government or counsel refuted this serious allegation of misconduct, betrayal, and conflict of interest. Nor was it reported to any disciplinary body. The court ordered no hearing on the allegation; a proceeding that would have required the testimony of both the judge and other officers of the court, including counsel. In fact, the court made no mention whatsoever of the misconduct or made any findings related to it. The court simply found that the Petitioner "had no grounds to legally withdraw his guilty plea" and that there was no structural error. Appx. B, 2105. A certificate of appealability was also denied. Id. PID 2111.

d) PETITIONER WAS ABANDONED BY COUNSEL AT THE PLEA WITHDRAWAL HEARING WHERE HE TESTIFIED AGAINST HIS CLIENT

Petitioner's counsel declined to argue the plea withdrawal motion when asked to by the Petitioner and, at the judge's request, counsel proceeded to testify against his client. Appx. D, PID 1938-39, 1942. Petitioner argued his motion for 21 minutes before a hostile judge who belittled Petitioner's arguments and on-point citations to the law while counsel stood silent. Appx. J, PID 1467-79. Counsel continued to remain silent as the judge misstated and ignored the law that required her to withdraw the guilty plea and allow the Petitioner to proceed to trial. Id., PID 1476-78. Then, at the judge's prompting, counsel proceeded to testify against his client and rebut his claims with counsel's own version of events, and attacked his client's credibility and called him a liar twice. Id., PID 1479-95.

Here again, neither the Government or counsel refuted these allegations. The district court denied the claim without a hearing, as well as a certificate of appealability, and made no findings on these allegations other than to state that Petitioner had no legal grounds to withdraw his guilty plea (Appx. B, PID 2105) and that its methods "did not result in any error related to the Petitioner's right to counsel". Id. PID 2108.

Interestingly, the judge actually contradicted her own ruling to deny the certificate of appealability by admitting that it was arguable "that when counsel effectively disputed his client's [claims] on the record, **counsel was no longer effectively acting as counsel for Petitioner.**" Id., PID 2105 (Emphasis added). This admission by the judge completely refutes her finding denying the

the certificate of appealability on this issue by admitting the issue was "arguable" which would ~~mandate its~~ granting under Slack.

e) SENTENCING COUNSEL ALLOWED A BREACH OF THE PLEA AGREEMENT REGARDING RESTITUTION

Sentencing counsel was either ~~un-aware~~ of, or was indifferent to, an agreement reached in open court that there was no identified victim and that there was no restitution in the case, and as a result, counsel failed to object to the court's imposing \$7,500 in restitution Appx. D, PID 1939; Appx. N, PID 600, 607.

The Government did not refute the claim. Nevertheless, the judge denied the claim and a hearing and a certificate of appealability stating that the claims were meritless because "restitution [was] mandated by statute and the plea agreement did not bind the court's discretion in sentencing." Appx. B, PID 2106. This ruling obviously does not comport with law regarding the breach of a plea agreement under Santabello v. New York.

f) THE STRUCTURAL DENIAL OF COUNSEL BY THE JUDGE

1. The district court failed to inquire into, or acknowledge, Petitioner's written letter complaining of counsel's misconduct and his request for the appointment of new counsel. Appx. D, PID 1942.

The district judge admitted that she was advised in writing of the Petitioner's dissatisfaction with counsel and of his serious misconduct which asked for the appointment of new counsel to represent Petitioner for the withdrawal of his plea. Appx. H. The judge chose to ignore the letter and proceeded to issue its written ruling denying the motion. Id.; Appx. I. This fact is confirmed by the judge's admission that she received this letter

three (3) days prior to her written order denying the plea withdrawal. Appx. I, pg. 7.(fn. 2 and 3). Instead of inquiring into the serious allegations made in the letter and, perhaps, rehearing the motion, the judge chose to ignore the claims and stick by the flawed hearing and deny the plea withdrawal. Appx. I.

2. At that plea withdrawal hearing, the district court compelled the Petitioner to argue his motion pre se, despite counsel being present, without obtaining the Petitioner's waiver of his right to counsel or providing the Petitioner any Faretta warning against doing so. Appx. D, PID 1943.
3. The district court suborned a conflict of interest by prompting, then allowing, counsel to testify against his own client. *Id.*, 1944.

All the above factual claims were supported by irrefutable evidence, including the hearing transcript. Appx. J, 1465- . Neither the Government or counsel rebutted these facts of record. Nonetheless, the judge denied both a hearing and a certificate of appealability stating:

"It is not the case that Petitioner did not have counsel, but that he was dissatisfied with counsel's performance. Petitioner had counsel because the Court did not grant counsel's motion to withdraw until after Petitioner's motion to withdraw his plea of guilty. Importantly, the method used to address those two motions did not result in any error related to Petitioner's right to counsel."

Appendix B, 2108

This dicta made no findings whatsoever as to the above allegations of structural denial of counsel that had nothing to do with counsel or his performance and everything to do with the court's procedural errors and it attempt to pass on them with its

tortured opinion and order that avoided the errors.

g) THE COURT'S PLAIN ERROR IN DENYING THE PLEA WITHDRAWAL

The court committed plain error when it denied the Petitioner's motion to withdraw his unaccepted guilty plea that was made under the prison mailbox rule at the same time that the judge accommodated counsel by accepting the guilty plea. Appendix D, 1945-46. Despite Petitioner's reply brief argument that the appellate court's affirmance of the motion's denial did not adhere to this instance of plain error (Appendix L, PID 2059), the judge nonetheless ruled without a hearing that the issue was previously resolved on direct appeal and was therefore meritless. Appendix B, 2109.

The fact is that the plain error is clear and obvious from the record, regardless of the Sixth Circuit's erroneous affirmance.

h) THE PLEA WAS NOT KNOWING AND INTELLIGENT

Neither the court magistrate, counsels present, or the Petitioner were aware of all the necessary elements of the Accessing charge to which the Petitioner pleaded guilty to in Count One, nor was he ever advised of those necessary elements. Appendix D, PID 1946. Further, the court's Rule 11 plea colloquy never determined the Petitioner's understanding of the nature of the crime. Id., PID 1947-48. The transcript of the plea hearing clearly supports the claims. Appendix N, PID 603-04, 620-21.

The judge did not make any finding, or cite any part of the hearing record, to refute the claims. Instead, the judge ruled that the claims had been addressed on direct appeal and were meritless. Appendix B, PID 2109. The fact is that neither of these claims were ever raised on direct appeal.

THE RULE 56 MOTION FOR SUMMARY JUDGMENT

In lieu of the Government's response to the § 2255 petition, the Petitioner filed a Fed.R.Civ.P. 56 Motion for Summary Judgment demanding judgment as a matter of law on the following claims that were uncontested as well as unrefuted by the record.

(The Denial Of Counsel At The Plea Withdrawal Hearing)

1. It was undisputed that

- a) the court was made aware of the Petitioner's dissatisfaction with his counsel, his misconduct and conflict of interest, and of Petitioner's request for new counsel.
- b) the court failed to address these issues, and
- c) the court was derelict in its duty to rehear the motion.

Appendix M, PID 2064

2. It was undisputed that

- a) counsel stood silently as the court misstated the facts, the record, and the law as Petitioner involuntarily argued his motion pro se.
- b) counsel, when asked to argue the motion, refused saying "It's your motion. You argue it", and
- c) counsel testified against his client's claims, attacked his credibility, and called him a liar.

Id., PID 2064-65

3. It was indisputable that the record showed

- a) the Petitioner was compelled to argue his motion pro se.
- b) the Petitioner never expressed any desire to do so, and
- c) counsel was present.

Id., 2065

4. It was indisputable that the record showed

- a) the court failed to advise the Petitioner of his right to have counsel the motion.
- b) the court failed to provide Petitioner any Fareta warning, and

- c) the court failed to obtain Petitioner's waiver of the right to have counsel argue the motion.

Id.

5. It was undisputed that

- a) the court excluded counsel from the plea withdrawal hearing, and
- b) the court effectively recruited counsel as an adversary against his own client.

Id.

6. It was undisputed that

- a) the court recruited counsel to testify against his own client, and
- b) the court suborned a conflict of interest.

Id.

(The Court's Plain Error and Violation of Due Process)

7. It cannot be disputed that

- a) the indictment was insufficient and failed to state an offense.

Id.

8. It was undisputed that

- a) the petitioner had an absolute right to withdraw his guilty plea for any or no reason.
- b) it was plain error for the court to deny plea withdrawal motion, and
- c) the Law of the Case Doctrine did not apply to the Sixth Circuit's previous affirmance of that denial due to its error.

Id., 2065-66

9. It was indisputable that

- a) it was plain error for the court to accept the flawed and non-compliant Rule 11 guilty plea.

Id., 2066

(The Plea Was Not Knowing and Voluntary)

10. It was indisputable, that

- a) none of the parties were aware of the necessary element of scienter to the Accessing charge (Count one) to which the Petitioner pleaded guilty to, and
- b) the court failed to notify the Petitioner, and determine his understanding of, the nature of the charge.

Id.

The Government declined to file any opposition to the motion.

Nevertheless, the judge denied the motion without a hearing, denied a certificate of appealability, and did so without acknowledging the undisputed claims or providing any reasons for the denial.

Appendix B, 2111.

REASONS FOR GRANTING THE PETITION

The § 2255 motion presented allegations of serious ethical and professional misconduct of counsel, as well as unlawful acts of the district court, that were clear violations of the Petitioner's constitutional rights that prejudiced him and resulted in his unlawful conviction and 20-year sentence for Accessing (not viewing) Material Containing Child Pornography. Petitioner shows herein that these allegations have not been fully and fairly reviewed by the district court judge who admitted that "Petitioner's claims are analyzed as presented in ECF 136, Petitioner's Second Amended Memorandum in Support of Motion" and not as presented in the § 2255 motion. Appendix B, PID 2099, n. 3.

This admission by the judge is critical because the Memorandum contained only arguments of law; it did not contain the § 2255 motion's specific factual allegations and supporting evidence as well as the citations to the record that indisputably established the claims. This faulty method of analysis explains how and why the judgment order does not once refer to the actual § 2255 motion and its evidence, nor cite or rebut the record it referred to.

In actuality, the district court ruled on the non-dispositive memorandum and not the habeas corpus petition itself.

Petitioner must reluctantly submit that the district court utilized this method of analysis in order to side-step and avoid addressing the undisputed facts, supported by the record, of defense counsel's serious misconduct, conflict of interest, and clear violations of the attorney standards of conduct. Petitioner can only assume that this was done in order to protect the attorney from

potential damage to his reputation as he was, at that time, being elevated to serve on the Northern District of Ohio's bench.

Petitioner must also submit that the district court used this method of analysis to also avoid addressing allegations of its own errors and oversight that denied the Petitioner his absolute right to withdraw his unaccepted guilty plea and proceed to trial, and of the part the judge played in the Petitioner being abandoned and rendered structurally without counsel at the plea withdrawal hearing.

Lastly, the trial judge betrayed her bias when she denied an evidentiary hearing on the dubious ground that Petitioner "rescinded his request for one in his reply brief." Appendix B, PID 2096. This finding is utterly spurious as the reply brief simply stated that an evidentiary hearing was not necessary "as the pleadings submitted established Petitioner's entitlement to relief and the relevant facts admitted." Appendix L, PID 2050. The Petitioner must submit that this denial of an evidentiary hearing, in the face of the obvious and compelling facts and record supporting one, served to prevent the airing of a laundry list of errors and misconduct that would necessitate the judge's recusal from the case as her testimony would be necessary as a material witness.

In regard to the denial of a certificate of appealability by the Sixth Circuit Court of Appeals, Petitioner can only surmise that either politics or incompetence prevented that court from seeing the grievous factual claims presented in the § 2255 motion, or that it found them simply too incredible to believe.

In the face of these undisputed claims, and the district and appellate courts' apparent departure from the usual course of

of judicial proceedings, this Court must step in and exercise its supervisory power as a court of last resort and remand this case with the issuance of a certificate of appealability and an order that the unresolved factual allegations raised in the § 2255 motion be fully and fairly heard/reviewed, and that those specific allegations be found true or false, to wit:

(The Search Warrants)

- Did the search warrant affidavit mislead the magistrate with an impossible theory of the case?
- Was the Dell laptop found in a common area of the City Mission?
- Was the laptop password protected?
- Did dozens of City Mission residents have access to it?
- Was the laptop's hard drive accessed without a warrant prior to its examination?
- Was the scope of the device's search exceeded?

(The Rule 11 Hearing)

- Was the Petitioner ever advised of all the elements of the charge?
- Did the magistrate have the Petitioner state his understanding of the offense?

(Counsel's Misconduct and Conflict of Interest)

- Was counsel aware that Petitioner was contemplating the withdrawal of his guilty plea prior to its acceptance?
- Did counsel contact the court and request that it accept the guilty plea?
- Did counsel tell Petitioner "It's your motion. You argue it"?
- Did counsel fail to advocate for the Petitioner's motion to withdraw guilty plea?
- Did counsel testify against his client?

(Structural Denial of Counsel)

- Did the district court judge issue a written ruling denying Petitioner's plea withdrawal motion without addressing his letter advising the judge of Petitioner's dissatisfaction with counsel, his misconduct and conflict of interest, and his request for new counsel to represent him at the plea withdrawal hearing?
- Did the judge compel the Petitioner to argue motion pro se without obtaining his waiver of counsel or providing him any Faretta warning?
- Did the judge suborn counsel's testifying against his client?

(Plain Error)

- Did the Petitioner file his motion to withdraw guilty plea under the prison mailbox rule the same day that the judge accepted the guilty plea?
- Did the judge accept the guilty plea that did not conform to Rule 11?

(Knowing and Voluntary Plea)

- Did the Petitioner understand the elements of the charge?
- Did the magistrate have the Petitioner explain what he did to commit the offense?

(Restitution Breach of the Plea Agreement)

- Did the judge breach the plea agreement by imposing restitution?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Sullivan
Date: 4-10-23

DECLARATION OF VERITY

The Petitioner hereby declares under penalty of perjury that the above facts are true to the best of his knowledge and belief.

Executed on 4-10-23
Date

J. Sullivan
Declarant