23-6311

ORIGINAL

TRULINCS 20962075 - CLUM, DAVID JR - Unit: MLL-C-C

FROM: 20962075
TO:
SUBJECT: S CT COVER PAGE
DATE: 12/10/2023 01:59:26 PM

* No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVIE CLUM, JR., PETITIONER
vs.
UNITED STATES OF AMERICA

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

PETITION FOR WRIT OF CERTIORARI

David Clum, Jr., Petitioner

FCI Memphis- CAMP
David Clum, Jr. 20962-075
PO Box 34550
Memphis TN 38184

TRULINCS 20962075 - CLUM, DAVID JR - Unit: MLL-C-C

FROM: 20962075
TO:
SUBJECT: S CT QUESTION PRESENTED
DATE: 12/10/2023 01:59:07 PM

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QUESTION PRESENTED

SHOULD THIS COURT GRANT THE WRIT WHERE IT IS SHOWN FROM THE RECORD THAT THE ELEVENTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY THE LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO CORRECT A MANIFEST MISCARIAGE OF JUSTICE?

FROM: 20962075
TO:
SUBJECT: S CT LIST OF PARTIES
DATE: 12/10/2023 01:58:24 PM

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LIST OF PARTIES

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

FROM: 20962075
TO:
SUBJECT: S CT TABLE OF CONTENTS
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N. Photograph - Hannah, Rachel, and Sarah Clum - 2014

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TRULINCS 20962075 - CLUM, DAVID JR - Unit: MLL-C-C

FROM: 20962075
TO:
SUBJECT: S CT TABLE OF AUTHORITIES CITED
DATE: 12/10/2023 08:17:45 AM

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TABLE OF AUTHORITIES CITED

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STATUTES AND RULES

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OTHER

TRULINCS 20962075 - CLUM, DAVID JR - Unit: MLL-C-C

FROM: 20962075
TO:
SUBJECT: S CT PETITION FOR WRIT OF CERTIORARI
DATE: 12/10/2023 01:58:56 PM

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeals Case No. 22-11976 appears at Appendix A to the petition and is unpublished - 09/05/2023.

The opinion of the United States District Court Case No. 22-60954 appears at Appendix B to the petition and is reported at 2022 U.S. Dist. LEXIS 244921, Clum v United States - 05/25/2022.

JURISDICTION

The date on which the United States Court of Appeals decided my case was 09/05/2023

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 11/20/2023, and a copy of the order denying Rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED appear at APPENDIX O, No.'s 1-12, (see INDEX TO APPENDICES at TABLE OF CONTENTS) except for 18 USC 3582(c)(1)(b)(6), which is not available in the prison law library and is written out at pages 14-15 herein.

FROM: 20962075
TO:
SUBJECT: S CT STATEMENT OF THE CASE AND FACTS #1
DATE: 12/10/2023 01:26:53 PM

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STATEMENT OF THE CASE AND FACTS

A. Course Of Proceedings And Disposition In The Lower Tribunals

On November 10, 2011, a grand jury in the Southern District of Florida ("SDFL") returned an indictment against Laura Barel ("Barel"), Penny Jones ("Jones"), Michael D. Beiter, Jr. ("Beiter"), David Clum, Jr. ("Clum"), Dale Peters ("Peters"), Christopher Marrero ("Marrero"), and John Michael Smith, Jr. ("Smith"). In COUNT 1, Respondent United States of America ("Government") alleged a conspiracy to defraud the United States in violation of 18 USC 286. COUNTS 2-42 alleged substantive crimes in violation of 18 USC 287 and 2. See APP O-1,2,3. William P. Dimitrouleas ("Judge") was assigned to the case. On May 17, 2012, a superseding indictment was returned. Barel and Smith pled guilty to a lesser charge, and Jones took an 'open plea' the first day of trial. Trial began October 1, 2012 and ended October 29, 2012, the jury finding Beiter, Clum and Marrero guilty of all counts and Peters guilty on most of them. The Judge sentenced Barel to time-served (eighteen (18) months in return for her testimony as a Government witness), Smith to thirty-six (36) months, and Jones to 144 months. The Judge sentenced Marrero to 180 months, Beiter to 300 months, Clum to 293 months, and Peters to 144 months. See US v David Clum, Jr., 11-60273, 11th Cir. 2011.

*****

POST TRIAL - CJA COUNSEL

11th Cir. - US v David Clum, Jr., No. 13-10602, Direct Appeal, 607 Fed. Appx. 922 (2015) unpublished - den. 04/13/2015 reh. den. 07/15/2015

S. Ct. - David Clum, Jr. v US, 136 S. Ct. 557, cert. den. 11/30/2015 - reh den. 02/29/2016

*****

POST TRIAL - PRO SE

EDAR - Clum v Rivera, 2017 US Dist. Lexis 133937, No. 16-00149, 11/14/2016 - 2241 Habeas recharacterized as 2255 sent to SDFL 08/22/2017

SDFL - David Clum, Jr., v Rivera, No. 17-61687, 08/23/2017 - den. 12/04/2017

S. Ct. - In re David Clum, Jr., 2241 Habeas, No. 17-6513, 138 S. Ct. 491, 10/27/2017 - den. 11/27/2017

EDAR - David Clum, Jr. v Gene Beasley, 2018 US Dist. Lexis 122366, 2241 Habeas, No. 18-00028, 02/29/2018 - den. 07/23/2018

8th Cir. - David Clum, Jr. v Gene Beasley, 2018 US App Lexis 36931, No. 18-2706, 08/09/2018, IFP granted, No briefing allowed - den. 11/01/2018 per Local Rule 47A - Reh. den. 01/08/2019

S. Ct. - David Clum, Jr. v Beasley, 139 S. Ct. 2651, No. 18-8860 - cert. den. 05/28/2019

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INSTANT CASE - PRO SE -- (NOTE: The following is an abbreviated list of the confusing docketing that took place between the 11th Circuit and the SDFL. Please see 11th docket - 22-11976)

05/09/2022 - 11th - Clum files PRO SE MOTION FOR COA and OMNIBUS MOTION TO VACATE ("OMNIBUS"), 11th Clerk sends to SDFL referencing original criminal case No. 11-cr-60273, 05/16/2022

05/19/2022 - SDFL - dockets OMNIBUS in 17-61687, the five (5) year old 2255 case recharacterized from the 2241 in EDAR ,16-00149

05/19/2022 - SDFL - dockets OMNIBUS in new case No. 22-60954

05/19/2022 - SDFL - denies COA, 17-61687

05/25/2022 - SDFL - FINAL ORDER AND JUDGMENT DISMISSING OMNIBUS MOTION TO VACATE, 22-60954, 31 pps. ORDER DENYING COA

05/26/2022 - SDFL - FINAL ORDER AND JUDGMENT DISMISSING OMNIBUS MOTION TO VACATE, 17-61687, 31 pps. ORDER DENYING COA

06/10/2022 - SDFL - dockets NOTICE OF APPEAL filed in 22-60954

06/14/2022 - 11th - Habeas Appeal docketed. New Case No. 22-11976, DE 1

06/17/2022 - 11th - PREMATURE APPELLANT's BRIEF docketed, DE 7

07/07/2022 - 11th - dockets SDFL ORDER GRANTING IFP status, DE 8

07/07/2022 - 11th - dockets MOTION FOR COA construed from NOTICE OF APPEAL, DE 10

09/29/2022 - 11th - dockets ORDER, MOTION FOR COA construed from NOTICE OF APPEAL, denied as UNNECESSARY, may proceed to briefing, DE 16

10/18/2022 - 11th - dockets MOTION FOR APPOINTMENT OF COUNSEL. Denied 02/16/2023. New Briefing Schedule set, DE 19

09/22/2023 - 11th - dockets APELLANT'S BRIEF AND APPENDIX, DE 25, 26

04/21-2023 - 11th - dockets AUSA's MOTION FOR SUMMARY AFFIRMATION. APPELLANT'S Response filed 05/08/2023, DE 28

09/05/2023 - 11th - dockets NON-PUBLISHED JUDGMENT, Summary Affirmation GRANTED, DE 31

11/20/2023 - 11th - den. PETITION FOR REHEARING/HEARING EN BANC, DE 38-2

(NOTE: Three (3) Motions for Appointment of Counsel were made. Denied.)

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B. Statement Of The Facts

In January 2009, Jones, Clum, Beiter, and Peters formed a Florida LLC, PMDD SERVICES, LLC ("PMDD"), to provide tax preparation services to people who wanted to file their returns using IRS Form 1099-OID. Clum met Peters, a Stanford grad and IT Specialist, at a 2008 New York seminar. Clum met Beiter in Florida at a meeting in Beiter's home December 2008, and had known him through church affiliated contacts. Clum had previously invested money with Beiter in failed ventures. When PMDD was formed, Beiter was in the process of repaying Clum for his $400,000 in losses. Jones, an ex-IRS Enrolled Agent and twenty-five (25) year veteran tax preparer, called-in to a radio program Beiter hosted and Clum only spoke to her by phone and through emails. The parties lived in four (4) different states.

IRS Form 1099-OID is "an income reporting document" similar to W-2 for reporting "original issue discount" on debt instruments. See 26 USC 1273 at APP O-4: "The term "original issue discount" means the excess (if any) of the stated redemption price at maturity, over the issue price." - See 26 USC 1275 at APP O-5: "In general, except as provided in subparagraph (B), the term "debt instrument" means a bond, debenture, note, or certificate or other evidence of indebtedness."

However, the Government's chief witness at two (2) grand juries, IRS Agent Michelle Lavoro, falsely testified on June 2, 2011, that OID is, "just a different form of a 1099 form and it just has to do with mostly from zero coupon bonds." [sic], and again on November 10, 2011, that OID, "just relates to bonds." See APP D-1 and D-2. This perjury was suborned by the trial prosecutors in attendance and was never corrected by them. In fact, this perjury was brought pretrial to the Judge's attention. He refused to hold a hearing even after a Motion To Dismiss was filed on the issue.

Lavoro also falsely testified that a company owned solely by Jones, FOREVER GRACE, LLC ("FOREVER GRACE") was a "successor entity" to PMDD. However, FOREVER GRACE was formed by Jones, Beiter and Barel after PMDD ceased formal operations April 9, 2009. Clum was unaware of its formation, yet he was falsely charged in the indictment and prejudicially joined to Jones. Lavoro's false testimony was suborned by the prosecutors and never corrected. See Indictment at APP E, pps 1-2, Item 3.

Clum and the others, including all of PMDD's clients who testified at trial, believed certain funds could be lawfully recovered ("OID Theory") by filing returns using IRS Form 1099-OID. In fact, not one single Government witness testified, or produced a single piece of material evidence, that Clum "conspired" with anyone to defraud the Government. There was no mens rea adduced at trial. Absolutely none.

Thirty (30) year employee and IRS Frivolous Filing Department Chief, Shauna Henline ("Henline"), the Government's chief trial witness, testified the IRS published public "Notice of Frivolous Positions", but OID Theory did not appear in that

publication until "mid-year 2010", one (1) year AFTER PMDD ceased operations See TRDE 759, pps 25-26. Moreover, she testified that "frivolous filings are a civil issue, subject only to a monetary penalty". It is beyond dispute that the entire time Clum was involved with PMDD, the IRS never gave public notice that those who subscribed to OID Theory and filed OID returns were subject to criminal prosecution rather than civil penalties such as fines. In fact, the record contains the transcript of a June 16, 2009 recorded call between Jones and Henline in which Henline states the only penalty for Jones' OID filings fell under 26 USC 6701, a civil fine. See APP O-6. At trial, she testified likewise, and also that there was no "code' nor any "law" that criminalized Clum's actions. See APP F.

Clum and his wife filed personal OID returns before PMDD was formed, and Clum volunteered to be PMDD's first filer because he believed OID Theory to be sound. The Clum's amended those returns, which were accepted by the IRS as the "lawful returns of record", one (1) year BEFORE any grand jury proceeding was held. Yet, the Indictment charged Clum in two (2) counts for those returns claiming they were fraudulent.

After Clum's arrest on November 16, 2011, he was granted a $25K signature bond in Nashville,TN by Magistrate Joe Brown, but was not released because the SDFL Judge transferred him to the SDFL for a "de novo" bond hearing on December 22, 2011; denied December 24, 2011. Clum appealed to the Eleventh Circuit in January 2012. In May 2012, oral argument was scheduled for mid-October 2012, after trial was set to begin. It was denied October 15, 2012, two (2) weeks into trial without oral argument. It took ten (10) months for the Eleventh Circuit to decide a pre-trial bond appeal. Thirty (30) year veteran Miami defense lawyer, Michael Smith, told Clum he had never seen any such thing in his career. Counsel did nothing in those ten (10) months to determine, or to object to, the delay.

Pre-trial, the Government claimed it had three (3) terabytes (3TBs) of evidence. Later, it was supposedly reduced 98% somehow to 56.72 gigabytes (56.72 GBs). Motions were filed for Full Access To Discovery and a hearing was held two (2) months before trial where the defendants' expert witness testified it would take Clum six-plus (6+) years, 24/7, to read all that information. Motion for Full Access was denied. A "discovery attorney" was appointed by the Judge. He was supposed to provide a searchable database of the 56.72 GBs, but he was a salesman hawking software in beta-test that failed to produce any meaningful results. Clum never met this attorney. The Judge told the defendants "It seems to me you all have access to the three terabytes if you want to WASTE YOUR TIME looking through it.", and "If Clum wants to read every word of every IRRELEVANT EMAIL in this case, the Court will not wait 6.71 years to try this case to facilitate Clum's desires." See TRDE 441, p 18. AUSA Jed Silversmith ("Silversmith"), confessed "[e]ven our litigation support people [don't] have this software". See TRDE 441, p 12. Yet, the Government claimed it had not seen anything that would be BRADY, infra, material. A real BRADY review of only 50 GBs would take twenty (20) working man years.

Multiple motions were made to Dismiss for Denial of Due Process. All were denied. At the ready hearing three (3) days before trial, CJA counsel filed a Writ of Mandamus to the Eleventh Circuit to stop the trial because of his and Clum's inability to review even a miniscule portion of the discovery. Clum told the Judge that he was not ready for trial because he had been denied access to discovery and the Judge told him, "You will get to see the evidence, I guess, as it unfolds and you're confronted with it at trial, Mr. Clum.". See TRDE 830, pps 14-18. Strangely, CJA Counsel said he was ready to proceed to trial after handing the Judge his copy of the Mandamus in which he admits his ineffectiveness due to his inability to review the discovery. CJA Counsel also admitted his ineffectiveness in TRDE 215, one (1) of three (3) Motions to Dismiss for Due Process Violation. The Eleventh Circuit denied the Mandamus.

During trial, several Motions for Mistrial were made and denied. All Rule 29 Motions were denied. See APP O-7.

FROM: 20962075
TO:
SUBJECT: S CT STATEMENT OF THE CASE AND FACTS # 2
DATE: 12/10/2023 12:48:38 PM

* At trial, 10/09/2012, TRDE 756, p 1055, when the Judge was asked by trial Counsel to speak to the jury about their sleeping. he said, "And just one more thing, you know, sometimes after lunch in the afternoon, it's kind of tough. It's oaky to rest your eyes, but don't rest them for too long, okay?" See APP G-1, 2. In essence, the judge gave the jury permission to sleep, and they did. He never admonished them to not sleep. The Judge later responded he was just joking. See APP B, Judge's ORDER, 22-60954/17-61687, p 8, Item 16G.

See also TRDE 775, 10/18/2012, p 2452, nine (9) days later, Attorney Clark Mervis, Beiter's CJA Counsel, to the Judge:

MR. MERVIS: I'm informed, really, that some jurors really do appear to be napping in the afternoon periodically. I know the court has made an admonition once. Maybe another one is necessary. But at some point, I have seen several sort of slumping bodies over there.
THE COURT: All right. Well, I'll try to keep an eye on them.

The Judge didn't. They continued to sleep. See APP G-2 for the dates of those sleeping after this second (2nd) request.

During the first half of the Government's closing arguments,TRDE 747, p 79, AUSA Silversmith turned to the jury, pointed at Clum, and called him "anti-American". A Motion for Mistrial, required by this Court's decisions and Eleventh Circuit's own precedents against poisoning the jury, was denied. The next day in final closing, TRDE 748, p 25, Silversmith, then emboldened by the Judge's sanctioning of his previous misconduct, called Clum a "non-American". No motion for mistrial was made. It can be proven from the record that Silversmith repeatedly vilified Clum without objection from Counsel and told one-hundred (100) outright lies in his closing remarks. Clum has them marked in the transcripts.

There are many more instances of the prosecutor's and Judge's biases and denials of Clum's Fifth, Sixth and Fourteenth Amendment Constitutionally secured rights, pre-trial. during trial, and post-trial, which are elucidated from the record below in Clum's various pleadings over the years, including those with this Court. See APP O-8,9,10. However, by now it should be obvious to the reader that the SDFL Judge denied Clum a fair trial and due process of law through his erroneous decisions and the erroneous shielding of the Government's misconduct. Please see Clum v Rivera, 2017 US Dist Lexis 133937, (8th Cir. 2017) - Case No. 16-00149, EDAR, 2241 Habeas Petition, 11/16/2016, DE 1.

One of the stipulations that Clum made to his PMDD partners for his involvement in the business was that PMDD MUST have a licensed Certified Public Accountant advising them on the operations of the company. Beiter introduced Rick Abdallah ("Abdallah") to the group as being a CPA, a Marine Corps Reserve General, and the son of a prominent judge.

Clum did not vet Abdallah other than to review his impressive website and to speak with him on the phone. Abdallah claimed to have hired six (6) new employees to assist Jones in the preparation of the OID returns and Beiter reassured the other PMDD members that he had. Reliance on a CPA is a complete defense. And Clum tried to testify about PMDD having a

CPA working with the company, but Counsel did not allow Clum to develop that defense. In fact, Clum tried to get CJA Counsel to bring Abdallah in as a witness for the defense and Counsel refused to do so. Clum did finally demand that Counsel ask Barel about Abdallah and she testified that he was a CPA who Beiter presented. See APP H-1, 2, 3. No one else testified to anything about Abdallah at trial other than Barel. Because of the failure of counsel to develop Clum's complete defense, the jury was not given a Substantive Jury Instruction that they MUST acquit, but rather they were given a simple good-faith instruction that they MAY acquit.

Because of the unfair treatment Clum received in the SDFL and in the Eleventh Circuit's handling of his pre-trial bond appeal, the denial of his Mandamus, and the unpublished denial of his Direct Appeal (which ex-Federal Public Defender Richard Klugh called "an abomination"), Clum felt it would be an exercise in futility to file a 28 USC 2255 in the SDFL, and he chose rather to file a 28 USC 2241 Habeas Corpus in the EDAR where he was imprisoned. See O-11,12. Again, See EDAR 2241 Habeas Petition, Clum v Rivera, supra - 16-00149-KGB, 11/14/2016. The EDAR 2241 was recharacterized as a 28 USC 2255 Motion To Vacate and returned to the SDFL to become Clum v Rivera, SDFL No. 17-61687, (2017), DE 22.

On October 24, 2017, part way through the proceedings in 17-61687, Clum received an affidavit from private detective Gary W. Hoffman ("Hoffman"). Hoffman declares and shows with exhibits Abdallah was never a CPA, a Marine, nor the son of a prominent judge. Abdallah was a complete fraud and had been sued in the same Federal district Clum was tried in. Abdallah and the IRS were jointly sued for related frauds and at least one judgment was returned in the plaintiff's favor. That plaintiff was the victim of other like and kind frauds of Abdallah and his associates, one of whom was Beiter, Clum's business partner in PMDD. Abdallah was actually being referred by the IRS to "assist them" in dealing with "complex" tax issues. See Hoffman's affidavit, APP I, with relevant pages from two (2) of the cases. One case was in the SDFL and both took place before Clum was indicted, therefore, the Government cannot claim they had no knowledge Abdallah was not a CPA when their witness, Barel, testified he was. The Government did not correct that false material testimony and Clum was prejudiced by their failure to reveal Abdallah's fraud to Clum, or Counsel. Being denied full access to discovery, Clum had no opportunity to discover that information, nor was he inclined to seek it. At trial, Clum was of the belief that PMDD had been advised by a CPA. Only the Government knew the truth of the fraud and they withheld it from Clum and Counsel.

When Clum tried to Amend his 2255 in the SDFL, 17-61687, to include the newly discovered evidence about Abdallah, the SDFL Judge denied him that right. See SDFL 17-61687, DE 38, et al.

Clum had no part in the formation, operations or monies of FOREVER GRACE. Yet, he was charged, convicted and sentenced as if he were. Clum learned about FOREVER GRACE after he was indicted. Jones was not present at trial and she did not testify, even though many of her emails were read at trial as is if she were there testifying. After Clum's conviction

and before sentencing, he contacted Jones seeking an affidavit declaring he had no part in Jones' company. At sentencing, the Government asked the Judge to enhance for obstruction of justice because of that email, but the Judge declined. Clum has contacted Jones many times in the past several years seeking such an affidavit and December 28, 2021, Jones had a crises of conscience and executed an affidavit exonerating Clum from the indictment's charge at COUNT 1. See APP J-1.

In October 2015, Counsel motioned for a new trial based upon the affidavit of codefendant Beiter. The Motion was denied. However, that affidavit is prima facie evidence that FOREVER GRACE was not a "successor entity" to PMDD and that Clum had no part in its operations, which corroborates Jones' affidavit which came many years later. See APP J-2.

There was no forensic accounting done on any of the tax returns the Government presented in Counts 2-42. In fact, there was no forensic accounting done on ANY of the numbers the Government presented at trial and at sentencing, even though Clum and his codefendants demanded a forensic accounting be done. All of PMDD's clients used their own personal information, i.e., social security number, bank statements, loan documents, address, telephone number, etc. No one was trying to hide anything from anyone. Everyone involved believed that what they were doing was an "in-the-box" IRS procedure. There was no "conspiracy to defraud the Government".

When the Government claimed that there was a "loss" of between $100 - 200 million dollars, they were pulling numbers out of thin air. The only accounting they provided was an "Accounts Receivable Statement", not a "Loss Statement" according to Generally Accepted Accounting Principles (GAAP). The failure of Counsel to provide a forensic accounting of all of the Government's numbers clearly prejudiced Clum.

When Clum was sentenced, the Judge enhanced the Basic Offense Level ("BOL") by 24 levels. The Judge did that by "literally picking a number out of thin air" to use as an "intended loss" amount. See Clum's Direct Appeal Brief, US v Clum, 607 Fed Appx 922 (11th Cir. 2013) - Case No. 13-10602 at pps 62-63. See APP K-1. The Judge was speculating about an intended loss amount because the Government provided no evidence at trial or at sentencing to support their numbers, which were objected to in the Pre-Sentence Report ("PSR"), and at the sentencing hearing where the Judge said, "I don't think it's fair to say that they were going to expect to receive all 160 million. I think half of that figure is a reasonable amount to believe that they were expecting to get. So, I'm gonna score the loss at $80 million...". See APP K-2. The record is unequivocal that there was NO loss to the Government. None. Intended or otherwise. Clum showed this to be true in US V CLUM, 136 S. Ct. 557, (2015), Certiorari Petition for Rehearing, No. 15-6511, pps 13-14. See APP K-3.

Due to the unfair treatment in SDFL 17-61687, Clum did not to appeal to the 11th Circuit. Instead, he pursued another 2241 Habeas petition in the EDAR. See David Clum, Jr. v Gene Beasley, 2018 US Dist Lexis 122366, No. 18-00028, - denied 07/23/2018. Clum appealed to the 8th Circuit which affirmed without a briefing. The S. Ct. denied certiorari 05/28/2019.

TRULINCS 20962075 - CLUM, DAVID JR - Unit: MLL-C-C

FROM: 20962075
TO:
SUBJECT: S CT REASONS FOR GRANTING THE PETITION #1
DATE: 12/10/2023 12:56:43 PM

* REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE RECORD CLEARLY SHOWS THAT THE ELEVENTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY THE LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO CORRECT A MANIFEST MISCARRIAGE OF JUSTICE.

1. Clum has claimed actual innocence since his arrest November 16, 2011. When he received the Hoffman affidavit October 2017, he attempted to amend his pleadings in SDFL 17-61687 with this newly discovered exculpatory evidence believing the Court would hold the required hearing/s. An affidavit is evidence to be accepted as the truth, prima facie.

See RAMIREZ V US, 315 Fed Appx 227 (11th Cir. 2009)(A federal habeas corpus petitioner is ENTITILED to an evidentiary hearing if [s]he alleges facts, which, if proven, would entitle [h]er to relief." DIAZ V UNITED STATES, 930 F 2d. 832 (11th Cir. 1991)(quotation omitted). "[A] petitioner need only allege - not prove - reasonably specific non-conclusory facts..." ARON, 291 F 3d. at 715, n. 6. "The court on review MUST accept all of the petitioner's alleged facts as true and determine whether the petitioner has set forth a valid claim..." DIAZ at 834. "If the allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is REQUIRED to hold an evidentiary hearing." Aron at 715, n. 6.)

See also WHITE V US, 640 Fed Appx 798 (11th Cir. (2012)(The court's not holding a hearing is reviewed for abuse of discretion. UNITED STATES V REED, 719 F 3d 369 (5th Cir. 2013). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief", the district court in a Section 2255 case "SHALL... grant a prompt hearing" before making the necessary findings and conclusions. 28 USC Section 2255(b). A petitioner is entitled to an evidentiary hearing if he makes specific factual claims that are "not speculative, conclusory, plainly false, or contradicted by the record." REED, 719 F 3d. at 374.)

2. The SDFL Judge denied Clum the right to Amend. Because no required hearing was held, the entire proceeding was rendered unable to produce a judgment on the merits causing a structural per se reversible error.

3. When the Judge did not hold the required hearing on Clum's claims of ineffective assistance of counsel stemming from the Government's BRADY/GIGLIO, violations, the proceeding was again rendered unable to produce a judgment on the merits causing another per se reversible error.

The Judge's FINAL JUDGMENT in SDFL 17-61687 was not dismissed with prejudice, and contrary to the Judge's claim, the BRADY/GIGLIO issue was not decided on the merits, nor were the other issues.

Four (4) years later, when Clum filed his PRO SE OMNIBUS MOTION TO VACATE and COA with the Eleventh Circuit, (See Clum v US, 11th Cir. (2022), Case No. 22-11976, DE 26, (at Appendix A, pps 1-19)), Clum was of the honestly held belief that, according to his prison law library research, he was following proper procedure to bring the new evidence of his actual innocence, i.e., Jones' Affidavit, to the Court, along with his claims of BRADY/GIGLIO violations and ineffective assistance of counsel, which had not been previously adjudicated on the merits nor dismissed with prejudice.

See FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, 7th Ed. (2021) ("FHCPP"), Part VI, Vol. 23, CH. 28, Sec. 28.3[b] - Petitions not classifiable as "successive" (Prior to the enactment of AEDPA, the caselaw construing former section 2244(h) recognized at least two instances in which a petition that was numerically 'second or successive' could not be subjected to the restrictive rules governing so-called "successive petitions" - In the second situation, the latter petition - although attacking the same judgment as the earlier petition - was not properly classifiable as 'second or successive" because the earlier petition did not produce, or for some reason could not possibly have produced, a judgment on the merits of the claim in question.") - and [ii] prior judgment on the merits ("The second type of situation that is exempt from a successive petition analysis arises when the federal courts did not deny the earlier petition (or the relevant claim in the earlier petition) on the merits with prejudice.").

The Eleventh Circuit Clerk sent Clum's pleadings to the SDFL referencing the original criminal case, US v Clum, supra, Case No. 11-60273. The SDFL placed them into the five (5) years old SDFL 17-61687 case, and the same day, 05/19/2022, docketed them into an entirely new case, SDFL No. 22-60954. The Judge denied the COA in 17-61687 the same day. Six (6) days later, 05/25/2022, the Judge issued a thirty-one (31) page FINAL ORDER in 22-60954 and the very next day, 05/26/2022, issued a thirty-one (31) page FINAL ORDER in 17-61687. See APP B.

Clum sent the SDFL a timely NOTICE of APPEAL in 22-60954 and it was docketed 06/10/2022. Four (4) days later on 06/14/2022, the Eleventh docketed a Habeas Appeal and created a new case, No. 22-11976. Please see the confusing Course of Proceedings above.

The Eleventh accepted IFP status and a briefing schedule was set. Clum believed he was arguing the merits of his position in a new 28 USC Section 2255, but the Eleventh Circuit considered his pleadings as a procedurally barred "second or successive" 2255 Motion and denied him in a NON-PUBLISHED OPINION, in violation of this Court's decision in:

McQUIGGIN V PERKINS, 133 S. Ct. 1924 (2013)(We have recognized, however, that a prisoner otherwise subjected to defenses of abusive or successive use of the writ (of habeas corpus) may have his federal constitutional claims considered on the merits if he makes a proper showing of actual innocence." (citing SAWYER V WHITELY, 112 S. Ct. 2514 (1992). See also MURRAY V CARRIER, 106 S. Ct. 2639 (1986)("[W]e think that in an extraordinary case, where a constitutional violation had probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.") In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits notwithstanding the existence of a procedural bar to relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." HERRERA, 113 S. Ct. 853.{6] We have applied the miscarriage of justice exception to overcome various defaults. These include "successive" petitions asserting previously rejected claims, see KAUFMAN V WILSON, 106 S. Ct. 2616 (1986), "abusive" petitions asserting in a second petition claims that could not have been raised in a first petition, see McCLESKEY V ZANT, 111 S. Ct. 1454 (1991).)

See also MITCHELL V W. T. GRANT, 94 S. Ct. 1895 (1974)("Due process of law guarantees no particular form but protects substantial rights; the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginative situation.")

The SDFL Judge was not being forthright when he claimed he had decided Clum's claims "on the merits". How could he have been when he never held the required hearing/s? And Clum could not possibly have raised the BRADY/GIGLIO, infra, issue any sooner than when he discovered it, nor could he have presented Jones' affidavit any earlier than when she finally decided to confess.

Just because a district Judge claims a pro se prisoner's allegations are "speculative", or "conclusory", etc., doesn't

necessarily mean they are. Just like prosecutors, judges will rarely admit they are wrong, that they have made a mistake/s, and take the necessary measure/s to correct their error/s.

Clum believes this is partly because pro se prisoners are considered as "a kind of trash". See ABA Journal, September 17, 2017 interview with retired Chief Judge Richard Posner, Seventh Circuit: "The basic thing is that most judges regard these people (Pro Se's) as a kind of trash not worth the time of a federal judge." He should know.

And Clum believes it is partly because of the "confirmation of bias" which is inherent in the mental/moral contagion that ALL human beings are susceptible to: COGNITIVE DISSONANCE.

So when a Pro se prisoner appeals a district court Judge's decision, isn't it incumbent upon and a duty of the Circuit Court of Appeals to investigate thoroughly and determine whether the Judge is being forthright in his/her biases, especially when the Judge has flat-out denied the petitioner the right to be heard on a material issue, and especially when the claims are supported by credible affidavits?

See MARBURY V MADISON, 1 Cranch 137, 2 LEd. 60 (1803)([i]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as the legislature. Why otherwise does it direct the judges to take an oath to support it? - Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?).

See US V HAYMAN, 72 S. Ct. 263 (1952)(Term "hearing" used in 28 USC Section 2255 which requires a prompt hearing on any motion filed under Section 2255, refers to judicial proceedings tradition whereby petitioner who is denied opportunity to be heard in such type proceeding loses something indispensable, however convincing any ex parte proceeding may be.").

See also, MATHEWS V ELDRIDGE, 96 S. Ct. 893 (1976)(The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." ARMSTRONG V MANZO, 85 S. Ct. 1187 (1965)).

The record clearly shows that the most fundamental requirement of due process has been denied to Clum.

When codefendant turned Government witness, Laura Barel, testified Rick Abdallah was a CPA, that false testimony was material. Clum was of the similar belief that Abdallah was a CPA at that time. However, the prosecutors knew for a fact Abdallah was a fraud and they failed to correct Barel's testimony and thereby committed a blatant BRADY/GIGLIO violation. When the Government was presented with these facts in Clum's pleadings in the Eleventh Circuit's 22-11976, rather than addressing the claims, they cried "procedural bar", and the Eleventh Circuit affirmed.

See BRADY V MARYLAND, 83 S. Ct. 1194 (1963) (Conviction on testimony known to prosecutors to be perjured as denial of due process.)(Suppression of evidence by prosecutors in criminal case as vitiating conviction.).

See GIGLIO V US, 92 S. Ct. 763 (1972) Headnotes: 1. Deliberate deception of a court and jurors in a criminal case by the presentation of known false evidence is incompatible with the rudimentary demands of justice. 3. Under the due process clause, the prosecutor's suppression of material evidence justifies a new trial irrespective of the prosecutor's good faith or bad faith.

See also, US V KALLEN-ZURY, 629 Fed Appx 894 (11th Cir. 2015) (Pursuant to GIGLIO, false testimony is material if the false testimony could in any reasonable likelihood have affected the judgment of the jury.).

If the jury would have known Clum relied upon a CPA who, unbeknownst to him was a fraud, there is more than a

reasonable likelihood their judgment would have been affected.

See also SCOTT V US, 890 F 3d 1239 (11th Cir 2011) cited in FHCPP (Explaining that all the PANETTI factors - the implication for habeas practice, the purpose of AEDPA, and the abuse-of-the-writ doctrine - compel the conclusion that second-in-time BRADY claims cannot be "second or successive" for purposes of [AEDPA's] Sec 2255(h).").

See also STORY V LUMPKIN, 142 S. Ct. 2576 (2022)([a]pplying the bar on second or successive habeas petitions to BRADY claims would produce troublesome results, create procedural anomalies, and close [the courthouse] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.).

The courthouse doors have been slammed shut in Clum's face. Clum was prejudiced by the SDFL Judge's erroneous decisions and the Eleventh's failure to correct them. Clum has been denied due process and the protection of the laws by those sworn to afford it to him as per MARBURY, supra.

FROM: 20962075
TO:
SUBJECT: S CT REASONS FOR GRANTING PETITION #2 & CONCLUSION
DATE: 12/10/2023 01:04:34 PM

* The BRADY/GIGLIO, supra, issue is highly problematic for the Government because it exposes their deception and is outrageously egregious: an innocent man (and his innocent Family) has been languishing in prison over twelve (12) years.

This is nothing if not a Manifest Miscarriage of Justice. Yet, the Eleventh Circuit echo's the prosecutor's cry of "procedural bar" in violation of this Court's decision in McQUIGGAN, supra.

4. Clum has been claiming his actual innocence since the outset of this travesty of justice. In his Direct Appeal Certiorari, US v Clum, 136 S. Ct. 557, No. 15-6511, pps 14-22 - see APP L - Clum asked this Court to invoke its supervisory power to enforce its holding in ELONIS V UNITED STATES, 135 S. Ct. 2001 (2015)("The 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.' " US V BALINT, 42 S. Ct. 301 (1922)).

Clum, now more than eight (8) years later with even more evidence in hand, is once again at the door of this Court asking it to enforce its holding not only in ELONIS, but also in its recent holding in RUAN V UNITED STATES, 142 S. Ct. 2370 (2022) at 2382, "[w]hat matters is the defendant's subjective mens rea".

The Jones' Affidavit is prima facie evidence of Clum's actual innocence. If there was any doubt of that, the Government should have argued for a hearing, or the SDFL Judge should have ordered a hearing, or the Eleventh Circuit should have remanded for a hearing. Instead, the Government did not even attempt to rebut a single claim Clum presented. The SDFL Judge ignored Supreme Court holdings and Eleventh Circuit precedents. The Eleventh Circuit itself departed, and sanctioned the lower Court's departure, from the accepted and usual course of judicial proceedings.

5. To sentence a sixty-one (61) year old man to 293 months in prison is a LIFE sentence. Clum's twenty-four (24) level enhancement was legally unsupportable then, and could not stand today in light of the Eleventh Circuit's decision in UNITED STATES V DUPREE, 57 F. 4th 1269 (11th Cir. 2023) where it reversed its long standing position on the use of the U. S. Sentencing Commission's Guidelines Commentary to enhance a sentence. And that reversal came after the Third Circuit's decision in UNITED STATES V BANKS, 55 F 4th 246 (3rd Cir. 2022)(The loss enhancement in the Sentencing Guidelines impermissibly expands the word loss to include both intended loss and loss.).

There appears to be a Circuit split brewing over this issue. And the new Guidelines effective November 1, 2023, at 18 USC 3582(c)(1)(b)(6) offers relief for an unusually long sentence.

1B1.13 Reduction in Tern of Imprisonment Under 18 USC Section 3582(c)(1)(b) EXTRAORDINARY AND COMPELLING REASONS. Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof: (6) UNUSUALLY LONG SENTENCES. If the defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be

imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

(NOTE: the current 3582 statute is not available in the prison law library for Clum to print and add to the APPENDIX.)

Again, there was no intended loss nor actual loss to the Government. See APP K.

Removing just that twenty-four (24) level enhancement would have brought Clum's BOL to a Level 14 for a total of 15 to 21 months. Clum has already served over SEVEN TIMES that amount of time. This is unconscionable in a country touting "the rule of law" as king.

In their 2007 book, MISTAKES WERE MADE (but not by me) WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS, authors Tavris and Aronson offer the definition of Cognitive Dissonance coined by Leon Festinger in 1959: "A state of tension that occurs whenever a person holds two cognitions (ideas, attitudes, beliefs, opinions) that are psychologically inconsistent. Dissonance produces mental discomfort from minor pangs to deep anguish; people don't rest until they find a way to reduce it."

Chapter five (5), LAW AND DISORDER, p 149: "Many prosecutors end up being prepared to sabotage their own side's goal of justice to preserve their convictions, in both meanings of the word. By the time prosecutors go to trial, they often find themselves in the real-world equivalent of a justification-of-effort experiment. - Any doubts they might have are drowned in the satisfaction that they are representing the forces of good against a vile criminal. - And so, with a clear conscience, they end up saying to the jury: "This defendant is sub-human, a monster. Do the right thing. Convict!". Occasionally, they have so thoroughly convinced themselves that they have a monster that they, like the police, go too far; coaching witnesses, offering pleas deals to jailhouse informants, or failing to give the defense all of the information they are legally obligated to turn over."

Clum believes this is precisely what happened to him. Did the Government coach Barel? See DE 765, at APP H-3. She admitted at trial she had spoken to the prosecutors AFTER testimony had begun. She was incarcerated pretrial for sixteen (16) months when trial began and received a plea deal for time-served, one (1) month after trial. Barel rode with Clum, Peters, and Beiter in the Marshal's van to the courthouse the day she testified. She broke down and cried most of the way there because, as she explained, she was going to "tell the prosecutors what they want to hear" so she could get out to find her four (4) children her ex-husband had taken when she was arrested. She confessed she was going to lie, and her conscience was torturing her. However, self-justification won out; a prime example of cognitive dissonance at work. It's in the record and in Clum's pleadings the lower Courts reviewed, yet not one single hearing was held to discover the truth.

WHY?

"Once a case is prosecuted and a conviction won, officials will be motivated to reject any subsequent evidence of the defendant's innocence." Id. at p 133.

"The confirmation bias ever sees to it that no evidence - the absence of evidence - is evidence for what we believe." Id. p 20.

"Self-justification not only puts people in prison, it sees to it that they stay there." Id. p 130.

These 2007 quotes from 'MISTAKES' seem highly prescient to Clum's case.

When a carpenter makes a mistake and cuts a board too short, he shouldn't use it because it will make his construction project unsteady at best, and a total failure at worst. If he has any integrity, he will take the time and incur the expense to fix his mistake. America's criminal justice system can be analogous to a construction project. The judges and lawyers are the carpenters using the Constitution as a blue print, and the Golden Rule of Law as their tool. And the three (3) branches of Government is the contractor working for the client, "We the People", to build and maintain a sound structure.

However...

"If the system can't function fairly, if the system can't correct its own mistakes and admit that it makes them and give people an opportunity to correct them, then the system is broken. Id. p 154.

Clum admits his mistakes in the OID tax preparation business. He was wrong not to have personally vetted the fake CPA and to have trusted a business partner, Beiter, who previously caused him to lose a great deal of money. And some of Clum's honestly held beliefs about the OID Theory were mistakes. However, he did not "conspire" with anyone to defraud the Government. That is absurd. There is no evidence to be found in the record to support such an allegation. Not a scintilla.

Why? Because is NEVER happened.

Please see APP M - Clum v US, 11th Cir. No. 22-11976 "PREMATURE BRIEF" - Clum's line-by-line rebuttal to the SDFL Judge's thirty-one (31) page FINAL JUDGMENT at APP B. Clum apologizes in advance; it is inexpertly written and may be difficult to navigate. However, if the reader will place it side-by-side to the Judge's ORDER, it will be simple to follow and should lead the reader to the only logical conclusion:

Clum is an innocent man.

Actually, factually, and legally.

He was falsely charged, wrongfully convicted, and unjustly sentenced.

He did not get a fair trial.

He has been denied his Constitutionally secured right to due process of law secured by the Fifth, Sixth, and Fourteenth Amendments.

Clum is not schooled in law or procedure, nor could he afford to pay attorneys to write this petition, and to secure dozens of Amicus Briefs for him as did Dr. RUAN, in RUAN v US, supra, among others.

However, Clum is most certainly not "a kind of trash not worth the time of a federal judge".

Clum is a living, breathing human being, a living Soul with a conscious mind, and a Loving Family. See APP N.

Clum is not a criminal and no amount of time in prison will make him one.

See FAY V NOIA, 372 US 441 (1963)(Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison.).

Clum, and his innocent Family, have been languishing in prison for OVER TWELVE (12) YEARS.

In Caldwell's and Klinger's 2017 book, "ANATOMY OF INNOCENCE - TESTIMONIES OF THE WRONGFULLY CONVICTED", with introductions by Scott Turow and Barry Scheck of the Innocence Project, the authors cite Justice Learned Hand in 1923: "Our procedure has always been haunted by the ghost of the innocent man convicted."

Has the American psyche changed so drastically in the past 100 years that the current judiciary is no longer "haunted" by convicting innocents?

"Some say as many as 5 to 10 percent of the prison population may be wrongfully convicted persons, which leads to a potential of 200,000 people who are innocent and are in prison today." Id.

200,000 +/- is a lot of people. Maybe the psyche has changed, or maybe statistics technology is exposing what has been happening all along.

"[e]xonerations, in Caldwell's words, are the once dirty little secret of the criminal justice system." Id.

"I guess it's really hard for a prosecutor [or judge] to acknowledge error and say, 'Gee, we have [12] years of this guys life. That's enough.' " MISTAKES, p 120.

This Court can fix the mistakes the contagion of Cognitive Dissonance has wrought upon the Clum Family.

If only it will.

"If you refuse to admit to yourself or the world that mistakes do happen, then every wrongfully convicted person is stark, humiliating evidence of how wrong you are." Id. p 156.

Clum is now seventy-two (72) years old. He has not "been there" for his three (3) lovely Daughters who were young teens when he was ripped from their lives. His family has been traumatized beyond words by this horrible, horrible injustice.

In MARBURY, supra, this Court opined, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

Clum's vested legal Right to protection of the Laws through Due Process has been deprived to him by the lower Courts' arbitrary departures from the accepted and usual course of judicial proceedings.

MARBURY, supra: "But the discretion of a court always means a sound, legal discretion, not an arbitrary will. If the

applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man."

Clum has made out a proper case.

Now, Clum prays this Honorable Court not refuse him justice, that it be more fully informed, and that it afford him and his Family remedy for the Manifest Miscarriage of Justice which is his case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David Clum, Jr.

DATE: December 10, 2023