No. 22-7744

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY BARTUNEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Gregory P. Bartunek

29948-047

Federal Correctional Institution

P.O. Box 9000

Seagoville, TX 75159

QUESTIONS PRESENTED

Did the Court of Appeals abuse its discretion, violationg Bartunek's due process rights, by failing to issue a Certificate of Appealability for constitutional claims that were supported by facts and law, and therefore, deserved further consideration?

And by doing so, did the appeallate court sanction the District Court's departure from the usual course of judicial procedure--to hold a hearing and appoint counsel, when Bartunek's § 2255 motion survived inital review?

And, if so, did this violate the law and Bartunek's due process rights and right to counsel guaranteed by the Fifth and Sixth Amendments of the United States Constitution?

SUBSIDIARY QUESTIONS PRESENTED

Is a § 2255 proceeding a critical stage in the petitioner's criminal prosecution, requiring the appointment of counsel, and therefore, when the District Court failed to appoint counsel, it deprived Bartunek of his Sixth Amendment right to counsel?

Is Rule 4(a) governing § 2255 proceedings, requiring a Judge to rule on his own errors, abuses of discretion, misconduct and/or vindictiveness, unconstitutional, or unconstitutional as applied to Bartunek's case?

UNDERLYING
QUESTIONS PRESENTED

I. WHETHER DELAYS CAUSED BY COUNSELOR FAILURES, A PRO SE DEFENDANT WHO DIDN'T CHOOSE SELF-REPRESENTATION, THE PROSECUTOR, AND THE COURT ARE ATTRIBUTABLE TO THE STATE PURSUANT TO THE SPEEDY TRIAL ANALYSIS IN BARKER V. WINGO, 407 US 514, 530 (1972), RESULTING IN VIOLATION OF BARTUNEK'S SPEEDY TRIAL RIGHTS UNDER THE SIXTH AMENDMENT

II. WHETHER FAILURE TO APPOINT ALTERNATE COUNSEL DEPRIVED BARTUNEK OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING CRITICAL STAGES OF HIS CASE

III. WHETHER, UNDER THE TOTALITY OF CIRCUMSTANCES, BARTUNEK'S TRIAL WAS UNFAIR, VIOLATING HIS DUE PROCESS RIGHTS

IV. WHETHER COUNSEL FAILED TO SUBJECT THE PROSECUTOR'S CASE TO ANY MEANINGUL ADVERSARIAL TESTING

V. WHETHER ALLOWING COUNSEL TO SIT AT A TABLE BEHIND BARTUNEK, AND THUS PREVENTING BARTUNEK FROM CONFURRING WITH HIM DURING TRIAL, DENIED BARTUNEK"S RIGHT TO COUNSEL

VI. WHETHER COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT AN ALIBI DEFENSE, WHEN BARTUNEK SPECIFICALLY ASKED HIM TO DO SO, CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

VII. WHETHER ADMITTING THE NCMEC EVIDENCE VIOLATED BARTUNEK'S RIGHT TO CONFRONTATION, AND FAILURE OF HIS COUNSEL TO OBJECT TO ITS ADMITTANCE VIOLATED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

VIII. WHETHER BARTUNEK'S SENTENCE WAS IMPOSED IN VIOLATION OF THE LAW AND/OR CONSTITUTION OF THE UNITED STATES

IX. WHETHER DUE PROCESS AND THE RIGHT TO A JURY TRIAL WAS VIOLATED WHEN THE COURT IMPOSED A SENTENCE THAT, BUT FOR JUDGE FOUND FACTS, RESULTED IN A SUBSTANTIVELY UNREASONABLE AND THUS ILLEGAL SENTENCE

X. WHETHER BARTUNEK'S SENTENCE WAS VINDICTIVELY IMPOSED BECAUSE HE EXERCISED HIS RIGHT TO TRIAL INSTEAD OF ACCEPTING A PLEA AGREEMENT

XI. WHETHER THE DISTRICT COURT ERRED IN DENYING BARTUNEK'S § 2255 MOTION

XII. WHETHER THE DISTRICT AND APPELLATE COURTS ERRED IN FAILING TO ISSUE CERTIFICATE OF APPEALABILITY FOR BARTUNEK'S § 2255 CLAINMS

RELATED CASES

Direct Appeal of 8:17CR28

8th Cir.	19-1584	United States v. Bartunek	08/12/2020
Supreme	20-6889	United States v. Bartunek	02/27/2021

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PETITION FOR WRIT OF CERTIORARI

Bartunek respectfully petitions the Court for a writ of certiorari to review the Judgment entered by the United States Court of Appeals for the Eighth Circuit on February 14, 2023.

OPINIONS BELOW

The Judgment of the Court of Appeals denying Bartunek's application for a Certificate of Appealability (COA) and dismissing his appeal, unpublished, is appended to this petition. (App. 1). The district court's Memorandum and Order denying Bartunek's initial 28 U.S.C. § 2255 Motion and Supporting Briefs, found at United States v. Bartunek, 2022 U.S. Dist. LEXIS 10947 (D. Neb., Jan. 14, 2022), is appended. (App. 2). Bartunek's Amended § 2255 Motion, unpublished, is appended. (App. 3). The district court's Memorandum and Order summarily dismissing 31 of Bartunek's 45 claims, found at United States v. Bartunek, 2022 U.S. Dist. LEXIS 82782 (D. Neb., May 6, 2022), is appended. (App. 4). The district court's Memorandum and Order dismissing Bartunek's remaining claims, denying his motion, and refusing to issue a COA, found at United States v. Bartunek, 2022 U.S. Dist. LEXIS 181833 (D. Neb., Oct. 4, 2022) is appended. (App. 5). An Appeal was filed. (App. 6).

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on February 14, 2023. Bartunek filed a timely Petition for Rehearing. (App. 7). It was denied on April 12, 2023. (App. 8). This Petition has been timely filed. Jurisdiction is proper under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Articles I, § 9, Cl. 2 and III, § 2, Cl. 3 of the U.S. Constitution; Amendments I, II, IV, V, VI, IX, and XIV of the U.S. Constitution; 18 U.S.C. §§ 2252, 2252A, 3006A, 3142, 3161, 3599; 28 U.S.C. §§ 47, 144, 455, 1915, 2241, 2253, 2254, 2255; Fed. R. Crim. P. 11, 16; Fed. R. Civil. P. 8; Fed. R. App. P. 4, 22; Fed. R. Gov. 2255 P. 4, 8, 11; Fed. R. Evid. 403, 404, 414, 801, 802, 803; U.S.S.G. §§ 2G2.2, 6A1.3.

STATEMENT OF THE CASE

Jurisdiction in the district court is under 18 U.S.C. § 3231. Facts material to consideration of the questions presented follow. See (App. 3).

PREINDICTMENT DELAY

On March 26, 2016, Omegle.com sent a CyberTip to NCMEC, reporting that their chat system captured a snapshot image from a user's webcam video stream which contained apparent child pornography. A NCMEC CyberTipline Report was created and made avaiable to Nebraska law enforcement officials. (App. 49). The Report identified the user only by an IP address. Law enforcement subpoeneed COX Communications to determine the Subscriber of the IP address. Based on this information, on May 25, 2016, the Omaha Police, et. al, executed a State search warrant on Bartunek's residence. Following the search, Bartunek was interrogated by the police. Within the first minute of the interrogation, Bartunek stated that he wasn't going to say anything and that he wanted a lawyer. Never-the-less, the police continued interrogating him. Bartunek repeated his request for a lawyer after approximately 5 minutes and then again at 10 minutes, before the police finally ended the interrogation. According to the government, they had evidence to arrest Bartunek that day. However, Bartunek was not arrested at that time, nor were any State charges ever filed against him. Therefore, on December 30, 2016, Bartunek filed a lawsuit to get his property back.

THE INDICTMENT

On January 19, 2017, Bartunek was federally indicted for violating: Charge I - 18 U.S.C. § 2252A(a)(2); Count II - 18 U.S.C. § 2252(a)(4)(B). The single page indictment simply mimicked the federal statutes, but except for the dates of the alleged crimes, it was void of any statement of facts and circumstances specific to the charged offenses. (App. 50).

PRETRIAL DELAY

Bartunek was arrested and incarcerated almost a month following the indictement on February 16, 2017. The total amount of pretrial delay was nearly 2 years from the time he was arraigned on February 17, 2017 until his trial on October 29, 2018 (619 days). During that entire time, Bartunek was imprisoned alongside other pretrial detainees and convicted criminals. This adversely affected his ability to defend himself, caused the loss of a material witness, and resulted in him being convicted of both crimes. And although Bartunek was a first-time offender, he was sentenced to 17 years in prison based on erroneous judge-found facts.

A. INITIAL DELAY: DAYS 1–45 (45 days)

During Bartunek's arraignment, public defender Maloney was appointed to represent him; he plead not guilty; and prosecutor Norris moved to detain Bartunek pending trial. On February 23, 2017, Maloney received some discovery material. However, it was void of any copies of the files and data from computer devices seized from Bartunek's residence. That same day, Magistrate Judge Bazis ordered Bartunek to be released pending trial. However, he wasn't released because the government claimed that they didn't have the monitoring equipment required by the Adam Walsh Act. No one questioned this. Norris then appealed the release order. And on February 28, 2017, District Judge Rossiter rescinded the release order and ordered Bartunek to be detained, even though there was no new evidence or good cause shown to justify it.

Bartunek asked Maloney to appeal his detention order to the Court of Appeals, as well as other questions regarding the progression of his case. But Maloney was incommunicato. Therefore, Bartunek asked the court to appoint alternate counsel, which was denied. Over Bartunek's objections,

on March 14, 2017, Maloney asked for a 30-day extention of the pretrial motion deadline, which was granted. According to Maloney, he was too busy with other cases to meet the deadline. Thereafter, Maloney failed to appeal the detention order; failed to file any pretrial motions; and ignored Bartunek's repeated attempts to communicate with him. Bartunek again made the court aware of Maloney's failures.

B. PRETRIAL MOTIONS DELAY: DAYS 46-237 (192 days)

On April 3, 2017, a hearing was held upon Bartunek's request to appoint alternate counsel. After discussing various options regarding Bartunek's representation, the court asked Bartunek how he wanted to proceed. He answered, "with the assistance of a lawyer as per the Constitution." Instead of appointing alternate counsel, the court granted Bartunek pro se status, appointing Maloney as his stand-by counsel. The court assured Bartunek that, going forward, Maloney would assist him by answering his legal questions and providing him with case law; and that he would have access to the jail's law library one hour per week. However, this legal assistance was later denied by the court.

After becoming pro se, Bartunek found that 1 hour per week access to the jail's law library, legal documents, and discovery material, made it impossible to prepare a proper defense. Therefore, he made a motion to be released pending trial pursuant to 18 U.S.C. § 3142(i). Instead of releasing Bartunek, Judge Rossiter required Bartunek to waive the speedy trial for 15 days in order to get 2 additional hours in the law library to prepare his pretrial motions. However, from April 11th until May 24, the jail denied Bartunek and his entire housing unit any access to the law library, due to staffing mismanagement. When Bartuenk made the court aware of this, it ruled that Bartunek was not legally entitled to any access to the law library or

legal materials. The court told Bartunek that his stand-by counsel could assist him if he had any legal questions or needed case law. However, when Bartunek attempted to get this assistance, as before, Maloney would not communicate with him. So Bartunek asked for replacement counsel. Without a hearing, the court denied his request and ruled the Bartunek was not legally entitled to any legal assistance from his stand-by counsel, except for help with proceedural matters. Bartunek then filed an appeal to the Court of Appeals because he was denied any access to the courts or counsel, whatsoever. The appellate court refused to consider Bartunek's appeal, stating that they lacked the jurisdiction to do so.

Never-the-less, Bartunek was able to file several motions regarding preindictment delay, insufficient indictment, detention, suppression, discovery, speedy trial, and other matters. And while the court did order the jail to give Bartunek additional access to the law library, this was after the pretrial motion deadline had already expired. And Bartunek struggled to defend himself without effective assistance of counsel at his Omnibus hearing on his motions. Approximately 3½ months after the hearing, on October 11, 2017, the court ruled against Bartunek's motions.

C. COURT ORDERED DELAY: DAYS 238-291 (54 days)

The court then set the trial date for December 4, 2017. While Bartunek filed additional motions during this period, they did not affect the date of the trial.

D. DISCOVERY DELAYS: days 292-389 (98 days)

On April 21, 2017, Bartunek filed a motion for Discovery to review data and files from devices seized from his resisence pursuant to Fed. R. Cri. P. 16. Bartunek also files several motions to compel to get copies of this discovery. However, the government opposed these motions, and the court denied them.

It was not until August 24, 2017 that Bartunek was able to convince the court that he was entitled to this discovery. The government then provided Bartunek with copies of the data and files from some of the drives seized. However, the copies were missing critical system and user files and folders, and dates of the files were corrupt. Therefore, Bartunek filed a motion to stay in order to get the government to fully comply. Norris claimed that they could not get copies of the missing files or correct the dates. But the government's FBI computer forensic expert, Warnock, contradicted Norris and told the court that they could give Bartunek a complete and accurate copy of the data and files. Therefore, the court delayed the trial from December 4, 2017 until January 8, 2018, to give them time to do so. But once again, the government failed to comply in a timely manner, partly because they gave other cases precedence. In addition to this, there was still some missing or unaccessable data and corrupt dates. So Bartunek, once again asked the court to either delay the trial or dismiss the case. The court delayed the trial until March 12, 2018.

E. ANOTHER COURT ORDERED DELAY: DAYS 390–557 (168 days)

Prior to trial, Bartunek asked the court to appoint counsel. He told the court that due to his incarceration and the limitations this imposed on him, his ability to prepare an effective defense was compromised; that discovery delays were still occurring; that the lengthly incarceration took a great toll on his physical and mental well being, and that an attorney would most likely be able to gain access to resources, witnesses, and other matter that he couldn't. The court asked Bartunek if he would be OK with Maloney being his counsel. Bartunek thought it would be OK. But when Maloney told the court he wouldn't be ready for trial within the 70-day speedy trial limit, again because of his overburdened case load, Bartunek strenuously objected.

Faced with going to trial immediately without counsel or delaying trial in order to be represented by counsel, Bartunek reluctantly agreed to have Maloney appointed. But when Bartunek later found out that the court delayed the trial for 168 days, 48 days longer than even Maloney had requested, he filed a motion to reconsider appointment of counsel and the lengthly delay of trial, and a motion for justice. The court then appointed CJA Panel Attorney, Wilson,,to represent Bartunek. However, Judge Rossiter still refused to set the trial date within the 70-day speedy limit. He kept the trial date at August 27, 2018, stating that any attorney would require the same amount of time, without siting any facts or circumstances to support his claim. He also told Bartunek that this would be the last time that alternate counsel would be appointed; and assured Bartunek that the trial date would be no later than the August 27th date.

F. THE FINAL DELAY: DAYS 558–619 (62 days)

On March 22, 2018, the government provided Wilson with discovery which included the computer forensic reports from Pecha and Warnock based on the computer and external drives that were seized from Bartuenk's residence. In early May, Bartunek sent Wilson his forensic reports based on the same discovery material, as well as additional information in support of his defense. On May 10, 2018, the court approved hiring computer specialist Meinke, to perform the same analysis as was done by Pecha, Warnock, and Barutnek. And on July 5th, Wilson informed Bartunek that Meinke had completed his analysis of the images from Omegle.com and those on the drives that the government had analyzed.

And yet, on August 1, 2018, Wilson filed a motion to delay the trial claiming that "the case involved a significant amount of computer forensic investigation and additional time is required to complete such work."

Wilson also told the court that his motion was unopposed. However, Bartunek vehemently opposed any further delays, and informed the court of his opposition. (App. 51). Furthermore, the court was aware (through previous hearings and filings) that based on Warnock's expert opinion and his personal experience, it would take another expert like Meinke only a couple of days to complete the forensic analysis. (App. 52).

Never-the-less, without a hearing, Judge Rossiter granted the delay of the trial until October 29, 2018. Thereafter, Bartunek attempted to file a pro se motion based on ineffective assistance of counsel and for violating his speedy trial rights. But, the district court refused to accept the motion. So, on September 20, 2018, Bartunek filed a pro se habeas pursuant to 28 U.S.C. § 2241, which was denied as premature.

FAILURE TO APPOINT ALTERNATE COUNSEL BEFORE TRIAL

When Wilson first met with Bartunek he made it very clear that he was in charge of the case and that he would make all the decisions going forward. He compared himself to a driver in a car, and that Bartunek was just a passenger, along for the ride. Wilson only met with Bartunek twice during the first month of his appointment. And thereafter, he refused to communicate with Bartunek until Bartunek told Wilson that he would report him to the court. Although Wilson responded to Bartunek via a letter, he didn't meet with Bartunek again until the the third week of July to tell him that he was going to delay the trial. The meeting was very heated, as Bartunek couldn't understand why additional time was needed. When Bartunek asked for an accounting of his time, Wilson told Bartunek that he could fire him if he felt he wasn't doing his job, without giving Bartunek any information on what he was doing to move the case forward, or discussing the status of his case.

Bartunek didn't hear from Wilson again until October 3, 2018. He met with Bartunek to ask him if he wanted a plea agreement. Bartunek told Wilson the same thing he told him the first time they met, that he wanted to go to trial, but if Wilson believed it was in Bartunek's best interest, to look into a plea. Wilson was not interested in discussing anything else regarding the upcoming trial or Meinke's analysis.

On October 17, 2018, Wilson met with Bartunek to discuss the 11(c)(1)(C) plea agreement. The terms of the agreement were that the distribution charge would be dismissed if Bartunek plead guilty to possession, and would be sentenced to 4-7 years imprisonment. Wilson also told Bartunek that if he went to trial and was convicted of both charges, he would be sentenced to 75 months (6.25 years) on each count and his Guideline sentencing range would be 120-150 months, or less. However, he failed to explain how he calculated the range or what factors would affect this range. Based on this information, Bartunek declined the offer. When asked why, Bartunek told Wilson that he was innocent. At that point Wilson asked Bartunek to discuss trial strategies he would use to prove his innocense. However, whenever Bartuenk started to discuss an issue, Wilson would interrupt him and tell him it was irrelevant or that it proved nothing, but failed to explain why, or carry on a civil conversation about it. Therefore, Bartunek suggested that they get together with Meinke and get his input. Via speakerphone, Meinke and Bartunek went over some of the same issues, and Meinke agreed that some of them had merit. But as soon as he did, Wilson would interrupt and dismiss whatever Meinke or Bartunek were discussing. After this happend a few times, Bartunek got upset, telling Wilson that he needed to listen to him. Wilson then replied, "We're finished," and left.

Wilson contacted Judge Rossiter to allow him to withdraw as counsel because the attorney/client relationship was broken beyond repair. According to Wilson, he did not believe that he "could adequately represent [Bartunek] because there's not going to be any way [he] can communicate with him to -- to -- to effectively present the best defense possible for him at trial." Wilson also told the court because of Bartunek's behavior that morning, Meinke was no longer willing to work on the case. However, the next day, Bartunek called Meinke and asked if he quit. Meinke told Bartunek that he did not quit, but was told he would no longer be working on the case.

Judge Rossiter told Bartunek that he could continue to trial with Wilson in some capacity, he could represent himself, or that alternate counsel could be appointed, which was unlikely. Bartunek didn't want Wilson to continue to represent him, but since Judge Rossiter had previously made it clear he would not appoint alternate counsel, Bartunek would have been forced to represent himself, which he didn't want to do either. Therefore, he told the judge that he wanted to go forward with "an attorney as per his constitutional rights." Wilson also told the judge that there were previous communication problems, and Bartunek told Judge Rossiter that he had a "whole bunch" of correspondence, pertenant and relevant to his decision, that he would like to submit as evidence to the court. But Judge Rossiter refused to allow Bartunek to admit this evidence. Judge Rossiter later ruled to deny Wilson's motion.

Prior to the trial, Wilson failed to have any meaningfull discussions with Bartunek regarding any motions, witnesses, evidence, or trial strategies. Bartunek presented Wilson with both direct and circumstantial evidence of his innocense, including an alibi defense. However, Wilson refused to thouroughly investigate the evidence or interview several potential witnesses. And although Bartunek wanted to testify, Wilson told him that "we need to do

everything we can to prevent that," without discussing both the pros and the cons of testifying.

THE TRIAL

Bartunek went to trial on October 29, 2018. The trial lasted 3 days. The government solicited testimony from 9 witnesses over a period of approximately 8 hours (470 minutes). Wilson relied entirely on cross-eximination, which averaged 1-2 minutes per person for a total of about 20 minutes, or less than 5% of the total time of the trial. And although Wilson had both direct and circumstantial evidence of Bartunek's innocense, he failed to use it.

During the trial, several errors, including those of Constitutional magnitude, were made by Counsel, Prosecutor, and the Court, including but not limited to: denial of counsel; evidence admitted in violation of Bartunek's Constitutional rights; violation of Bartunek's presumption of innocense; failure to present a viable defense; and double jeopardy.

During jury selection, Norris eliminated jurors with advanced knowledge of computers, the Internet, and Omegle.com. And, although several jurors believed an innocent man would not hesitate to testify, Wilson convinced Bartunke not to do so. According to Wilson, if Bartunek testified, the 404 evidence, i.e., the alleged sexual assault claims and the dolls would be admitted, and it would be practically impossible to win if that happened. However, all the 404 evedence was admitted. And yet, Wilson still told Bartunek not to testify. Since Wilson was in charge, the expert in law, Bartunek felt he had no choice but to do what Wilson told him.

A. Denial of Counsel

During the trial, Wilson abandoned Bartunek. Instead of sitting at the same table as Bartunek, Wilson sat at a table behind him, where Meinke was

sitting. The jury was not told who Meinkey was, nor why Wilson did this. Wilson's actions prevented Bartunek from confuring with him during the trial.

B. Admission of Extrinsic Evidence Violated Bartunek's Rights

The government used four items of evidence that were illegally seized from Bartunek's residence, because, although these items were in plain site, they were not listed in the warrant, and were not evidence of any crime: dolls; underwear; adult pornography; and messy house. Also, admitting the erotica violated Bartunek's right to privacy, as it was not evidence of a crime and was beyond the scope of the warrant. Admitting the 2003 Knock and Talk evidence violated Bartunek's right to confrontation, as the evidence was obtained from an anonymous individual who claimed that Bartunek had child pornography at the time. And Wilson failed to make a timely objection to this evidence. Bartunek's constitutional rights were also violated when S.P. was allowed to testify that Bartunek sexually assaulted the same person he sexually assaulted without a timely objection. Furthermore, S.P.'s claim that this individual was 13 at the time of the assaults was a lie. Police records show that he was older than S.P., who was 16 at the time. Finally, Bartunek's due process rights and a right to a fair trial were violated because this extrinsic evidence was admitted in violation of the Rules of Evidence.

C. Violation of Bartunek's Presumption of Innocense

Bartunek's refusal to incriminate himself when he was interrogated by the police was used against him by the prosecutor, violating his presumption of innocense. Norris solicited testimony from Officers Stigge and Pecha about this interrogation, and emphasized Bartunek's refusal to incriminate himself in his closing statements. According to Stigge, whenever they asked Bartunek a question, his common refrain was, "I don't know what to say," and that he

refused to answer their questions directly. During a sidebar, Norris even admitted, "It still looks like we have violated [Bartunek's] rights," referring to improperly using Bartunek's statements against him.

D. Admitting the NCMEC Evidence Violated Bartunek's Confrontation Rights

The NCMEC Reports were entered into evidence to show that Bartunek distributed child pornography. However, admitting these reports violated Bartunek's right to confrontation, because, although the process to generate these reports is partially automated, a human was involved in the process. The Omegle.com moderator(s) determined that the images contained apparent child pornography and sent a report to the NCMEC based on their opinion. NCMEC then catagorized this image as unconfirmed child pornography and sent the report to law officials. And Wilson was ineffective for not objecting to the admission of this evidence.

E. Failing to Investigate and Present an Alibi Defense

Bartunek was accused of distributing child pornography on March 26, 2016 using a tower computer in his residence. However, Bartunek spent the afternoon and evening with a friend at the Ameristar Casino in Council Bluffs, IA, several miles away from his home. Evidence of this fact is a signed VISA and receipt from the Ameristar Sportsbar. Bartunek filed a Notice of Alibi Defense on June 1, 2017, shortly after he was made aware of the evidence the government planed to use, and was able to confirm his wherabouts on the date of the alleged distribution. However, due to the amount of time (over a year) that had elapsed, together with Bartunek's incarceration, and lack of finances and other resources, he was unable to locate his alibi witness.

Even without this witness, the VISA and receipt, together with computer records from the tower computer, shows that someone other than Bartunek was using the computer on the 26th. The receipt showed that two "guests" were

waited upon at 7:07 PM on March 26, 2016. It takes 32 minutes to drive from Bartunek's residence to the Casino, park the car, go to the Sportsbar, and be waited on. Even if Bartunek were home that day, he would have had to leave his home at 6:35 PM (7:07 PM - 32 minutes). However, the computer records show the tower computer was logged off at 6:39:38 PM, almost five minutes after Bartunek would have left. Since Bartunek cannot be at two places at the same time, this evidence unequovocally shows that someone other than Bartunek was using his computer. In addition to this evidence, there was no evidence presented to show that the software required to generate an image that could have been captured by Omegle.com, was found on the tower computer.

When Bartunek told Wilson about this alibi evidence, Wilson refused to investigate or use this evidence in Bartunek's trial, even though Wilson told the court that someone other than Bartunek could have committed the crimes. According to Wilson, the evidence was useless because the government could dispute it, saying that Bartunek loaned his VISA to someone else. However, he ignored that fact that the VISA was signed by Bartunek, which would disprove the governments claim. Furthermore, Wilson failed to interview other witnesses who could have corroborated that Bartunek was not at home at the time of the alleged distribution.

F. Violation of Double Jeopardy

During the government's opening statment they claimed that one image from Omegle.com matched images from the external drive and internal drive in the tower coputer seized from Bartunek's residence. They were also able to get Pecha to agree that the Omegle image match one image from the external drive created on April 1, 2016, without objection from Wilson. Both images were created within the timeframe of the alleged distribution indicated on the

indictment (March 2016 to May 6, 2016). Wilson later tried to show that the images did not match. However, Norris still claimed that the images matched in his closing statement. And again, Wilson failed to object. There were no jury instructions telling the jury that distribution and possession could not be based on the same act or common scheme. And because possession is a lesser-included crime of distribution, using this evidence to convict Bartunek of both crimes violated double jeopardy.

FAILURE TO APPOINT ALTERNATE COUNSEL FOR SENTENCING

After the trial, Bartunek again asked the court to appoint alternate counsel because Wilson was still failing to meet with hm or reply to his questions about sentencing. A hearing was held on December 6, 2018. Wilson told Judge Rossiter that it would be in the best interest of justice to appoint new counsel for sentencing and appeal, because of the complete breakdown of communication, and it would be a conflict of interest for him to raise errors he made during the trial. Bartunek again tried to present evidence to support the need for alternate counsel, but Judge Rossiter again refused to allow it, stating it would not change his position. In the end, Judge Rossiter refused to appoint alternate counsel.

Thereafter, Wilson still failed to meet with Bartunek to discuss any issues regarding sentencing. Therefore, on January 18, 2019, Bartunek sent a letter to Judge Rossiter regarding this lack of communication and the concerns he had with Wilson representing him. (App. 53). He received no response. The sentencing hearing was scheduled for March 8, 2019. Still not having heard from Wilson, on March 1, 2019, Bartunek sent another letter to appoint alternate counsel and to file an appeal. His request was denied without a hearing. Wilson finally met with Bartunek the weekend before sentencing. According to Wilson he was there simply because Bartunek had

complained to the court. But Wilson still refused to have any meaningful conversation with Bartunek, refusing to discuss the PSR, objections, or any other sentencing issues.

BARTUNEK'S SENTENCE

Bartunek was sentenced to 17 years (85% of the statutory maximum) for Count I, distribution, and 10 years (100% of the statutory maximum) for Count II, possession, served concurrently. And without explination, discussion, or objection from Wilson, Judge Rossiter also sentenced Bartunek to 15 years supervised release with 39 very restrictive conditions. (App. 54). However, Bartunek's sentence was based on an improperly calculated Guidelines offense level and sentencing range. Furthermore, Judge Rossiter incorrectly presumed the guidelines to be resonable, rejecting the Sentencing Commissions findings, other scientific studies, and opinions of other judges, including those in his own court. And he made it clear that even if he were wrong on the application of any sentecing enhancments, the sentence would be the same.

A. Guidelines Offense Level

The probation office initially calculated the offense level at 37, pursuant to U.S.S.G. § 2G2.2, based soely on the government's version of the offense. This was calculated using a basic level of 22 plus 15 levels for enhancements: (B)(2) - Minor Under 12, +2; (b)(3)(F) - Knowingly Engaged in Distribution, + 2; (b)(4) - Sadistic or Masochistic, +4; (b)(6) - Use of Computer, +2; and (b)(7)(D) - Number of Images > 600, + 5. However, the court failed to identify the images used to support these enhancements, simply accepting the government's claims. And the total image count incorrectly counted 2 images as videos, included 350+ images of child erotica and several non-existent videos, identified only by name.

Upon insistence of the government, the probation office revised the offense level, increasing it by 5 levels to 42, pursuant to U.S.S.G. § 2G2.2(b)(5), based on police reports of 15-year-old charges of sexual assault of S.P., even though these charges were dismissed by two courts, refusing to convict Bartunek of any crime, not even a misdemeanor.

B. Sentencing Recommendations

Wilson objected to all sentencing enhancements except for § 2G2.2(b)(3)(F). His calculated offense level was 24. He recommended a sentence of 5 years based on the facts that: the offense level was calculated in error; Bartunek was a first-time offender; age, mental and physicial conditions and military and civic and charitable service warranted a reduced sentence; the sentencing guidelines were ill conceived and outdated; and sentencing Bartunek based on the S.P. charges violated Bartunek's Due Process, Confrontation, and Double Jeopardy rights.

The probation office recommended a sentence of 10 years. The rationale for a variance below the guidelines sentencing range was based on: Bartunek's characteristics; the reasoning in U.S. v. Abraham, 944 F. Supp. 2d 723 (2013); the sentencing commission's statistics for Nebraska child pornography offenders who received median an mean sentences of 5 and 6.25 years; but a longer sentence was warranted because Bartunek did not plead guilty.

The government, contrary to its previous recommendation in the plea offer of 4-7 years, recommended the maximum statutory sentence of 20 years. According to the government, Bartunek deserved such a harsh sentence because: he was intelligent; he had dolls and children's underwear; he used Omegle.com instead of a Peer-to-Peer network; the S.P. allegations; and the fact that Bartunek exercised his right to trial instead of pleading guilty. The government failed to explain or justify a sentence 3-5 times greater than

their plea offer when there was no new evidence or facts revealed druing the trial that was not already known by all parties, including the court, at the time the plea was on the table.

FAILURE TO APPOINT ALTERNATE COUNSEL ON APPEAL

Wislon again filed a motion to withdraw on March 18, 2019, based on the broken attorney/client relationship and conflict of interest. Without a hearing, Judge Rossiter again denied the motion. However, in his denial he admitted that Wilson's motion could have merit, but that he would leave it up to the Court of Appeals to decide. Then on April 4, 2019, Wilson filed a motion to withdraw with the Court of Appeals. Grounds for the motion were: 1) material breakdown in the attorney/client relationship; 2) conflict of interest; and 3) it would be in the best interest of justice to grant his motion. The motion was denied. Finally, Bartunek filed a motion to appoint alternate counsel on April 9, 2019, which was also denied.

THE DIRECT APPEAL

Wilson raised three issues on appeal, that extrinsic evidence was not admissable under Rules 404(b) and 403: the dolls; S.P.'s testimony; and the Knock and Talk testimony. However as the appellate court raised in its opinion, Wilson failed to make timely objections to the S.P. and Knock and Talk testimony. Wilson also failed to raise other issues regarding this evidence that were stronger: 1) the doll evidence was obtained through an illegal search; 2) none of the prior bad acts had significant indicia of relaiability; 3) the S.P. testimony regarding the alleged grooming, corruption, snd allegations that Bartunek assaulted S.P.'s victim was inadmissible under Rule 414 because S.P. and his victim were both older than 14 years at the time; 4) the Knock and Talk evidence was irrelevant and inadmissable hearsay evidence from an anonymous informant, and was wrongly used to show that

Bartunek was evasive for exercising his constitutional rights under the Fourth and Fifth Amendments; and 5) the evidence was ommitted under the wrong rules of evidence. Furthermore, Wilson failed to raise other stronger issues of Constitutional magnitude such as the admission of the NCMEC hearsay evidence without objection; violation of presumption of innocense; denial and ineffectiveness of counsel, et. al.

In addition to Wilson's failures, the appellate court refused to allow Bartunek to file a pro se brief raising the issues of: 1) speedy trial violation; 2) error in denying motions to suppress evidence and statements; 3) insufficient indictment; 4) ineffective assistance of counsel; 5) prosecutorial misconduct; 6) judicial misconduct; and 7) due process errors.

2255 MOTION

Bartunek filed a timely 28 U.S.C. § 2255 Motion. The court ordered Bartunek to file an amended motion and brief, stating that his original motion and briefs were far too long and repetitive, contained a considerable amount of argument on the merits, and raised numerous issues wheich were procedurally defaulted. Bartunek filed a motion to recuse Judge Rossiter, which was denied. He then filed an amended motion, brief, and exhibits raising 44 claims. The court summarily dismissed 31 of the claims including all claims of errors or misconduct by the court and claims regarding sentencing. According to Judge Rossiter, there was no colorable basis for the claims, they were inexcusably procedurally defaulted, and/or he had already thouroughly considered the claims and rejected them. The only remaining claims were ineffective assistance of counsel and prosecutorial misconduct and vindictiveness.

Bartunek filed a correction to his motion, and added another claim 45, which was argued in his brief, but not specifically addressed in his

amended motion. The government then filed an answer to these remaining claims, asking that the motion be denied without a hearing. Bartunek filed a reply. In the end, Judge Rossiter denied the motion in its entirety, without a hearing or appointing counsel for Bartunek. According to Judge Rossiter, the motion, files, and records of the case conclusively showed that Bartunek was not entitled to any relief. He also stated that many of the claims against the prosecutor were procedrually defaulted, and that Bartunek's arguments which applied to ineffective counsel could not overcome the presumption of reasonableness. No certificate was issued.

Bartunek appealed and requested a Certificate of Appealibility on each of his claims, siting case law in their support. Without discussing why each claim did not meet the requirements to issue a certificate, the appellate court simply denied the claims and dismissed the appeal, stating that the court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. Bartunek then filed a petition for rehearing en banc, which was also denied.

REASONS FOR GRANTING THE PETITION

Bartunek's case involves "exceptional circumstances where the need for [habeas relief] is apparent." Hill v. United States, 368 US 424, 428 (1962). Bartunek's issues span from the time before his indictment to the denial of his § 2255 motion. While Bartunek is not a lawyer, he was able to decern that, based on his study of case law and the constitution, his legal and constitutional rights were violated repeatedly. However, without the assistance of a competent lawyer, he was unable to narrow the scope of his claims or to adequately present his legal arguments. Furthermore, both the district and appellant courts denied him a Certificate of Appealability based only on a conclusionary statement, unsupported by any pertinent legal analysis.

There can be no other explination-the Court of Appeals simply "rubber stamp[ed]" the district court's decision, which often happens; "especially for pro se litigants." McGee v. McFadden, 139 S. Ct. 2608 (2019).

I. A 28 U.S.C. § 2255 proceeding is a critical stage of the criminal prosecution, and therefore, Bartunek was entitled to all the rights provided by the Sixth Amendment, including appointment of counsel.

"[F]undamental fairness is the central concern of haeas corpus." Strickland v. Washington, 466 US 668, 697 (1984). And yet, indigent defendants, like Bartunek, are stripped of their most fundamental right during their 2255 proceedings, the right to counsel guaranteed by the Sixth Amendment of the U.S. Constitution. How can this be fundamentally fair?

The right to counsel applies to sentencing hearings because they are a critical state in a criminal prosecution. See Glover v. United States, 531 US 192, 203-204 (2001). This court has also ruled:

> "A criminal prosecution continues and the defendant remains an accused with all the rights provided by the Sixth Amendent until final sentence is imposed." United States v. Haymond, 139 S. Ct. 2369, 2379 (2019).

It follows that Bartunek's sentence was not final until his 2255 proceeding was completed, since a § 2255 Motion can be used to vacate, set aside, or correct a sentence or conviction. And therefore, he had the right to counsel.

Clearly, "a proceeding under § 2255 is a continuation of the criminal trial and not a civil proceeding." United States v. Frady, 456 US 152, 182 (1982). And, there is no doubt that a 2255 proceeding is a "critical stage" becasue it "held significant consequences for the accused." Bell v. Cone, 535 US 685, 696 (2002). In Bartunek's case, it was his only chance to bring forward a claim of ineffective assistance of counsel, because the Eighth Circuit does not normally consider ineffective-assistance claims on direct appeal. See United States v. Davis, 406 F.3d 505, 510 (8th Cir. 2004). Furthermore, the 2255 proceeding was Bartunek's last best chance to correct

the legal and constitutional violations of his rights, which unfairly deprived him of his freedom. There can be no doubt that a § 2255 proceeding is a critical stage of the criminal prosecution. And therefore, like any other critical stage, not only Bartunek, but all defendants are entitled to the effective assistance of counsel during the entire 2255 proceedings.

Other statutes, legislative history, and case law confirm that indigent defendants should be appointed counsel under a wide variety of conditions. 18 U.S.C. § 3599 even mandates the appointment of counsel for capital cases. And, 18 U.S.C. § 3006A(a)(2)(B) requires the district courts to have a plan for the appointment of counsel for "any financially eligible person" in habeas corpus cases whenever the court determines that "the intersts of justice so require." 28 U.S.C.§ 2255(b) states in part:

> "Unless the motion and the files and records of the case conslusively 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, determine the issues and make findings of fact and conclusions of law with respect thereto."

A plain reading of the statute mandates that if the §2255 Motion is not summarily dismissed, a hearing is required. And case law also mandates that if the court grants a hearing, appointment of counsel is also required. See, e.g., Green v. United States, 262 F.3d 715 (8th Cir. 2001). Even so, some judges falsely believe that the Sixth Amendment right to counsel does not extend to postconviction proceedings based on Pennsylvania v. Finley, 481 US 551, 555-57 (1987). Id. (Judge Bye, dissenting). The Finley case was a § 2254 civil habeas, not a § 2255 criminal habeas case.

The House report on Habeas Rule 8(c) stated that federal courts should make counsel available from the beginning of habeas corpus proceedings if the petition "raises a substantial legal issue." H.R. Rep. No. 1471, 94th Cong., 2d Sess (1976), reprinted in 176 U.S. Code Cong. & Admin. News 2478, 2481.

And, another congressional report, discussing the discretionary "may" language in 3006A(2)(B)'s predecessor provision stated that the court "should" appoint counsel when "necessary to insure a fair hearing." H.R. Rep. 1546, 91st Cong. 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 3982, 3993.

Some examples of case law showing where the courts have generally endorsed the appointment of counsel include: cases that turn on substantial and complex procedural, legal or mixed legal and factual questions[1]; factually complex cases[2]; cases in which the petitioner has a colorable claim but lacks the capacity to present it[3]; cases involving at least one strong legal claim[4]; and cases where the petitioner has claims that are not frivolous and survive summary dismissal[5] or include a colorable claim[6].

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[1] Hughes v. Joliet Correctional Center, 931 F.2d 425, 429 (7th Cir. 1991) (section 1915 case) ("In deciding whether to grant a motion for appointment of counsel, a district judge must be alert to the pitfalls that confront laymen in dealing with nonintuitive procedural requirements applied in a setting of complex legal doctrine."); Battle v. Armontrout, 902 F.2d at 702 ("The factual and legal issues are sufficiently complex and numerous that appointment of counsel would benefit both Battle and the court by allowing counsel to develop Battle's arguments and focus the court's analysis."); Hodge v. Police Officers, 802 F.2d 58, 61 (2d Cir. 1986) (section 1915 case) (complexity of issues is factor in deciding whether to appoint counsel (discussing Maclin v. Freake, 650 F.2d 885, 888–89 (7th Cir. 1981) (*per curiam*))); Chaney v. Lewis, 801 F.2d at 1196; Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983) ("complex[] ... legal issues"); Wilson v. Duckworth, 716 F.2d 415, 418 (7th Cir. 1983); Merritt v. Faulkner, 697 F.2d 761, 764 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983) (section 1915 case) (counsel required for particular claim because of "novelty and complexity")

[2] Maclin v. Freake, 650 F.2d at 888. *Accord, e.g.,* Hodge v. Police Officers, 802 F.2d at 61 (section 1915 case) ("conflicting evidence implicating the need for cross-examination will be the major proof presented"); Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984) (section 1915 case) (*pro se* litigant's version of events sharply conflicts with defendant's "so that the outcome of the case depends largely on credibility"); Ulmer v. Chancellor, 691 F.2d at 213 (section 1915 case); Manning v. Lockhart, 623 F.2d 536, 540 (8th Cir. 1980) ("question of credibility of witnesses and ... case presents serious allegations of fact"). *See also* Hughes v. Joliet Correctional Center, 931 F.2d at 429 (section 1915 case) ("layman's need for a lawyer is most acute when a case reaches the stage at which evidence must be obtained and presented"; "suit *had* reached that stage when the defendants moved for summary judgment, since by submitting evidence with their motion the defendants shifted to the plaintiff the burden of producing his own evidence"); United States ex rel. Marshall v. Wilkins, 338 F.2d 404, 406 (2d Cir. 1964) (appointment is appropriate if hearing is required); United States ex rel. Wissenfeld v. Wilkins, 281 F.2d 707, 715–16 (2d Cir. 1960) (complexity of facts makes legal assistance necessary to ensure fair presentation of claim).

[3] Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978). *See* Hughes v. Joliet Correctional Center, 931 F.2d at 429 (section 1915 case) ("Hughes had a colorable case, but without the assistance of a lawyer was likely to be tripped up by his opponents' lawyers"); Franklin v. Rose, 765 F.2d 82, 85 (6th Cir. 1985) (suggesting appointment if petitioner's claims not " 'totally spurious' " (quoting *Deloney v. Estelle*, *infra*)); Whisenant v. Yuam, 739 F.2d at 163 (section 1915 case); Robinson v. Fairman, 704 F.2d 368, 372 & n.7 (7th Cir. 1983) (ambiguous petition "is not beyond an explanation that might preclude" dismissal); Deloney v. Estelle, 679 F.2d 372, 373 (5th Cir. 1982); Maclin v. Freake, 650 F.2d at 889–90; Abduc v. Lane, 468 F. Supp. 33, 37 (E.D. Tenn.), *aff'd*, 588 F.2d 1178 (6th Cir. 1978) (counsel appointed following *prima facie* showing of discrimination in selection of grand jurors).

[4] One circuit court has established a *per se* rule under 28 U.S.C. § 1915(d) (now 28 U.S.C. § 1915(e)(1)) ("that when an indigent presents a colorable civil claim to a court, the court, upon request, should order the appointment of counsel from the bar." Hahn v. McLey, 737 F.2d 771, 774 (8th Cir. 1984) (citing Nelson v. Redfield Lithograph Printing, 728 F.2d 1003 (8th Cir. 1984)). *But see* Jenkins v. Chemical Bank, 721 F.2d at 880 ("attorney need [not] be appointed in every case which survives a motion to dismiss"); Maclin v. Freake, 650 F.2d at 887. Other courts, although not applying a *per se* rule, generally have held that a strong legal claim, especially one that may be stronger than a lay litigant is capable of establishing without assistance, provides a particularly appropriate occasion for appointing counsel. *See, e.g.*, Whisenant v. Yuam, 739 F.2d at 163; Robinson v. Fairman, 704 F.2d at 372 & n.7; Branch v. Cole, 686 F.2d 264, 266 (5th Cir. 1982) (*per curiam*); Maclin v. Freake, 650 F.2d at 889 (by implication); authority cited *infra* notes 86, 87.

[5] *See* Franklin v. Rose, 765 F.2d 82, 85 (6th Cir. 1985) (if claims are not " 'totally spurious' " (quoting Deloney v. Estelle, 679 F.2d 372, 373 (5th Cir. 1982))); Cullins v. Crouse, 348 F.2d 887, 889 (10th Cir. 1965) (if petition is not summarily dismissed); United States ex rel. Marshall v. Wilkins, 338 F.2d 404, 406 (2d Cir. 1964) (if petition is not frivolous); Farrar v. United States, 233 F. Supp. 264, 268 (W.D. Wis. 1964), *aff'd*, 346 F.2d 375 (7th Cir. 1965) (if petitioner's allegations are not "hopelessly frivolous"). *See also* 7th Cir. R. 22(a)(5) (1988) (pre-Anti-Drug Abuse Act court rule requiring that counsel be appointed on request in capital habeas corpus appeals if issues raised are not frivolous)

[6] Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978) (appointment required if "*pro se* litigant has a colorable claim but lacks the capacity to present it"). *Accord, e.g.*, Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984); Hahn v. McLey, 737 F.2d at 774 (*per se* rule requiring appointment of counsel in stated circumstances). *See also* Mulero v. LeFevre, 873 F.2d 534, 536 (2d Cir. 1989) (denial of petition reversed "in the interests of justice" because counsel appointed to represent *pro se* petitioner mistakenly failed to brief claims prior to district court's dismissal); Shields v. Jackson, 570 F.2d 284, 286 (8th Cir. 1978) (counsel appointed because *pro se* litigant was unable adequately to investigate facts of claim which "states a cause of action"); Dillon v. United States, 307 F.2d at 447 & nn. 8–11 (*dicta*) (extensive "authority indicating that counsel should be appointed in collateral attack proceedings whenever it appears probable that any substantial issue ... will be presented").

II. The district court violated Bartunek's due process rights and right to counsel by denying his § 2255 motion, without a hearing, and failing to appoint counsel in violation of the law and constitution.

Even though many of Bartunek's claims met the above requirements, Judge Rossiter still failed to appoint counsel. This is no surprise, since he previously told Bartunek that the last time he would appoint alternate counsel in Bartunek's case was when he appointed Wilson.

Clearly, Bartunek lacked legal acumen to clearly state his claims and support them. This is shown by the fact that Judge Rossiter rejected Bartunek's initial motion, stating that it was deeply flawed, that the motion and supporting briefs were far to long and repetitive, that the motion contained considerable amount of argument, and that many of the claims were procedurally defaulted. He also stated that Bartunek was struggling to show that his counsel was ineffective under the facts and circumstances of his case, and that he had work to do. (App. 2).

And yet, not only did Judge Rossiter require Bartunek to resubmit his motion, but to also submit a brief, without the assistance of counsel. Then when Bartunek submitted his ammended motion and brief, Judge Rossiter admonished Bartunek, stating that in his motion he failed to narrow the scope of his claims, that his brief was too terse, failing to support the claim with any pertenent analysis, and dismissing the majority of the claims because he believed they lacked a colorable basis to support them. (App. 4). Judge Rossiter erred in dismissing these claims because he held Bartunek to a higher standard of review than he should have, under the law.

> "A pro se complaint, however artfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt (emphasis added) that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Estelle v. Gamble, 429 US 97, 106 (1976).

In addition to this, Judge Rossiter refused to hold a hearing on several debatable factual issues; for example, Bartunek's alibi evidence. His alibi was not only supported by his own allegations, but also by physical evidence, the VISA, Receipt, and the tower computer registry data; and by a second alibi witness, his brother. However, Judge Rossiter rejected the alibi claim because he believed that Bartunek's new evidence of his innocense was far from overwheling, and the evidence against him was strong. (App. 2). However, his ruling conflicts with precedent set by the Supreme Court in Schlup v. Delo, 513 US 398 (1995) (the court vacated the decision to deny his actual innocense claim, with instructions to remand the case to the district court for further proceedings). Id. at 332. According to the court:

> "A petitioner's showing of evidence is not insufficient soley because the trial record contained sufficient evidence to support the jury's verdict." Id. at 331.

Furthermore, there was nothing in the record to show that Bartunek was in his residence at the time of the alleged distribution. Case law also shows:

> "A petitioner's allegations must be accepted as true and a hearing should be held unless they are contradicted by the record, inherently incredible, merely conclusions, or would not entitle the petitioner to relief." Garcia v. United States, 679 F.3d 1013, 1014 (8th Cir. 2012). See also, Machibroda v. United States, 368 US 487, 494-95 (1962); Walker v. Johnson, 312 US 275, 285-87 (1941); United States v. Hayman, 342 US 205, 220 (1952).

While this court has never ruled that actual innocense is a constitutional claim, Bartunek's claim that Wilson was ineffective for failing to investigate and present an alibi defense was a cognizable claim that did survive Judge Rossiter's initial review. See, e.g.:

> Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990) (a tactical decision to pursue one defense does not excuse failure to present another defense that would bolster rather than detract form the primary defense); Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1990) (failure to pursue defendant's only realistic defense constituted ineffectiveness).

Another example of a debatable issue involved the fact that Wilson sat on a table behind Bartunek, refusing to communicate with Bartunek during the

trial. The reason why Wilson did this was the debatable fact, requiring a hearing. Judge Rossiter assumed this was effective trial strategy. Bartunek argued that Judge Rossiter cause the proplem because he refused to appoint alternate counsel when Wilson told him that the attorny/client relationship was broken beyond repair, and there was a total breakdown of communications.

> See Holloway v. Arkansas, 435 US 475, 488-91 (1978) (a court is required to appoint alternate counsel if there is a "complete breakdown of communications).

The court never asked Wilson why he did this, nor did it allow Bartunek a hearing to resolve this disputed fact. Clearly, Wilson's actions amounted to nothing less than a total denial of counsel during the trial, which is reversible error, without the need to show any prejudice. See:

> Moore v. Purkett, 275 F.3d 685, 688-89 (8th Cir. 2001); Perry v. Leek, 488 US 272, 286 (1989); United States v. Cronic, 466 US 648, 659 (1984).

A third example is the factual disagreement whether the S.P. allegations were true. Clearly, there was no proof other than S.P.'s self-serving statements in police reports that were over 15 years old; S.P. did not testify that Bartunek abused him; the testimony was inconsistent with S.P.'s previous statements he made in the police reports; and although Bartunek faced charges based on S.P.'s uncorroborated allegations, they were dismissed by two courts, and Bartunek was not convicted of any crime, not even a misdemeanor.And these allegations were erroneously used to increase Bartunek's guideline offensel level by 5 levels under U.S.S.G. § 2G2.2(b)(5), increasing Bartunek's recommended sentence by over 12 years. However, according to U.S.S.G. § 6A1.3, this was insufficient to support the enhancement. See:

> United States v. Fatico, 579 F.2d 707, 713 (7th Cir. 1978) (out of court statments can only be used in sentencing provided they have "sufficient corroboration by other means."); United States v. Ortiz, 993 F.2d 204, 207 (10th Cir. 1993) ("Unreliabel allegations should not be considered."); Townsend v. Burke, 334 US 736, 741 (1948) (a defendant may not be sentenced on the basis of "materially untrue" information.).

III. Rule 4(a) governing § 2255 proceedings, requiring Judge Rossiter to rule on his own errors, abuses of discretion, misconduct and vindictiveness, violated Bartunek's due process rights.

There were several other claims which met the requirements to appoint counsel and deserved further consideration. However, Judge Rossiter summarily dismissed these claims because they were directed against him: pre-indictment delay; insufficient indictment; suppression rulings; unfair balance of resources; denial of access to the courts; speedy trial; double jeopardy; trial errors, failure to appoint counsel; judicial misconduct; and sentencing errors. But how could he do otherwise? For in order to overturn his own decisions, "the judge would be required to find that he affirmed an unconstitutional conviction, and, implicitly in sending [the petitioner] to prison in violation of [his] constitutional rights." Russell v. Lane, 980 F.2d 947, 948 (7th Cir. 1989).

> No judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." Re: Murchison, 349 US 133, 136 (1955). This is because a "fair judgment [would be] impossible." Liteky v. United States, 520 US 540, 544 (1994).

According to 28 U.S.C. § 2255, the applicaiton for writ of habeas corpus must be sent to the trial or sentencing court. However, Rule 4(a) states it must be sent to the trial/sentencing judge. While this may be judicially efficient, it violates the fundamental principal of fairness. Clearly, it is a violation of due process for a judge to assume the roles of prosecutor, jury, and judge for claims directed against him.

One thing is clear. The history of Judge Rossiter's rulings show that once he makes a ruling, he refuses to reconsider his decision, regardless of the facts or law contrary to that decision. This is evidenced by his refusal to: reverse Bartuenk's detention order; set a trial date within the 70-day speedy trial limit; deny Wilson's 60-day delay of trial when the facts show

that the reason for the delay was false; appoint alternate counsel when both Bartunek and Wilson repeatedly asked him to do so based on a complete breakdown of communication; accept that S.P.'s claims were false, even though there was overwhelming evidence disputing his claims; and consider any § 2255 claims regarding his own misconduct. While past rulings normally are not sufficient reasons to recuse a judge, in Bartunek's case, the interests of justice required recusal. See Liteky at 544 (rejecting the strict application of extrajudicial souce doctrine).

Legislative history does not indicate that congress wanted the trial judge to preside in § 2255 proceedings. Congress simply indicated that the same court should preside to reduce the burden on a few districts, for judicial effeciency, and so that the applicant of the writ could be resentenced, or granted a new trial. A § 2255 proceeding is not an appeal. However, as in Barunek's case, many courts have ruled in the past that the defendant is entitled to a new trier of his petion for the same reasons that a judge is forbidden to sit on appeal for his own case. See 28 U.S.C. § 47. See also;

> Hill v. United States, 380 F.2d 270 (1st Cir. 1967); United States v. Rosen, 485 F.2d 1213 (2nd Cir. 1973); United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973); United States v. Mckinney, 466 F.2d 1403 (6th Cir. 1972); and Farrow v. United States, U.S.APP LEXIS 6966 (9th Cir. 1976).

Although Bartunek filed a motion to recuse Judge Rossiter, it was quickly denied, even though there was evidence to support it. For example, on March 20, 2018, Judge Rossiter told Bartunek "whether or not I was right or wrong [about detaining Bartunek], I had the right as a judge who the appeal was taken to make a decision." (App. 55). This as well as other comments he made then and at other times showed he was biased against Bartunek.

> "Numerous courts of appeals have reassigned cases due to an appearance of partiality that was tracable to speech by a district judge." Re Kemp, 894 F.3d 900, 906 (8th Cir. 2018).

This court has also ruled that the mere possibility of prejudice in a proceeding is grounds for recrusal. See, e.g.:

> Gregg v. United States, 394 US 489, 492 (1969); Brown v. Allen, 344 US 443, 448 n.3 (1953); and Berger v. United States, 255 US 23, 36 (1921).

Clearly, this is demonstrated in Wilson's motion for variance of Bartunek's sentence, where he specifically expressed his concern that because Bartunek frustrated the court, that this might affect the court's sentencing decision.

While there are proceedures to recuse a judge, as evidenced in Bartunek's case, this is usually an exercise in futility. Other's have also questioned the effectiveness of these procedures. See Developments in the Law-Federal Habeas Corpus, 83 Har. L. Rev. 2038, 1206-07. And although there is the right to appeal such rulings, as Bartunek did, since the appellate courts give such great deference to lower court's judgments, this to was an ineffective method to cure the numerous violations of Bartunek's constitutional rights. Clearly, Rule 4(a) for § 2255 motions is unconstitutional, at least as applied to Bartunek's case.

IV. Bartunek's claims met the requirements to merit a Certificate of Appealability.

In order for a certificate to issue, the petitioner must show that

> "reasonable jurists could debate ... whether ... the petition should have been resovled in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 US 473, 484 (2000).

If it is denied on procedural grounds a certificate must issue if

> "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack at 478

> "The COA determination does not require petitioner[s] to prove, before issuance of the COA, that some jurists would grant the petition for habeas corpus." Miller-El v. Cockrell, 537 US 322, 338 (2003)

> "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that the petitioner will not prevail." Id.

This is a prettly low bar. However both the district and appellate courts erred in failing to follow these standards. Not only did most, if not all, of Bartunek's claims deserve a Certificate of Appealability, but they also had merit, deserving reversal of his convictions and sentence. However, because both courts departed from the liberal pleading standards set forth by Fed. R. Civ. P. 8(a)(2), their errors denied Bartunek's due process rights to receive justice. And their departure was even more pronounced in Bartunek's case, because he was proceeding, from the start of his § 2255 proceeding, without counsel. See also, Rule 8(f) ("All pleadings shall be so construed as to do substantial justice").

How then, can a petitioner, without counsel, sucessufully meet this bar and convince the courts to issue a certificate; by providing a persuasive argument? Obviously Bartunek lacked the legal acumen to do so. However, he did provide ample case law supporting his claims. For a pro se petitioner, this should suffice. It's not possible and would not serve the court for Bartunek to repeat his arguments for all his claims. Instead this petition will discuss a select few, together with relevant case law.

A. Judge Rossiter erred in summarily dismissing most of Bartunek's claims.

According to Judge Rossiter, he determined most of Bartunek's claims were not cognizable in a § 2255 motion based on Houser v. United States, 508 F.2d 509, 514 (8th Cir. 1974). (App. 2). However, he ignored the fact that Houser was dictum, and even so, Houser clearly stated that any constitutional claim can be raised in a § 2255 motion, regardless of whether or not it was raised on appeal. Id. See also, Hill v. United States, 368 US 424, 428 (1962) ("[I]ssues of constitutional magnitude are cognizable in a habeas corpus").

B. Any procedurally defaulted claims are excusable.

Judge Rossiter also dismissed many of Bartunek's claims because he erroneously believed they were procedurally defaulted because they were not properly preserved. However, Bartunek's pretrial claims were raised prior to trial. And the Court of Appeals refused to allow Bartunek to raise these and other claims on appeal. (App. 56). See also:

> United States v. Lee, 374 F.3d 637, 654 (8th Cir. 2004) (claims which the appellate courts refused to review on direct appeal are properly addressed in a 28 U.S.C. § 2255 Motion).

Even if they were procedurally defaulted, Bartunek's ineffective assistance of counsel and his alibi evidence meet both the cause and prejudice, and the actual innocense factors to excuse any defaults. See Bousley v. United States, 523 US 614, 620 (1984).

C. Denial of Bartunek's right to counsel under the Sixth Amendment.

The most egregous denial of Bartunek's constitutional rights was the absolute denial of effective assistance during the entire court proceedings, including his appeal and his § 2255 proceedings. He was denied this very fundamental right when: (1) his public defender did nothing for 45 days, failed to meet the pretrial motion deadline, and refused to appeal Bartunek's detention; (2) Bartunek unintelligently and unequivocally waived his right to counsel; (3) alternate counsel was not appointed prior to or after trial, including both sentencing and on appeal, even though the attorney/client relationship was broken beyond repair and there was a complete breakdown of communications; (4) counsel entirely failed to subject the prosecutor's case to any meaningful adversarial testing; (5) Bartunek was prevented from confuring with counsel during trial; (6) counsel allowed the admission of the NCMEC evidence without objection; (7) he failed to use the alibi defense or other available evidence to raise reasonable doubt of Bartunek's guilt; (8) he failed to effectively

argue for a fair sentence; and (6) he failed to raise issues in his appeal that were more apparent and stronger than the ones he raised.

D. Unintelligent waivier of counsel / denial of counsel.

Bartunek's right to counsel was violated because he didn't "knowingly", "intelligently", "voluntarily", and "unequvocally" choose self-representation. Faretta v. California, 422 US 806, 835-36 (1975). And he was severly prejudiced by the lack of counsel to help him with his pretrial motions and omnibus hearing on those motions. See Smith v. Lockhart, 923 F.2d 1314, 1318 (8th Cir. 1990). Even Judge Rossiter recognized this, stating "Bartunek's complaints [about his counsel] appear to be predicated on a basic misunderstanding of his decision to represent himself." United States v. Bartunek, 2017 U.S. Dist. LEXIS 71314 * 4-6 (D. Neb. May 10, 2017). And yet he refused to inquire further or hold a hearing as required by law.

> "When a defendant raises a seemingly substantial complaint about counsel, the judge has an obligation to inquire thouroughly into the alleged allegation." Smith at 1320.

E. Failure to appoint alternate counsel

This is probably the most serious violation of Bartunek's right to counsel because all of the remaining ineffective assistant claims were dependent on this one claim. And yet, Judge Rossiter refused to even address this claim, simply ignoring it, as he did with every other claim directed against him.

The reason that Judge Rossiter should have appointed alternate counsel is because the attorney/client relationship was broken beyond repair, the result of a total breakdown of communication between Wilson and Bartunek.

> The court "must appoint different counsel" if there is "a conflict of interest, an irreconciliable conflict, or a complete breakdown of communication between the attorney and the defendant." Smith at 1320.

This ability to communicate is critical to providing effective assistance. ABA Standards for Criminal Justice, Defense Function state in part:

"1) Counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds; and 2) strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasable and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions, and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced." See also Strickland at 688 (ABA Standards are used as a guide in assessing attorney effectiveness).

The first time Judge Rossiter was made aware of this communication problem was when on August 3, 2018, the court received a copy of a letter that Bartunek sent to Wilson objecting to the continuance. (App. 51). And again on September 10, 2018, when Bartunek wrote a letter to Judge Rossiter and Magistrate Bazis, indicating Wilson wouldn't communicate with him, and asking to file a motion to dismiss the case. (App. 57). This is the same motion Bartunek then filed as a habeas petition under 28 U.S.C. § 2241, which the court dismissed as premature. See discrict court case 8:18CV440.

Then on October 17, 2018, a hearing was held regarding Wilson's motion to withdraw. During the hearing, Judge Rossiter gave Bartunek of choice of: keeping Wilson who was unprepared for trial and wouldn't communicate with Bartunek; giving up his right to counsel and represent himself; or asking for another attorney, which Judge Rossiter was not inclined to do. Faced with this Hobson's choice, Bartunek chose option 3, stating that he wanted to go forward with "an attorney as per his constitutional rights." Bartunek also asked to present documentation relevant and material to the motion, but Judge Rossiter refused to allow it. Clearly, Bartunek's right to counsel was violated, no matter what choice he made.

See Gilbert v. Lockhart, 930 F.2d 1356, 1360 (8th Cir. 1991) (defendant's right to counsel violated in that he was offered the "hobson's Choice" of proceeding to trial with an unprepared counsel or no counsel at at).

Unlike Gilbert who was forced to represent himself, Bartunek was forced to be represented by ineffective counsel. Both were denied effective assistance.

Bartunek again asked the court to appoint alternate counsel after the trial because Wilson still would not communicate with him regarding his upcomming sentencing hearing.

> See Rust v. Hopkins, 984 F.3d 1486 (8th Cir. 1992) (the court found that inmate was denied due process and effective assistance of counsel because his counsel failed to adequately discuss with him the strategy and evedentiary and procedural aspects of the sentencing hearing).

Finally, Wilson failed to have any meaningful discussion with Bartunek about his appeal.

> "Counsel generally has a duty to consult with the defendant about an appeal." Thompson v. United States, 506 F.3d 1203, 1206 (11th Cir. 2007).

Both Wilson and Bartunek asked Judge Rossiter to appoint alternate counsel for the appeal. And even though Judge Rossiter admitted that Wilson's motion to withdraw, based on the fact that there was a complete breakdown of communication and a conflict of interest might have merit, he still refused to appoint alternate counsel, or have a hearing.

The court's failure to allow Wilson to withdraw and to appoint another attorney prejudiced Bartunek at his trial, sentencing, and on appeal, violating his due process rights and right to effective assistance of counsel under the Fifth and Sixth Amendments of the U.S. Constitution, requiring reversal.

F. The trial was constitutionally unfair, violating Bartunek's due process rights, confrontation rights, and right to effective counsel.

"A fair trial in a fair tribunal is a basic requirement of due process." Re: Murchison at 136. However, there were several trial errors by the court, prosecutor, and counsel which violated this and other of Bartunek's fundamental constitutional rights, including, but not limited to: complete denial of counel; violation of Bartunek's presumption of innocense; ineffective assistance of counsel; and prejudicial evidentiary errors. And these errors "so infect[ed] the proceeding as to warrant the grant of habeas relief." Brecht v. Abrahamson,

507 US 619, 638 n.9 (1993). And yet, Judge Rossiter dismissed these errors, even though his rulings conflicted with case law within his district, other districts, and the Supreme Court.

G. Complete denial of counsel.

There is no doubt that, when Wilson abandoned Bartunek during the trial by sitting behind him, his right to counsel guaranteed under the Sixth Amendment was violated. America's system of justice requires the defendant to be present during the trial, as well as to have counsel by his side. However, justice is not served if they are unable to communicate with eachother during that trial.

> "As part of the right to effective assistance of counsel, the Sixth Amendment guarantees a defendant the right to confur with counsel in the courtroom about the broad array of unfolding matters, often requiring immediate responses, that are relevant to the defendant's stake in his defense and the outcome of the trial." Moore v. Purkett, 275 F.3d 685, 688 (8th Cir. 2001).

Clearly, Bartunek was actually or constructively denied this fundamental right to counsel. Therefore, automatic reversal of his convictions is mandated. Brecht at 629-30.

H. Ineffective assistance of counsel.

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." Strickland at 684. However, Wilson failed to: ask for required jury instructions; effectively cross-examine witnesses; prevent admission of inadmissable evidence, use an alibi defense; call an expert witness or other witnesses, including Bartunek; impeach false testimony; profer any evidence he had in support of Bartunek's innocense or raise reasonable doubt of his guilt; and address the prosecutor's misconduct. Wilson entirely failed to subject the prosecutor's case to any "meaningful adversarial testing," requiring reversal of Bartunek's convictions, without showing any prejudice. United States v. Cronic, 466 US 648, 659 (1984).

I. Failure to present an alibi defense.

Wilson's failure to investigate and present Bartunek's alibi defense constituted ineffectiveness. See, e.g., Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1990) ("failure to pursue [defendant's] only 'realistic' defense constituted ineffectiveness."). And, to be unwilling to introduce the alibi evidence, simply because it would be disputed, is unreasonable and inexcusable. All evidence is "subject to the rigorous adversarial testing, that is the norm of Anglo-American proceedings." Maryland v. Craig, 497 US 836, 846 (1990). While the alibi evidence alone may not have been sufficent to conclusively prove that Bartunek was not home at the time of the distribution, it was clearly enough to raise reasonable doubt.

> "In a case depending upon circumstantial evidence alone, the finding of one fact inconsistent with defendant's guilt is sufficient to raise reasonable doubt." Holt v. United States, 281 US 245 (1910).

Had Wilson used this evidence, there is a reasonable probability that Bartunek would not have been found guilty of ditribution, satisfying Strickland's prejudice test, requiring reversal of his convictions.

J. Admitting the NCMEC evidence violated Bartunek's Constitutional Rights.

The admittance of the NCMEC evidence, including both the Reports and the embedded images, violated the Confrontation Clause under the Sixth Amendment. And, Wilson's failure to object to its admittance also violated Bartunek's right to Effective Assistance of Counsel.

On May 3, 2018, Bartunek told Wilson, via a letter, that he believed the NCMEC evidence was inadmissable hearsay. But Wilson never discussed the matter with Bartunek nor did he investigate the saw supporing this fact. And Wilson was ineffective for not doing so, because a lawyer "must make a thourough investigation of the law and facts." Strickland at 690-91. Had Wilson done so, he would have found case law showing that admitting this evidence violated

Bartunek's right to confrontation under the Sixth Amendment. See, e.g.:

United States v. Bates, 665 Fed. Appx. 810, 814-15 (11th Cir. 2016); United States v. Cameron, 699 F.3d 621, 649-53 (1st Cir. 2012); and United States v. Morrissey, 895 F.3d 541, 554 (8th Cir. 2018).

All of these cases were decided prior to Bartunek's trial. A more recent case also shows these NCMEC Repors were inadmissable hearsay evidence and admitting them violated his right to confrontation. See United States v. Juhic, 954 F.3d 1084, 1088-89. (8th Cir. 2020).

Clearly, the NCMEC Reports were hearsay, because they were out-of-court statements "offer[ed] in evidence to prove the truth of the matter asserted": that images of child pornography were distributed by Bartunek. See Fed. R. Evid. 801(c). And, these Reports were not subject to the business record exception, because they were testimonial, meaning they were "made under circumstances which would lead an objective witness to believe that the statement[s] would be available for use at a later trial." Melendex-Diaz v. Massachusetts, 557 US 305, 310, 324 (2009). It was only after a human at Omegle.com determined that the images contained child pornography, that the images and notations were inserted into the CyberTip. And then, another human at NCMEC classified it as unconfirmed child pornography (because the age of the child was unknown) and created the NCMEC Report, making it available to Nebraska Law Officials. This human involvment in this otherwise automated process made the Reports inadmissable hearsay. See Morrissey at 554.

In the Morrissey and other cases, the courts ruled that the admission of information from the NCMEC Reports violated the defendant's constitutional rights, but upheld the convictions because there was other evidence to support it. However, in Bartunek's case, these NCMEC Reports were the only evidence of distribution. And, there is no doubt that the jury relied on this evidence to convict Bartunek of distribution, as Norris made it very clear in his closing

statements that the NCMEC Reports were the sole basis to support the elements of the crime of distribution. And therefore, without this evidence, there is a reasonable probability that Bartunek would not have been found guilty of distribution, satisfying the requirements for reversal of Bartunek's convictions. See Strickland at 695.

V. Bartunek was denied the assistance of counsel.

Based on the facts and the law, there is no doubt that Bartunek was denied the assistance of counsel during his § 2255 proceedings. And although he didn't ask for counsel to be appointed, the court was bound by the law and constitution to do so. Furthermore, Bartunek expected the appointment of counsel. When he asked Judge Rossiter to reconsider his motion to proceed In Forma Pauperis (IFP), Bartunek stated that an IFP order established a predicate for appointment of counsel. And clearly, Bartunek was prejudiced by the failure to appoint counsel, because he never had a legal advocate or his day in court to show that his constitutional claims had merit and/or met the conditions for issuance of a certificate of appealability.

SUPPORTING DOCUMENTS

Additional facts and law, with appropriate references to the record, can be found in district court case 8:17CR28: Original § 2255 Motion (Filing No. 446); Amended § 2255 Motion (No. 468); Bartunek's Brief (No. 469); Exhibits for the Brief (No. 466); Motion for Recusal (No. 461); Memorandums I-X (Nos. 448-54, 458, 442-55, 460); and appellate court case 22-3523, Application for Certificate of Appealability (No. 5226774).

COMPELLING REASONS TO GRANT THE PETITION

Bartunek's case presents an ideal vehicle for resolving the questions presented, whether the Court chooses to answer the questions presented, subsidary questions, and/or any one or more of the underlying questions.

These are important questions of federal law that were decided in a way that conflicts with case law from other courts within and external to the district court's circit, as well as precedents of this Court. And clearly, the appeallate court's refusal to grant a certificate of appealability condoned the district court's departure from accepted and usual course of judicial proceedings. Furthermore, the Court's answer to these questions will not only be determinative in this case, but its impact will be widespread.

Bartunek attempted to bring up his claims prior to trial and afterwards, but his efforts were thwarted by procedural obsticals, lack of effective counsel, a biased judge, and an appellate court which sanctioned the multiple violations of Bartunek's constitutional rights.

"The great writ of habeas corpus has been for centuries esteemed the best defence of personal freedom." Ex parte Yerger, 8 Wall 85, 95 (1869).

This right was so important that it was included in the constitution; a right that "shall not be suspended." Article I, § 9, Cl. 2. And the right to a "jury" trial was also included. Article III, § 2, Cl.3. Clearly, the "due process" clause of the Fifth Amendment requires that all court proceedings be fair. And the effective assistance of counsel "in all criminal prosecutions," was one of the greatest safeguards of freedom guaranteed under the Sixth Amendment. And yet, Bartunek was denied these and other fundamental rights throughout the entire court proceedings, inclusing his § 2255 proceeding.

CONCLUSION

For the forgoing reasons, the court should grant this petition.

Respectfully Submitted,

Gregory P. Bartunek

05/24/2023
Date

Gregory P. Bartunek
29948-047
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159