

No.: 22-7646

IN THE SUPREME COURT OF THE UNITED STATES

DEREK PELKER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Supreme Court, U.S.
FILED
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ON PETITION FOR WRIT OF CERTIORARI FROM THE THIRD
CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Pelker alleged the Federal Government's impermissible collusion within the prosecution of the Commonwealth of Pennsylvania for the same misconduct underlying his federal indictment violated Mr. Pelker's substantive constitutional right to be free from arbitrary governmental actions in contravention of the fundamental constitutional principles of Federalism, Separation of Powers, Equal Protection, Fundamental Fairness, Abuse of Process, and several procedural due process protections under state law. Additionally, Mr. Pelker alleged that said claim addressed issues outside of the trial record and legal rights outside the federal jurisdiction. Thus 28 U.S.C. §2255 was the appropriate proceeding to litigate said claim. However, Mr. Pelker also alleged that if the Court held said claim was procedurally defaulted, Mr. Pelker asserted appellate counsel John A. Abom, Esquire, ineffectiveness in this regard established the essential "cause" and "prejudice" to excuse said default.

Did the Third Circuit Court of Appeals err in denying Mr. Pelker a Certificate of Appealability (herein referred to as a "COA") by relying upon the District Courts erroneous decision that Mr. Pelker procedurally defaulted his claim of the Federal Government's unconstitutional collusion in the Commonwealth of Pennsylvania's prosecution by failing to raise said claim within his direct appeal and the courts determination that said claim lacked merit?

Suggested Answer: Yes

Mr. Pelker also alleged that prior counsel Jeffrey A. Conrad, Esquire, rendered per se ineffective assistance of counsel for having two (2) actual conflicts of interest while representing Mr. Pelker during his federal criminal proceedings. Initially, counsel adopted and acted upon his belief that Mr. Pelker should had been convicted of the charged misconduct. Neither the District Court nor the Third Circuit Court of Appeals addressed said issue. Lastly, counsel was campaigning and seeking employment as a judge in Lancaster County, Pennsylvania; without obtaining Mr. Pelker's informed consent. However, Mr. Pelker also alleged that even if the Court determined that no conflict of interest existed, Mr. Pelker was able to demonstrate ineffectiveness in regard to Mr. Conrad's representation pursuant to the traditional Strickland standard, both for coercing his guilty plea and his self incriminating proffer which was not in his best interest.

Did the Third Circuit Court of Appeals err in denying Mr. Pelker a COA by relying upon the District Courts erroneous decision that Mr. Pelker was unable to establish prejudice in regard to Mr. Conrad's ineffectiveness for maintaining representation of Mr. Pelker despite having two (2) actual conflicts of interests; one (1) of which both courts failed to address, and imploring/coercing a third-party; who was cooperating with the Federal Government and was a person of interest for a violation of a federal law, to coerce Mr. Pelker into pleading guilty and provide a self incriminating proffer?

Suggested Answer: Yes

Lastly, Mr. Pelker alleged that his constitutional right to file a Petition for Writ of Certiorari with the United States

Supreme Court from the denial of his direct appeal by the Third Circuit Court of Appeals should have been reinstated due to Mr. Pelker's inaction in this regard being solely from the interference the global pandemic had on his access to the institutional law library and his constitutional right to access to the Court in regard to filing said petition.

Did the Third Circuit Court of Appeals err in denying Mr. Pelker a COA by relying upon the District Courts erroneous decision that Mr. Pelker's alleged "proficiency" of law essentially eradicated any access to the court claim and rendered reinstatement of his direct appeal rights unwarranted?

Suggested Answer: Yes

LIST OF PARTIES

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

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

Petitioner, Derek Pelker, pro se, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Third Circuit Court of Appeals, rendered in these proceedings on October 26, 2022.

OPINION BELOW

The Third Circuit Court of Appeals affirmed Petitioner's convictions and sentence in its Case No.: 22-2291. The entry of judgment is reprinted in the reproduced record to this petition (See Exhibit 46). The Third Circuit Court of Appeals Order denying rehearing is reprinted in the reproduced record to this petition (See Exhibit 47)

JURISDICTION

The original opinion of the Third Circuit Court of Appeals was entered October 26, 2022. A timely motion to that Court for rehearing was overruled on December 06, 2022.

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

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom

of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST., AMEND. V

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 casings arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence 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 be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., AMEND. VI

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

U.S. CONST., AMEND IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONST., AMEND. X

The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST., AMEND. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced by prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST., AMEND. XIV

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

28 U.S.C. §2255

STATEMENT OF THE CASE

On April 24, 2015, an armed bank robbery occurred at the Susquehanna Bank located on South Main Street in East Prospect Borough, York County. The crime was originally investigated by the Pennsylvania State Police (herein referred to as "PSP") (counts 1-4

of the Second Superseding Indictment). However, by August 11, 2015, the Federal Government by the way of the Federal Bureau of Investigation (herein referred to as "FBI") started to jointly assist the State's criminal investigation of this matter. (See Reproduced Record Exhibit (herein referred to as "RRE") 1). FBI Special Agent (herein referred to as "SA") Donald Asper was directly involved in said assistance. (See Id.) On August 20, 2015, PSP Jeremy Corrie and FBI SA Asper created a commercial which was released to the general public, soliciting assistance in identifying the suspect in said bank robbery. (See RRE 2) From this joint release, additional evidence/information was obtained in this matter. (See RRE 3)

During the course of the state's investigation, PSP Corrie was deputized by the Federal Government. PSP Corrie was also the lead state investigator and charging officer in regard to the state's prosecution. (See RRE 4) Both State and Federal authorities jointly exchanged information (See RRE 5-6), collectively interviewed witnesses (See RRE 7), collectively interviewed several alleged defendant's (See RRE 8-13), used said information deriving therefrom to discover additional evidence (See RRE 14), and utilized the prosecutorial mechanisms of the Commonwealth of Pennsylvania's prosecution to obtain both a tactical advantage and additional evidence against Mr. Pelker. PSP Corrie obtained a search warrant; at the behest of the FBI, for Mr. Pelker's DNA. (See RRE 13 and 15) (See Trial Transcripts (herein referred to as "TT", pp. 639) Additionally, the Federal Government exerted direct control of the State's prosecution in order to assist their own criminal investigation of the same conduct. (See RRE 16-19)

On April 08, 2016, Mr. Pelker was arraigned on said State charges. On July 18, 2016, Mr. Pelker was provided his delayed State preliminary hearing which was continued at the behest of the Federal Government in order to assist their criminal investigation of the same conduct. (See RRE 19) During said hearing, Mr. Pelker stated upon the record an objection in regard to the stalled hearing pursuant to Pa.R.Crim.P. 540(c)(E)(1) and Pa.R.Crim.P. 542(E). Mr. Pelker wasn't made aware of the nature of the delay of said hearing until after the proceeding concluded. (See RRE 17 and 18)

On July 22, 2016, Mr. Pelker's State charges were consolidated with his codefendants. (See RRE 20) On October 11, 2016, Mr. Pelker renewed his objection in regard to the above mentioned unconstitutional delay under oath before the State court. (See RRE 21, pp. 3, lns. 19-21) On October 18, 2016, Mr. Pelker filed an Omnibus Pretrial Motion in the State court in which he presented several constitutional claims in regard to the above mentioned unconstitutional delay. (See RRE 23) On October 21, 2016, the State court scheduled an evidentiary hearing to adjudicate the above mentioned claims on October 27, 2016. (See RRE 24) Hours before the scheduled hearing, the Commonwealth of Pennsylvania Nolle Prosequi all criminal charges within the State's prosecution. This action evaded an adverse result in this matter from Mr. Pelker's constitutional claims in regard to the above mentioned unconstitutional delay. (See RRE 25)

On April 15, 2016, Mr. Pelker was interviewed by FBI SA Ford, Detective Joseph A. Zimmerman, and PSP Corrie in regard to the

above mentioned charged misconduct. Mr. Pelker refused to cooperate with both governments and denied any involvement in said misconduct. (RRE 13) On May 12, 2016, Mr. Pelker was again interviewed but this time his biological brother and codefendant Keith Pelker was present. At the time of the interview Keith Pelker was cooperating with both governments. Mr. Pelker refused to cooperate and denied any involvement in said misconduct.

On August 24, 2016, Mr. Pelker was charged by way of two (2) separate Indictments, for various counts related to two (2) bank robberies. (respectfully 1:16-cr-240, Doc. 1; 1:16-cr-241, Doc. 25) Mr. Pelker was appointed Daniel Myshin, Esquire, to represent him. Throughout Mr. Myshin's representation, Mr. Pelker reported him to the District Court for engaging in overzealous plea negotiations in opposition to his demand to proceed to trial. (See 1:16-cr-241, Doc's. 58, 61, 77, and 84) On November 08, 2016, the District Court held a hearing in regard to Mr. Pelker's above mentioned complaints. During this proceeding, Mr. Pelker reaffirmed said complaints against Mr. Myshin under oath and before the Court. (See Id., Doc. 85)

On November 18, 2016, the government requested a continuance in this matter alleging a possibility of filing a superseding indictment and continuing unwanted plea negotiations. (See Id., Doc. 88, 114) On December 20, 2016, Mr. Myshin and AUSA Scott Ford compelled Mr. Pelker to Mr. Ford's office in order to permit the government to conduct a reverse proffer in order to familiarize Mr. Pelker of the nature of their case and to allow him to fairly consider their last and final plea offer of 300 months. Mr. Pelker

again refused to plead guilty and cooperate with the government. Mr. Pelker reported Mr. Myshin for engaging in over zealous plea negotiations in regard to his demand for representation. On December 22, 2016, Mr. Myshin moved the District Court to withdraw from his representation in this matter. (See Id., Doc. 67, ¶15)

On December 30, 2016, Jeffrey A. Conrad, Esquire, was appointed to represent Mr. Pelker. (See Id., Doc. 70; 1:16-cr-240, Doc. 70) Mr. Pelker made Mr. Conrad aware of his prior complaints against Mr. Myshin and clearly stated his demand for representation was to proceed to trial. On April 04, 2017, the District Court consolidated both dockets in this matter to docket number 1:16-cr-240. (See 1:16-cr-240, Doc. 91) On April 21, 2017, Mr. Pelker reported Mr. Conrad to the District Court for engaging in overzealous plea negotiations in opposition to his demand for a trial. (See RRE 26) On April 28, 2017, the District Court held a pretrial conference in regard to the above mentioned complaint. (See RRE 48) At said hearing, Mr. Pelker reaffirmed his complaints against Mr. Conrad under oath. (See Id., pp. 8, lns. 22-23) The District Court noted upon the record that it was apparent Mr. Pelker wasn't interested in a plea and intended to proceed to trial. (See Id., pp. 10, lns. 19-23)

On May 05, 2017, Mr. Conrad contacted Mr. Pelker's girlfriend at the time Lauren Mohn. (See RRE 27) Said communication was suppose to pertain to Mr. Pelker's trial clothing, but changed to imploring Ms. Mohn to coerce Mr. Pelker into pleading guilty. Mr. Conrad divulged privileged information pertaining to Mr. Pelker's case to Ms. Mohn in order to impress upon her a false immediacy

for her action. Mr. Conrad appraised Ms. Mohn of an incorrect sentencing outcome as it related to Mr. Pelker's case. Mr. Conrad told Ms. Mohn that if she loved Mr. Pelker; and he loved her, she would do anything she could to get Mr. Pelker to plead guilty. Mr. Conrad instructed Ms. Mohn that Mr. Pelker would do anything for her and her two (2) children. Lastly, Mr. Conrad instructed Ms. Mohn to not disclose the content of their conversation with Mr. Pelker as he would report him to the District Court. (See RRE 27) That same day during a prison phone call with Mr. Pelker and utilizing the information provided by Mr. Conrad, Ms. Mohn successfully coerced Mr. Pelker into pleading guilty. (See RRE 27 and 29) Mr. Pelker was not informed pertaining to the content of Ms. Mohn's and Mr. Conrad's earlier communication. (See RRE 27 and 29)

On May 08, 2017, Mr. Pelker; due solely to Ms. Mohn's coercion (See Id.), appeared for a change of plea hearing in which he expressed his intent to plead guilty and cooperate with the government¹ in exchange for a 300 month sentence. Immediately after said hearing, Mr. Pelker was taken to AUSA Ford's office in order to provide his self-incriminating proffer pursuant to his plea agreement. (See RRE 43) From the fruits of his proffer, the government obtained information of additional and previously unknown criminal activities of Mr. Pelker. (See RRE 31-41)(counts 5-10 of the Second Superseding Indictment)

1

The government agreed that Mr. Pelker's cooperation would only include information in regard to himself and nothing pertaining to any other individual(s).

After Mr. Pelker pled guilty and provided the previous mentioned proffer, Ms. Mohn informed him about the content of her conversation with Mr. Conrad on May 05, 2017. (See RRE 27 and 29) On June 12, 2017, Mr. Pelker filed a request with the District Court to withdraw from the plea agreement. (See RRE 30) On August 17, 2017, newly appointed counsel John A. Abom, Esquire, filed a formal Motion to Withdrawal Guilty Plea (See Doc. 137 and 138), in which he presented Mr. Conrad's misconduct as a fair and just reason. On October 02, 2017, the Court granted said motion. (See Doc. 184)

On May 04, 2018, Mr. Conrad testified during an evidentiary hearing in this matter. (See RRE 49) Mr. Conrad acknowledged that Mr. Pelker never wanted to plead guilty to the criminal charges. (See Id., pp. 33, lns. 9-10) Mr. Conrad articulated his belief that Mr. Pelker was guilty and should had been convicted of said crimes. (See Id., pp. 32-33) Mr. Conrad acknowledged that his intent in contacting Ms. Mohn was to implore her to coerce Mr. Pelker into pleading guilty. (See Id., pp. 38-39) Mr. Conrad acknowledged that he was recently elected as a Lancaster County judge. (See Id., pp. 8) Lastly, Mr. Conrad acknowledged that the government agreed that Mr. Pelker's proffer would only consist of information pertaining to himself and not other individual(s). (See Id., pp. 48, lns. 1-6)

Ms. Mohn testified about the content of her May 05, 2017, conversation with Mr. Conrad. Ms. Mohn articulated how said communication made her feel and interpreted it as a command to coerce Mr. Pelker into pleading guilty. Ms. Mohn articulated how Mr. Conrad instructed her to not divulge the content of their conversation, as Mr. Pelker wouldn't had pled guilty and reported

him to the Court. Ms. Mohn admitted using the information provided by Mr. Conrad in order to coerce Mr. Pelker into pleading guilty. Ms. Mohn acknowledged that she didn't inform Mr. Pelker about the above mentioned phone call until after he plead guilty. Lastly, Ms. Mohn stated Mr. Pelker wouldn't have plead guilty if it wasn't for her actions in coercing him. (See Id., pp. 70-73)

Mr. Pelker testified that Ms. Mohn was crying and imploring him to plead guilty for her and her children. Mr. Pelker stated that Ms. Mohn stated that if he truly loved her and her children he wouldn't put them through a trial. Mr. Pelker articulated how said communication was demoralizing and made him believe Ms. Mohn would break up with him if he didn't plead guilty. Mr. Pelker stated that Ms. Mohn didn't reveal the content of her communication with Mr. Conrad until after he pled guilty and provided his proffer. Lastly, Mr. Pelker testified that he wouldn't have pled guilty and provided his proffer if it wasn't for Ms. Mohn coercing him into doing so. (See Id., pp. 82-86) Mr. Pelker specifically directed the Court to the fact he refused said plea agreement on four (4) separate occasions. (See Id.)

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT COURT OF APPEALS IMPROPERLY DEFERRED TO THE DISTRICT COURTS DENIAL OF A COA IN REGARD TO THE FEDERAL GOVERNMENT'S COLLUSION WITHIN THE COMMONWEALTH OF PENNSYLVANIA'S PROSECUTION

Mr. Pelker (herein referred to as "Petitioner") avers that the Third Circuit Court of Appeals improperly deferred to the District

Courts denial of a COA in regard to the Federal Governments unconstitutional collusion within the Commonwealth of Pennsylvania's prosecution as he made a substantial showing of the denial of a constitutional right as jurists of reason could disagree with the courts resolution of his constitutional claims and or conclude the issues presented are adequate to deserve encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)

a. Appeal Meets Constitutional Standing Prerequisites

Procedurally, the United States Constitution Article III standing requirements have no bearing on Petitioner's capacity to assert a defense in his criminal case and his appeal meets constitutional standing prerequisites. He has standing to challenge the current indictment, convictions, and sentences as they derive from an unconstitutional investigation which infringed upon the powers and rights reserved to the Commonwealth of Pennsylvania and himself. His challenge to his convictions and sentence satisfies the case and controversy requirement because his incarceration, convictions, sentences, and violations of his constitutional rights constitute a concrete injury; caused by the convictions and sentences that derived from an unconstitutional investigation which is redressable by invalidation of said convictions and sentences. See Bond v. United States, 564 U.S. 211, 218 (2011)

b. The Federal Government's Involvement, Participation, and Collusion Within the Commonwealth of Pennsylvania's Prosecution Violated the Constitutional Principle's of Federalism and Separation of Powers

Petitioner avers that the lower courts erred by concluding that the Federal Government's involvement, participation, and collusion within the Commonwealth of Pennsylvania's prosecution did not violate the constitutional principle's of Federalism and Separation of Powers expressed by the 9th, 10th, and 11th Amendments of the United States Constitution. See U.S. Const. Amend. 9th, 10th, and 11th

The lower court held: "Indeed, cooperation 'between federal and state officials not only do[es] not offend the Constitution but [is] commonplace and welcome.' See United States v. Leathers, 354 F.3d 955, 960 (8th Cir 2004)" (See RRE 45, pp. 10) "the Court previously noted in denying Petitioner's pretrial motions, nothing suggests that 'continuance of [his] preliminary hearing amount[ed] to a constitutional violation or offend[ed] the concept of federalism.' (Doc No 356 at 4-5)" (See Id., pp. 11) "Moreover, the federal government's cooperation with state authorities is not prohibited and does not offend principles of federalism or separation of powers, and violations of state procedural rules do not alone give rise to due process violations, as Plaintiff appears to suggest." (See Id.)

The lower courts reliance upon the above mentioned argument was erroneous. Though cooperation between federal and state officials is permissible, said cooperation is not without restrictions. This is because "principles of equity, comity, and federalism have little force in the absence of a pending state proceeding." See Brown v. Brannon, 399 F.Supp 133, 136 (3rd Cir 1975) "Though cooperation is encouraged, the states are demanded to utilize its jurisdiction in a manner consistent with the values of federalism and fundamental fairness." See Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1140

(3rd Cir 1976); United States v. Mardis, 600 F.3d 693, 697 (6th Cir 2010)(stating impermissible collusion could be demonstrated with evidence that one sovereign manipulated another for an advantage.) This Court has previously held that improper collaboration and working arraignments between federal and state authorities is forbidden. See Anderson v. United States, 318 U.S. 350 (1943); Brinegar v. United States, 93 L.Ed. 1879, 1893 (1949) This Court also held that preindictment delay intended to harass or gain a tactical advantage violates the due process clause. See United States v. Lovasco, 431 U.S. 783, 789-90 (1977) Lastly, this Court previously held that "prohibition against improper use of the formal restraints imposed by the criminal process lies at the heart of the liberty interest protected by the Fourteenth Amendment due process clause." See Board of Regents v. Roth, 408 U.S. 564, 572 (1972)

The only dispute in this matter is whether the Federal Government's request to the Commonwealth of Pennsylvania to delay the state prosecution of Petitioner in order to assist the parallel federal investigation of the same charged misconduct violated his constitutional rights. (See RRE 19) Though Petitioner didn't possess a constitutional right to a preliminary hearing within the state prosecution under the United States Constitution, he was entitled to said hearing under state created rights. See Pa.R.Crim.P. 540(E)(2)(right to a timely preliminary hearing without unnecessary delay); Pa.R.Crim.P. 540(F)(1)(defining a timely preliminary hearing as one within ten (10) from arraignment); Pa.Const.Art. 1, §9 (right to due process of law) Said state rights, statutes, and or procedures did not recognize an extraterritorial application or

exemption to their applicability. "When a statute gives no clear indication of an extraterritorial application, it has none." See Morrison v. National Australia Bank, Ltd., 130 S.Ct. 2869, 2873 (2010) Petitioner retained a substantive constitutional right to not be subjected to arbitrary governmental actions in contravention of the constitutional fundamental principles of Federalism and Separation of Powers. See Bonds, 564 U.S. at 221. "The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Ninth, Tenth, and Eleventh Amendments, both are expressed by them. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government." See New York v. United States, 505 U.S. 144, 155 (1992) "Federalism is more than an exercise in setting boundaries between different institutions of government for their own integrity. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign powers." See New York, 505 U.S. at 181.

The Federal Government's collusion within the state proceedings in order to assist their future prosecution of the same charged misconduct offended the fundamental principles of justice rooted in the traditions and conscience of the United States and transgressed the principles of fundamental fairness. See Medina v. California, 505 U.S. 437, 446-48 (1992) Petitioner's constitutional rights to access to the courts were chilled, his right to due process of law weaponized, and his right to not be subjected to arbitrary governmental actions in contravention of the principles of Federalism and Separation of Powers denied, solely to assist their parallel investigation for the state charged misconduct.

Petitioner asserts that the conduct he was charged, convicted, and sentences of (respectfully counts 1-4 of the Second Superseding Indictment), derive from the unconstitutional actions undertaken by the Federal Government. The federal executive officers conduct, involvement, and collusion in the state prosecution signaled a massive and unjustifiable expansion of federal law into the state prosecutorial mechanisms and procedures. The prosecutorial mechanisms and integrity of the Commonwealth of Pennsylvania; in its inherent capacity as a sovereign, and Petitioner's rights which derived therefrom, were displaced, degraded, and weaponized by the Federal Government's collusive misconduct in disregard of the fundamental conceptions of justice.

c. The Federal Government's Collusion Violated Petitioner's Due Process Rights

Petitioner asserts that the lower courts erred by concluding that the Federal Government's collusion within the states prosecution did not violate his due process rights. See U.S. Const. Amend. 5th and 6th. Under state law, Petitioner possessed the right to a timely preliminary hearing without unnecessary delay which state law defined as a hearing within ten (10) days after arraignment. See Pa.R.Crim.P. 540(E)(2); Pa.R.Crim.P. 540(F)(1). Petitioner was arraigned on the state charges on April 08, 2016, and was not provided a preliminary hearing until July 18, 2016; approximately 100 days after his arraignment. (See RRE 17)

Due to the Federal Government's requested delay (See RRE 19) the day of Petitioner's scheduled preliminary hearing (See RRE 16), the state court failed to schedule any hearing and grant said delay

until June 07, 2016. (See RRE 17) This rendered the state courts docket void of any future court date for twelve (12) days despite the fact he remained incarcerated demanding said right. (See RRE 18) "An individual defendant must be guaranteed as speedy a preliminary hearing as is practicable. Where no hearing date was set pending word from the Commonwealth and where the docket was silent as to the continuance subsequently granted, the accused who was incarcerated during the period was unlawfully deprived of liberty." See Commonwealth v. Wansley, 375 A.2d 73, 75-6 (Pa. 1977)

This Court has previously held that a "preliminary hearing is a critical stage of a state's criminal" prosecution. See Coleman v. Alabama, 399 U.S. 1, 10 (1970) The Federal Government utilizing said critical hearing and colluding to deprive Petitioner his state procedural due process protections to assist their investigation of the same misconduct was an improper use of the formal restraints deriving from said prosecution. See Roth, 408 U.S. at 572. Said usage was fundamentally unfair as it provided the Federal Government assistance in regard to the same misconduct being prosecuted by the state while depriving Petitioner the due process under state law which said prosecution was required to provide. See Milliken v. Meyers, 311 U.S. 457, 463 (1940) Said usage was also an abuse of process as Petitioner's state prosecution was perverted into an illegitimate purpose of assisting the Federal Government in a future prosecution against him for the same charged misconduct while denying him his state created rights. (See RRE 19) "To establish a claim for abuse of process, there must be some proof of a definite act or threat not authorized by the process; or aimed at an objective not legitimate in the use of process." See

Bristow v. Clevenger, 80 F.Supp.2d 421, 430 (M.D.Pa. 2000) This is applicable when a "prosecution is initiated legitimately and thereafter is used for a purpose other than that intended by the law." See Id. at 431(quoting Rose v. Bartle, 871 F.2d 331, 350 (3rd Cir 1989)

Due to the Federal Government's requested delay, Petitioner's state speedy trial right was violated. Under state law, "trial in a court case in which a written complaint is filed against the defendant, when the defendant is incarcerated on that case, shall commence no later than 180 days from the date on which the complaint is filed." See Pa.R.Crim.P. 600(A)(2). Petitioner was arraigned on said charges on April 08, 2016, and remained incarcerated therefrom. (See RRE 16); Pa.R.Crim.P. 600(C)(1) (stating that state speedy trial right commences upon a criminal defendant is arraigned on said charges if arrest couldn't occur upon the filing of a written compliant.) The Commonwealth of Pennsylvania did not Nolle Prosequi the state charges until October 27, 2016. (See RRE 25) In which, Petitioner remained incarcerated within York County Prison during the pendency of said charges demanding to be provided his rights. (See RRE 18) From the arraignment to the Nolle Prosequi of said charges totaled 202 days, in violation of Pa.R.Crim.P. 600(A)(2).

Petitioner was denied equal protection of law which similarly situated defendants within the Commonwealth of Pennsylvania were provided, merely because he was being federally investigated for the charged misconduct. (See RRE 19) Petitioner was excluded and denied both the previously articulated substantive constitutional rights and state procedural due process protections which all

citizens are entitled to. See U.S. Const. Amend. 14th. Petitioner's exclusion from the above mentioned protections "is of critical importance, since the discriminatory exclusion alone violates the asserted rights quit apart from any objective or subjective disadvantage that flowed from it." See Eisenstadt v. Baird, 405 U.S. 438, 452-55 (1972).

The tactical decision by the Commonwealth of Pennsylvania to Nolle Prosequi the state charges on October 27, 2016, (See RRE 25); the day of Petitioner's scheduled evidentiary hearing to address his constitutional claims in regard to the above mentioned misconduct (See RRE 23), does not present an obstacle in regard to his current claims before the Court. See Klopfer v. North Carolina, 386 U.S. 213 (1967). An adverse decision in regard to the above mentioned constitutional claims by the state court would have prevented the Federal Government from prosecuting said conduct.

d. Prejudice

Petitioner was prejudiced by the Federal Government's unconstitutional actions in this matter. Petitioner was arbitrarily and unconstitutionally incarcerated due to the Federal Government's requested delay. (See RRE 19) Despite the fact that the Federal Government was the sole reason for said delay, Petitioner wasn't accredited any time spent incarcerated in this regard to his current Federal sentences. Petitioner's attorney client relationship with his state court appointed counsel Mr. Dubbs was irreconcilably broken to the point he ceased Mr. Dubbs representation in his state prosecution and elected to proceed pro se solely because of the above mentioned delay. (See RRE 21) Petitioner's substantive

constitutional rights and state due process rights were violated in order to provide the Federal Government a fundamentally unfair advantage over him in their future prosecution of the same misconduct. Petitioner's right to access to the courts were chilled and or interfered with in order to provide the Federal Government their requested assistance. (See RRE 19) While the Petitioner was being excluded and denied the above mentioned rights the Federal Government was obtaining evidence and witnesses to use against him in said future prosecution. Lastly, Petitioner currently stands convicted and sentenced from the fruits of the Federal Government's investigation.

e. Procedural Default

Petitioner asserts that this claim addressed issues outside the trial court record and legal rights and procedures outside the federal judiciary. Thus 28 U.S.C. §2255 was the appropriate proceeding to litigate said claims. However, the lower courts held that said claims were procedurally defaulted as they should had been presented within his direct appeal. (See RRE 45, pp. 8-9) Petitioner asserts that appellate counsel Mr. Abom's ineffectiveness in this regard is sufficient cause and prejudice to overcome said procedural default. See Martinez v. Ryan, 566 U.S. 1 (2012)

Mr. Abom was obligated to be knowledgable of the relevant legal issues of the case, present claims which have merit and are non-frivolous which could warrant relief, and act upon Petitioner's best interest. See American Bar Association Standards (herein referred to as "ABA Standards") 4-3.7(g); 4-4.6(a); and 4-9.3(d). Additionally, Petitioner instructed Mr. Abom to present said claim

but refused to do so. See Hodge v. United States, 554 F.3d 372, 380 (3rd Cir 2009)(petitioner established cause to excuse a procedural default by instructing counsel to file claim.) The record in this matter supports Petitioner's claim in this regard as he presented said claim both within a pretrial motion and at his sentencing. As Petitioner has proven that the underlying claims have merit, are non-frivolous, implicate fundamental principles of justice, and warrant relief, Mr. Abom's failure to present said claim cannot be deemed a reasonable strategic decision and his performance was deficient under relevant legal precedents and professional norms.

Furthermore, Petitioner satisfied the prejudice prong. As the above mentioned claims have merit, are non-frivolous, implicate fundamental principles of justice, and warrant relief, there is a reasonable probability that more likely than not the outcome of his direct appeal would have been different absent Mr. Abom's unprofessional error. The Third Circuit Court of Appeals would have more likely than not granted Petitioner's direct appeal, dismissed counts 1-4 of the Second Superseding Indictment, and vacated and remanded the remaining counts back to the District Court for a new trial. Mr. Abom's unprofessional error worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

e. Compelling Reasons to Address Claims

Petitioner's claims implicate fundamental principles of justice which require clarification from the Court. As the Court and Congress have previously held that such interference within

ongoing state proceedings from the federal judiciary is restricted unless extraordinary circumstances are presented. See In re Diet Drugs Prod. Liab. Litig., 369 F.3d 293, 305 (3rd Cir 2004)(Younger Absentee Doctrine); 28 U.S.C. §2283. It would be unreasonable to conclude that the executive branch would not be subjected to the same or even greater restrictions. The Federal Government's action in this matter was a massive intrusion into both the states performance and integrity of an essential governmental function and criminal defendants rights which derive therefrom. It would be in the interest of the public for the Court to provide review in this matter. Lastly, the Court providing review in regard to the above mentioned claims coincides with Congress and their intent to provide oversight in regard to the Federal Governments propensity to act in unconstitutional manners. (Congressional Committee for the Weaponization of the Federal Government)

f. Relief

Petitioner request the Court for the following relief:

- 1) Grant Writ of Certiorari
- 2) Dismiss counts 1-4 of the Second Superseding Indictment, vacate convictions and sentences on the remaining counts, and remand it back to the District Court for a new trial
- 3) Remand this matter back to the lower court in to grant a COA
- 4) Any other relief which the Court deems appropriate

II. THE THIRD CIRCUIT COURT OF APPEALS IMPROPERLY DEFERRED
TO THE DISTRICT COURTS DENIAL OF A COA IN REGARD TO
PETITIONER'S PRIOR COUNSEL'S INEFFECTIVENESS IN
RELATION TO COERCING HIS GUILTY PLEA AND SELF
INCRIMINATING PROFFER

Petitioner asserts that the Third Circuit Court of Appeals improperly deferred to the District Courts denial of a COA in regard to his prior counsel Jeffrey A. Conrad, Esquire, ineffectiveness in relation to imploring Ms. Mohn to coerce him into pleading guilty and providing an incriminating proffer as he made a substantial showing of the denial of a constitutional right as jurists of reason could disagree with the courts resolution of his constitutional claims and or conclude the issues presented are adequate to deserve encouragement to proceed further. See Miller-El, 537 U.S. at 327.

a. Mr. Conrad Imploring Ms. Mohn to Coerce Petitioner Into Pleading Guilty and Providing an Incriminating Proffer was Ineffective Assistance of Counsel

Petitioner asserts that Mr. Conrad disregarding his demand to proceed to trial by eliciting Ms. Mohn's assistance in coercing him into pleading guilty and providing an incriminating proffer unconstitutionally infringed upon his fundamental autonomy interest in deciding the objectives of his defense in violation of his constitutional right to effective assistance of counsel. See U.S. Const. Amend. 6th

In order to establish a claim of ineffective assistance of counsel, Petitioner must demonstrate: 1) that his attorney's

performance was deficient; and 2) counsel's deficiency caused prejudice. See Strickland, 466 U.S. at 687. "The Strickland test applies where the petitioner suggests that his guilty plea resulted from ineffective assistance of counsel." See Hill v. Lockhart, 473 U.S. 52, 56 (1985) The court is mandated to review all circumstances of the plea which include facts which are on and off the record. See Blackledge v. Allison, 431 U.S. 62, 75 (1977)

Deficiency of Performance Prong

To establish deficient performance, Petitioner must show that counsel's performance "fell below an objective standard of reasonableness." See Strickland, 466 U.S. at 688. In this respect, the measure of an attorney's performance "remains simply reasonableness under prevailing professional norms" and must be determined by the facts and circumstances of the particular case. See *Id.*, at 689-90.

It is well established that a defendant has a constitutionally protected interest in "mak[ing] the fundamental choices about his own defense." See McCoy v. Louisiana, 138 S.Ct. 1500, 1511 (2018) This autonomy interest arises out of the fundamental proposition that "[t]he right to defend is personal" and the defendant's choice in exercising that right "must be honored out of respect for the individual which is the lifeblood of the law." See *Id.*, at 1507. This Court has held that the fundamental decision whether to plead guilty or not may only be made by "the defendant alone." See Von Moltke v. Gillies, 332 U.S. 708, 721 (1948); Brookhart v. Janis, 384 U.S. 1, 7 (1966); Jones v. Barnes, 463 U.S. 745, 751 (1983); Florida v. Nixon, 543 U.S. 175, 187 (2004)(explaining that "counsel lacks authority to consent to guilty plea on client's behalf.");

McCoy, 138 S.Ct. at 1516("[A] defendant cannot be forced to enter of plea against his wishes.")(Alito, J., dissenting)

The facts and circumstances of the case clearly establish that Petitioner not only refused to plead guilty and cooperate with the government on numerous prior occasions but continuously reported his prior counsel's for even engaging in any plea negotiations on his behalf. (See RRE 30 and 48) Mr. Conrad eliciting Ms. Mohn assistance in coercing Petitioner into pleading guilty and providing his incriminating proffer merely a week after he reported counsel to the District Court for overzealous plea negotiations was contrary to his professional norms. See ABA Standards 4-5.1(f)(Defense counsel should not exert undue influence on the client's decision regarding a plea.); ABA Standards 4-5.1(g)(Defense counsel should advise the client to avoid communication about the case with anyone, including family and friends.); ABA Model Code of Professional Responsibility EC7-7(Defense counsel must respect and abide by the defendants decision whether to pled guilty or not.); and ABA Standards 4-6.2(e) (Defense counsel may make a recommendation to the client regarding disposition proposals, but should not unduly pressure the client to make any particular decision.)

Mr. Conrad's proffered explanation at the May 04, 2018, evidentiary hearing in regard to this claim substantiates the unreasonableness of his misconduct.

"And on that particular night, I did speak with her [Ms. Mohn] about clothing, about getting him clothes, but then I also spoke with her about, you know, what I believed to be overwhelming evidence in the case and my hope that

activities which he was engaged in. (See RRE 31-42) The above mentioned criminal conduct was charged, prosecuted, and Petitioner was ultimately convicted of said conduct which derived from Mr. Conrad's ineffectiveness. (respectfully counts 5-10 of the Second Superseding Indictment)

b. Mr. Conrad had an Actual Conflict of Interest by Campaigning for Judgeship

Petitioner asserts that Mr. Conrad had an actual conflict of interest while providing Petitioner representation, as Mr. Conrad was campaigning for judgeship in Lancaster County, Pennsylvania, and never disclosed said fact to Petitioner nor obtained his informed consent. Mr. Conrad was obligated to inform Petitioner that during his representation, he was campaigning for judgeship. "If defense counsel is a candidate for a position, or seeking employment, as a prosecutor or judge, this should be promptly disclosed to the client, and informed consent to continue be obtained." See ABA Standards 4-1.7(j)

To establish a conflict of interest, Petitioner must demonstrate 1) some plausible alternative defense strategy might have been pursued, and 2) the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interest. See United States v. Morelli, 169 F.3d 798, 810 (3rd Cir 1999) If an actual conflict of interest is demonstrated, prejudice is presumed. See United States v. Cronic, 446 U.S. 648, 666 (1984)

Some Plausible Alternative Defense Strategy Might Have Been Pursued

During Mr. Conrad's entire representation of Petitioner, he

consistently implored Petitioner to plead guilty despite the fact that Petitioner unequivocally demanded to proceed to trial. (See RRE 30 and 48) Mr. Conrad should have abandoned the unwanted plea negotiations strategy and pursued Petitioner's strategy and demand to proceed to trial.

The Alternative Defense Was Inherently In Conflict With Or Not Undertaken Due To The Attorney's Other Loyalties Or Interest

The lower courts held that "the fact that Attorney Conrad was campaigning for judicial office falls short from demonstrating that he persuaded Petitioner to enter into the plea agreement due to other loyalties or interest." (See RRE 45, pp. 17) Petitioner asserts that Mr. Conrad's overzealous plea negotiations in opposition to his demand for a trial was undertaken because of his interest in his campaign for judgeship in Lancaster County, Pennsylvania. Petitioner proceeding to trial would have provided publicity in the surrounding area, which includes Lancaster County. Mr. Conrad being counsel of record, would have been publicly acknowledged as representing an accused bank robber. To limit said publicity and the negative effect said publicity would/could have had in regard to his campaign, Mr. Conrad ignored Petitioner's demand in regard to proceeding to trial and instead elicited Ms. Mohn's assistance in coercing him into pleading guilty and providing an incriminating proffer. (See RRE 27 and 29)

c. Incriminating Proffer was not in Petitioner's Best Interest

Petitioner asserts that Mr. Conrad procuring his incriminating

proffer for the government was not in his best interest. Throughout the entire prosecution, Petitioner unequivocally refused to pled guilty and provide an incriminating proffer. However, once Mr. Conrad secretly elicited Ms. Mohn's assistance in coercing Petitioner into doing so, he eventually succumbed to said coercion. (See RRE 27, 29, and 49) Prior to Petitioner providing his incriminating proffer on May 08, 2017, Mr. Conrad had the government agree that "because of his own philosophy, was not going to talk about anyone else. The government had already given me the assurance that he was going to get this..." (See RRE 49, pp. 47-48) "You were never going to talk about other people, just yourself." (See Id., pp. 49) Despite the fact Petitioner wouldn't speak about anyone else but himself, the government retained derivative use of said proffer. (See RRE 43) Petitioner provided the government his incriminating proffer which included information about criminal conduct which he engaged in and the government had no prior knowledge of. (See RRE 31-42) The derivative use and Petitioner's inability to disclose any and all information in regard to any other person involved beside himself, ensured that the government would be able to charge him in the future from the fruits of his unconstitutional proffer. (See Id.)

Mr. Conrad was obligated to ensure that Petitioner's best interest was protected. See ABA Standards 4-1.2(a) and (d). Mr. Conrad being aware that Petitioner would not provide any information pertaining to anyone else other than himself and the government retaining derivative use of said statement, should had instructed Petitioner to not provide said proffer and or had the government agree to forfeit the derivative use of said proffer.

There is a reasonable probability that absent Mr. Conrad's unprofessional errors, Petitioner would not have provided his incriminating proffer. (See RRE 43) As previously articulated, Petitioner had continuously refused to plead guilty and cooperate with the government. Petitioner reported both the government and his prior counsel's to the District Court for attempting to usurp his fundamental decision to proceed to trial. (See RRE 30 and 48) Lastly, Petitioner's proffer only occurred because Mr. Conrad secretly elicited Ms. Mohn's assistance in coercing him into doing so. (See RRE 27, 29, and 49) Instead of protecting Petitioner's rights and pursuing his best interest, Mr. Conrad acted as an agent of the government solely to usurp his rights.

d. Compelling Reasons to Address Claims

Mr. Conrad's misconduct in this case usurped Petitioner's fundamental autonomy interest in deciding the fundamental objectives of his own defense. The Court providing review on this matter will assist both the effectiveness of the criminal justice system as a whole and clearly articulate the restrictions within counsel's performance. Thus review would be in the interest of justice.

e. Relief

Petitioner request the Court for the following relief:

- 1) Grant Writ of Certiorari
- 2) Dismiss counts 5-10 of the Second Superseding Indictment, vacate convictions and sentences on the remaining counts, and remand it back to the District Court for a new trial

- 3) Remand this matter back to the lower court in order to grant a COA
- 4) Any other relief which the Court deems appropriate

III. THE THIRD CIRCUIT COURT OF APPEALS IMPROPERLY DEFERRED TO THE DISTRICT COURTS DENIAL OF PETITIONER'S 28 U.S.C.

§2255 WHEN BOTH COURTS FAILED TO ADDRESS THE MERITS OF HIS CLAIM THAT PRIOR COUNSEL HAD A CONFLICT OF INTEREST FOR ADOPTING AND ACTING UPON HIS BELIEF THAT PETITIONER SHOULD HAD BEEN CONVICTED OF THE CHARGED MISCONDUCT

Petitioner asserts that the Third Circuit Court of Appeals improperly deferred to the District Courts denial of Petitioner's 28 U.S.C. §2255 when both courts failed to address the merits of his claim that prior counsel Jeffrey A. Conrad, Esquire, had an actual conflict of interest for adopting and acting upon his belief that Petitioner should had been convicted of the charged misconduct. "an attorney who adopts and acts upon a belief that his client should be convicted fails to function in any meaningful sense as the Government's adversary." See Cronic, 446 U.S. at 666.

The facts and circumstances of the case clearly establish that Petitioner not only refused to plead guilty and cooperate with the government on numerous prior occasions but continuously reported his prior counsel's for even engaging in any plea negotiations on his behalf. (See RRE 30 and 48) Mr. Conrad eliciting Ms. Mohn's assistance in coercing Petitioner into pleading guilty and providing his incriminating proffer merely a week after he reported counsel to the District Court for overzealous plea negotiations was contrary to his professional norms. See ABA Standards 4-5.1(f);

ABA Standards 4-5.1(g); ABA Model Code of Professional Responsibility EC7-7; and ABA Standards 4-6.2(e).

Mr. Conrad acknowledged said belief and acting upon it within his testimony at the May 04, 2018, evidentiary hearing.

"And on that particular night, I did speak with her [Ms. Mohn] about clothing, about getting him clothes, but then I spoke with her about, you know, what I believed to be overwhelming evidence in the case and my hope that I could get him to take a plea agreement." (See RRE 49, pp. 11)

Mr. Conrad's misconduct was in direct contradiction to Petitioner's demand for representation. Mr. Conrad could had abandoned his overzealous belief of Petitioner's guilt and elicitation of Ms. Mohn's assistance in coercing his conviction and confession and instead focused solely upon his demand for a trial. Lastly, Mr. Conrad's belief that Petitioner was guilty was the sole reason he engaged in said misconduct.

The lower courts failed to address this claim despite Petitioner properly presenting it. (See RRE 45-47) For the above mentioned reasons, Petitioner request the Court for the following relief:

- 1) Grant Writ of Certiorari
- 2) Remand case back to lower court in order to address claim
- 3) Dismiss counts 5-10 of the Second Superseding Indictment, vacate convictions and sentences on the remaining counts, and remand back to the District Court for a new trial

4) Any other relief which the Court deems appropriate

IV. THE THIRD CIRCUIT COURT OF APPEALS IMPROPERLY DEFERRED TO THE DISTRICT COURTS DENIAL OF A COA IN REGARD TO PETITIONER'S ACCESS TO THE COURT CLAIM REQUESTING REINSTATEMENT OF HIS DIRECT APPEAL RIGHTS

Petitioner asserts that the Third Circuit Court of Appeals improperly deferred to the District Courts denial of a COA in regard to his access to the court claim requesting reinstatement of his direct appeal rights to file with this Court a Writ of Certiorari from the denial of said appeal as he made a substantial showing of the denial of a constitutional right as jurists of reason could disagree with the courts resolution of his constitutional claims and or conclude the issues presented are adequate to deserve encouragement to proceed further. See Miller-El, 537 U.S. at 327.

On July 29, 2020, the Third Circuit Court of Appeals denied Petitioner's direct appeal. See United States v. Pelker, 82 F.App'x 93 (3rd Cir 2020) Petitioner had until December 26, 2020, to file a Writ of Certiorari with this Honorable Court. However, during the entire period of time mentioned above, the Pennsylvania Department of Corrections (herein referred to as "PADOC") was operating under a state of emergency which restricted his access to any and all legal materials and institutional law library. (See RRE 44)

On January 20, 2020, the United States confirmed its first case of Covid-19. Shortly thereafter, on March 02, 2020, the Commonwealth of Pennsylvania's Governor Tom Wolf signed an Emergency Disaster Declaration. As a result, the PADOC nearly restricted all and any

prisoners movements within their institution. The extraordinary circumstances caused by the global pandemic interfered, chilled, and denied Petitioner his constitutional right to file said petition. See U.S. Const. Amend. 1

The lower court rested upon Petitioner's alleged "proficiency" in concluding that his constitutional rights weren't violated. Petitioner asserts that the lower courts own observation is a fact which in fact goes against their ruling. (See RRE 45, pp. 18) There is basis to conclude that Petitioner; if he did file a petition for writ of certiorari in his direct appeal, this Court would had granted review. In his direct appeal, Petitioner alleged that the District Court abused its discretion by denying his verbal motion to continue trial. Petitioner would had demonstrated that the trial docket revealed that he was incapable to filing a formal request prior as the District Court failed to rule upon a prior request. (Doc. 262) (Doc. 355, ORDER, May 10, 2018)

Petitioner request the Court for the following relief:

- 1) Reinstate his direct appeal rights
- 2) Remand this case back to the lower court in order to grant a COA
- 3) Any other relief which the Court deems appropriate

CONCLUSION

WHEREFORE, the Court should grant this Petition for Writ of Certiorari for all the reasons stated.

Respectfully,



Derek Pelker HS-6614

Dated: March 04, 2023