



No. 23-6735

THE SUPREME COURT OF THE UNITED STATES

Fuhai Li
Petitioner
v.
United States of America
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Should the court of appeals recall its mandate denying Petitioner's application for a Certificate of appealability (COA) when Petitioner has demonstrated actual innocence in light of the new evidence presented in his § 2255 motion or a change in law?
2. Should the court of appeals recall its mandate denying Petitioner's application for a COA when Petitioner has shown that a fraudulent conduct was carried out by the district court in order to serve its biased and unjust opinion that there existed no actual conflict of interest in this case?

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PROCEEDINGS IN THE COURTS

A. Proceeding in the trial Court

On February 10, 2021, Petitioner filed a Pro Se 28 U.S.C. §2255 motion along with a memorandum of law in support of the said motion in the United States District Court for the Middle District of Pennsylvania captioned as United States of America v. Fuhai Li (Case No. 3:16-CR-00194-001). On May 21, 2021, the government filed its memorandum of law in opposition to Petitioner's §2255 motion. On June 10, 2021, Petitioner filed a reply brief. On May 6, 2022, the district court wrote its opinion and issued an order denying Petitioner's §2255 motion and declining the issuance of COA.

B. Proceeding in the Court of appeals

On June 13, 2022, Petitioner filed an application for a COA along with a memorandum of law in support of the said application in the United States Court of Appeals for the Third Circuit captioned as United States v. Fuhai Li (Case No. 22-2086). The government did not file a response in opposition to the issuance of the requested COA. On November 30, 2022, a panel of the court of appeals issued an opinion and order denying Petitioner's request for a COA. On January 13, 2023, Petitioner filed a Petition for rehearing of the Panel's decision. On February 1, 2023, the Court of appeals denied Petitioner's rehearing Petition. After this Court denied Petitioner's Petition for a writ of Certiorari, Petitioner filed a motion to recall the mandate in the court of appeals (Exhibit A). On October 24, 2023, the Court of appeals denied Petitioner's motion to recall the mandate (Exhibit B).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1).

The filing of this Petition for a Writ of Certiorari is timely pursuant to Rule 13 of the Rules of the Supreme Court of the United States, because the Court of Appeals' order denying Petitioner's motion to recall the mandate was entered on October 24, 2023. See Exhibit B.

STATEMENT OF THE CASE

Petitioner was a medical doctor specializing in pain management and neurology, and practiced both pain management and neurology in Milford, Pennsylvania.

In about October, 2012, Petitioner's disgruntled employee reported Petitioner to the Pike County District Attorney's Office for "prescribing high amounts of narcotics outside the scope of his medical profession." An investigation about Petitioner's prescriptions for controlled substances was then conducted by the Pike County detectives under the Pike County District Attorney's Office, the narcotic agent in the Pennsylvania Office of Attorney General, and the investigator from the Pennsylvania Department of State Bureau of Licensing, and was concluded that "the PA State Department Bureau of Licensing did not believe that they had enough information to take administrative action against Li's medical license at this time."

In about March, 2013, Petitioner's case along with an informant-Petitioner's disgruntled employee, was referred to DEA by the Pike County Detectives. On March 5, 2013, DEA agent Hischar initiated his investigation about Petitioner's "illegal Prescribing of controlled Substance medicine."

On July 19, 2016, a federal grand jury returned a 24-count indictment against Petitioner. On about January 3, 2017, Petitioner received the government's discovery including Agent Hischar's affidavit for application for a search warrant. After becoming aware of the exculpatory evidence from the PA State agencies' investigation about the same issue from Agent Hischar's affidavit, Petitioner asked Counsel to request such exculpatory evidence from the PA state agencies several times, but Counsel failed to do so, although he stated that he would subpoena it.

On October 17, 2017, a federal grand jury returned a 32-Count Superseding indictment against Petitioner.

From May 2 to June 4, 2018, a jury trial was held. During trial, Petitioner's Counsel failed to cross-examine the government's expert, Dr. Thomas on a patient-by-patient basis in all of the 35 patients' medical records he testified, failed to elicit evidence from Petitioner's expert to counter Dr. Thomas' baseless opinion in 31 of the 35 patients' medical records Dr. Thomas testified, and failed to elicit evidence from Petitioner to counter patients' testimony in 16 of the 20 patients who testified. Further, in the death count (count 24) where Petitioner prescribed Oxycodone 15 mg every 6 hours as needed for the patient's severe low back pain and knee pain for pain relief, Counsel entirely failed to defend Petitioner by failing to perform three critical examinations— a cross-examination on Dr. Thomas, a key witness for Petitioner's conviction and two direct-examinations on Petitioner's expert and Petitioner himself, key witnesses for Petitioner's innocence, and particularly by failing to present two pieces of critical exculpatory evidence from the opioid treatment guidelines and other literatures offered by Petitioner, and three pieces of critical exculpatory evidence provided by the government as part of the discovery— the lethal (postmortem) Oxycodone blood level of 400 to 700 ng/ml, morphine found in the deceased patient's system and the unknown level of zolpidium (a sleep pill— respiratory suppressant) in the deceased patient's blood.

Sometime during trial, Counsel informed Petitioner that the Pike County chief detective was in court. Later on, Petitioner accidentally became aware that the Pike County chief detective who investigated Petitioner and then referred Petitioner's case to DEA for federal prosecution and conviction was a friend of Petitioner's Counsel, which was NEVER disclosed to Petitioner by Counsel.

On June 4, 2018, Petitioner was convicted on all remaining 30 counts in the Superseding indictment (Count 18 and Count 21 were withdrawn by the government). On April 3, 2019, Petitioner was sentenced to 330-month imprisonment.

COMPELLING REASONS FOR GRANTING THIS PETITION

I. The Court of Appeals erred in denying Petitioner's motion to recall its mandate when Petitioner has demonstrated actual innocence in light of the new evidence presented in his §2255 motion or a change in law.

1. The new evidence in Petitioner's §2255 motion supports actual innocence in the death count (count 24) which mandated minimal 20-year imprisonment.

Prior to this Court's new decision in *Ruan v. United States*, 142 S.Ct. 2370 (2022), to convict Petitioner in the death count (count 24), the government must prove beyond a reasonable doubt that Petitioner's Oxycodone prescription was not for a legitimate medical purpose AND the Oxycodone prescribed by Petitioner was the but-for cause of death. See Exhibit A. Reproduced Record (RR) at 36-37 (all of the RRs below are in Exhibit A).

In the instant case, the government relied on its expert, Dr. Thomas' testimony to convict Petitioner, RR at 33-36. Dr. Thomas opined that Petitioner's Oxycodone prescription in the death count (count 24) was not for a legitimate medical purpose when it was prescribed to the patient with severe low back pain and knee pain for pain relief, because of the patient's significant psychiatric history, abnormal urine drug screen and history of suicidal ideation. RR at 33. While Dr. Thomas did not cite any authority to support his such an opinion, the following evidence counsel failed to present at trial squarely refutes Dr. Thomas' such a baseless opinion. First, the opioid treatment guidelines published by a national expert panel in counsel's hand clearly indicate that opioids can be prescribed to a patient with severe pain for pain relief even though the patient has a significant psychiatric history. RR at 33-34. Second, the published literature and Dr. Thomas' own testimony support that the so-called "abnormal urine drug screen" could be an expected result, not truly abnormal, due to cross-reaction. RR at 33-34. Even though the patient's urine drug screen was truly abnormal, no opioid treatment guidelines, model

Policies or any other literatures indicate that Opioids cannot be prescribed to that Patient with severe pain for pain relief. Third, no opioid treatment guidelines, model policies or any other literatures indicate that opioids cannot be prescribed to a patient with severe pain for pain relief when the patient has a history of suicidal ideation. Id. As a result, the evidence Counsel failed to present at trial clearly supports that Petitioner's Oxycodone prescription to the patient with severe low back pain and knee pain for pain relief in the death Count (Count 24) was for a legitimate medical purpose.

The district court's opinion that the above evidence Counsel failed to present at trial would not undermine Dr. Thomas' testimony - Petitioner's Oxycodone Prescription was not for a legitimate medical purpose, hinged on two arguments. First, the district Court argued that the "abnormal urine drug screen" needed "clarification" or "further inquiry", but Petitioner failed to do so. RR at 58. However, the district court ignored another piece of important evidence Counsel failed to present at trial that Clarification or Confirmatory test is not always needed due to high cost based upon the recommendation published by a national expert panel and a physician thus has discretion to decide whether "clarification" or "further inquiry" is warranted under certain circumstances. RR at 34. Even though Petitioner's decision of not pursuing "clarification" or Confirmatory test in this case was wrong, it was at most a negligence or a medical malpractice, but not a criminal conduct, at least Petitioner did not know and the court did not point out any supporting evidence that failure to clarify a questionable abnormal urine drug screen because of cross-reaction was a criminal conduct. Second, the district Court argued that "more frequent and stringent monitoring parameters" were not put into place by Petitioner before Oxycodone was prescribed to the patient with severe pain for pain relief who had a significant psychiatric history. RR at 59. However, the district Court's such an opinion was a pure speculation, because it failed to demonstrate what constitutes "more frequent and stringent monitoring parameters" and failed to offer any evidence in supporting that "more frequent and stringent monitoring parameters" were not implemented by Petitioner. Id. Even though Petitioner failed to implement such "more

frequent and Stringent monitoring parameters" in this case where Petitioner Prescribed Oxycodone only once to the Patient with Severe low back Pain and Knee Pain for Pain relief (Exhibit C), Petitioner's such a failure was at most a negligence or a medical malpractice, but not a criminal conduct, at least Petitioner did not know and the Court did not point out any supporting evidence that failure to implement "more frequent and Stringent monitoring parameters" before Oxycodone is prescribed to a Patient with Severe pain for Pain relief who had a significant Psychiatric history is a criminal conduct. Because the district Court's above two arguments failed, the evidence Counsel failed to Present at trial did undermine Dr. Thomas' testimony that Petitioner's Oxycodone prescription was not for a legitimate medical Purpose. When the government's Key evidence-Dr. Thomas' testimony failed to prove beyond a reasonable doubt that Petitioner's prescription was not for a legitimate medical purpose in light of the new evidence presented in his §2255 motion, "it is more likely than not that no reasonable juror would have convicted [Petitioner] in light of the new evidence presented in his habeas Petition", supporting a Strong showing of Petitioner's actual innocence. *Calderon v. Thompson*, 523, U.S. 538, 559 (1998).

Dr. Thomas further opined that the Oxycodone prescribed by Petitioner was the but-for cause of death, because of blood Oxycodone concentration of 215 ng/ml. RR at 35-36. While Dr. Thomas did not cite any authority to support his such an opinion, the following evidence Counsel failed to Present at trial unequivocally repudiates Dr. Thomas' such a baseless opinion. First, the government's own evidence in its discovery showed that the blood Oxycodone lethal (postmortem) level was 400 to 700 ng/ml, two to three times higher than the decedent's blood Oxycodone level of 215 ng/ml. RR at 36. Second, there existed morphine in the decedent's system, RR at 35-36, but the government did not offer any evidence in supporting that morphine was not the but-for cause of death in this case. Third, there was unknown level of Zolpidium (sleep pill-a respiratory suppressant) in the decedent's blood, RR at 36, but the government did not offer any evidence in supporting that Zolpidium was not the but-for cause of death in this case. Had there been no morphine and Zolpidium in the decedent's system, Oxycodone alone would not

have caused death, because the decedent's blood Oxycodone level of 215 ng/ml was far below the blood Oxycodone lethal level of 400 to 700 ng/ml. In fact, the district court did not even argue that the above evidence Counsel failed to present at trial would not undermine Dr. Thomas' testimony that the Oxycodone prescribed by Petitioner was the but-for cause of death. RR at 57-59. Because the new evidence in Petitioner's §2255 motion demonstrates that the government's Key evidence- Dr. Thomas' testimony failed to prove beyond a reasonable doubt that the Oxycodone prescribed by Petitioner was the but-for cause of death, "it is more likely than not that no reasonable juror would have convicted [Petitioner] in light of the new evidence in his habeas Petition", supporting a strong showing of Petitioner's actual innocence. Calderon, 523 U.S. at 559.

2. This Court's new decision in Ruan supports Petitioner's actual innocence in this case.

"A Petitioner can establish that no reasonable juror would have convicted him by demonstrating an intervening change in law that rendered his conduct non-criminal." United States v. Tyler, 732 F.3d 241, 246 (3d Cir. 2013). This court has held that a habeas Petitioner may demonstrate "actual innocence" by pointing to Post-conviction decisions "holding that a substantive Criminal Statute does not reach [his] conduct." Bousley v. United States, 523 U.S. 614, 623 (1998). In light of this Court's new decision in Ruan, to convict Petitioner, the government in addition is required to prove beyond a reasonable doubt that Petitioner knew or intended that his opioid prescription was not for a legitimate medical purpose and outside the usual course of professional practice. Ruan, 142 S.Ct. at 2375.

In the death count (count 24), Dr. Thomas opined that Petitioner's prescription was not for a legitimate medical purpose when it was prescribed to the patient with severe pain for pain relief because of a significant psychiatric history, an abnormal urine drug screen result and a history of suicidal ideation. RR at 33. But the government did not offer any evidence supporting that Petitioner knew or intended that his prescription was not for a legitimate medical purpose when it was prescribed to the patient with severe

Pain for pain relief if that Patient had a significant Psychiatric history, an abnormal Urine drug Screen and a history of Suicidal ideation.

In the remaining drug-related Counts (Counts 1 through 23, 25), Dr. Thomas opined that Petitioner's Prescriptions were not for a legitimate medical purpose when they were prescribed to the Patients with Severe Pain for pain relief, because of no prior medical records, no imaging study or report, accepting patient's word, normal physical examination (note: Patients with Severe pain may have a normal physical examination), prescribing high dosage of Controlled Substances, unnecessary EMG study, no testing to assess high-dose Oxycodone, no attempt to decrease the Opioid dosage, no apparent medical rationale documented for Opioid increase, and prescribing Opioids upon patients' request for pain relief. RR at 28. But no evidence supports that Petitioner knew or intended that his Opioid prescriptions were not for a legitimate medical purpose when they were prescribed to Patients with Severe Pain for pain relief if the above Circumstances exist. In fact, Dr. Thomas had testified that Petitioner's Opioid prescriptions were for a legitimate medical purpose but Substandard when Opioids were prescribed to Patients with Severe pain for pain relief even though the above very same Circumstances exist. Id. If Dr. Thomas opined that Petitioner's Opioid prescriptions were for a legitimate medical purpose but Substandard under these circumstances he mentioned, how could Petitioner know or intend that Petitioner's Opioid prescriptions were not for a legitimate medical purpose under these Circumstances?

Because the government failed to prove beyond a reasonable doubt that Petitioner knew or intended that his opioid prescriptions were not for a legitimate medical purpose in light of this Court's new decision in Ruan, Petitioner has established that no reasonable juror would have convicted him in light of an intervening change in law that rendered his conduct non-criminal, a strong showing of actual innocence in all drug-related counts.

3. The Court of appeals' decision denying Petitioner's motion to recall its mandate is contrary to the decision of this Court.

"[T]he Courts of appeals are recognized to have an inherent power to recall their

mandate ... the power can be exercised only in extraordinary circumstances." Calderon, 523 U.S. at 549-50. This Court further opined that recall of the mandate is warranted to avoid miscarriage of justice when a strong showing of actual innocence has been established by a habeas Petitioner. Id. at 558.

In the case at bar, Petitioner has demonstrated actual innocence, because "it is more likely than not that no reasonable juror would have convicted [Petitioner]" in light of the new evidence presented in his § 2255 motion and in light of a change in law that rendered his conduct non-criminal, as discussed above. As a result, recall of the mandate is warranted to avoid miscarriage of justice in this case.

II. The Court of appeals erred in denying Petitioner's motion to recall its mandate when Petitioner has shown that a fraudulent conduct was carried out by the district court in order to serve its biased and unjust opinion that there existed no actual conflict of interest in this case.

1. A fraudulent conduct was carried out by the district court in order to serve its biased and unjust opinion that there existed no actual conflict of interest.

a. The district court falsified such evidence that Counsel's friend was detective or chief detective of the Pike County Sheriff's Office.

The record of Petitioner's § 2255 motion contained the following relevant alleged facts: an investigation about Petitioner's prescriptions was conducted by the Pike County District Attorney's office and other PA state agencies; the Pike County detectives then referred Petitioner's case along with an informant to DEA; Petitioner's Counsel informed Petitioner that the Pike County chief detective presented to the court at Petitioner's trial, but Counsel did not inform Petitioner that the Pike County chief detective was his friend until one day he accidentally disclosed it to Petitioner; Counsel's friend—the Pike County chief detective was seeking Petitioner's federal prosecution and conviction, but Petitioner was seeking acquittal. RR at 38-39.

When the above contexts are read as a whole, a reasonably prudent person would

Know from the alleged facts that the investigation of the Pike County District Attorney's Office about Petitioner's prescription was carried out by its investigators—the Pike County detectives, the Pike County detectives then referred Petitioner's case along with an informant to DEA, and Counsel knew that his friend—the Pike County chief detective investigated Petitioner and then referred Petitioner's case along with an informant to DEA to seek Petitioner's prosecution and conviction by the federal government, but a reasonably prudent person would not conclude from the alleged facts that Counsel's friend was detective or chief detective of the Pike County Sheriff's Office (PCSO) and that the PCSO was in any way related to Petitioner's case. Further, Petitioner NEVER alleged Counsel's friendship with the PCSO detective or chief detective in his § 2255 motion, and in nowhere did the § 2255 motion ever mention the Pike County Sheriff's Office that was irrelevant to Petitioner's case. Thus, the district Court's such evidence that Counsel's friend was the PCSO detective or chief detective asserted by the Court in its opinion, RR at 46, 66-68, was plainly falsified. In fact, there was no detective in the Pike County Sheriff's Office and Counsel's friend who investigated Petitioner and then referred Petitioner's case to DEA to seek Petitioner's federal conviction was the Pike County chief detective under the Pike County District Attorney's Office. See Affidavit in Exhibit A.

— b. The district Court then solely relied on its falsified evidence to conclude that there existed no actual conflict of interest and Petitioner thus did not receive ineffective assistance of Counsel.

— The district Court's falsification of Counsel's friendship with the PCSO detective or chief detective was not without purpose, because the district Court solely relied on its falsified evidence—Counsel's "friendship with PCSO detective" to reach its biased and unjust conclusion that there existed no actual conflict of interest and Petitioner thus did not receive ineffective assistance of Counsel. RR at 67-68. Since the PCSO detective or chief detective was irrelevant to Petitioner's case, supra, it seemed that the district Court correctly concluded that there existed no actual conflict of interest in this case when the district Court asserted that "Counsel was personal friends with PCSO's

Chief detective." RR at 66. But the truth was that the district Court knew or should have known from the alleged facts in the § 2255 motion that Counsel's friend was not the PCSO detective or chief detective that was irrelevant to Petitioner's case, but the Pike County chief detective that was involving Petitioner's case. Supra. If the district Court was truly unclear about whether Counsel's friend was the Pike County chief detective that was involving Petitioner's case or the detective or chief detective of the Pike County Sheriff's Office that was irrelevant to Petitioner's case, it should hold evidentiary hearing to find out truth, because justice can be served only based on the truth. However, the district court in the instant case did not hold evidentiary hearing to find out the truth, but simply chose to falsify the factual evidence that Counsel was personal friend with the PCSO detective or chief detective that was irrelevant to Petitioner's case, and then solely relied on its falsified evidence to serve its biased and unjust opinion that there existed no actual conflict of interest and Petitioner thus did not receive ineffective assistance of counsel. RR at 66-68. The above evidence demonstrates that the district Court's conduct was not just an inadvertent error, but a purposeful falsification of the factual evidence. This is manifest INJUSTICE !

C. The district Court in its analysis of conflict of interest completely disregarded material facts in the record.

Despite the fact that all factual allegations about Counsel's failures and acts in the record of the § 2255 motion were specifically included in this claim indicated by the statement that "numerous omissions and acts reflected in the records including failure to request exculpatory evidence ...", RR at 39, the district Court in its analysis of conflict of interest completely disregarded the following material facts in the records (see RR at 66-68): (1) Counsel knew that his friend - the Pike County chief detective investigated Petitioner and then referred Petitioner's case along with an informant to DEA to seek Petitioner's conviction by the federal government. RR at 38-39; (2) Counsel refrained from investigating or obtaining the critical exculpatory evidence from the Pike County District Attorney's Office and other PA state agencies.

and refrained from presenting it to the jury for Petitioner's defense, despite several requests by Petitioner, RR at 19, 38-39, 42; (3) Counsel failed to file a brief in support of the motion to suppress evidence and failed to prepare and/or submit many other motions and briefs, RR at 19-23, 39; (4) Counsel erroneously conceded the relevance and fit of Dr. Thomas' proffered testimony at Daubert hearing, RR at 23-24, 39; (5) Counsel failed to cross-examine Dr. Thomas on a patient-by-patient basis in all of the 35 patients' medical records he testified, RR at 24-29, 39; (6) Counsel failed to perform direct-examination on Petitioner's expert to counter Dr. Thomas' baseless opinion in 31 of the 35 patients' medical records he testified, RR at 29-31, 39; (7) Counsel failed to perform direct-examination on Petitioner to counter Patients' testimony in 16 of the 20 patients who testified, RR at 31, 39; (8) Counsel entirely failed to defend Petitioner in the death count (count 24) which mandated minimal 20-year imprisonment, RR at 31-36, 39; and (9) Counsel informed Petitioner that the Pike County chief detective who investigated Petitioner and then referred Petitioner's case along with an informant to DEA to seek Petitioner's federal conviction, was in court at Petitioner's trial, but failed to inform Petitioner that the Pike County chief detective was his friend until one day Counsel accidentally disclosed it to Petitioner, RR at 38. Had the district court not solely relied on its falsified evidence, but considered the above material facts in its analysis of the conflict of interest, it would have reached a different conclusion as discussed below.

d. The factual evidence in the record supports that there existed an actual conflict of interest in this case and Petitioner thus received ineffective assistance of Counsel.

An actual conflict of interest arises when "the trial attorney's interest and defendant's interest 'diverged with respect to a material factual or legal issue or to a course of action.'" *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3d Cir. 1984). In the case at bar, the evidence in the record shows that Counsel knew that his friend - the Pike County chief detective investigated Petitioner and then referred Petitioner's case along with an informant to DEA to seek Petitioner's federal prosecution and conviction. Counsel failed to disclose his friendship with the Pike County

Chief detective, and Counsel failed to defend Petitioner's interests on numerous occasions in this case. Supra. These evidence clearly demonstrates that Counsel's interest and Petitioner's interest in this case diverged due to Counsel's loyalty to his friend and Counsel's interest in serving his friend for Petitioner's conviction rather than in serving Petitioner for his acquittal as supported by Counsel's numerous failures in defending Petitioner's interests and that Counsel's friendship with the Pike County Chief detective resulted in Counsel attempting to serve incompatible needs between his client—Petitioner who was seeking acquittal and his friend—the Pike County Chief detective who was seeking Petitioner's federal conviction. RR at 38-39. As a result, there existed an actual conflict of interest which adversely affected Counsel's performance or adequacy of his representation in this case.

Further, an actual conflict of interest adversely affecting Counsel's performance or adequacy of his representation is also established by demonstrating that "some plausible alternative defense strategy or tactic might have been pursued... [which] possessed sufficient substance to be a viable alternative... [and] the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988). In the instant case, the evidence in the record demonstrates that a plausible alternative defense strategy Petitioner had pursued was to obtain the critical exculpatory evidence from the Pike County District Attorney's Office and other PA state agencies and then present it to the jury for Petitioner's defense, RR at 19, 38-39, 42, and such critical exculpatory evidence contained sufficient substance to be a viable alternative defense as held by the Court that "[exculpatory] evidence, if investigated, 'might have led to a viable defense and a [favorable] verdict'", *United States v. Barnes*, 687 F.2d 659, 673 (3d Cir. 1982), but Counsel refrained from obtaining or investigating the critical exculpatory evidence from the Pike County District Attorney's Office and other PA state agencies and then refrained from presenting it to the jury for Petitioner's defense, despite several requests by Petitioner, due to Counsel's loyalty to his friend and Counsel's interest in serving his friend.

for Petitioner's conviction rather than in serving Petitioner for Petitioner's acquittal. RR at 19, 38-39, 42. As a result, there existed an actual conflict of interest that adversely affected Counsel's performance or adequacy of his representation in this case. Consequently, Petitioner received ineffective assistance of Counsel in this case. See *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) ("a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("Actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective.")

— 2. The Court of appeals' decision denying Petitioner's motion to recall its mandate is contrary to the decision of this Court.

— "[T]he Courts of appeals are recognized to have an inherent power to recall their mandate... the power can be exercised only in extraordinary circumstances." *Calderon*, 523 U.S. at 549-50. When a fraud was perpetrated upon the Court by a party, recall of the mandate was warranted by the Court of appeals for the interest of justice. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). The Court's "historic power of equity to set aside fraudulently begotten judgment is necessary to the integrity of the Courts." *Chambers v. NASCO Inc.*, 501 U.S. 32, 44 (1991).

— In the current case, a fraudulent conduct—purposeful falsification of the factual evidence in the record in order to serve its biased and unjust opinion that there existed no actual conflict of interest and Petitioner thus did not receive ineffective assistance of Counsel, was carried out by the district Court that was supposed to be fair and impartial when it discharged its duties of the office. See Code for the United States Judge Canon 3 ("A judge should perform the duties of the office fairly, impartially and diligently."). If the district Court's such a fraudulent conduct is allowed in the judicial proceedings or if the Court is allowed to alter the material factual evidence in the record in the judicial processes in order to serve its biased