No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Bruce Rutherford - Petitioner

VS.

MARCIA A. CRONE, DISTRICT COURT JUDGE

CHRISTINE NOWAK, MAGISTRATE JUDGE - Respondent(s)

UNITED STATES DISTRICT COURT FOR THE FIFTH DISTRICT

PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS

BRUCE RUTHERFORD - 27006-078

FCI TEXARKANA

P.O. BOX 7000

TEXARKANA, TX 75505

QUESTION PRESENTED

Is the Constitutional right to a fair and impartial judge enforceable by mandamus under this courts precedent?

RELIEF SOUGHT

Petitioner prays for a writ of mandamus to recuse for abuse of discretion, bias/prejudice against the petitioner and/or the nature of the charged offense, Judge Marcia A. Crone and Magistrate Judge Christine Nowak, United States district court for the Fifth district, Sherman Division.

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UNAVAILABILITY OF RELIEF IN OTHER COURTS

A motion to recuse Judge Crone has already been denied in the Fifth District Court, Sherman Division by Judge Crone.

The Fifth Circuit Court of Appeals has refused to hear this case because of an unlawful sanction placed on petitioner in case No. 20-40619 for frivolous and meritless reasons allowing no opportunity to appeal.

This sanction is in violation of my Constitutionally protected rights under the First Amendment right to petition the government for redress of grievance, Fifth Amendment due process, Fourteenth Amendment equal protection and no access to the courts.

UNSUITABILITY OF ANY OTHER FORM OF RELIEF

The only other form of relief I can find is the filing of 18 U.S.C. § 241 and 242. I believe that I need to file with the Supreme Court before I file these.

LIST OF PARTIES

Bruce A. Rutherford, Inmate, FCI Texarkana

Marcia A. Crone, District Court Judge 5th district, Sherman Division

Christine Nowak, Magistrate Judge 5th district, Sharman Division

TABLE OF AUTHORITIES CITED

JURISDICTIONAL STATEMENT

This court has jurisdiction of to the issue the requested writ under 28 U.S.C. § 1651(a) and Supreme Court Rule 20.

STATUTES AND REGULATIONS

U.S.S.G. 2G2.2

U.S.S.G. 2G2(b)(4)

28 U.S.C. § 2252A(a)(5)(B)

STATEMENT OF THE CASE

I, Bruce Rutherford, pro se, am presenting the facts proving the abuse of discretion, the bias/prejudice of District Court Judge Marcia A. Crone and Magistrate Judge Christine A. Nowak of the petitioner and/or the nature of the charged offense in support of my motion to recuse Judge Crone.

On June 17, 2021, Judge Crone, ignoring esclupatory evidence, dismissed my 28 U.S.C. § 2255 Motion, without an evidentiary hearing required by 2255(b).

> "A motion brought under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and the records of the case conclusively show that the prisoner is entitled to no relief."

(United States v. Bartholomew, 974 F.2d 29, 41 (5th Cir. 1992)(per curiam) (emphasis added).

I offer the following proof in support of my claim of abuse of discretion, bias/prejudice against the petitioner and/or the nature of the charged offense, and why this motion for the recuseal of Judge Crone needs be granted.

Bias or prejudice Defined - The Extrajudicial - Source Doctrine:

The standard for determining whether bias or prejudice is:

"Whether a reasonable person with knowledge of all the facts would conclude that the judges impartiality might reasonably be questioned."

This is an objective standard,

"so what matters is not the reality of bias or prejudice, but its appearance."

United States v Jordon, 49 F.3d 152 (5th Cir. 1995);

Liteky v. United States, 510 U.S. 540 (1994).

FACTS IN SUPPORT OF THE CASE

PLEA OFFERS

In Judge Crone's Order of Dismissal, first page, 2nd paragraph, 4th line (APPENDIX A) Judge Crone states:

> "Furthermore, Movant claims for the first time that counsel failed to convey plea offers to him, which entitles him to relief.
> However, issues raised for the first time in adjunctions are not properly before the court, and need not be addressed."

It is clear from this statement by Judge Crone, that she chose to ignore this evidence in my 2255. This complaint is in my § 2255 memorandum of points, page 3, Ground Five. (APPENDIX B).

COERSED GUILTY PLEA (APPENDIX C).

This complaint is in my 2255 memorandum of points, page 3 Ground Five and was completely ignored by Judge Crone.

> "Challenge to a guilty plea heard by means of Section § 2255 to be remanded to the district court for hearing"
> United States v. Timmreck, 441 U.S. 780 (1979);
> Fontaine v. United States, 411 U.S. 213 (1973).

CHANGE OF PLEA HEARING

At the change of plea hearing, Judge Crone asked the Prosecutor Marisa Miller, to read into the record, the actual evidence that she would have presented at trial to prove my guilt.

Miller simply read into the record the factual bases for the charge and not a single piece of actual evidence she would have presented at trial to prove my guilt. (APPENDIX D).

Judge Crone and Prosecutor MIller were attempting to create the evidence to support my guilty plea at the change of plea hearing.

> "The Federal Rules of Criminal Procedure 11(b) requires that the district court judge must determine that there is a factual bases for the crime prior to the entry of the judgement and not just at the time of the plea. The record must show the factual bases exists in the record for the plea."
>
> Sassoon v. United States, 561, F.2d 115 (5th Cir. 1977);
>
> Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253 (1976)

This fact was completely ignored by Judge Crone, and not even mentioned in her Order of Dismissal.

Judge Crone and Prosecutor Miller, knew that the factual bases were not supported by the record and were trying to create the record at the change of plea hearing. The factual bases are not supported by the record and Judge Crone committed an error in excepting my guilty plea. United States v. Davila, 698 F.2d 715 (5th Cir. 1983).

GRAND JURY HEARING

Prosecutor Miller and Police Officer Jeff Rich, provided false/perjured testimony to the Grand Jury in order to obtain an indictment against me.(APPENDIX F). Truman v. Oren, 2021 U.S. app LEXIS 16727 (2021).

Officer Rich testified under oath that there are facts in evidence to support each and every allegation in his testimony. (APPENDIX F).

It has been well established that every verbal interaction between Petitioner and law enforcement on the night of the search was recorded.

That recording was turned over in the discovery by the prosecutor. Not a single word of Officer Rich's Grand Jury testimony was on that recording, nor has a single bit of evidence been entered to support his testimony. Judge Crone and Prosecutor Miller were well aware of this and deliberately hid this fact.

> "A Constitutional defect in an indictment or information is" not cured by the verdict."
>
> Sutton v. United States, 157 F.2d 661 (CA5 1946).

NUMBER OF IMAGES ENHANCEMENT

The Sentencing Guidelines provide that:

> "For purposes of determining the number of images under Section (b)(7): (ii) Each video, video clip, movie or similar visual depiction shall be considered to have 75 images."
>
> U.S.S.G. 2G2.2 application note 6.

The PSR states that:

> "Case material shows that I possessed 4 videos depicting child pornography.
> In calculating the number of images (4 videos x 75 images) only supports 300 images."

Judge Crone, using her discretion, doubled the number of images (4 videos x 150 images) = 600 images. The effect of doubling the number of images to 600 increased the level and the number of years she could sentence me to prison.

ENHANCEMENTS FOR UNCHARGED CONDUCT

a. Judge Crone added a 2 level enhancement for knowingly engaging in the distribution of child pornography even though I was never charged with distribution of child pornography.

The judge cannot add enhancements based on uncharged conduct. United States v. Booker, 125 S. Ct. 735 (2005).

b. Judge Crone added the (b)(2) enhancement for children under the age of 12 years. There was no evidence to support this enhancement and increased my sentence.

c. 18 U.S.C. § 2252A(a)(5)(B) is at level 18 and with no criminal history a sentence of 27 to 33 months.

Judge Crone sentenced me to 150 months. That is 5 times longer then what it should have been at the discretion or abuse of discretion and bias/prejudice against me and/or the nature of the charged offense.

d. Judge Crone added a 4 level enhancement for material that portrayed sadistic and masochistic conduct pursuant to U.S.S.G. 2G2(b)(4) with absolutely no evidence to support this enhancement just to add additional years of imprisonment.

e. A two level enhancement for use of a computer with no evidence of the use of a computer.

Judge Crone deliberately delayed ruling on my § 2255 for 24 months after the last substantive filing, and then only got a ruling because I filed for a writ of mandamus to the Supreme Court.

A defendant has the fundamental right to fairness in every proceeding.

Fairness is upheld by avoiding even the appearance of partiality. Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).

When a judge's actions stand at odds with these basic notions, we must act or suffer the loss of public confidence in our judicial system. Affutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 1199 L.Ed 11 (1954); Miller v. Sam Houston State University, Texas University System, (5th Cir. 2021).

REASONS FOR GRANTING THE PETITION

The district court is in disagreement with information contained in their own court records.

I have shown indisputable evidence from the courts own records that Judge Crone ignored esclupatory evidence, abused her discretion, bias/prejudice in order to arrive at a desired outcome.
If these acts are permitted to stand, a system of justice no longer exists for the common man.

CONCLUSION

For the foregoing reasons, petitioner requests that this court issue a writ of mandamus to recuse not only Judge Crone and Magistrate Judge Nowak, but due to the many years of service Judge Crone has spent in the 5th district, she has built many friendships and forged strong working relationships with the judges not only in the Eastern District but, throughout the 5th District and assign this case to a district far from the 5th district like the 2nd or the 9th Districts.
It will be extremely difficult if not impossible to get a fair and impartial ruling in the 5th district. I request that this court issue a mandamus to recuse all judges in the 5th District from further participation in these proceedings.

In the alternative, the petitioner request the issuance of a writ of mandamus ordering Judge Crone to permit discovery and hold an evidentiary hearing regarding the factual bases for disqualification issues raised in the petitioner's motion for recusal.
This writ of mandamus should be granted.

Respectfully Submitted on 9-1-, 2022

by: by: Bruce Rutherford

Bruce Rutherford - 27006-078
FCI Texarkana
P.O. Box 7000
Texarkana, TX 75505

APPENDIX A

UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

BRUCE ALLEN RUTHERFORD #27006-078 §
§
versus § CIVIL ACTION NO. 4:19-CV-348
§ CRIMINAL ACTION NO. 4:17-CR-41(1)
UNITED STATES OF AMERICA §

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Christine A. Nowak, who issued a Report and Recommendation (#47) concluding that the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed pursuant to 28 U.S.C. § 2255 should be denied and dismissed with prejudice. Movant filed objections (#49).

In the objections, Movant reurges the ineffective assistance of counsel claims that he raised in the § 2255 motion. Despite his arguments, Movant fails to show that, but for his counsel's deficient performance, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Furthermore, Movant claims for the first time that Counsel failed to convey plea offers to him, which entitles him to relief. However, issues raised for the first time in objections are not properly before the court and need not be addressed. *See United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992); *see also United States v. Cervantes*, 132 F.3d 1106, 1111 (5th Cir. 1998) (district court does not abuse its discretion in refusing to consider new issues in a § 2255 after the Government filed its response). Movant fails to show the Report and Recommendation is in error or that he is entitled to habeas relief.

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Movant to the Report, the Court is of the opinion

APPENDIX B

Ground Two: Defense Counsel Edgett was ineffective for failing to file a motion to suppress the Affidavit to support the search warrant as bare bones and seriously lacking in probable cause.

Petitioner argues that an Affidavit is bare bones " if it is so deficient in probable cause that it renders an officer's belief in its existence completly unreasonable." For example, an affidavit that merly states that the Affiant "has cause to suppect and does believe or has received reliable information from a credible person that contraband is located on the premises" are bare bones. United States v. McPhearson, 469 F.3d 518 (6th Cir. 2006).

Ground Three: Defense Counsel Edgett was ineffective for failing to file a motion to compel the Government to comply with the Jenkcs Act 18 U.S.C. §3500.

Petitioner argues that Counsel Edgett was in effective for failing to recognize, investigate and assert the the Government failed to the alleged confession and evindence in support of the Grand Jury testimony of Detective Jeff Rich at the hearing on March 8, 2017 concerning the alleged statements made by petitioner. Brady v. Maryland, 373 U.S. 83, 83, S. Ct. 1194, 10 L Ed 2d 215 (1963) Counsel Edgett's ineffectiveness denied the defense of critical information as to the actual existence of this evidence and would have had substantial effect on the outcome of the defense's case.

Ground Four: Defense Counsel Edgett was ineffective for failing to file a pretrial motion for a Judgment of Acquittal.

Petitioner argues that failing to file a pretrial motion foa a Judgment of Acquittal put the defense at a great disadvantage and unprepared to defend against evidence that was not disclosed by the failure to enclude in its discovery. This is a violation of Petitioner's Sixth and Fourteenth Amendments for Effective Counsel and due process.

Ground Five: Defense Counsel Edgett was ineffective for failing to inform Petitioner of plea offers from the Government was Ineffective Assistance of Counsel.

The Docket shows that the Government had presented plea bargins to the petitioner that was never disclosed to Petitioner by Counsel Edgett. Cullen v. United States, 194 F.3d 401 (2nd Cir 1999). Missouri v. Fyre, 182 L Ed.2d 379 (2012).

(5) Affiant states that on Setember 5, 2017, I was at the Federal Courthouse in Plano, TX waiting for my trial to start. Counsel Edgett came into the holding area to talk to me. Counsel Edgett told me that if I went through with the trial I was going to loose and I would get 20 years. I asked Mr. Edgett why I would loose, I wasn't guilty of anything. Mr. Edgett said that the images were found on a computer that I owned. I told Mr.edgett that I I didn't know that they were there. Mr.Edgett said that if I changed my plea to guilty I would only get 5 years, what do I want to do. I told him that I didn't want either one but 5 years is better then 20. It sounds like I don't have any choice. I asked Mr. Edgett what I needed to do. He said that he would take care of it and he would be right back. Mr. Edgett came back a few minutes later and told me we were going into the courtroom to change my plea and he would guide me through it so that the judge would accept mu guilty plea. I answered the judges questions just as he told me to. I knew nothing about the law, thats why I hired an attorney.

(6) Counsel Edgett not only gave me false information to get me to change my plea, He never told me about the conseqüences and the constitional rights I would be loosing by changing my plea to guilty.

(7) Counsel Edgett's statements to me concerning the 5 year sentence was completely false. I received a 150 month sentence. I do not believe Mr. Edgett had developed any kind of defense and was competely unprepared for for my defense.

(8) After I changed my plea, I was returned to Fannin County Jail. During the course of the next two to three weeks I was learning about what I had given up by changing my plea to guilty. Counsel Edgett never told me anything about any of this. Over the next 3 months I wrote Mr. Edgett 3 letters telling him I wanted him to withdraw my guilty plea. I didn't get any response from Mr. Edgett on any of the letters. I finaly filed a a complaint with the Texas Bar Association listing several complaints. I had no communication from Mr. Edgett for slmost eight months.

will be no trial. So by pleading guilty, you waive the right to a trial and these other rights.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The government is now going to make a proffer of proof of the evidence it would offer at the time of trial to support the charges against you. Pay close attention to statements made by counsel for the government.

MS. MILLER: Your Honor, by and through the factual basis, the defendant stipulates and agrees that the following facts are true and correct as charged in Count One of the First Superseding Indictment:

On or about February 10, 2017, in this district the defendant did knowingly possess material -- in this case a Compaq Presario laptop computer that contained one or more images of child pornography which had been shipped and transported using any means and facility of interstate or foreign commerce and that had been shipped and transported in and affecting interstate and commerce by any means, including by computer, and which was produced using materials which had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer.

Specifically, the defendant admits that he possessed

APPENDIX F

Ground One: Defense Counsel Edgett was Ineffective for failing to recognize, investigate and assert fales testimony and Prosecutorial misconduct of Detective Jeff Rich abd United States Attorney Marisa Miller at the Grand Jury Hearing on March 8, 2017 at 10:37 a.m.

Petitioner submits that Defense Counsel Edgett was ineffective for failing to recognize, investigate and assert the false statements of Detective Jeff Rich. Counsel Edgett was also ineffective for failing to recognize and assert that United States Attorney Marisa Miller knew or should have known Detective Rich was giving false testimony.

On page 13 lines 18 - 19 Ms. Miller asked Detictive Rich " what did he say when you told him that you found child pornography on his computer?".

Lines 20-25 response by Detective Rich - "Mr. Rutherford then stated that he had downloaded files of child pornography on his computer, that he had stored them in a particular folder on his computer, and that he had been using a file sharing network to make those files or to -- to obtain those files.

Page ±4 lines 1-3, Ms. Miller - "According to Mr. Rutherford, the folder where he had these files saved, did he create those files -- that folder?".

line 4 Detective Rich - "He did".

Line ±3-±4 - Ms. Miller - "Did it have the title he told you it would have?".

Line 15 - Detective Rich "It did".

Line 16 Ms. Miller - "Okay, Did Mr. Rutherford talk to you about deleting files?"

Line 18 Detective Rich "Yes".

Line 19-20 Ms. Miller - "What did he tell you about deleting child pronography?"

Line 21-22 Detective Rich - "He initially stated that if anything like that ever came up on his computer, he would delete it"

Page 15.

Lines 19-21 Ms. Miller - "Did you find the peer-to-peer file sharing network that Mr. Rutherford discussed with you during your interview?"

Line 22 Dective Rich - "the software, yes."

Petitioner submits that the elleged statements made by Pertitoner to Detictive Rich are false and Petitioner never made any such statements. Every single verbal interaction between Mr. Rutherford and law enforcement was recorded. Petitioner submits that Ms. Miller knew or should have known that Detective Rich's testimony was fales and did not exsist in any of the evidence. United States v. Agurs, 427 U.S.97, 103, 96 S. Ct 2392, 49 L Ed.2d 342 (1976).

United States district court
Eastern district of Texas

Bruce A. Rutherford	)	Case No. 4:19-cv-00348
	)	
v.	)	Memorandum of Law
	)	In Support of Rule 60(b)(6)
United States of America	)	

1. I, Bruce A. Rutherford, pro se, Petitioner, am presenting the facts in this Memorandum, not as an appeal of the denial of my § 2255, but, as evidence supporting the denial of my § 2255 was the direct result of the abuse of discretion and bias of district court Judge Marcia A. Crone and magistrate judge Christine A. Nowak toward the petitioner and/or the nature of the charged offense.

I will state again for the record that I am not guilty of this offense!

2. On June 17, 2021, district court Judge Marcia A. Crone for the Eastern district of Texas, issued an Order of Dismissal of my 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct Sentence and without an evidentiary hearing in violation of § 2255(b).

> "A motion brought under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and the records of the case conclusively show that the prisoner is entitled to no relief."
>
> (United States v. Bartholomew, 974 F.2d 29, 41 (5th. Cir. 1992) (per curiam)(emphasis added))

In her dismissal, Judge Crone stated that the findings of the magistrate judge are correct, and Movant's objections are without merit, Therefore, the court hereby adopts the findings and conclusions of the magistrate judge as the findings and conclusions of the court.

I submit that this dismissal was not based upon the content or the merits of my § 2255, but on the bias and abuse of discretion either against the petitioner and/or the nature of the charged offense, of Magistrate Judge Nowak and District Court Judge Marcia A. Crone

In this Memorandum of Law and the accompanying Affidavit, I will prove beyond a shadow of a doubt, that, either Judge Crone and Judge Nowak did not read my § 2255 prior to dismissing it and did not even know what was in it, or

this is at a minimum an abuse of discretion and a bias against the petitioner, and/or the nature of the charged offense.

In my § 2255, there are 24 claims of Constitutionally protected rights violations and at least 4 Plain/Structural errors.

The Clisby Rule states:

> "The district court must resolve all claims
> "whether habeas relief is granted or denied."
> Clisby v. Jones, 960, F.2d 925, 936 (11th Cir. 1992).

The Constitutional claims and the Plain/Structural Errors were not resolved.

Plain Error is established when there is:

1. A legal error that has not been abandoned.
2. that is a clear or obvious rather then subject to reasonable dispute.
3. error effected defendant's substantial rights, ie. effected outcome of the proceedings.
4. seriously effected the fairness, integrity, or public reputation of judicial proceedings.

United States v. Halverson, 897 F.3d 645 (5th Cir. 2018).

In this Memorandum of Law and the accompanying Affidavit, I will present indisputable evidence of this bias and abuse of discretion.

3. The Plain/Structural Errors in my § 2255 are clear and obvious.

The First Structural Error is the failure of counsel to inform me of plea offers from the government and allowing them to expire.

The Second Plain/Structural Error is the coerced guilty plea by my counsel on the day of the trial.

The third Plain/Structural Error is the false testimony provided to the Grand Jury in order to get an indictment.

The Fourth Plain/Structural error was at the sentencing hearing.

An additional Structural Error was created when these were completely ignored or completely unknown to Judge Crone and Judge Nowak.
Either these were purposefully ignored in order to avoid a reversal, or my § 2255 was not even read prior to denying it.

4. The magistrate's Report and Recommendations reads like it was taken directly from the prosecutor's response to my § 2255 filed on 8/16/2019. It makes the same incorrect statements concerning ineffective assistance of counsel claims and Constitutional deprivations occurring prior to the guilty plea are waived.
Its like the prosecutor wrote the Report and Recommendations for the magistrate judge.
This is the kind of misleading statements that I would expect from a prosecutor, not a judge.
There are many other issues in my § 2255, including other Structural errors, that were never even mentioned in her report.

In (Randall v. United States, 454 F.2d 1132 (5th. Cir. 1922) even if the petitioner failed to assert Constitutional error on direct appeal, federal courts are not precluded nor spared burden of examining merits of alleged error.

In Walton v. Arizona, 497 U.S. 639, 653 (1990), trial judges are presumed to know the law, and apply it in making there decisions.

It would seem that, either judge Nowak did not know the law, or, chose to ignore the law in order to reach a desired outcome, and not the fair, Constitutional, unbiased finding of a judge.

This is an abuse of discretion and bias against the petitioner and/or the nature of the offense. Either way, its a huge issue.
A judge is supposed to perform a fair, unbiased, Constitutional assessment of the arguments, not try to find any possible way to deny them.

5. In reading the statements of Judge Crone in her Order of Dismissal, it becomes clear and obvious that she had already decided the fate of my § 2255

even before she got it.

There are many incorrect assumptions and misinterpretations in applying the laws in the magistrate's Report pertaining as to what can or cannot be included in a § 2255 that was adopted by Judge Crone as true and correct.

I pointed out many of these errors in my response to the magistrate's Report.

Judge Crone or Judge Nowak do not even mention any of these issues, including the Structural Errors.

Either Judge Crone did not read my response to the magistrate's Report or she chose to ignore it in order rule in a way that reached her desired outcome.

By Judge Crone dismissing my § 2255 without reading it or even knowing what is in it, shows a serious defect in the fairness, integrity and public reputation of the judicial system, an abuse of discretion and bias and creates an additional Structural Error that denies me my Constitutional rights under the First Amendment Right to petition the government for redress of grievance, and the Fifth Amendment Due Process.

The intent of this Rule 60(b)(6) Motion is to factually establish the abuse of discretion and bias towards the petitioner and/or the nature of the offense in the decisions and rulings of the Judge Crone, and denies fundamental fairness under due process. (Shillern v. Estelia, 720 F.2d 764, 766 (5th. Cir. 1983).

Judge Crone's statements show that the dismissal of my §2255 motion was not based on the content or the merits, but was an obvious abuse of discretion and a bias against the petitioner and/or the nature of the offense.

A familiar and recurring evil that if left unaddressed, would risk systematic injury to the administration of justice. (Pena-Rodriquas v. Colorado, 137 U.S. 588 (2017)).

No higher duty rests upon this court than to exert its full authority to prevent all violations of the principles of the Constitution. (Downs v. Bidwell, 182 U.S. 255, 380-382, 45 L Ed 1088 (1901)).

The court is to protect any encroachment of Constitutionally secured liberty. (Boyd v. United States, 116 U.S. 616 (1886))

6. I offer the following proof in support of these claims.

a. In judge Crone's Order of Dismissal, first page, 2nd paragraph, 4th line, Judge Crone states: (See exhibit A)

"Furthermore, Movant claims for the first time that Counsel failed to convey plea offers to him, which entitles him to relief.
However, issues raised for the first time in objections are not properly before the court, and need not be addressed."

Based on this statement, it is clear that Judge Crone did not read my § 2255 Motion or my response to the magistrates Report, or she chose to ignore it.

How can Judge Crone state that the findings of the magistrate judge are correct, and Movant's objections are without merit, When she had not even read it?

If she had read it, she would have known this claim is in fact in my §2255 Memorandum of Points, on page 3, Ground Five. (See exhibit B).

As this is one of the Plain/Structural errors,it is egregious that an error of this magnitude would be dismissed by a district court judge sworn by oath to uphold the Constitution of the United States.

This shows an obvious abuse of discretion and bias, or, ignorance of the law. Either way, this constitutes a structural error that requires a reversal.

Clearly this meets the requirement as an extraordinary circumstance.

Due process clearly requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant.

Judges shall be impartial, and held accountable when judges are biased. (Bracy v. Warden, U.S. Supreme Court No. 96-6133 (1997))

b. Another Plain/Structural Error that was not even mentioned by Judge Crone in her dismissal, was the coerced guilty plea on the morning of my trial. My change of plea to guilty was not voluntary, but based on erroneous and coerced advice from my Attorney. (See exhibit C).

"The Federal Rules of Criminal Procedure 11(b)(3) requires that the district court judge must determine that there is a factual bases for the crime prior to the entry of the judgment and not just at the time of the plea.
The record must show the factual bases exists in the record for the plea."

(Sassoon v. United States, 561, F.2d 115 (5th Cir. 1977);
(Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253 1976))

This claim alone is a Plain/Structural error, and requires reversal or an evidentiary hearing at a minimum.

> "Challenge to a guilty plea heard by means of Section §2255 to be remanded to district court for hearing".
> (United States v. Timmreck, 441 U.S. 780 (1979); Fontaine v. United States, 411 U.S. 213 (1973)).

c. When Judge Crone asked the prosecutor to read into the record the evidence that she would have presented at trial to prove her case, The prosecutor simply read the factual basis that I had just signed, and she never presented any actual evidence that she would have presented at trial to prove my guilt beyond a reasonable doubt. (See exhibit D).

Judge Crone and my attorney accepted this testimony without objection, which shows ineffective assistance of counsel by my attorney, and an abuse of discretion and bias by Judge Crone.

Following the reading of the factual bases, Judge Crone had the following colloquy with me: (See exhibit E)

THE COURT: And tell me in your own words what you did wrong;

THE DEFENDANT: Well, it's deep, I guess. Sometime in the beginning of the year I just kind of ran across accidentally an image and it was a -video. And I - I guess something just kind of snapped or something, because I've never had that kind of interest before.

COURT: You need to tell me exactly what you did wrong. You're pleading guilty. What did you do wrong?

THE DEFENDANT: Possession of -

THE COURT: What?

THE DEFENDANT: --child pornography.

This clearly shows that I did not knowingly possess any child pornography and was trying to answer what the judge wanted to hear for fear that she would not accept my guilty plea and I would have to spend 20 years in prison like my attorney told me.

No factual bases exists to support all the elements of the offense and Judge Crone made no attempt to reconcile these differences and committed an error in excepting my guilty plea.

The term "knowingly" applies to all elements of the crime. In order to plead guilty, I had to knowingly and willingly commit each and every element of the crime.
(Rehaif v. United States, 588 U.S. 139 S. Ct. 1291, 2196 (2019)).

My substantial rights were effected, and I would not have pleaded guilty had I known the truth about what my attorney had told me.
I knew that I was actually innocent of the offense alleged and held to my not guilty plea from the very beginning all the way to September 5, 2017, the day of my trial, and only changed my plea to guilty because of my counsel's threat of 20 years in prison.

I had never been arrested for anything in my whole life and had no knowledge of the law or the legal process and relied completely on the advice of my attorney. That's why I hired him.

My change of plea was not voluntary, but coerced by incompetent counsel.

> "challenge of voluntariness of guilty plea heard by means of Section §2255 Motion; case remands to district court to hold hearing".
>
> (Sanders v. United States, 373 U.S. 1 (1963)).

My §2255 was unlawfully denied without an evidentiary hearing.

Rule of Tollett v. Henderson, 411 U.S. 258, (1973):

> "habeas petition may attack the voluntary and intelligent Character of the guilty plea 'based on pre-plea ineffective assistance of counsel' by showing the advice he received from counsel was not within the range of the competence demanded of Attorneys in a criminal case..."
>
> (United States v. Rumery, 698, F.2d 764, 766 (5th Cir. 1983)).
>
> "In determining whether claim of error is cognizant under Section §2255, distinction is drawn between Constitutional or jurisdictional errors on one hand, and mere errors of law on the other; Section §2255 does not offer recourse to all who suffer trial errors since it is reserved for transgressions of Constitutional rights and for that narrow compass of the injury that could not have been raised on direct appeal and would, if condoned, result in complete miscarriage of justice."
>
> (United States v. Capua, 656 F.2d 1033 (5th Cir. 1981)).

A fundamental miscarriage of justice inherently results in a complete miscarriage of justice. (Davis v. United States, 417 U.S. 533 (1974)).

d. Prosecutor Marisa J. Miller and Plano Police Officer Jeff Rich, provided false testimony to the Grand Jury in order to get an indictment against me, that otherwise would not have been granted. (See exhibit F). (Truman v. Oren, 2021 U.S. app LEXIS 16727 (2021).

Officer Rich testified under oath that there are facts in evidence to support each and every allegation contained in the indictment. (See exhibit G).

This evidence, if it exists, is required to be disclosed by the government under the Jencks Act 18 U.S.C. §3500. It was not.

This claim is in my §2255 Memorandum of Points, page 3, Ground Three. (See exhibit H).

Every verbal interaction between law enforcement and myself during the interview was recorded when this testimony was alleged to have taken place.

The recording that the government disclosed did not contain any of the sworn testimony of Rich to the Grand Jury.

Judge Crone knew or should have known that this testimony was never disclosed or placed into evidence, or even if this evidence actually existed.

Every attempt I made to obtain this evidence for my defense was blocked by Judge Crone. (See exhibit I).

A Constitutional defect in an indictment or information is not cured by the verdict. (Sutton v. United States, 157 F.2d 661 (CA5 1946)).

e. Another area where Judge Crone demonstrated abuse of discretion and bias was during the sentencing hearing.

The judge's interpretation of the Sentencing Guidelines is reviewed de novo and its factual findings at sentencing for clear error.

> "The government bears the burden of proving by a preponderance of the evidence and reliable evidence that the facts support a sentencing enhancement."

(United States v. Rodriguez, 523 F.3d 519, 524 (5th Cir. 2008)).

I filed an objection to the application of U.S.S.G. § 2G2.2(b)(7)(D) and the resultant 5 level offense level increase. The First Superseding Indictment alleged that I possessed 4 videos.

The sentencing guidelines provide that:

> "for purposes of determining the number of images under section (b)(7): (ii) Each video, video clip, movie or similar visual depiction shall be considered to have 75 images."
> U.S.G.S. § 2G2.2 application note 6.

The PSR found

> "in calculating the number of images (4 videos x 75 images) I would be responsible for 300 images."

Although there was a written factual bases submitted in connection with my plea, the plea colloquy before Judge Crone does not support a finding that I possessed at least 600 images and videos. (exhibit E).

THE COURT: And what quantity approximately did you possess?

THE DEFENDANT: I-I know that there were I think several-four or five, six videos-honestly, I can't remember. There was too many. (Note: this is an error in the transcript, should have read "There wasn't too many.")

THE COURT: Well, but you have here in your factual bases a particular amount, more than 600 images and videos. Is that correct?

THE DEFENDANT: Yes. Yes ma'am.

Clearly, I was not admitting to the possession of at least 600 images and videos.

Judge Crone clearly asked me if the factual bases states more then 600 images and videos, not what I knew to be the number of images possessed.

My response to Judge Crone's question shows I had no knowledge of the number of images possessed.

she asked if the factual basis stated that I possessed 600 images and 600 videos.

Furthermore, the PSR states that:

> "[c]ase material shows I possessed at least 4 videos depicting child pornography."

> "in calculation the number of images (4 videos x 75 images), only supports 300 images".

The finding by Judge Crone that I possessed at least 600 images and is not supported by any evidence in this case and does not support the 5 level enhancement that Judge Crone applied pursuant to U.S.S.G. § 2G2.2(b)(7)(D).

In the sentencing hearing, the prosecutor's sworn testimony to the alleged existence of images that was never disclosed or placed into evidence, or proven to even exist and Judge Crone not only failed to dismiss this unsupported testimony, she embraced it.

The prosecutor referencing information or material not in evidence as fact is improper and prejudicial. (Hall v. United States, 419 F.2d 582 (5th Cir. 1996); United States v. Pariente, 558 F.2d 1186 (5th Cir. 1977)).

The application of this enhancement is not supported by the evidence and is an abuse of discretion and a bias by Judge Crone.

This constitutes an extraordinary circumstance.

Judge Crone also erred in sentencing me to a term of imprisonment in excess of 10 years in violation of (Apprendi v. New Jersey, 120 S. Ct. 2348 (2000)). 18 U.S.C. § 2252A(b)(2) provides for a sentence of not more then 10 years upon a conviction for a violation of 18 U.S.C. § 2252A(a)(5)(B) and imprisonment of not more than 20 years if "any image of child pornography involved a pre-pubesent minor who had not attained 12 years of age...".

The evidence presented at my plea hearing as to the purported age of any minor was insufficient to support the enhanced sentencing range.

At my plea hearing, Judge Crone read the necessary elements of the offense to me and stated that one of the elements was "the defendant knew that such item contained child pornography which involved a prepubesent minor, or a minor who had not attained 12 years of age. However, when Judge Crone questioned me concerning my conduct to support the plea, the following exchange took place: (See exhibit E)

THE COURT: All right. And did - what age children were depicted in that child pornography?

THE DEFENDANT: I-I don't know the exact ages, but they were - my guess is under 12.

THE COURT: And did they appear to be prepubescent?

THE DEFENDANT: I believe so, yes.

It is clear and obvious from the above, that my responses concerning the age of any of the individuals depicted in the pornography were equivocal, confusing, and contradictory.

I clearly stated that I did not know the ages of any of the individuals, and any attempt on my part to determine the ages, would be a mere "guess".

I had never seen the videos so I could only guess at what the judge was wanting. There is nothing in this colloquy to establish that the images were those of prepubescent minors.

Once the court embarks on asking a defendant what he did that makes them guilty of an offense, the court cannot disregard those responses -- responses which then must be considered in determining the sufficiency of the evidence to establish the elements of an offense beyond a reasonable doubt.

Judge Crone heard what she wanted to hear and abused her discretion and displayed her bias and just accepted the testimony as being what she wanted.

The statutory maximum for a conviction under 18 U.S.C. § 2252A(b)(2) is not more then 10 years.

Judge Crone sentenced me to 150 months. (12 1/2 years).

The confusion and uncertainty in my answers should have necessitated further inquiry from Judge Crone.

There was insufficient evidence to support the increased punishment range.

This was not a sentence within the statutory maximum of 10 years for possession of child pornography, but a sentence based upon the bias and abuse of discretion of Judge Crone.

This shows an abuse of discretion and a bias which constitutes an extraordinary circumstance.

f. I was never charged with distribution of child pornography, however, Judge Crone applied a 2 level increase for knowingly engaging in the distribution of child pornography without pecuniary gain or for any type of valuable consideration as set out in U.S.S.G. § 2G2.2(b)(3)(F).

The judge cannot add enhancements based on uncharged conduct. (United States v. Booker, 125 S. Ct. 935 (2005).

A 4 level increase for material that portrayed sadistic and masochistic conduct pursuant to U.S.S.G. § 2G2.2(b)(4), 2 level increase for use of a computer pursuant to U.S.S.G. § 2G2.2(b)(6).

I found out that the charged offense is at level 18, which is a sentence of 21 to 27 months.
When Judge Crone got finished adding all these extra points, I was at level 33 which is a sentence of 135 to 168 months.
A sentence that was 5 times longer then the actual offense level, added at the discretion of Judge Crone.
There was insufficient evidence to support any of these extra enhancements and years of additional imprisonment.
They were added to my sentence based on discretion, in this case, the abuse of discretion and bias of Judge Crone.

Sentencing me to a sentence 30 months in excess of the 10 year maximum sentence provided by 18 U.S.C. § 2252(b)(2), 129 months (10 years 9 months) in excess of the initial level of 21 to 27 months not only shows an abuse of discretion and bias of Judge Crone but also seriously affects the fairness, integrity and public reputation of these judicial proceedings and violates due process and is just wrong.

An enhancement that raises your sentence above the mandatory maximum, must be submitted to a jury, even on a guilty plea. (Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004))

On November 4, 2020, I filed a motion for recuseal of Judge Crone for abuse of discretion and bias.

On November 30, 2020, Judge Crone denied my motion to recuse Judge Crone.
On December 30, 2020, I filed an appeal for the recusal of Judge Crone.
On April 11, 2021, my appeal was dismissed.

A defendant has the fundamental right to fairness in every proceeding.
Fairness is upheld by avoiding even the appearance partiality. (See Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L.Ed 2d 182 (1980).

When a judge's actions stand at odds with these basic notions, we must act or suffer the loss of public confidence in our judicial system. (Affutt v.

United States, 348 U.S. 11, 14, 75 S. Ct. 1199 L.Ed 11 (1954); Miller v. Sam Houston State University, Texas University System, (5th Cir. 2021)).

This abuse of discretion and bias has been going on throughout my case and if allowed to stand, will:

> "Seriously effect the fairness, integrity, or public reputation of the judicial proceedings."

(United States v. Marek, 238 F.3d 310, 315 (5th Cir. 2001)).

CONCLUSIONS

Provisions of 28 U.S.C. § 2255 apply to claims of error based on "laws of the United States" as well as to claims grounded on Federal Constitution.
Judge Crone failed to resolve any of the 24 claims of constitutional violations in my § 2255 Motion in violation of the Clisby Rule.

> "The district court must resolve all claims regardless of whether habeas relief is granted or denied."

Clisby v. Jones, 960 F.2d 925, 936 (11th. Cir. 1992)

I have shown in this Memorandum of Law, indisputable evidence from the courts own records, the abuse of discretion, bias, prejudice, and willful violation of my First Amendment right to petition the government for a redress of grievances, and Fifth Amendment right of due process.
I have proven perjured testimony to the Grand Jury, that was suborned by the prosecuting attorney and condoned by Judge Crone and Judge Nowak, in order to secure an indictment.
I have proven that Judge Crone has blocked any attempt I have made to obtain this evidence.

I have shown the unjust and unlawful sentence, a 5 fold increase was applied to me by Judge Crone without supporting evidence and without any due process.

This goes way beyond "fundamentally unfair" and "Miscarriage of Justice". Judge Crone and Judge Nowak, have not shown the least bit of interest in justice fairness, truth, Constitutional due process or whether I am even guilty or innocent.
Their objective has clearly been to keep the conviction at any cost.

I have spent 5 years locked up for a crime that I did not commit and every attempt that I have made to prove this to the court has been met wit.. denials and threats of sanctions against me if I continue to fight.

The expectation of the court seems to be, I said that you are guilty, so shut up and do the time I gave you.

I am NOT guilty!

I will never stop fighting no matter how many sanctions are placed on me.

If I live long enough to do all of the 150 months, when I get out I will still keep fighting until I clear my name.

If I can't succeed in a court of law, I will go to the court of public opinion.

All for a case that should never have been prosecuted in the first place.

The justice system should be proud.

Submitted on 1-11,2022

By: Bruce A. Rutherford

Bruce A. Rutherford
Reg. # 27006-078
FCI Texarkana
Texarkana, TX 75505

EXHIBIT A

UNITED STATES DISTRICT COURT		EASTERN DISTRICT OF TEXAS
BRUCE ALLEN RUTHERFORD #27006-078	§	
	§	
versus	§	CIVIL ACTION NO. 4:19-CV-348
	§	CRIMINAL ACTION NO. 4:17-CR-41(1)
UNITED STATES OF AMERICA	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Christine A. Nowak, who issued a Report and Recommendation (#47) concluding that the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed pursuant to 28 U.S.C. § 2255 should be denied and dismissed with prejudice. Movant filed objections (#49).

In the objections, Movant reurges the ineffective assistance of counsel claims that he raised in the § 2255 motion. Despite his arguments, Movant fails to show that, but for his counsel's deficient performance, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Furthermore, Movant claims for the first time that Counsel failed to convey plea offers to him, which entitles him to relief. However, issues raised for the first time in objections are not properly before the court and need not be addressed. *See United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992); *see also United States v. Cervantes*, 132 F.3d 1106, 1111 (5th Cir. 1998) (district court does not abuse its discretion in refusing to consider new issues in a § 2255 after the Government filed its response). Movant fails to show the Report and Recommendation is in error or that he is entitled to habeas relief.

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Movant to the Report, the Court is of the opinion

EXHIBIT B

Ground Two: Defense Counsel Edgett was ineffective for failing to file a motion to suppress the Affidavit to support the search warrant as bare bones and seriously lacking in probable cause.

Petitioner argues that an Affidavit is bare bones " if it is so deficient in probable cause that it renders an officer's belief in its existence completly unreasonable." For example, an affidavit that merly states that the Affiant "has cause to suppect and does believe or has received reliable information from a credible person that contraband is located on the premises" are bare bones. United States v. McPhearson, 469 F.3d 518 (6th Cir. 2006).

Ground Three: Defense Counsel Edgett was ineffective for failing to file a motion to compel the Government to comply with the Jenkcs Act 18 U.S.C. §3500.

Petitioner argues that Counsel Edgett was in effective for failing to recognize, investigate and assert the the Government failed to the alleged confession and evindence in support of the Grand Jury testimony of Detective Jeff Rich at the hearing on March 8, 2017 concerning the alleged statements made by petitioner.
Brady v. Maryland, 373 U.S. 83, 83, S. Ct. 1194, 10 L Ed. 2d 215 (1963)
Counsel Edgett's ineffectiveness denied the defense of critical information as to the actual existence of this evidence and would have had substantial effect on the outcome of the defense's case.

Ground Four: Defense Counsel Edgett was ineffective for failing to file a pretrial motion for a Judgment of Acquittal.

Petitioner argues that failing to file a pretrial motion foa a Judgment of Acquittal put the defense at a great disadvantage and unprepared to defend against evidence that was not disclosed by the failure to enclude in its discovery. This is a violation of Petitioner's Sixth and Fourteenth Amendments for Effective Counsel and due process.

Ground Five: Defense Counsel Edgett was ineffective for failing to inform Petitioner of plea offers from the Government was Ineffective Assistance of Counsel.

The Docket shows that the Government had presented plea bargins to the petitioner that was never disclosed to Petitioner by Counsel Edgett.
Cullen v. United States, 194 F.3d 401 (2nd Cir 1999).
Missouri v. Fyre, 182 L Ed.2d 379 (2012).

(5) Affiant states that on Setember 5, 2017, I was at the Federal Courthouse in Plano, TX waiting for my trial to start. Counsel Edgett came into the holding area to talk to me. Counsel Edgett told me that if I went through with the trial, I was going to loose and I would get 20 years. I asked Mr. Edgett why I would loose, I wasn't guilty of anything. Mr. Edgett said that the images were found on a computer that I owned. I told Mr.edgett that I I didn't know that they were there. Mr.Edgett said that if I changed my plea to guilty I would only get 5 years, what do I want to do. I told him that I didn't want either one but 5 years is better then 20. It sounds like I don't have any choice. I asked Mr. Edgett what I needed to do. He said that he would take care of it and he would be right back.
Mr. Edgett came back a few minutes later and told me we were going into the courtroom to change my plea and he would guide me through it so that the judge would accept mu guilty plea. I answered the judges questions just as he told me to. I knew nothing about the law, thats why I hired an attorney.

(6) Counsel Edgett not only gave me false information to get me to change my plea, He never told me about the consequences and the constitional rights I would be loosing by changing my plea to guilty.

(7) Counsel Edgett's statements to me concerning the 5 year sentence was completely false. I received a 150 month sentence. I do not believe Mr. Edgett had developed any kind of defense and was competely unprepared for for my defense.

(8) After I changed my plea, I was returned to Fannin County Jail. During the course of the next two to three weeks I was learning about what I had given up by changing my plea to guilty. Counsel Edgett never told me anything about any of this. Over the next 3 months I wrote Mr. Edgett 3 letters telling him I wanted him to withdraw my guilty plea. I didn't get any response from Mr. Edgett on any of the letters. I finaly filed a a complaint with the Texas Bar Association listing several complaints. I had no communication from Mr. Edgett for slmost eight months.

EXHIBIT D

will be no trial. So by pleading guilty, you waive the right to a trial and these other rights.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The government is now going to make a proffer of proof of the evidence it would offer at the time of trial to support the charges against you. Pay close attention to statements made by counsel for the government.

MS. MILLER: Your Honor, by and through the factual basis, the defendant stipulates and agrees that the following facts are true and correct as charged in Count One of the First Superseding Indictment:

On or about February 10, 2017, in this district the defendant did knowingly possess material -- in this case a Compaq Presario laptop computer that contained one or more images of child pornography which had been shipped and transported using any means and facility of interstate or foreign commerce and that had been shipped and transported in and affecting interstate and commerce by any means, including by computer, and which was produced using materials which had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer.

Specifically, the defendant admits that he possessed

THE COURT: Do you acknowledge and agree with the government's summary of the facts, constituting proof of the commission of the offense and the charges against you in the Indictment in every respect?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you signed the document embodying the factual basis for your plea?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand and agree with it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are there any changes that you would offer?

THE DEFENDANT: I'm sorry?

THE COURT: Are there any changes that you would offer to that document?

THE DEFENDANT: No, Your Honor.

THE COURT: And tell me in your own words what you did wrong.

THE DEFENDANT: Well, it's deep, I guess. Sometime in the beginning of the year I just kind of ran across accidently an image, and it was a -- a video. And I -- I guess something just kind of snapped or something, because I've never had that kind of interest before.

THE COURT: You need to tell me exactly what you did wrong. You're pleading guilty. What did you do

wrong?

THE DEFENDANT: Possession of --

THE COURT: What?

THE DEFENDANT: -- child pornography.

THE COURT: All right. And did -- what age children were depicted in that child pornography?

THE DEFENDANT: I -- I don't know the exact ages, but they were -- my guess is under 12.

THE COURT: And did they appear to be prepubescent?

THE DEFENDANT: I believe so, yes.

THE COURT: All right. And what quantity approximately did you possess?

THE DEFENDANT: I -- I know that there were I think several -- four or five, six videos -- honestly, I can't remember. There was too many.

THE COURT: Well, but you have here in your factual basis a particular amount, more than 600 images and videos. Is that correct?

THE DEFENDANT: Yes. Yes, ma'am.

MS. MILLER: Your Honor, if I might clarify. Just for purposes of that calculation, each video constitutes 75 images. I do note, too, that there were both saved, as well as incomplete downloads, as well as deleted images and videos.

EXHIBIT F

Ground One: Defense Counsel Edgett was Ineffective for failing to recognize, investigate and assert fales testimony and Prosecutorial misconduct of Detective Jeff Rich abd United States Attorney Marisa Miller at the Grand Jury Hearing on March 8, 2017 at 10:37 a.m.

Petitioner submits that Defense Counsel Edgett was ineffective for failing to recognize, investigate and assert the false statements of Detective Jeff Rich. Counsel Edgett was also ineffective for failing to recognize and assert that United States Attorney Marisa Miller knew or should have known Detective Rich was giving false testimony.

On page 13 lines 18 - 19 Ms. Miller asked Detictive Rich " what did he say when you told him that you found child pornography on his computer?".

Lines 20-25 response by Detective Rich - "Mr. Rutherford then stated that he had downloaded files of child pornography on his computer, that he had stored them in a particular folder on his computer, and that he had been using a file sharing network to make those files or to -- to obtain those files.

Page ±4 lines 1-3, Ms. Miller - "According to Mr. Rutherford, the folder [illegible] where he had these files saved, did he create those files -- that folder?".

line 4 Detective Rich - "He did".

Line ±3-±4 - Ms. Miller - "Did it have the title he told you it would have?".

Line 15 - Detective Rich "It did".

Line 16 Ms. Miller - "Okay, Did Mr. Rutherford talk to you about deleting files?"

Line 18 Detective Rich "Yes".

Line 19-20 Ms. Miller - "What did he tell you about deleting child pronography?"

Line 21-22 Detective Rich - "He initially stated that if anything like that ever came up on his computer, he would delete it"

Page 15.

Lines 19-21 Ms. Miller - "Did you find the peer-to-peer file sharing network that Mr. Rutherford discussed with you during your interview?"

Line 22 Dective Rich - "the software, yes."

Petitioner submits that the elleged statements made by Pertitoner to Detictive Rich are false and Petitioner never made any such statements. Every single verbal interaction between Mr. Rutherford and law enforcement was recorded. Petitioner submits that Ms. Miller knew or should have known that Detective Rich's testimony was fales and did not exsist in any of the evidence. United States v. Agurs, 427 U.S.97, 103, 96 S. Ct 2392, 49 L Ed.2d 342 (1976).

11:00AM A. Yes.

11:00AM Q. Okay. Detective Rich, looking at the Indictment as a whole, is it true and correct to the best of your knowledge?

11:00AM A. Yes.

11:00AM Q. Are there facts in evidence to support each and every allegation contained in the Indictment?

11:00AM A. Yes.

11:00AM MS. MILLER: Okay. I'd just ask you to please step outside of the room and we'll see if the Grand Jury has any questions.

11:00AM (The witness exits the room.)

11:00AM MS. MILLER: Ladies and gentlemen, any questions for Detective Rich? Yes, sir.

11:00AM GRAND JURY MEMBER: You keep making the distinction between prepubescent and pubescent. Does that determine the severity of the crime for one versus the other?

11:01AM MS. MILLER: I -- I cannot as your legal advisor address you what the penalties are. I can tell you that the -- the count that we have charged here, possession, there is a distinction in the code between prepubescent and pubescent minors and you may have heard that there was a reference earlier in the Indictment to prepubescent minors, so that's one

EXHIBIT H

Ground Two: Defense Counsel Edgett was ineffective for failing to file a motion to suppress the Affidavit to support the search warrant as bare bones and seriously lacking in probable cause.

Petitioner argues that an Affidavit is bare bones " if it is so deficient in probable cause that it renders an officer's belief in its existence completly unreasonable." For example, an affidavit that merly states that the Affiant "has cause to suppect and does believe or has received reliable information from a credible person that contraband is located on the premises" are bare bones. United States v. McPhearson, 469 F.3d 518 (6th Cir. 2006).

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Cullen v. United States, 194 F.3d 401 (2nd Cir 1999).
Missouri v. Fyre, 182 L Ed.2d 379 (2012).

EXHIBIT I

UNITED STATES DISTRICT COURT		EASTERN DISTRICT OF TEXAS
UNITED STATES OF AMERICA	§	
	§	
versus	§	CASE NO. 4:17-CR-41
	§	
BRUCE ALLEN RUTHERFORD	§	

MEMORANDUM AND ORDER

Pending before the court is Defendant Bruce Allen Rutherford's ("Rutherford") Request for Factual Evidence Pursuant to Federal Rule of Civil Procedure 52(a)(5) (#106). Rutherford challenges the sufficiency of the evidence supporting his conviction and requests that the court provide him with evidence independent of the plea hearing to establish each element of the charged offense, possession of child pornography.

Rutherford's reliance on the Federal Rule of Civil Procedure 52 is misplaced because the Federal Rules of Civil Procedure do not apply in criminal cases such as this one. *See* FED. R. CIV. P. 1 ("These rules govern the procedure in all *civil* actions and proceedings in the United States district court . . . .") (emphasis added). Nevertheless, in conjunction with Rutherford's plea of guilty, in which he was placed under oath, he stipulated and agreed that the facts stated in his Factual Basis (#56), dated September 5, 2017, were true and correct, thereby admitting the elements of the offense to which he pleaded guilty. Both Rutherford and his attorney signed the Factual Basis. Immediately above his signature, the Factual Basis reads: "I have read this Factual Basis and have discussed it with my attorney. I fully understand the contents of this Factual Basis and agree without reservation that it accurately describes my acts." The Factual Basis is independent of the change of plea hearing. Moreover, Rutherford's challenge to the sufficiency of the evidence has already been rejected. As stated by the United States Court of Appeals for the

United Suates district court
Eastern district of Texas

Bruce A. Rutherford	)	
	)	Case No. 4:19-vcr-348
Vs.	)	Motion of Relief
	)	(Fed. R. Civ. P. 60(b)(6)
	)	
United States of America	)	

Relief Sought

Bruce A. Rutherford, Petitioner, pro se, moves this court, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, for an order setting aside the judgment entered in this action on September 5, 2017.

Grounds for Relief

Extraordinary circumstances in this case require that the judgment in this action be set aside, and no other grounds under Rule 60(b) and no other procedure is available to grant this relief that justice requires.

1. This case involves the bias and abuse of discretion of District Court Judge Marcia A. Crone and Magistrate Judge Christine Nowak of the Fifth District, Eastern District of Texas.

2. The Order of Dismissal issued on June 17, 2021 of my 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence and denying my § 2255 without an evidentiary hearing as required under § 2255(b).

3. I prove in my accompanying Memorandum of Law and Affidavit that neither judge read my § 2255 motion nor knew what it contained prior to denying it.

4. By not reading or even knowing what is in my § 2255, Judge Crone and Judge Nowak failed to address 4 plain/structural Errors and 24 claims of violations of my Constitutionally protected rights under the First Amendment to petition the government for a redress of grievance, and Fifth Amendment due process.

5. Plain/Structural Errors were ignored by district court Judge Marcia A. Crone and magistrate judge Christine Nowak.

1. False (perjured) testimony presented to the Grand Jury to get an indictment.

2. The failure of counsel to inform me of plea offers from the government and permitted them to expire.

3. The coerced guilty plea on the morning of my trial by my counsel.

4. Unlawfully applied enhancements applied at sentencing to add additional years of imprisonment.

5. Abuse of discretion and bias against the petitioner and/or the nature of the charged offense.

6. These errors were either completely overlooked because the judge chose to not read my § 2255 or they did read it and chose to completely ignore it.

7. In addition to the plain/structural errors, there are an additional 21 claims of Constitutional violations that went unaddressed.
This violates the Clisby Rule. (Clisby v. Jones 960, F.2d 925, 936 (11th Cir. 1992)).
District court must resolve all claims regardless whether habeas relief is granted or denied.

8. Judge Crone's denying my motion without reading it or even knowing what is in it, creates a Structural Error in and of itself, and denies me my First Amendment right to petition the government for redress of grievances and my Fifth Amendment Due Process, and is in direct conflict with the court record.
This constitutes an extraordinary circumstance by its very definition

These claims are all proven using the court documents in the accompanying Memorandum of Law and Affidavit.
The only course of action for a Structural Error is reversal.

This ruling was in retaliation for me filing for a writ of mandamus to the Supreme Court to require the district court to make a ruling on my § 2255 after an unwarranted delay of over 22 months and several requests for ruling.
And for filing a motion to recuse Judge Crone for bias and abuse of discretion.
For filing an appeal to recuse Judge Crone.
For filing a complaint against Judge crone for prejudice and bias.

On December 15 2020, Judge Crone issued an Order barring me from filing any motion without advanced permission from the court because I was trying to get evidence of the testimony of Jeff Rich to the Grand Jury.
I do not believe that this evidence exists, and his testimony was perjured as shown in my Memorandum of Law.
Denying me access to the court to get the evidence that I require for my defense in violation of my First Amendment.

Judge Crone denied every motion from me to get any evidence for my defense. She was trying to keep me from finding out that the evidence of the Grand Jury on the false testimony does not exist.

There can be no doubt that this constitutes an extraordinary circumstances.

This motion is timely because it is being raised at the earliest possible time following the discovery of the extraordinary circumstances that justify relief.

Record on Motion

This motion is based on this document, the attached Notice of Motion, Certificate of Service, the supporting Memorandum of Law, and the Affidavit.

Dated: 1-11-2022

by: Bruce A Rutherford

Bruce A. Rutherford Reg. # 27006-078
FCI Texarkana
P.O. Box 7000
Texarkana, TX 75505

United States district court
Eastern district of Texas

Bruce A. Rutherford	)	
	)	Case No. 4:19-cv-348
vs.	)	Affidavit in Support of
	)	
	)	Rule 60(b)(6)
United States of America	)	

My name is Bruce A. Rutherford, pro se, I am over the age of 18 years. I am fully competent to make this Affidavit, and have personal knowledge of the facts in this Affidavit.
To my knowledge, all facts stated in this Affidavit are true and correct.
I state for the record that I am not guilty of the charged offense.

1. This case involves the abuse of discretion and bias of District Court Judge Marcia A. Crone and Magistrate Judge Christine Nowak toward the petitioner and/or the nature of the charged offense (1) ~~and for~~ the violation of my First Amendment right to petition the government for redress of grievance and my Fifth Amendment right of due process.

2. On June 17, 2021, district court judge Marcia A. Crone Dismissed my 28 U.S.C. §2255 motion without an evidentiary hearing as required by § 2255(b) and after an unwarranted delay of 22 months.
This delay would have been much longer if I had not petitioned the Supreme Court for a writ of mandamus.
Based on Judge Crone's statements in her dismissal, she denied my § 2255 without reading it or knowing what was in it, as I show in detail in my Memorandum of Law.

3. A motion under §2255 can be denied without a hearing only if the motion, files, and the records show that the prisoner is entitled to no relief.

There are 24 Constitutional violations and at least 5 structural errors, and some incorrect statements of facts or law.
To claim that my § 2255 shows that no relief is warranted especially without even knowing what is in it, is a huge abuse of discretion and bias and an obvious miscarriage of justice to claim that my §2255 is without merit with so many Constitutional violations and structural errors in it.

Facts Concerning the Indictment.

When I read the transcripts for the testimony of Plano Police Officer Jeff Rich on March 8, 2017, I almost went into shock.
Jeff Rich testified that he and I had this conversation during the interview at my home during the search.
The indictment had little or no chance of being issued without Jeff Rich's testimony.
~~I knew that~~ every word of that interview was recorded.
I also knew that the conversation that he testified ~~about~~ to, never took place. I had listened to the recorded interview that was disclosed, and not a word of his testimony was on it.
There was no evidence of any kind to support his testimony.
In the transcripts of his Grand Jury testimony, Rich stated under oath that he had the evidence to support every item in his testimony.
If this evidence did exist, then it would have been required to have been disclosed under the Jencks Act, 28 U.S.C. § 3500, which it was not.
There is nothing ~~to support his testimony~~ evidence.

I know for a fact that this evidenced does not exist because I also know for a fact that I never made any such statements to Rich or anyone else.
Unless the government can produce this recorded testimony to prove otherwise, this is perjured testimony by Rich and suborn by Miller to the Grand Jury to obtain an indictment.
The indictment and the fact that there was no evidence to support it, was accepted by Judge Crone without question.
~~I believe, as~~ I show in my Memorandum of Law, this is why all my attempts to get this evidence for my defense has been blocked by Judge Crone.

Facts Concerning my Guilty Plea.

My guilty plea was not knowingly and voluntary, but coerced by deception.
I was told by my attorney on the morning of my trial, that if I went through with the trial, I was going to lose and would get 20 years in prison.
If I changed my plea to guilty I would get 5 years.
I believed that I had no choice but to go with my attorney's advice.
I believed that Mr. Edgett had made a deal with the prosecutor Miller.
On page 10, line 12 of the change of plea hearing the court asks me:

> "Is your decision to plead guilty based on discussions between the government's attorney, your attorney, and you?"

I believed that the judge was asking me about the 5 years that my attorney told me I would get if I changed my plea to guilty.
My guilty plea was not voluntary, it was coerced by the threat of 20 years in prison.
This is fully explained in my Memorandum of Law.
I knew that I was not guilty and I believed that I would not possibly be convicted.
I have never been even arrested in my whole life so it came as a big shock when my attorney told me I was going to lose and would get 20 years in prison.
I would have never thought this would be possible.
This completely cought me off gard and had me totally confused.
At the change of plea hearing, my attorney told me that he would guide me through it and to say exactly what he told me to say to the judge or she may not accept my guilty plea and I would have to go through with the trial.
The judge would ask a question and Mr. Edgett would tell me tell me what to say and I repeated it to the judge.
There was no way I could have answered the judge's questions because I had never seen the videos so I had no idea about what was in them.

This is an obvious structural error and was unlawfully ignored and dismissed by Judge Crone.

The bias/prejudice in this action is unmistakable.

In the change of plea hearing transcripts, on page 13, lines 1. 2. and 3, Miller states that, I got the videos through the use of the internet and used a peer-to-peer file sharing program.

The Compaq computer that they claimed contained the 4 videos is an old computer that I kept around as a loner to anyone that need to borrow it.
I have lent it out over a dozen times over the last couple of years.
I never used it as I have my much newer AZUS computer that I use for my work and my personal use.
Nothing was found on my AZUS computer or any of the other several external hard drives, storage devices, thumb drives, memory cards, and cell phones that was taken.
Just the Compaq computer.
To the best of my knowledge and from what I was told by Mr. Edgett, there was no peer-to-peer software installed on the Compaq computer and no evidence has been shown that it was.
This is and has been an unproven statement by the government and nothing more.
This statement has been fully excepted by Judge Crone as fact, with no questions and no proof whatsoever.
The government stated that the videos were found in a private folder called maxsys.
They also claimed that the videos were viewed by an informant in Pennsylvania who never provided any proof or evidence, not even an affidavit.
For anyone to view any files remotely on another computer whether its on the internet or a network, or anywhere else, it must be stored in a public folder.
You cannot view any files or anything else in a private folder.
According to the government, no files were found in a public folder, therefore no files could have been viewed by any computer connection to it.
This fact may explain why no evidence was ever shown.

Sentencing Hearing

At the sentencing hearing I was sentenced to 150 months (12 1/2 years), not the 5 years Mr. Edgett told me I would get.

I found out after I arrived at FCI Texarkana and received my full case file that Judge Crone had piled on all kinds of extra points and enhancements raising the level from 21 to 27 months, to 150 months, giving me a much longer (5 times longer) sentence.

Judge Crone added every enhancement she could just to add additional years in prison to my sentence.

I show in my Memorandum of Law that many of these enhancements were unjustified and should not have been added, and was added, because of the bias and abuse of discretion of judge Crone.

Throughout my entire case, Judge Crone has acted much more like a prosecutor then an impartial judge.

A judge is supposed to protect my constitutional rights and insure a fair and unbiased hearing. Not assist the prosecutor in the conviction.

My attorney never said anything to me about what points were or anything about enhancements.

I have never been in trouble with the law before in my whole life. I have never had any reason to know anything about the law.

I though that is what attorneys were for.

I believed that judges were supposed protect your constitutional rights and make sure that everything is fair and just.

The base level for my charge is 21-27 months.

To go from a 21-27 months sentence to a 150 month sentence, something is very wrong.

I did discover the reason that Mr. Edgett lied to me and threatened me with 20 years in prison to get me to change my plea to guilty.

As I explained in my § 2255, Mr. Edgett never prepared a defense, Never filed any pretrial motions until just a couple of days before the trial, he filed 2 motions on August 28, 2017, my trial started September 5, 2021, and they were so badly written and one was due by July 28, 2017 and he didn't submit it until August 28, 2017 they were denied.

He never filed for discovery, never interviewed any witnesses, never examined or challenged any of the governments evidence.

The record is silent on any defense actions taken by Mr. Edgett.
This is clearly covered in my §2255 that was denied as meritless.
My attorney could not go into the trial with no defense prepared, so he used me to cover for him.
I also found out in looking at the docket sheet that at least 4 plea offers had been offered by the government during the pretrial.
My attorney never told me anything about any plea offers at all.
I never knew anything about them until I saw them in the docket sheet.
Judge Crone stated in her Order of Dismissal that I had not brought up the plea offer issue in my § 2255, this is completely untrue.
This is detailed in my Memorandum of Law and also shows that this is in my § 2255 and was ignored by the magistrate judge and Judge Crone.
As Judge Crone did not know that this claim was in my § 2255, then this clearly shows that Judge Crone denied my § 2255 without reading it or knowing what is in it.
By the very definition, this is a structural error.
When a judge denies a motion, especially one as important as a § 2255, without reading it or even knowing what is in it, it is a major violation of the First Amendment right to petition the government for redress of grievance, and the Fifth Amendment due process, a major miscarriage of justice, violates the fundamental fairness and destroys the public reputation and confidence in the justice system.

Submitted on 1-11-2022

by: Bruce A. Rutherford

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