No. ______________________

____

IN THE

SUPREME COURT OF THE UNITED STATES

____

PHILLIP SCHENCK — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS - FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

PHILLIP SCHENCK
(Your Name)

P.O. Box 33 - USP Terre Haute
(Address)

Terre Haute, Indiana 47808
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1). Whether the Lower Court violated the Due Process and Equal Protection Clauses of the United States Constitution by failing to properly docket and thereafter rule upon a timely filed Petition For Rehearing and Rehearing en banc?

2). Whether this Court's holdings in United States v. Throckmorton, 98 U.S. 61 (1878); Hazel-Atlas Glass Co. v. Hartford-Empire, 322 U.S. 238 (1944); and Chamber v. NASCO, 501 U.S. 32, 44 (1991) steadfast intolerance for fraud perpetuated by an Assistant United States Attorney representing the United States, was violated by the Lower Court for failure to ever consider timely NOTICE (by Motion) of such fraud upon the Court?

3). Whether a AUSA and as an attorney himself commits fraud upon the District Court and Lower Court when he remains silent as to the fraud he has perpetuated upon said Court never correcting this fraud when faced with filed certified affidavit of said fraud by a member of the same Bar of which he is a member?

4). Whether an indictment and thereafter a plea of guilty can stand if said plea is the product of fraud upon the Court from the alter ego of the United States?

5). Whether the Lower Court can sit idly by when presented with a sworn affidavit of fraud upon said Court and the District Court, by stating such presentation of fraud upon the Court is "untimely" thereby allowing the uncontested fraud to continue?

6). Whether appointed Appellate Counsel is obligated to bring to the attention of the Lower Court, a fraud perpetuated by the opposing Counsel (the United States) upon Said Court, the District Court and the Appellant?

LIST OF PARTIES

[ ] All parties appear in the caption of the case 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 the subject of this petition is as follows:

The Petitioner Phillip Schenck hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of the Court may evaluate possible disqualification or recusal.

- CHRISTOPHER WOODWARD (represented Petitioner)
- J. STEVEN BUSH (represented Petitioner briefly)
- SHAWN SMITH (represented the United States of America)
- JOHN McBRYDE (the District Court Judge in the case)

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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

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

The opinion of the United States court of appeals 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.

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

[X] reported at U.S. v. Schenck No. 4:15-CR-152-A(07) (N.D. TX); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] 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

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

The date on which the United States Court of Appeals decided my case was September 25, 2017.

[ ] 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: October 19, 2017, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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 INVOLVED

- Fifth Amendment of the United States Constitution - Due Process
- Fifth Amendment of the United States Constitution - Equal Protection
- Sixth Amendment of the United States Constitution - Right To Counsel

STATEMENT OF THE CASE

On June 10, 2015, in the Northern District of Texas, Phillip Schenck (hereinafter "Schenck") was charged by Indictment with Conspiracy to Possess With Intent to Distribute a Controlled Substance, a violation of 21 U.S.C. § 846; and 21 U.S.C. § 841(a)(1). § 841(b)(1)(B). Specifically, the Indictment alleged that beginning in 2014 and continuing until on or about May 18, 2015, Schenck conspired with others to possess with intent to distribute 50 grams or more of methamphetamine, a Schedule II Controlled Substance. AUSA Shawn Smith made the entire presentation to the Grand Jury to obtain the instant indictment.

On August 7, 2015, Schenck entered a plea of guilty. No plea agreement was entered in this case; although a Factual Resume was filed with the Court.

THE FACTS:

a) The assistant United States Attorney, Shawn Smith, who personally presented the instant Lower Court case to the Grand Jury and thereafter obtained the instant indictment and sentence while prosecuting the same case before the Lower Court, while acting as the alter ego of the United States of America did:

1) One week after obtaining a 40 year sentence for a 21 U.S.C. § 846 conspiracy offense in the instant Lower Court, penalizing the undersigned defense trial Counsel Christopher K. Wooodward and admitted "that he (Smith) realized that Mr. Schenck and Mrs. Means (the alleged co-conspirator) did not know each other and

had no relevant conduct connection". Appendix A, pgs 1-2.

b) AUSA Smith did present this knowing false facts to the Grand Jury to obtain the instant indictment, thereby presented knowingly false evidence to the Grand Jury to obtain the controlling instant indictment. **Appendix A.**

c) AUSA Smith knowingly using false facts persisted in the prosecution of Schenck, as alter ego of the United States, to obtain a plea based on false facts and a conviction resulting in a 40 year sentence. **Appendix A.**

d) The respective case agents well know that there was no conspiracy between Schenck and Amanda Means as they were present during her questioning. They, the agents also presented false evidence and conspired to present false evidence to both the Grand Jury and the District Court with Shawn Smith, AUSA. **Appendix A.**

e) Attorney, trial defense counsel Christopher K. Woodward did not alert the District Court of the Shawn Smith, AUSA, fraud admission when it took place any time thereafter. See **Entire Case Docket.**

f) Appellant counsel McCaffrey had REFUSED to alert this Court or opposition counsel to these subject-matter Jurisdiction implicating facts. **Appendix G.**

g) Counsel McCaffrey, did without my express permission, inform, tell, and/or disclose, to the Office of the Federal Defender attorneys this affidavit thereby creating an express and unwaivable conflict of interest as McCaffery violated the attorney client privilege. Appendix G.

h) Attorney McCaffrey, refuses to inform the Court of the fraud he is aware of and all its criminal implications to this Court as is his duty to do so, so as to prevent a fraud upon this Court. Appendix G.

i) Attorney McCaffrey, actually is advising me to forego, the right to argue this issue that the United States has knowingly withheld from the Lower Court record implicating the Subject Matter Jurisdiction of this Court, forego Direct Appeal entirely on this issue and fight it on collateral attack, 2255. In doing so, allowing this Court to be made an unknowing party to this criminal fraud conspiracy. Appendix G.

j) Attorney McCaffrey admits, post panel decision, that he never so much as sought, let alone received or read the case file of Schenck in "preparation" and writing of the instant appeal briefs. Appendix G.

k) Petitioner Schneck did file a timely Petition For Rehearing and Rehearing en banc. Schenck received this Court's decision on October 3, 2017, and filed said Petition on October 9, 2017, therefore the Petition was timely according to Houston v. Lack, 487 U.S. 266 (1988). Instead of filing the Petition, Schenck received a letter from the Clerk of the Court stating:

> "Dear Mr. Schenck,
> On October 16, 2017 we received your letter dated October 9, 2017 asking us to accept your letter/certification in lieu of a more formal Petition For Rehearing and Rehearing En Banc.
>
> No action will be taken on the above document, in light of the Mandate having issued on October 17, 2017."

The Lower Court, having been presented twice with these facts and documented proof thereof ignored the fraud upon the Court and the defendant's Due Process Rights, Equal Protection Rights, and Effective Counsel Rights as guaranteed in the United States Constitution. **Appendix E and F.** This resulted in **Appendix C and B.**

REASONS FOR
GRANTING THE PETITION

Fraud upon the Lower Court and District Court that was perpetuated by Assistant United States Attorney (AUSA) Shawn Smith and the United States Attorney for the Northern District of Texas. See: Appendix F.

The entire history of the Judicial Branch has steadfastly maintained absolute adhorrence for fraud perpetuated upon the Courts. No matter who the perpetuator, even an alter ego of the United States itself, no tolerance for lying, creating and proffering false evidence and facts, fraud upon the Court, bring to bare the full force of the Executive's prosecutorial power upon the accused has never been openly tolerated.

See: United States v. Throckmorton, 98 U.S. 61 (1879);
Hazel-Atlas Glass Co. v. Hartford-Empire, 322 U.S. 238 (1944);
Browning v. Navarro, 826 F.2d 335 (CA 5 1987); and
Fierro v. Johnson, 197 F.3d 147 (CA 5 1999).

This has now, in the most shameful of fashions taken place. The idea that evidence such as that provided in the "untimely" motion for the appointment of substitute Counsel has been, by the Lower Court, ignored gives unconstitutional support to continuing crimes perpetuated by those who act on behalf of the United States to cause this Court as a rubber stamp effectively authorizing further fraud and criminality before, upon and by the federal Courts.

The truth is never "untimely." This is why the Lower Court has the power to recall the mandate "to avoid miscarriage of justice" and "fraud upon the court", Calderon v. Thompson, 523 U.S. 538 (1998). The Supreme Court has repeatedly held that federal Courts possess the inherent power "to vacate [their] own judgments upon PROOF that fraud has been perpetuated upon the court." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (citing Hazel-Atlas Glass Co. supra). The power to grant "equitable relief against fraudulent judgments is not of statutory creation." Hazel-Atlas, 322 U.S. at 248. This equitable power was "firmly established in English practice long before the foundation of our Republic." Id. at 244, and the power is vested in the Courts by their very creation. See: Chambers, 501 U.S. at 43-44 ("some elements of inherent authority are so essential to 'the Judicial Power,' - United States Constitution Article III § 1 - that they are indefeasible....").

Truth and justice were and are always to be the arbiter's basis for decision. Belated truth, only belated due to both the malfeasance of this Court's appointed Counsel McCaffrey and the United States' alter ego, remain the truth. This truth clearly meets this Court's standard in Creel v. Johnson, 162 F.3d 385, 391 (CA 5 1998) for KNOWING GOVERNMENT FRAUD UPON THE COURT and was placed at the foot of this Court BEFORE the instant factually flawed and legally tainted September 25, 2017 decision. Nothing is untimely here.

FRAUD UPON BOTH THE DISTRICT AND THIS COURT BY THE UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF TEXAS - THE BLACK LETTER OF THE LAW

To establish fraud on the Court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the Court in its discretion. Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the Court. Less egregious misconduct, such as nondisclosure to the Court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the Court. First Nat'l Bank of Louisville v. Lustig, 96 F.3d 1554, 1557 (5th Cir. 1996) (quotation marks and citations omitted).

The Lower Court decision in <u>Browning v. Navarro</u>, 826 F.2d 335 (5th Cir. 1987), provides further guidance on the standard for considering fraud upon the Court. In <u>Browning</u>, the Court analyzed two Supreme Court cases dealing with "fraud on the court" actions: <u>United States v. Throckmorton</u>, 98 U.S. 61, 25 L.Ed. 93 (1878); and <u>Hazel-Atlas</u>. The Court summarized the lessons of these two cases:

> <u>Throckmorton</u> stands clearly for the proposition that intrinsic fraud, that is, fraudulent evidence upon which a judgement is based, is not grounds to set aside a judgment. It also makes clear that extrinsic fraud, that is, fraud that was not the subject of litigation, that infects the actual judicial process, is grounds to set aside a judgment as procured by fraud. 14.... <u>Hazel-Atlas</u> is to be read as an expansion of the limits set by <u>Throckmorton</u> in attacking judgments generally ... <u>Hazel-Atlas</u> allows a judgment to be attacked on the basis of intrinsic fraud that results from corrupt conduct by officers of the court. <u>Browning</u>, 826 F.2d at 344 (footnotes omitted).

This Court's instant decision is founded upon the supposition that the United States Attorney was seeking actual justice and the Lower Court was truthfully informed by the prosecution team. It was not. Instead, as evidenced by the September 2, 2016 affidavit of trial defense Counsel Christopher K. Woodward the United States, through its alter ego Shawn Smith, not only perpetuated a fraud upon the trial Court but this Court as well. As for the required knowledge of wrong doing requirement, AUSA Smith, outside the trial record, actually bragged about knowingly deceiving the trial Court to obtain Schenck's forty (40) year sentence.

THE UNADDRESSED APPELLATE RULE 27.3 EMERGENCY MOTION TO SUBSTITUTE COUNSEL ALERTED THIS COURT TO THE FRAUD PERPETUATED BY THE UNITED STATES, SAID MOTION SHOULD HAVE BEEN DECIDED BY THIS COURT ON THE MERITS AND FACTS IN SUPPORT

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for the law, it invites every man to become a law unto himself, it invites anarchy." Olmstead v. United States, 277 U.S. 439, 485 Justice Brandeis (dissenting).

With the facts before the Appellate Panel, the Lower Court ruled the truth be swept under the rug as some form of "untimely" truth. Think about this entire proposition put forth in the instant panel decision, the TRUTH IS "UNTIMELY". That a miscarriage of justice by way of fraud upon the Court perpetuated by the supposed most honorable and litigious of practitioners, the United States is ignored as somehow "untimely." The panel, instead of the Constitutional desire and need to follow the truth wherever it leads, closes its eyes to the wanton fraud upon itself as sworn by one of its own officers. This blind eye has resulted in a miscarriage of justice and blatantly not only upsets the instant case but all cases this criminal enterprise of AUSA Smith and the case agents have tainted with their soiled participation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

P. Sch.

Phillip Schenck

Date: 1-15-18