No. 24-6767

ORIGINAL

FILED
DEC 31 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON GREEN SOLOOOSY — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals, 2d. Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRANDON GREEN SOLOOOSY
(Your Name) FCI Butner Medium II
PO BOX 1500
(Address)
Butner NC 27509
(City, State, Zip Code)
919-575-3000
(Phone Number)

QUESTIONS PRESENTED

1. Whether a federal district judge's refusal to recuse himself after making statements prejudging the merits of ineffective assistance claims, displaying hostility toward a pro se defendant, and terminating a hearing while the defendant was speaking violates due process and the federal recusal statutes, 28 U.S.C. §§ 144 and 455.

2. Whether a district court's refusal to hear ineffective assistance of counsel claims prior to sentencing, despite initially agreeing to do so, violates a defendant's Sixth Amendment right to effective assistance of counsel and Fifth Amendment right to due process.

3. Whether a district court violates a defendant's Sixth Amendment right to self-representation by failing to honor explicit requests to proceed pro se after initially granting hybrid representation.

4. Whether a district court's multiple erroneous factual determinations, including but not limited to, mischaracterizing the location and disposition of a critical traffic stop, misstating evidence about firearms and drug distribution, and making unsupported findings about physical evidence, constitute a due process violation when those errors formed the basis for crucial pretrial, trial, and sentencing decisions.

LIST OF PARTIES

[ ] All parties appear in the caption of the cases on the cover page

[x] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is subject of this petition is as follows:

Brandon Green 56400054, Petitioner
FCI Butner Medium II
PO BOX 1500
Butner, NC 27509

Andrew K. Chan, Respondent
United States Attorney's Office for the Southern District of New York
One Saint Andrews Plaza
New York, NY 10007

RELATED CASES

- *United States v. Green*, No. 1:16-cr-00281, U.S. District for the Southern District of New York, Judgement entered July 26, 2021.

- *United States v. Green*, No. 21 2244, U.S. Court of Appeals for the Second Circuit. Judgement entered January 24, 2024.

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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

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[X] reported at United States v. Green, 2024 WL 1617 (2d. Cir. 2024); or, App. LEXIS

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 24 2024

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 6 2024, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

- The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be...deprived of life, liberty, or property, without due process of law."

- The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

- 28 U.S.C. § 144 provides:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

- 28 U.S.C. § 455(a) provides:

"Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

STATEMENT OF THE CASE

On March 27, 2019, following a five-week trial in the Southern District of New York, a jury convicted Petitioner Brandon Green of racketeering conspiracy, narcotics conspiracy, and firearms charges (verdict form Document 570 in district court). After trial, Mr. Green raised serious concerns about the effectiveness of his trial counsel and sought to have these claims heard prior to sentencing. The issues presented in this petition arose from a series of post-trial proceedings that demonstrate judicial bias, denial of the right to self-representation, violations of due process, and pervasive factual errors that undermined the fundamental fairness of the proceedings. The key events unfolded as follows:

On a July 25, 2019, hearing to substitute counsel, despite knowing that Mr. Green was dissatisfied with his trial counsel's performance and written materials and intended to pursue ineffective assistance claims, the district judge stated that trial counsel had "performed admirably throughout their entire representation" and that Mr. Green had been "the beneficiary of excellent representation." These statements reflected the judge's premature judgment about the merits of Mr. Green's ineffective assistance claims before they were even presented.

Throughout late 2019 and 2020, Mr. Green and his attorney at the time Zoe Dolan repeatedly requested to proceed pro se and to have his ineffective assistance claims heard before sentencing. While the court initially agreed to hear these claims pre-sentencing in a November 19, 2020, order (document 907 in district court), it imposed conditions requiring submission of an attorney-client privilege waiver and detailed affidavit.

The culminating events occurred during a January 5, 2021 (transcripts available in District Court doc. 929), telephone conference. When Mr. Green attempted to explain why he had not yet

received or been able to submit the required waiver form[1], the judge repeatedly interrupted him, displayed hostility, made sarcastic comments about his understanding of the proceedings, and ultimately terminated the conference while Mr. Green was speaking about the violations of his rights. The district court clerk apologized to Mr. Green about the judge rudely terminating the call. The judge's conduct demonstrated deep-seated antagonism that would make fair judgement impossible. Following this conference, Mr. Green explicitly requested in a letter of January 6, 2021 (document 932 in district court), a letter to proceed pro se and to have his case reassigned due to judicial bias. The district court failed to address these requests. Instead, on February 10, 2021, the court refused to hear Mr. Green's ineffective assistance claims prior to sentencing, despite the fact that Mr. Green had submitted his signed waiver form under the prison mailbox rule before the court's deadline. The record reveals additional serious errors in the court's fact-finding that affected crucial determinations throughout the proceedings. Most notably, regarding a critical traffic stop, the court erroneously stated that the Bronx District Attorney's office had dismissed the case, when in fact it was dismissed by the Bronx Supreme Court with the arrest and prosecution "deemed a nullity." The court repeatedly and incorrectly stated the traffic stop occurred "right at the Honeywell Projects" when evidence showed it occurred on Monterey Avenue. These errors allowed prejudicial testimony from NYPD Officer Jeffrey Sisco claiming Mr. Green possessed narcotics at the Honeywell-Projects location.

At sentencing, the pattern of erroneous fact-finding continued. The court made multiple unsupported determinations, including falsely stating that firearms recovered were "loaded," erroneously claiming Mr. Green distributed drugs in state and local prison systems, incorrectly asserting Mr. Green was "standing only feet away" from a closet containing handguns, and making

[1] Mr. Green explained in a December 4, 2020, letter to the district court that he had not received the waiver form and/or order, and this is why he needed more time to prepare and submit the affidavit.

unsupported claims about the location of guns and cash without record support. See Document No. 438, 502, 520-24.

REASONS FOR GRANTING THE PETITION

This case presents four important questions concerning the scope of constitutional protections in criminal proceedings and the proper operation of the federal judiciary. Each question independently warrants this Court's review, and their combination in a single case provides an ideal vehicle for addressing these critical issues. First, this case provides an opportunity to clarify when judicial conduct crosses constitutional lines requiring recusal. The circuits are divided on this question, particularly in cases involving prose defendants. Second, this case presents important questions about the scope of the right to self-representation and when courts must honor subsequent requests for self-representation after initially granting hybrid representation. Third, this case allows the Court to address when due process requires pre-sentencing resolution of ineffective assistance claims, particularly when there is clear evidence of ineffective assistance that could affect sentencing. Fourth, this case presents an opportunity to address when a pattern of erroneous factual determinations rises to the level of constitutional violation, particularly when those errors consistently favor the prosecution and form the basis for crucial rulings.

I. The District Court's Conduct Violated Due Process and Required Recusal Under Both Constitutional Standards and Federal Recusal Statutes

A. Constitutional Due Process Requirements for Judicial Impartiality

The Supreme Court has long recognized that impartial tribunal is a fundamental requirement of due process. In *re Murchison*, 349 U.S. 133, 136 (1955). This requirement exists in both criminal and civil cases because it "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'"

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 172 (1951)).

While not every claim of judicial bias rises to the level of a constitutional violation, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009), due process requires recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The Court evaluates such claims based on an objective standard, asking whether "a reasonable observer would conclude that due process had been violated." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016).

B. The District Judge's Statements Demonstrate Disqualifying Prejudgment

The record reveals clear evidence of prejudgment that violated these constitutional standards. At the July 25, 2019, substitution hearing, knowing that Mr. Green intended to pursue ineffective assistance claims, the judge declared that trial counsel had "performed admirably throughout their entire representation" and that Mr. Green was "the beneficiary of excellent representation." These statements are remarkably similar to those requiring recusal in *United States v. Dreyer*, 693 F.3d 803 (9th Cir. 2012), where the court found that judicial statements "reflected premature judgment" about competency issues warranted reassignment.

Such statements demonstrate prejudgment in two critical ways. First, they reveal that the judge had reached conclusions about the quality of representation before Mr. Green had any opportunity to present his ineffective assistance claims. As the Second Circuit has recognized, "a judge's comments indicating that he has predetermined the merits of a case may require recusal." *United States v. Diaz*, 797 F.2d 99, 100 (2d Cir. 1986). Second, the timing of these statements—made while knowing Mr. Green intended to challenge counsel's effectiveness—would cause any

reasonable observer to conclude the judge had already decided on the merits of claims not yet presented.

C. The Judge's Hostile Conduct Further Demonstrates Disqualifying Bias

The constitutional requirement of judicial impartiality extends beyond prejudgment to encompass a judge's conduct toward parties. While "expressions of impatience, dissatisfaction, annoyance, and even anger" do not necessarily establish bias, *Liteky v. United States*, 510 U.S. 540, 555-56 (1994), conduct demonstrating "deep-seated favoritism or antagonism that would make fair judgment impossible" requires recusal. Id. at 555. The judge's conduct during the January 5, 2021, telephone conference crossed this constitutional line. The transcript reveals Judge Gardephe repeatedly interrupting Mr. Green's attempts to explain his position, making sarcastic comments about Mr. Green's understanding of proceedings, threatening to terminate the conference when Mr. Green tried to raise legitimate concerns and then actually terminating the conference while Mr. Green was speaking about violations of his rights

This pattern of hostile conduct closely parallels cases where courts have found constitutional violations requiring recusal. See, e.g., In *re United States*, 614 F.3d 661, 666 (7th Cir. 2010) (finding recusal necessary when judge's "persistent disregard" of party's rights demonstrated bias); United States v. Antar, 53 F.3d 568, 576 (3d Cir. 1995) (requiring recusal where judge's conduct showed "deep-seated antagonism").

D. Federal Recusal Statutes Independently Required Disqualification

Even if the judge's conduct did not rise to the level of constitutional violation, recusal was required under federal statutes. Section 455(a) mandates recusal whenever a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This standard is broader than constitutional requirements, requiring recusal based on appearance of partiality alone. *United States v. Amico*,

486 F.3d 764, 775 (2d Cir. 2007). Section 144 separately requires recusal upon filing of an affidavit showing "personal bias or prejudice." 28 U.S.C. § 144. Mr. Green's detailed affidavit documenting the judge's prejudgment and hostile conduct satisfied this requirement. While courts construe Section 144 strictly, Mr. Green's allegations went far beyond "conclusory allegations" that might be insufficient. See *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993).

E. The Totality of Circumstances Required Recusal

The combination of prejudgment, hostile conduct, and erroneous factual determinations created an appearance of partiality requiring recusal under both constitutional and statutory standards. As the Ninth Circuit recently held in a similar context, when "the cumulative effect of a district judge's actions creates an appearance of bias, recusal is appropriate even if no single action would require recusal." United States v. Rangel, 697 F.3d 795, 804 (9th Cir. 2012).

The Second Circuit has specifically recognized that recusal may be required when a judge's "comments or actions during the course of a proceeding indicate a predisposition against a party." United States v. Pearson, 203 F.3d 1243, 1277 (10th Cir. 2000) (citing cases). Here, the judge's conduct demonstrated exactly such a predisposition against Mr. Green[2].

F. Remedy Required

When recusal is wrongfully denied, the appropriate remedy is vacation of all orders from the point where recusal became necessary. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995). Here, that requires, at minimum, vacating all orders after the July 25, 2019, statements demonstrating prejudgment. Given the pervasive nature of the bias shown,

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[2] The judge denied all of Mr. Green's post-trial motions and two requests for a certificate of appealability. through statements prejudging ineffective assistance claims, hostile treatment during proceedings, refusal to address legitimate concerns, pattern of erroneous factual findings favoring prosecution, and denial of opportunity to be heard

reassignment to a different judge on remand is also necessary. See United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (reassignment appropriate where judge's conduct raises questions about impartiality).

II. The Denial of Mr. Green's Clear Requests to Proceed Pro Se Violated His Fundamental Sixth Amendment Right to Self-Representation

A. The Constitutional Foundation of Self-Representation

The Sixth Amendment guarantees not only the right to counsel but also the fundamental right to self-representation. Faretta v. California, 422 U.S. 806, 819 (1975). This right is rooted in both the structure of the Amendment and "the English common law tradition of self-representation." Id. at 821-32. The Supreme Court has emphasized that the right is "necessarily implied by the structure of the Amendment," noting that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Id. at 819-20. The right to self-representation is so fundamental that its denial is structural error requiring automatic reversal without any showing of prejudice. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984). As the Court explained in United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006), this is because the right "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding."

B. Standards for Invoking the Right to Self-Representation

To exercise the right to self-representation, a defendant must "clearly and unequivocally" declare their desire to proceed pro se. Faretta, 422 U.S. at 835. The Second Circuit has held that this requires "an explicit request" to proceed without counsel. *Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994). However, "no particular form of words is required;" rather, courts must evaluate

whether "the record as a whole" demonstrates an unequivocal desire to proceed pro se. United States v. Tran, 13 F.4th 1152, 1160 (11th Cir. 2021).[3]

C. Mr. Green's Requests Were Clear and Unequivocal

The record demonstrates that Mr. Green made multiple clear and unequivocal requests to proceed pro se:

1. During the November 17, 2020, conference, Mr. Green explicitly expressed his desire to represent himself, stating he had "been misinformed or lied to by every lawyer that [he] had, in some way, shape or form." While the court initially granted hybrid representation with appointed standby counsel, it assured Mr. Green he could proceed solely prose "at any time."

2. In his January 6, 2021, letter following the hostile telephone conference, Mr. Green made an explicit written request to relieve standby counsel and proceed pro se. This written request satisfies even the most stringent requirements for invoking the right. See *United States v. Hernandez*, 203 F.3d 614, 621-22 (9th Cir. 2000) (written request provides clearest evidence of desire to proceed pro se).

3. Mr. Green's standby counsel also confirmed his desire to proceed pro se in a separate letter to the court, providing additional confirmation of the unequivocal nature of the request.

These requests were far more explicit than those found sufficient in other cases. See, e.g., *United States v. Ramirez*, 931 F.3d 1004, 1009 (9th Cir. 2019) (finding much less explicit statement sufficient to invoke right); *United States v. Washington*, 596 F.3d 777, 782 (10th Cir. 2010) (similar).

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[3] Even Mr. Green's attorney Zoe Dolan wrote several letters to the court requesting Mr. Green be granted a Faretta hearing. Doc. 852 in district court.

D. Hybrid Representation Cannot Be Used to Deny Subsequent Pro Se Requests

While courts may initially grant hybrid representation combining pro se advocacy with standby counsel, this arrangement cannot be used to effectively deny subsequent requests for full self-representation. *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997). The Second Circuit has specifically recognized that "a defendant's Sixth Amendment right to self-representation is not eliminated by his prior acceptance of counsel." *United States v. Stevens*, 83 F.3d 60, 67 (2d Cir. 1996). The district court's failure to address Mr. Green's December 4 and January 6 requests violated this principle. Once a defendant clearly invokes the right to self-representation, courts must conduct a Faretta inquiry to ensure the choice is known and voluntary. *United States v. Barnes*, 693 F.3d 261, 271 (2d Cir. 2012). The total failure to address a clear request violates this constitutional requirement. *United States v. Mendez-Sanchez*, 563 F.3d 935, 946-47 (9th Cir. 2009).

E. The Violation Was Particularly Egregious Given Prior Assurances

The constitutional violation was particularly clear here because the court had explicitly assured Mr. Green, he could proceed with prose "at any time." Courts have recognized that such assurances create legitimate expectations that cannot be arbitrarily denied. See *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (courts must honor legitimate expectations about self-representation). Moreover, Mr. Green's request came in direct response to hostile treatment during the January 5 telephone conference, where his attempts to be heard were repeatedly frustrated. The right to self-representation exists precisely to prevent such situations where appointed counsel (even standby counsel) might impede a defendant's ability to present their case. McKaskle, 465 U.S. at 174 (right to self-representation protects defendant's ability to present case in chosen manner).

F. The Error Requires Automatic Reversal

The denial of the right to self-representation is structural error requiring automatic reversal. McKaskle, 465 U.S. at 177 n.8. As the Supreme Court explained in *United States v. Gonzalez-Lopez,* 548 U.S. 140, 150 (2006), this is because "deprivation of the right to self-representation affects the 'framework within which the trial proceeds.'" This principle has been consistently applied by circuit courts. See, e.g., *United States v. Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019) (reversal required for denial of self-representation without showing of prejudice); *United States v. Jones*, 452 F.3d 223, 230 (3d Cir. 2006) (same). The Second Circuit specifically holds that "denial of the right to proceed pro se requires automatic reversal of a criminal conviction." *United States v. Schmidt*, 105 F.3d 82, 89 (2d Cir. 1997).

G. Remedy Required

Given the structural nature of the error, the appropriate remedy is vacatur of the conviction and remand for new proceedings. *United States v. Mosley*, 607 F.3d 555, 558 (8th Cir. 2010). The new proceedings must begin no later than the point at which Mr. Green's January 6 request was denied and should be conducted before a different judge given the context in which the violation occurred. See *United States v. Lopez-Vasquez*, 985 F.3d 862, 870 (9th Cir. 2021) (reassignment appropriate when self-representation denial occurs in context of other procedural irregularities).

III. The Refusal to Hear Ineffective Assistance Claims Prior to Sentencing Violated Due Process Given the Unique Circumstances of This Case

A. Constitutional Framework for Timing of Ineffective Assistance Claims

While ineffective assistance claims are typically addressed through post-conviction proceedings, the Supreme Court has never mandated a single procedural mechanism for their resolution. See *Massaro v. United States*, 538 U.S. 500, 504 (2003). Instead, the Court has emphasized that due process requires an "opportunity to be heard...at a meaningful time and in a

meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). When ineffective assistance claims could affect sentencing, fundamental fairness may require their pre-sentencing resolution. The Second Circuit has specifically recognized that district courts have discretion to address ineffective assistance claims before sentencing when circumstances warrant. *United States v. Brown*, 623 F.3d 104, 113 (2d Cir. 2010). This approach acknowledges that "in certain circumstances, district courts may properly adjudicate ineffective assistance claims pre-judgment." *United States v. Gonzalez*, 970 F.3d 1095, 1102 (9th Cir. 2020).

B. The District Court's Initial Recognition of Pre-Sentencing Claims

The district court initially recognized the appropriateness of pre-sentencing review, stating at the October 31, 2019, conference that "it would probably behoove me to explore the claims of ineffective assistance of counsel now." This acknowledgment came after Mr. Green had submitted detailed pro se filings outlining counsel's deficiencies, provided specific examples of counsel's failures at trial, demonstrated how these issues affected trial outcome, and showed the potential impact on sentencing. Courts have recognized that such circumstances may warrant pre-sentencing review. See *United States v. Steele*, 733 F.3d 894, 897-98 (9th Cir. 2013) (finding abuse of discretion in refusing to hear pre-sentencing claims supported by specific allegations); *United States v. DeCologero*, 530 F.3d 36, 45 (1st Cir. 2008) (noting appropriateness of pre-sentencing review when claims are "sufficiently developed").

C. The Court's Handling of the Claims Violated Due Process

The district court's subsequent handling of Mr. Green's claims violated fundamental principles of due process in multiple ways:

1. Imposition of Unnecessary Procedural Barriers

While the court could require reasonable procedures for presenting claims, the demands imposed here exceeded constitutional bounds. The requirement of both an attorney-client privilege waiver and detailed affidavit was unnecessarily burdensome, particularly given Mr. Green's pro se status. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (requiring liberal construction of pro se submissions). Courts have recognized that when a defendant raises ineffective assistance claims, they implicitly waive privilege regarding those communications. See *United States v. Pinson*, 584 F.3d 972, 978 (10th Cir. 2009); In *re Lott*, 424 F.3d 446, 453 (6th Cir. 2005). The additional requirement of a formal waiver served no legitimate purpose here.

2. Failure to Consider Prison Conditions and COVID-19 Impact

The court failed to account for the substantial obstacles Mr. Green faced as a pro se prisoner during the COVID-19 pandemic, including limited access to legal materials, restrictions on notary services, mail delays, 24-hour lockdowns, and limited ability to prepare documents. Courts must consider such circumstances when evaluating timeliness. See *United States v. Whiteside*, 775 F.3d 180, 185 (4th Cir. 2014) (requiring consideration of prison conditions affecting access to courts); *Washington v. Ryan*, 833 F.3d 1087, 1099 (9th Cir. 2016) (similar).

3. Disregard of Prison Mailbox Rule

The court's refusal to consider Mr. Green's submissions timely under the prison mailbox rule violated clearly established law. See *Houston v. Lack*, 487 U.S. 266, 276 (1988) (establishing prison mailbox rule); *Noble v. Kelly*, 246 F.3d 93, 97 (2d Cir. 2001) (applying rule to pro se submissions). Mr. Green's delivery of materials to prison authorities before the deadline constituted timely filing.

D. The Circumstances Required Pre-Sentencing Resolution

Several factors made pre-sentencing resolution particularly appropriate here:

1. Nature of the Claims

Mr. Green's claims involved counsel's failure to challenge crucial evidence about the illegal traffic stop, present exculpatory evidence, challenge the prosecution and government's misconduct, namely (a) Officer Sisco's "suborned and freely given" perjured testimony, (b) their use of manufactured evidence (GX141.227-28,236), (c) withholding Brady and Giglio materials inter alia exculpatory evidence that would have prevented the use of the illegal traffic stop, and to object to prejudicial testimony, communicate plea offers and file requested motions. These allegations, if proven, would affect both the validity of the conviction and the appropriate sentence. See *United States v. Williams*, 934 F.3d 1122, 1130 (10th Cir. 2019) (recognizing impact of ineffective assistance on sentencing determinations).

2. Available Evidence

The record was sufficiently developed to resolve the claims, including court transcripts showing counsel's performance, documentary evidence of the traffic stop disposition among other things, communications regarding plea offers, and trial record demonstrating prejudice. This distinguishes the case from those where factual development through collateral review is necessary. See *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995).

3. Judicial Economy

Pre-sentencing resolution would have served judicial economy by avoiding duplicate proceedings, preventing the need for later resentencing, allowing comprehensive review of all issues and preserving resources. Courts have recognized these benefits of pre-sentencing reviews when appropriate. *United States v. Tolliver*, 800 F.3d 138, 143 (3d Cir. 2015).

E. The Error Requires Remand

The court's refusal to hear the claims, after initially agreeing to do so and despite Mr. Green's diligent efforts to comply with requirements, requires remand. The Second Circuit has found abuse of discretion in similar circumstances. See Brown, 623 F.3d at 113-14 (remanding where court refused to hear pre-sentencing claims without good cause). Remand should include instructions to consider the claims on their merits, hold an evidentiary hearing, if necessary, evaluate impact on both conviction and sentence, provide appropriate relief if claims are proven. See *United States v. Arrington*, 763 F.3d 17, 27 (D.C. Cir. 2014) (prescribing similar procedure on remand).

IV. The District Court's Pervasive Factual Errors Violated Due Process and Demonstrate a Pattern of Bias That Undermined the Fundamental Fairness of the Proceedings

A. Constitutional Requirements for Judicial Fact-Finding

The Supreme Court has long recognized that due process requires judicial fact-finding to be based on actual evidence in the record, not speculation or mischaracterization. See *Townsend v. Burke*, 334 U.S. 736, 741 (1948). When a court's factual determinations are "materially untrue," they violate fundamental principles of due process. *United States v. Tucker*, 404 U.S. 443, 447 (1972). This requirement reflects the basic principle that "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" In *re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted). The Second Circuit has emphasized that a pattern of erroneous factual findings may demonstrate judicial bias requiring relief, particularly when those errors consistently favor one party. *United States v. Diaz*, 797 F.2d 99, 100 (2d Cir. 1986). Such patterns are especially concerning when they affect crucial determinations throughout the proceedings. *See United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007).

B. The Court's Mischaracterization of the Traffic Stop Evidence

The district court's handling of the crucial traffic stop evidence demonstrates a pattern of error that fundamentally affected the fairness of the proceedings. The record establishes that the traffic stop was dismissed by the Bronx Supreme Court, with the court explicitly stating that "the arrest and prosecution [were] deemed a nullity and [Green] was restored, in contemplation of law to the status occupied before the arrest and prosecution." This dismissal carried significant legal weight, completely nullifying the arrest and its consequences. Despite having this clear record before it, the district court fundamentally mischaracterized the disposition by stating during proceedings that "I guess I'm under the impression that the Bronx D.A.'s office dismisses all the time where it concluded there might be a search issue." This mischaracterization transformed what was actually a judicial nullification of the entire arrest and prosecution into a mere discretionary decision by prosecutors. The Third Circuit has specifically held that such mischaracterization of court records violates due process. *United States v. Moore*, 612 F.3d 698, 702 (3d Cir. 2010).

Even more prejudicial was the court's persistent misstatement about the location of the traffic stop. Despite clear evidence in the record establishing that the stop occurred on Monterey Avenue, the district court repeatedly stated that the "traffic stop" took place "right at the Honeywell Projects." This error appeared most prominently when the court declared: "Puff was previously identified as someone your client (referring to Mr. Green) supplied drugs with, who sold drugs in the Honeywell-Projects, and this arrest ('traffic-stop') took place right at the Honeywell-projects."

The significance of this location error cannot be overstated. By erroneously placing the traffic stop at the Honeywell Projects - the very location where the government claimed Mr. Green conducted drug trafficking activities, the court created a false connection that materially strengthened the prosecution's conspiracy theory. Courts have recognized that such location errors

can be crucial when they create false connections to criminal activity. See *United States v. Martinez*, 621 F.3d 101, 109-10 (2d Cir. 2010).

C. The Court's Compounding of Errors Through Evidentiary Rulings

The prejudice from these factual errors was magnified when the court allowed a stipulation between the prosecution and Mr. Green's lawyers that wrongfully stated the traffic stop was dismissed by the Bronx D.A.'s office (GX1012). This stipulation, based on the court's erroneous understanding, enabled NYPD Officer Jeffrey Sisco to present a false testimony claiming Mr. Green possessed narcotics on August 3, 2010, at Honeywell-Projects. The Supreme Court has emphasized that courts have a special duty to prevent the admission of evidence based on factual misunderstandings. See *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986).

D. Pervasive Errors in Sentencing Determinations

The pattern of erroneous fact-finding continued through sentencing, where the court made multiple unsupported determinations that materially increased Mr. Green's sentence. The court overruled Mr. Green's PSR objections and erroneously stated that "the firearms that were allegedly recovered from the Bridgeport, CT residence was loaded," and that "Green also distributed drugs in the state and local prison systems." (Quoting Judge Gardephe, July 22, 2021, Sentencing, Tr.48-49, Dk.743). Neither of these findings had any support in the record. The court's unsupported factual findings extended to numerous other crucial determinations. The court erroneously found a sufficient gun-drug nexus despite lack of record evidence. It incorrectly stated that six guns were found "loaded" and in an "open" handbag, contrary to the record evidence. The court wrongly claimed Mr. Green was "standing only feet away" from the closet containing handguns when marshals arrived, a claim unsupported by any testimony. The court erroneously asserted that guns and $2,000 cash were "found in the same bedroom" without any record support.

Such erroneous findings about firearms are particularly significant given their impact on mandatory minimum sentences. See Alleyne v. United States, 570 U.S. 99, 108 (2013) (emphasizing importance of accurate fact-finding for mandatory minimums). The Seventh Circuit has specifically held that clearly erroneous findings about firearm circumstances require resentencing. *United States v. Chatman*, 982 F.2d 292, 294 (7th Cir. 1992).

E. Procedural Errors Compounding Factual Mistakes

The court's fact-finding errors were further compounded by procedural mistakes. The verdict sheets erroneously suggested the jury could find Green guilty of the 924(c) Count even if he had allegedly possessed a gun merely "in relations to" the 846 Count. Furthermore, the court failed to instruct the jury that drug quantity was an element of the offense that must be proved beyond a reasonable doubt, contrary to established Supreme Court precedent in Apprendi v. New Jersey, 530 U.S. 466 (2000).

F. The Pattern of Errors Demonstrates Constitutional Violations

The systematic nature of these errors goes beyond mere mistake or oversight. Courts have recognized that when factual errors consistently favor one party and form the basis for crucial rulings, they may demonstrate unconstitutional bias. See *United States v. Antar*, 53 F.3d 568, 574 (3d Cir. 1995). The pattern here shows precisely such systematic bias: errors consistently strengthened the prosecution's case while undermining Mr. Green's defense.

The cumulative effect of these errors deprived Mr. Green of his constitutional right to due process. The Second Circuit has recognized that "the cumulative effect of multiple errors, while any one of which may be harmless in isolation, can nonetheless undermine the fairness of a trial." United *States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008). Here, the pervasive nature of the errors affected every stage of the proceedings, from pretrial rulings through sentencing.

G. Required Remedy

When a pattern of erroneous fact-finding demonstrates systemic bias, vacation of the affected proceedings is required. See *United States v. Londono-Tabarez*, 397 F. App'x 794, 799 (2d Cir. 2010). Here, that requires vacating the conviction and sentence. Given the pervasive nature of the errors and their demonstration of bias, reassignment to a different judge on remand is also necessary. See *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (reassignment appropriate where judge's conduct raises questions about impartiality).

The errors here are particularly egregious because they affected crucial determinations at every stage of the proceedings. The Second Circuit has emphasized that such systematic error requires reversal even without specific showing of prejudice. *United States v. Guglielmini*, 384 F.2d 602, 607 (2d Cir. 1967). The appropriate remedy must include detailed instructions ensuring that on remand: (1) The traffic stop evidence is properly characterized according to the actual court record; (2) Any firearm-related findings are based solely on record evidence; (3) Location evidence is accurately represented; and (4) All factual findings are supported by specific record citations. Only through such specific remedial measures can the constitutional requirement of fact-finding based on actual evidence be preserved.

The combination of issues presented in this case - judicial bias evidenced by prejudgment of claims and hostile conduct, denial of the fundamental right to self-representation, refusal to hear colorable ineffective assistance claims prior to sentencing, and pervasive factual errors affecting crucial determinations - presents important questions about the scope of constitutional protections in criminal proceedings. The record demonstrates systematic violations of Mr. Green's constitutional rights that undermined the fundamental fairness of the proceedings.

The district court's conduct, from prejudging ineffective assistance claims to making unsupported factual findings that consistently favored the prosecution, created an appearance of partiality requiring recusal. The court's failure to honor clear requests for self-representation violated a fundamental Sixth Amendment right. Its refusal to hear ineffective assistance claims, despite initially agreeing to do so and despite Mr. Green's diligent efforts to comply with requirements, violated due process. The pattern of erroneous factual determinations affecting crucial rulings further demonstrates the fundamental unfairness of these proceedings.

These issues, individually and collectively, warrant this Court's review to provide needed guidance on when judicial conduct requires recusal under constitutional and statutory standards, the scope of the right to self-representation after hybrid representation is granted, when due requires pre-sentencing resolution of ineffective assistance claims, and when factual errors rise to the level of constitutional violation

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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