No. 23-

IN THE

Supreme Court of the United States

NORMAN SEABROOK,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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March 13, 2024

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QUESTIONS PRESENTED

1. Did the District Court's *sua sponte* denial of Petitioner's habeas petition alleging ineffectiveness of trial counsel filed pursuant to 28 U.S.C. 2255 violate habeas procedural law when it dismissed the proceeding without prior notice (and without a hearing) to the Petitioner, where no opposition was filed, and by failing to review the facts in the light most favorable to Petitioner?

2. Was Petitioner's Sixth Amendment right to effective assistance of counsel to seek the trial judge's recusal at his retrial after the District Judge disclosed a close personal relationship with a former employee of the hedge fund which defrauded the municipal labor union which Petitioner led denied?

3. Did the District Court err in denying Petitioner's Federal Rules of Criminal Procedure 33 motion without a hearing?

PARTIES TO PROCEEDING AND RELATED CASES

The parties to this proceeding are the United States of America and Norman Seabrook.

- *United States v. Seabrook*, No. 16-cr-467, U.S. District Court for the Southern District of New York. Judgment entered Aug. 15, 2018.

- *United States v. Seabrook*, No. 19-436, U.S. Court of Appeals for the Second Circuit. Decision entered Aug. 4, 2020.

- *United States v. Seabrook*, No. 21-cv-8767, U.S. District Court for the Southern District of New York. Order entered Aug. 10, 2022.

- *Seabrook v. United States*, No. 22-841, U.S. Court of Appeals for the Second Circuit. Order denying rehearing *en* banc entered Dec. 7, 2023.

- *Seabrook v. United States*, No. 22-841, U.S. Court of Appeals for the Second Circuit. Summary order entered Nov. 13, 2023.

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OPINIONS BELOW

1. The United States Court of Appeals for the Second Circuit issued a summary order of affirmance of Judge Hellerstein's order denying habeas relief (*Seabrook v. United States*, __ F. Appdx. __, 2023 Westlaw 748996 [2nd Cir. 2023] (A-1a – A-7a)

2. The United States Court of Appeals for the Second Circuit issued an order on December 7, 2022 granting Petitioner a certificate of appealability (not reported)(A-8a – A-10a)

3. The United States District Court, Southern District of New York (Hellerstein, J.) on August 10, 2022 denied Petitioner's habeas petition in a written decision (*Seabrook v. United States*, Westlaw 3227907 [S.D.N.Y. 2022](A-11a – A-19a)

4. The United States Court of Appeals for the Second Circuit issued an order on December 14, 2023 denying Petitioner's petition for a rehearing *en banc* (not reported)(A-20a – A-21a)

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. 1254, this Court has jurisdiction to review the final order of United States Court of Appeals, Second Circuit dated November 13th, 2023, and its order dated December 14th, 2023 denying rehearing *en banc.*

Pursuant to Rule 13.1, this Court has jurisdiction to adjudicate the Petition because the Petition is filed within

90 days of the issuance of the mandate by the United States Court of Appeals, Second Circuit.

PROVISIONS INVOLVED

This Court must construe and apply the following:

A. Constitutional Provisions Involved

The Sixth Amendment to the United States Constitution in pertinent part guarantees a defendant the right to effective assistance of counsel, stating: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

B. Statutory Provisions Involved

28 U.S.C. 2255 states "(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." and

"(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

STATEMENT OF THE CASE

Petitioner NORMAN SEABROOK, the former President of the New York City Corrections Officers Union (C.O.B.A.) was initially charged, along with his co-defendant Murray Huberfeld, under 16-cr-467 (ALC) in an Indictment with charges of conspiracy to violate the "honest services" statute, and a substantive count of "honest services fraud," in connection with an alleged scheme in with Petitioner allegedly illegally "steered" C.O.B.A. to invest some $20 million into hedge fund Platinum Partners.

The case was originally tried before District Judge Andrew Carter, but ended in a mistrial. The case was then reassigned to Senior U.S. District Judge Alvin K. Hellerstein. On May 25, 2018, the co-defendant Murray Huberfeld pleaded guilty, pursuant to a written plea

agreement, charging Huberfeld with a single count of conspiracy to commit wire fraud.

The theory of the Government's case was that Petitioner allegedly conspired to conditionally receive, and subsequently after C.O.B.A. invested its funds in the Platinum Partners hedge fund, to receive a "placement fee" (which the Government characterized as a "kickback")). More specifically, it was conditionally agreed that Petitioner would be compensated only if the hedge fund generated a profit.

Jonah Rechnitz, a cooperating conspirator, allegedly paid Petitioner $60,000 months after C.O.B.A. transferred its funds to the Platinum Partners hedge funds. Due to fraud unrelated (and unforeseeable) to Petitioner, the hedge fund investment was lost.

The Sentencing

Judge Hellerstein sentenced Petitioner to serve a 58 month term of imprisonment, and pay $19 million to C.O.B.A. in restitution.

District Judge Lewis Liman sentenced the co-defendant to serve seven months incarceration, and pay $60,000 in restitution to Platinum Partners.

District Judge Hellerstein sentenced Rechnitz, the cooperator, on December 19th, 2019 to serve five months incarceration, and pay $10,000,000 in restitution, at the rate of $500,000 per annum. Rechnitz appealed his sentence.

The Appeal

Petitioner unsuccessfully appealed his conviction to the United States Court of Appeals for the Second Circuit (see *United States v. Seabrook*, 814 F. Appdx. 661 [2nd Cir. 2020]).

Huberfeld appealed his sentence. On August 4, 2020, a panel of this court vacated the sentence imposed, in an opinion by Circuit Judge Pooler, on the basis that Judge Hellerstein had erroneously applied the wrong sentencing guideline, and that Huberfeld bore no responsibility to C.O.B.A. to pay it restitution (see *United States v. Seabrook*, 968 F. 3d 224 [2nd Cir. 2020]).

The Habeas Litigation

On October 26, 2021, Petitioner moved pursuant to 28 U.S.C. 2255 to vacate his judgment of conviction, and sought a new trial pursuant to Federal Rule of Criminal Procedure Rule 33. More specifically, Petitioner alleged that he had been denied his Sixth Amendment right to effective assistance of counsel at both his retrial, and sentencing.

More specifically, Petitioner *inter alia* alleged that after Judge Hellerstein apprised Petitioner (and his then counsel) of a longtime close personal relationship with a material Government witness, trial counsel did not consult with Petitioner, and secure his knowing consent to waive the aforesaid judicially revealed conflict.

Rather than calendar the case for a status conference, Senior District Judge Hellerstein elected not to seek a

written statement from trial counsel focusing on whether he had valid cognizable "tactical reasons" for proceeding as he did, or invite the Government to file a response. Rather, instead, in an August 10, 2022 decision and order, Judge Hellerstein instead denied the habeas proceeding *sua sponte* without any advance notice, or conducting any hearing (A-11a).

REASONS FOR GRANTING THE WRIT

I THE DISTRICT COURT'S SUA SPONTE DENIAL OF PETITIONER'S 28 U.S.C. 2255 HABEAS PETITION VIOLATED HABEAS LAW AND THE COURT'S PRIOR PROCEDURAL HABEAS DECISIONS. THE HABEAS PETITION WAS NEVER CONTESTED, NOR DISPUTED.

Petitioner timely moved for a writ of habeas corpus pursuant to 28 U.S.C. 2255 on October 26th, 2021. Senior U.S. District Judge Alvin K. Hellerstein, alleging *inter* alia ineffectiveness of trial counsel after never:

(a) assigning the case to a Magistrate-Judge

(b) scheduling a court appearance or hearing

(c) directing Respondent to file a response

(d) directing trial counsel to file a response

(e) alerting Petitioner that the Court would *sua sponte* dismiss the Petition

dismissed the habeas petition.

In the context of a habeas proceeding arising from a contested trial, the decision by the U.S. Court of Appeals for the Second Circuit chose to ignore both these procedural requirements, and this Court's decision in *United States v. Hayman*, 342 U.S. 205 [1952], *Marchibroda v. United States*, 368 U.S. 487, 495-96 [1962], *Schirro v. Landrigan*, 550 U.S. 465 [2007], and Rule 4(b) of the 28 U.S.C. 2255 Rules (see also *Campusano v. United States*, 442 F. 3d 770 [2nd Cir. 2006, per Sotomayor, C.J.]).

This was not a case, as in *Chang v. United States*, 250 F. 3d 79, 85-86 [2nd Cir. 2001], where the District Court directed trial counsel to file an affidavit addressing the Petitioner's claims of ineffective assistance of counsel, and relied upon it to deny a hearing (c.f. *Pham v. United States*, 317 F. 3d 178, 184 [2nd Cir. 2003] vac. 2000 W.L. 375245 [S.D.N.Y][hearing ordered]).

Where, as here, the District Court and the Court of Appeals elect to ignore procedural requirements attendant to the great writ of *habeas corpus*, the constitutional protections which 28 U.S. 2255 enforces is undermined.

Here, the District Court acted surreptitiously *sua sponte* and without prior notice. Transparency and due process were jettisoned to achieve the judicially desired result. Petitioner respectfully urges the Court to revisit 2255 procedures and to grant the writ (see e.g. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 [1986] rev'g 756 F. 2d 181 [D.C.]).

II PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED. A DEFENDANT RIGHTLY CAN DIRECT COUNSEL TO SEEK RECUSAL WHERE THE DISTRICT COURT JUDGE ACKNOWLEDGED A "CLOSE PERSONAL RELATIONSHIP" WITH A WITNESS FROM THE HEDGE FUND WHICH DEFRAUDED PETITIONER'S UNION.

Petitioner contends criminal defendants are not mere "potted courtroom plants." While not legally schooled, they possess the "street smarts" to detect if a Judge is likely to treat him fairly (*Jones v. Barnes*, 463 U.S. 745, 751 [1983, rev'g 665 F. 2d 427 [2nd Cir.][client's right to have non-frivolous appellate issues considered]). Here, the trial judge disclosed the existence of a close and long-term relationship with a government witness who was employed by the hedge fund "Platinum Partners." That witness was both charged, and cooperating with the Government in a criminal trial in the Eastern District of New York (*United States v. Landesman*, 17 F. 4th 298 [2nd Cir. 2021] vac. 2018 W.L. 4736957 [E.D.N.Y.]).

Following these disclosures, defense counsel was judicially directed to consult with Petitioner regarding whether Petitioner consented to the judge remaining on the case. Petitioner's counsel, rather than do so, unilaterally waived any conflict. When a co-conspirator raised the issue on appeal, a panel of the Second Circuit vacated the conviction (see *United States v. Rechnitz*, 75 F 4th 131 [2nd Cir. 2023]). Against this backdrop, the case raises an evolving question: who drives the "legal bus," the client or counsel?

This Court has previously recognized client primacy over a variety of case impacting decisions: (1) *McCoy v. Louisiana*, __ U.S. __, 138 S. Ct. 1500, 1511 [2018], and (2) *Florida v. Nixon*, 543 U.S. 175, 187 [2004]. Petitioner recognizes that counsel is empowered to manage the conduct of trial (*Taylor v. Illinois*, 484 U.S. 400, 418 [1988]). This follows the practical recognition that it is impractical and unrealistic for counsel to meaningfully consult with counsel when evidentiary issues arise during trial. Here, however, the trial had not yet begun, and the issue related to the perceived fairness of the assigned District Judge.

The Second Circuit, in its summary order of affirmance (see *Seabrook v. United States*, __ Fed. Appdx. __ 2023 W.L. 7489961 [2nd Cir. 2023](A-1a), held that a criminal defendant's Sixth Amendment rights need not be appropriately respected by counsel, and, in the Court's view, that the decision to seek recusal rests solely with his counsel.

Here Petitioner's counsel failed to respect the Petitioner's request that, in the light of the District Court's disclosed close personal relationship to a Platinum Partners executive (under indictment in the Eastern District of New York), recusal should be sought. Here, like in *Roe v. Flores-Ortega*, 528 U.S. 470, 483-84 [2000], and *Garza v. Idaho*, 586 U.S. __, 139 S. Ct. 738, 747 [2019], rev'g 162 Idaho 791, 405 P. 3d 576, counsel knowingly, and prejudicially, failed to respect and/or follow Petitioner's voiced approach.

Defense counsel failed to (a) object, or (b) seek a hearing challenging restitution. Judge Hellerstein

directed Petitioner to pay $19 million in restitution, even though the investment of union funds was made in "good faith reliance" upon financial pitches by "Platinum Partners" projecting a positive investment strategy. These claims were, however, fraudulent. Rather, Platinum Partners' audit reports reflecting its poor financial picture were not timely released, nor shared with Petitioner's union.

Since at least this Court's decision in *Paroline v. United States*, 572 U.S. 434, 456 [2014], rev'g 701 F. 3d 749 [5th Cir.], the application of the "Mandatory Victim Restitution Act" (M.V.R.A.)(18 U.S.C. 3663A) requires restitution to crime victims for losses proximately caused by a defendant's criminal conduct (see also *United States v. Calderon*, 944 F. 3d 72, 97 [2nd Cir. 2019]; *United States v. Mekesian*, 170 F. 3d 1260 [9th Cir. 1999]; *United States v. Riley*, 143 F. 3d 1289 [9th Cir. 1998]; *United States v. Rogers*, 714 F. 3d 82, 89 [1st Cir. 2013]; *United States v. Benoit*, 713 F. 3d 1, 20 [10th Cir. 2013]), and only for amounts charged in the conviction (see *Hughey v. United States*, 495 U.S. 411 [1990]).

Here the union lost its funds not because Petitioner allegedly received a $60,000 "placement fee," but rather because Platinum Partners fraudulently induced the union to invest its funds, and later collapsed. The alleged "kickback" was not the proximate cause of the union's loss.

Any discussion concerning the scope of "foreseeability" should reflect the prudent 1928 holding by the New York Court of Appeals in *Palsgraf v. Long Island Railroad*, 248 N.Y. 339 [1928]. The Court, in an opinion by then Chief Judge Cardozo, applied principles of "foreseeability" to

a personal injury claim arising from a dropped package containing explosive substances on the Long Island Railroad's East New York Brooklyn train station.

We submit that, just as in *Palsgraf*, it was not foreseeable that registered securities industry professionals Platinum Partners would fraudulently induce a municipal labor union to invest. To hold Petitioner criminally responsible to pay restitution in the sum of $19 million essentially imposed strict liability for conduct which had no inkling that C.O.B.A. was being lured into a financially tenuous investment.

The issue should warrant full court review.

Petitioner's trial counsel nonetheless neither challenged, or objected to the $19 million restitution award, thereby rendering Petitioner a pauper, and destroying his financial future. There was no failure to timely object to the restitution. Here the $60,000 which the Government cooperator claimed Petitioner received (c.f. *United States v. Gonzalez-Calderon*, 920 F. 3d 83, 86 [1st Cir. 2019][defendant in "bid-rigging" case validly ordered to pay restitution where kickback payments approximated victim's actual loss])…

For too many defense counsel, the primary focus at sentencing is the jail time which the client faced, and the monetary consequences (like restitution) are too often overlooked, or ignored. However, effective assistance of counsel extends not merely to the carceral component, but likewise to restitution. Here, counsel simply failed to insure that the sentencing court followed *Paroline*. It didn't.

Additionally, Petitioner was charged and convicted following trial in connection with his alleged acceptance of an undisclosed "placement fee" which it characterized as a kickback. At sentencing, Senior U.S. District Judge Alvin K. Hellerstein imposed a $19 million restitution payment obligation, holding Petitioner criminally liable for "Platinum Partners" bankruptcy and C.O.B.A.'s loss of its $19 million investment. This sum wildly exceeded the $7 million which the Government sought in its sentencing submission.

A restitution award in a criminal fraud case requires (a) an intent to harm the victim, and (b) foreseeability. Notwithstanding the absence of both prongs, Petitioner was financially crucified with a loss he did not (a) foresee, (b) assist, aid, and abet, or (c) benefit from.

Petitioner contends that, too often, defense counsel understandably focus their attention on the carceral consequences of conviction (i.e. jail time). However, a restitution award, in a criminal case, lasts "forever," and impacts both the defendant and his heirs after he dies. Neglecting contesting a restitution payment obligation effectively destroys the defendant's financial future for all times.

That the panel of the U.S. Court of Appeals for the Second Circuit denied a "Certificate of Appealability" on this issue does not moot (or extinguish) the issue. It was an interlocutory order not then appealable, but, we submit, now reviewable with the Second Circuit's mandate.

In the face of the cooperating witness Andrew Kaplan's testimony that "Platinum Partners" investment

pitches were marinated in fraud, which C.O.B.A. relied upon, scapegoating Petitioner violates the restitution statute, and Petitioner's Sixth Amendment rights. Indeed, the Government's sentencing memorandum acknowledged that Petitioner had no knowledge of the hedge fund's fraud.

III THE COURT VIOLATED RULE 33 PROTOCOLS WHEN IT DENIED RELIEF WITHOUT A COURT HEARING

Rule 33, of the Federal Rules of Criminal Procedure, provides an available and appropriate legal remedy for defendants to access if, and when, materially newly discovered evidence, which, had it been both known and available, may have impacted the jury's determination (*United States v. Ferguson*, 246 F. 3d 129, 134 [2nd Cir. 2001]). In the case at bar, Petitioner Seabrook was convicted based upon the essentially uncorroborated testimony of a Government cooperator, Jonah Rechnitz, an "accomplice witness," as a matter of law (see *United States v. Siddiqi*, 959 F. 2d 1167, 1173-74 [2nd Cir. 1992]).

Rechnitz, by his own admission, was the conduit between "Platinum Partners," the co-defendant Murray Huberfeld, and Petitioner. As with many who sought to attract subscriber investors in a P.P. hedge fund, the financial reward was a paid "placement fee." Here, since Rechnitz was not a "registered securities representative," the trial testimony suggests that he approached his "placement fee" by designating the making of charitable donations made. The money which he alleged he paid to Petitioner, in a Ferragamo bag, was a portion of his placement fee, calculated based upon the pertinent investment returns.

Long after Petitioner 's August 15th, 2018 sentence, some 59 investors filed suit in Supreme Court, New York County (Ostrager, J.) in *Bruce Bullen, et. al. v. Cohn Reznick* (Index # 650144/20), alleging that the outside accounting and auditing firms had enabled P.P. principals to present a materially false and misleading financial picture to its investors (and potential investors). Andrew Kaplan, who testified as a Government cooperating witness, acknowledged the fraudulent sales pitch to C.O.B.A.

Auditing reports were both knowingly "massaged," and, upon information and belief, materially delayed, lest the release of an astringently accurate and timely audit report have (a) "spooked" potential hedge fund subscribers, and (b) sparked withdrawals. It was alleged, in a civil complaint filed in January, 2020, that these actions by the auditing firms enabled, aided and abetted P.P. to achieve its goals, and stanch investor withdrawals.

Petitioner, and the C.O.B.A. Board, lacked the benefit of both timely, and accurate outside auditor reports which, had they been made available, we respectfully submit, would have impacted Petitioner's mental state, and likely have dissuaded him, and the C.O.B.A. Board, from subscribing.

CONCLUSION

The Court should grant the writ of certiorari.

Dated: New York, New York
March 13, 2024

Respectfully submitted:

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APPENDIX

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED NOVEMBER 13, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 22-841

NORMAN SEABROOK,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of November, two thousand twenty-three.

PRESENT: RAYMOND J. LOHIER, JR.,
WILLIAM J. NARDINI,
BETH ROBINSON,
Circuit Judges.

SUMMARY ORDER

Appeal from an order of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, *Judge*).

Appendix A

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

Plaintiff Norman Seabrook appeals from a March 9, 2022 order of the District Court (Hellerstein, *J.*) denying his habeas petition under 28 U.S.C. § 2255 and his motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. We granted a certificate of appealability with respect to one of Seabrook's claims for relief: that he received ineffective assistance of counsel because his attorney failed to consult with him about the trial court's disclosed potential conflicts of interest.[1] We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

Seabrook, the former president of the Correction Officers Benevolent Association ("COBA"), was convicted after a jury trial of honest services wire fraud and conspiracy to commit wire fraud stemming from a kickback scheme involving a hedge fund, Platinum Partners. During a pretrial conference at which Seabrook was present with trial counsel, Judge Hellerstein disclosed that he had three relationships that presented potential conflicts of interest in the case: first, with a prosecution witness who had interned for him almost twenty years earlier; second, with the wife of Seabrook's co-defendant, whose parents Judge Hellerstein knew; and third, with Andrew Kaplan, a defendant in a pending Eastern District

1. Seabrook's appeal of the denial of his motion for a new trial does not require a certificate of appealability.

of New York criminal case and former Platinum Partners executive, with whom Judge Hellerstein and his family had a close friendship. After disclosing these potential conflicts, Judge Hellerstein asked counsel to inform him if they did not want him to preside over the trial. Seabrook's attorney responded, "we're comfortable having you as the trial judge." Appellee's Add. 13.

Seabrook brought a habeas petition, contending that his trial counsel's failure to consult with him before declining to seek Judge Hellerstein's recusal constitutes ineffective assistance of counsel. Seabrook also brought a motion for a new trial based on what he claims is new evidence material to his defense. On appeal, Seabrook challenges the dismissal of his habeas petition on the merits, Judge Hellerstein's failure to hold a hearing or provide Seabrook notice before dismissing the petition, and the denial of his motion for a new trial.

I. Ineffective Assistance of Counsel

"To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that he was prejudiced as a result." *Lee v. United States*, 582 U.S. 357, 363, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017) (quotation marks omitted). Pursuant to this Court's limited certificate of appealability, Seabrook argues that his trial counsel's failure to consult with him before declining to move for Judge Hellerstein's recusal fell below an objective standard of reasonableness because it undermined Seabrook's Sixth Amendment right of autonomy.

We disagree. We have previously described the "nature of counsel's choice not to move for recusal in a timely fashion" as "strategic." *United States v. Bayless*, 201 F.3d 116, 130 (2d Cir. 2000). In general, it is not a decision that implicates a defendant's "fundamental choices about his own defense." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508, 1510-11, 200 L. Ed. 2d 821 (2018); *see United States v. Rosemond*, 958 F.3d 111, 119-21 (2d Cir. 2020). For that reason, we reject Seabrook's argument that counsel's failure to consult with him before declining to seek recusal of the District Court judge violated his Sixth Amendment rights. *Cf. Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004) ("An attorney . . . has a duty to consult with the client regarding important decisions. . . . That obligation, however, does not require counsel to obtain the defendant's consent to every tactical decision.") (quotation marks omitted).

Having concluded that counsel's failure to consult with Seabrook did not impair his Sixth Amendment rights, we need not and do not reach the question of whether Seabrook can show that he was prejudiced as a result of counsel's failure to confer with him before declining to move for Judge Hellerstein's recusal.

II. Failure to Hold a Hearing

Seabrook next argues that the District Court erred in dismissing his habeas petition without holding a hearing or notifying Seabrook. We review the District Court's decision not to grant a hearing for abuse of discretion, *Gonzalez v. United States*, 722 F.3d 118, 131 (2d Cir. 2013), and its decision to dismiss Seabrook's habeas petition

without providing advance notice *de novo, Ethridge v. Bell*, 49 F.4th 674, 682 (2d Cir. 2022).

Section 2255(b) provides that a district court "shall . . . grant a prompt hearing" upon receiving a habeas petition "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). So "'if it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion.'" *Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009) (brackets omitted) (quoting Rule 4(b) of the Rules Governing Section 2255 Proceedings). "[A] district court has the power to dismiss the petition on the merits *without prior notice*" if it is clear "that the petitioner is not entitled to relief." *Ethridge*, 49 F.4th at 682 (quotation marks omitted) (emphasis added); *see also Femia v. United States*, 47 F.3d 519, 524 (2d Cir. 1995) (affirming dismissal without prior notice of a Section 2255 petition where the dismissal was based on the petition's lack of merit), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214.

Here, the material facts relating to trial counsel's decision not to consult with Seabrook before deciding not to seek Judge Hellerstein's recusal are undisputed. Because counsel was not obligated to confer with Seabrook before deciding whether to seek the recusal, for the reasons set forth above, Seabrook is not entitled to relief. The District Court dismissed Seabrook's habeas petition because it plainly lacked merit. We therefore conclude that the District Court did not err in forgoing a hearing

and dismissing Seabrook's habeas petition without prior notice.

III. Motion for a New Trial

Finally, Seabrook challenges the District Court's denial of his motion for a new trial based on newly discovered evidence: a state civil lawsuit brought by Platinum Partners' investors two years after Seabrook's trial, alleging that they were deceived by Platinum Partners and its outside auditors. *See* Fed. R. Crim. P. 33. Upon review of the District Court's denial of Seabrook's Rule 33 motion for a new trial for abuse of discretion, *United States v. James*, 712 F.3d 79, 107 (2d Cir. 2013), we reject Seabrook's challenge.

As an initial matter, Platinum Partners' alleged fraud is not "newly discovered" evidence, as several Platinum Partners executives were indicted for fraud well before Seabrook's trial took place. *See United States v. Landesman*, 17 F.4th 298, 317 (2d Cir. 2021) (noting that the grand jury returned an eight-count indictment in December 2016). And shortly after the indictment was filed, the Securities and Exchange Commission filed a complaint that alleged similar fraudulent schemes as the indictment. Compl., *SEC v. Platinum Mgmt. (NY) LLC*, No. 16-cv-6848 (BMC) (E.D.N.Y. Dec. 19, 2016).

Furthermore, we are not persuaded that the evidence of the lawsuit is material to Seabrook's conviction. The jury convicted Seabrook based on *his* intent to deprive COBA of honest services by taking bribes. Evidence of

Platinum Partners' efforts to conceal its separate and independent fraud, however, does not "directly contradict the government's case" against Seabrook and thus does not "justify the grant of a new trial." *United States v. Jones*, 965 F.3d 149, 164-65 (2d Cir. 2020).[2]

We have considered Seabrook's remaining arguments and conclude that they are without merit. For the foregoing reasons, the order of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

2. Seabrook also contends that the evidence would have a material impact on his sentence because it would show that he did not intend for COBA to lose all $19 million, reducing the amount of restitution imposed. But because this issue was not raised before the District Court, we decline to consider it on appeal. *Green v. Dep't of Educ. of City of N.Y.*, 16 F.4th 1070, 1078 (2d Cir. 2021).

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

22-841

NORMAN SEABROOK,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of December, two thousand twenty-two.

Present:

Denny Chin,
Beth Robinson,
Circuit Judges.*

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* Judge Susan L. Carney, originally assigned to the panel, recused herself from consideration of this matter. The two remaining members of the panel, who are in agreement, have decided this case in accordance with Second Circuit Internal Operating Procedure E(b). *See* 28 U.S.C. § 46(d); *cf. United States v. Desimone*, 140 F.3d 457, 458 (2d Cir. 1998).

Appendix B

Appellant moves for a certificate of appealability ("COA"). Because the district court has already granted a COA on one of the claims in this proceeding, we construe the COA motion as seeking to expand the existing COA.

Upon due consideration, it is hereby ORDERED that the motion is GRANTED on the following issue: whether the district court erred in dismissing Appellant's claim of ineffective assistance of counsel based upon counsel's asserted failure to consult with Appellant about the trial court's disclosed potential conflict. The motion is DENIED as to Appellant's other claims under 28 U.S.C. § 2255 because Appellant has not "made a substantial showing of the denial of a constitutional right" as to those claims. 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In particular, Appellant's claims that counsel was ineffective for failing to move for a judgment of acquittal, and for failing to object to the district court's interjections, the government's introduction of evidence concerning its cooperating witness's other instances of bribery, and the admission of evidence concerning the cash found at Appellant's home fail because the motions would not likely have been successful. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). His claims that he was denied *Brady/Giglio* material or that counsel was ineffective in failing to pursue *Brady/Giglio* material fail because he has failed to show a reasonable probability that the materials would have led to a different result. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). His challenge to the restitution order is not cognizable under § 2255 because the restitution obligation and payment schedule does not so constrain his liberty as to amount to custody. *United States v. Rutigliano*, 887 F.3d 98, 107 (2d Cir. 2018).

It is further ORDERED that the motion is DENIED as unnecessary as to Appellant's appeal of the denial of his Federal Rule of Criminal Procedure 33 motion, which does not require a COA. That appeal will proceed in the ordinary course in conjunction with the appeal concerning the § 2255 issue on which a COA has already been granted.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 10, 2022

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

16 Cr. 467 (AKH)
21 Civ. 8767 (AKH)

UNITED STATES OF AMERICA,

v.

NORMAN SEABROOK,

Defendant.

August 10, 2022, Decided;
August 10, 2022, Filed

ORDER DENYING PETITION UNDER 28 U.S.C. 2255 BUT SUGGESTING PROCEEDINGS FOR COMPASSIONATE SENTENCING REDUCTION

ALVIN K. HELLERSTEIN, U.S.D.J.:

In a second try after a split jury, Petitioner Norman Seabrook was convicted of one count of honest services wire fraud (18 U.S.C. § 1349) and one count of conspiracy to commit such crime (18 U.S.C. §§ 1343, 1346). I sentenced Seabrook to 58 months custody and $19 million restitution,

payable at 10% of his net income. The Second Circuit affirmed. *See United States v. Seabrook*, 814 Fed.Appx. 661, 662 (2d Cir. 2020). Petitioner then petitioned to vacate his convictions. I denied the petition, except for one ground about which, after further briefing, I now write. Order Denying Habeas Petition in Part, ECF No. 436. For the reasons that follow, the balance of Seabrook's habeas petition is denied.

BACKGROUND[1]

Seabrook, the former President of the Correction Officers Benevolent Association ("COBA"), was found by a jury to have accepted a bribe in 2014 to cause COBA to invest $20 million of pension funds, substantially the entirety of the pension fund, in a hedge fund, Platinum Partners LP. The bribe promised him compensation, estimated to be $100,000 the year of the investment and equivalent sums to follow, based on income the fund expected to receive from the investment. Murray Huberfeld, a principal of Platinum Partners, promised to pay the bribe. Jona Rechnitz, a friend of politicians and of both Huberfeld and Seabrook, arranged the bribe. The bribe, however, was not paid in full. Claiming disappointing 2014 results, Huberfeld paid $60,000 through a cash advance facilitated by Rechnitz. Huberfeld then had Platinum Partners repay Rechnitz, disguised

1. I assume familiarity with the factual background of this case and the evidence adduced at trial, which my previous rulings, including my order dated March 9, 2022, and the Court of Appeals have addressed extensively. The following discusses only the facts necessary to resolve the pending motion.

on Platinum's books as a repayment for the procurement of court-side tickets for the New York Knicks. COBA ultimately lost $19 million of its $20 million investment.

Seabrook and Huberfeld were tried together, but the jury could not agree on a verdict. After re-assignment to me and before re-trial, the government extended a favorable plea deal to Huberfeld, allowing him to plead guilty, not to defrauding COBA of $19 million, but of defrauding his own company, Platinum Partners, of $60,000—the amount listed on Platinum's books as a payment for Knicks tickets. I accepted the plea after an extended allocation, during which Huberfeld admitted that the purpose of the fraud was to bribe Seabrook to gain a $20 million investment from COBA. ECF No. 203, Huberfeld Plea Tr., at 27:21-28:7. I commented that COBA, not Platinum Partners, was the real intended victim, and advised Huberfeld, before accepting his plea, that his sentence might reflect the reality and consequence of his bribe. *See id.* at 9:15-10:22.

This left Seabrook as the only defendant in the second trial. Jona Rechnitz, the government's main witness, testified again pursuant to a cooperation agreement, and this time, without Huberfeld, the jury accepted his testimony. I sentenced Seabrook on February 8, 2019 to a Guidelines sentence of 58 months' imprisonment,[2] three years supervised release, and restitution to COBA of $19

2. The Guidelines showed a net offense level of 24, with no criminal history points, equating to 51 to 63 months' custody.

million, at a rate of 10% of net income.[3] *See* ECF Nos. 298, 302. Seabrook has been in custody since March 30, 2021. I explained my sentence as reflecting an approximate equivalence between the bribe giver, Huberfeld, and the bribe taker, Seabrook, before Guidelines adjustment of five levels — three for Huberfeld's acceptance of responsibility by a timely plea, and two because of Seabrook's violation of his fiduciary duty to COBA. On February 12, 2019, I sentenced Huberfeld to 30 months to reflect that five-level differential, changing the Guidelines range, from 51-63 months to 30-37 months. *See* Huberfeld Sentencing Tr., ECF No. 300, at 42:15-43:23; 59:10-21.[4]

Huberfeld's successful appeal changed the calculus. The Second Circuit held that Huberfeld's plea determined who was the victim and the amount of the loss, not COBA and a $19 million loss, but Platinum Partners and a $60,000 loss. *See United States v. Seabrook*, 968 F.3d 224 (2d Cir. 2020). In the re-sentencing ordered by the Court of Appeals, Huberfeld was sentenced to 13 months custody and $60,000 restitution to Platinum Partners.[5] *See* ECF Nos. 402, 420.

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3. Huberfeld, through a private agreement made before he was sentenced, paid COBA $7 million of its loss, in exchange for COBA's release of further claims against him. *See* Huberfeld Sentencing Tr., ECF No. 300, at 6:17-7:6. Thus, $12 million remained as COBA's loss.

4. I sentenced Rechnitz, because of extensive cooperation with regard to a number of defendants, to a much lower sentence.

5. I recused myself from the re-sentencing proceedings. The case was re-assigned to Hon. Lewis J. Liman for sentencing. *See* Sentence of Hon. Lewis J. Liman, June 22, 2021, ECF Nos. 402, 420.

Appendix C

DISCUSSION

There are two issues. The first, raised in Seabrook's briefs, is whether the disproportionate sentencing differential between Seabrook and Huberfeld constitutes error warranting section 2255 relief. The second, which the parties have not briefed, is whether the differential is basis for Compassionate Relief under 18 U.S.C. § 3582(c)(1)(a).

I. The Difference in Sentences Does Not Entitle Seabrook to Habeas Relief

In order to obtain collateral relief under Section 2255, a defendant must demonstrate "a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Cuoco v. United States*, 208 F.3d 27, 30 (2d Cir. 2000). This is a "significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). For a sentencing error to be cognizable on collateral review, it must be "of the fundamental character that renders the entire proceeding irregular and invalid." *United States v. Hoskins*, 905 F.3d 97, 103 (2d Cir. 2018) (quoting *United States v. Addonizio*, 442 U.S. 178, 186, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979)). "A 'later development' that 'did not affect the lawfulness of the judgment itself then or now,' is not enough to vacate the sentence imposed." *Id.* (quoting *Addonizio*, 442 U.S. at 186-88.

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Petitioner argues that he received a sentence disproportionately harsher than the sentences his co-conspirators received and suggests that he suffered a penalty for exercising his right to a trial. The Government argues that this cannot be because Seabrook was sentenced before Huberfeld and Rechnitz. However, I sentenced Seabrook with Huberfeld's potential sentence in mind, and because of the Second Circuit's reversal and remand, followed by Huberfeld's re-sentence, Seabrook's sentence is disproportionate.

Of more importance, disproportionality in sentencing in the Second Circuit is measured nationwide, and not in relation to sentences of co-defendants. *United States v. Frias*, 521 F.3d 229, 236 (2d Cir. 2008) ("section 3553(a)(6) requires a district court to consider nationwide sentence disparities, but does not require a district court to consider disparities between co-defendants."); *United States v. Stevenson*, 834 F.3d 80 (2d Cir. 2016) (rejecting argument based on disproportionate sentences between co-defendants guilty of receiving and giving bribes constituting honest services fraud). Thus, "a defendant has no constitutional or otherwise fundamental interest in whether a sentence reflects his or her relative culpability with respect to his or her codefendants." *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995). And Seabrook cannot complain that his higher sentence after trial was a punishment for not pleading guilty. *See Stevenson*, 834 F.3d at 84.

Seabrook's petition for section 2255 relief is denied.

Appendix C

II. Compassionate Release

The sentences of Huberfeld and Seabrook, as they stand now, are unjustly disproportionate. However, traditionally, a district court cannot modify a sentence once announced. *See United States v. Brooker*, 976 F.3d 228, 237-38 (2d Cir. 2020); *United States v. Goal*, 433 F.Supp.3d 613, 614 (S.D.N.Y. 2020). The First Step Act, providing for compassionate release from custody, or reductions of sentences, is an exception. It provides that

> the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> > [1] extraordinary and compelling reasons warrant such a reduction; . . .
> >
> > [2] and that such a reduction is

> consistent with applicable policy statements issued by the Sentencing Commission[.]

18 U.S.C. § 3582(c)(1)(A); *see also Concepcion v. United States*, 142 S.Ct. 2389, 2404, 213 L. Ed. 2d 731 (2022) (holding that district courts have wide discretion to consider intervening changes of law or fact in reducing sentences under the First Step Act). However, there are pre-conditions: the defendant must first make his request to the warden of his facility and, if that request is not satisfied within 30 days, file a motion with the district court. *See* 18 U.S.C. § 3582(c)(1)(A).

My discussion of Seabrook's disproportionately high sentence would constitute adequate basis for a compassionate reduction of his sentence. But section 3582, and good sense, require the motion first to be made to the Bureau of Prisons, before a motion is filed with the district court. The procedure allows the Bureau of Prisons to consider the prison behavior of a defendant and to exercise discretion as to whether to support the prisoner's request. If a motion to the district court is necessary, the Government and the defendant both have the opportunity to express their respective positions. At this point, I am not able to grant compassionate relief under 19 U.S.C. § 3582(e).

CONCLUSION

Seabrook's motion for release pursuant to 28 U.S.C. § 2255 is denied. Seabrook may consider initiating a

procedure for compassionate release pursuant to 18 U.S.C. § 3582(c). But this order is now final, and an appeal, if desired, is now appropriate. I grant a Certificate of Appealability. Seabrook pleads a just basis for relief, and thus satisfies the requirement that he make a "substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). The Clerk shall terminate ECF No. 424 in 16 Cr. 467 and close 21 Civ. 8767.

SO ORDERED.

Dated: August 10, 2022
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 14, 2023

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No: 22-841

NORMAN SEABROOK,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of December, two thousand twenty-three.

ORDER

Appellant Norman Seabrook, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

Appendix D

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe