

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL LOPEZ — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DANIEL LOPEZ

(Your Name)

P.O. BOX 6001

(Address)

ASHLAND, KENTUCKY 41105

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. WHEN COUNSEL IS INSTRUCTED TO APPEAL AND NO RETRACTION IS MADE OF THIS STATEMENT, IS COUNSEL'S ASSUMPTION THAT "HE THOUGHT" HIS CLIENT HAD CHANGED HIS MIND ENOUGH TO STRIP THAT CLIENT OF HIS APPELLATE RIGHT?
2. IS THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT OFFENDED WHEN THE JUDGE THAT PRESIDED OVER A DEFENDANT'S PRETRIAL LITIGATION IS ALLOWED TO PRESIDE OVER THAT SAME DEFENDANT'S POST CONVICTION LITIGATION THAT ADDRESSED THE CONSTITUTIONAL VALIDITY OF THAT SAME JUDGE'S PRETRIAL RULING?
3. CAN A PLEA AGREEMENT BE KNOWING AND VOLUNTARILY WHEN WHAT A DEFENDANT REASONABLY BELIEVED TO BE HIS BARGAIN WAS NOT WHAT THE GOVERNMENT INTENDED IT TO BE?

LIST OF PARTIES

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

☐ 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:

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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 A to the petition and is

☒ reported at OCTOBER 31, 2017; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

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

☒ reported at MARCH 30, 2017; 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☐ is unpublished.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☐ is unpublished.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 Oct. 31, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Jan. 3, 2018, and a copy of the order denying rehearing appears at Appendix C.

☐ 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

IV [1791]

FOURTH AMENDMENT "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..."

V [1791]

FIFTH AMENDMENT "No person shall be held to answer for a capital, or otherwise infamous crime,...without due process of law."

VI [1791]

SIXTH AMENDMENT "In all criminal prosecutions, the accused shall enjoy the right to trial by an impartial jury...and to have the Assistance of Counsel for his defence."

XIV [1868]

FOURTEENTH AMENDMENT/SECTION 1. "...nor shall any state deprive any person of life, liberty, or property, without due process."

STATEMENT OF THE CASE

On February 7, 2012, a grand jury returned an Indictment [Doc. 7], charging Petitioner with two counts of bank robbery and two counts of using, carrying, and/or brandishing a firearm in relation to a crime of violence. Petitioner filed motions to suppress illegally obtained evidence

On June 1, 2012, that Suppression Hearing was conducted before Magistrate Judge H. Bruce Guyton. After brief litigation and consideration to Circuit Court and Supreme Court case law presented by Attorney Moffatt, Magistrate Judge Guyton denied both motions. Subsequent to these denied motions, Petitioner entered guilty pleas to both counts of bank robbery and a single count of using, carrying, and/or brandishing a firearm in relation to a crime of violence [Doc. 30].

On February 5, 2013, District Judge Thomas W. Phillips sentenced Petitioner to 240 months of imprisonment, followed by five years supervised release. Judge Phillips entered the judgement of conviction [Doc. 38] the following day. Assistant Federal Defender Jonathan A. Moffatt represented Petitioner at all times, up to and including entry of judgement.

On February 7, 2014, the United States District Court, Eastern District of Tennessee, Knoxville Court docketed Petitioner's pro se motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. 41], raising two claims: (1) that his attorney was ineffective for not contesting the sufficiency of a factual basis set forth in the plea agreement, and (2) that his attorney gave constitutionally ineffective assistance by not filing a direct appeal as Petitioner requested.

Petitioner argued that he was entitled to relief under U.S.C. § 2255 because Attorney Moffatt failed to file a direct appeal on his behalf [Docs. 41 & 45]. In support of this claim, Petitioner filed an affidavit [Doc. 46], stating:

Immediately after the district court imposed sentence, I specifically asked counsel to file an appeal because I was dissatisfied with my plea, sentence, and the resolution of my Fourth Amendment claim.

Furthermore, I asked counsel to appeal the suppression issue even before I was sentenced.

On December 15, 2015, after patiently waiting twenty-three months for a ruling, Petitioner filed a WRIT OF MANDAMUS with the Sixth Circuit United States Court of Appeals requesting that the Court order the District Court to either grant Petitioner's requested relief or conduct an evidentiary hearing as required by law.

On January 26, 2016, the United States Court of Appeals **"INVITED"** the district court to respond to the mandamus petition within thirty days.

On February 1, 2016, District Judge Pamela L. Reeves ruled [Doc. 54] that Petitioner was entitled to an evidentiary hearing on the sole issue of whether Petitioner timely requested that his attorney to file a direct appeal on his behalf. Judge Reeves **"REFERRED"** the matter to Magistrate Judge H. Bruce Guyton and instructed Judge Guyton to **"APPOINT"** counsel to represent Petitioner. In addition, Judge Reeves also instructed Judge Guyton to address the merits regarding a Certificate of Appealability on all issues raised in the evidentiary hearing when filing his Report and Recommendation.

On March 29, 2016, an evidentiary hearing was held before the District Court on Petitioner's pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. 41]. Judge Guyton heard the testimony of the Petitioner and his former attorney Assistant Federal Defender Johnathan A. Moffatt, received exhibits, and heard parties arguments.

On September 1, 2016, Magistrate Judge Guyton **DENIED** Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and ordered that no certificate of appealability be issued with regard to any of the Petitioner's claim in his § 2255 motion [Doc. 41] or his reply [Doc. 46].

On February 10, 2017, Attorney James H. Varner, Jr. timely filed an OBJECTION TO THE REPORT & RECOMMENDATION OF THE MAGISTRATE motion to District Judge Pamela L. Reeves.

On February 24, 2017, District Judge Pamela L. Reeves allowed the Government

to respond with UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT & RECOMMENDATION TO DENY PETITIONER'S § 2255 MOTION [Doc. 70-1] where Assistant United States Attorney Kelly Norris cherry-picked statements and used them out of context to solidify the Government's objections to the Petitioner's objections to the Magistrate's Report and Recommendation.

On March 30, 2017, District Judge Pamela L. Reeves **DENIED** Petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 because she claimed that Petitioner did not establish that his counsel was deficient or that he was denied a constitutional right. Judge Reeves denied a certificate of appealability as well.

On April 24, 2017, Petitioner timely filed the pre-typed Notice of Appeal and forms to proceed in forma pauperis provided by Attorney James H. Varner Jr. Those documents were sent out via certified mail to the Eastern District of Tennessee Court (as advised by counsel) and was received by said Court on April 27, 2017.

On May 5, 2017, the Sixth Circuit Court of Appeals informed Petitioner that a appeal had been docketed and that Petitioner had until May 19, 2017 to either pay the full \$505.00 appeal filing fee to the U.S. District Court, or to file a motion in the Sixth Circuit Court of Appeals to waive the filing fee.

On June 7, 2017, Petitioner filed a MOTION FOR STATUS UPDATE concerning the status of his forma pauperis application and to inform the Court that Petitioner was in the process of being transferred to a lower security prison.

On June 6, 2017, the Sixth Circuit Court of Appeals issued an ORDER and about a week later, Petitioner received the ORDER stating that pursuant to Rule 45(a), Rules of the Sixth Circuit, that it is ordered that the cause be, and hereby is, dismissed for want of prosecution.

Subsequent to receiving this ORDER from the Court of Appeals, Petitioner contacted Case Manager Jill Colyer out of the Sixth Circuit Court of Appeals and explained how his former counsel had sent the pre-typed forms for appeal and instructed him to sign and send the forms to the District Court so that Petitioner

could proceed with his appeal to the Sixth Circuit Court of Appeals.

On June 12, 2017, Petitioner filed an APPLICATION IN SUPPORT OF CERTIFICATE OF APPEALABILITY motion and on June 19, 2017, that motion was filed with the Court of Appeals.

On July 3, 2017, while in transit, Petitioner filed a MOTION TO REINSTATE along with a MOTION FOR PAUPER STATUS that contained the five issues Petitioner wished to raise on appeal.

On July 12, 2017, the default issue that led to the dismissal of Petitioner's appeal had been cured and the Court of Appeals subsequently **ORDERED** that Petitioner's MOTION TO REINSTATE be **GRANTED**.

On July 19, 2017, after Petitioner arrived at his final destination, Petitioner filed a MEMORANDUM IN SUPPORT OF ARGUMENT #5 which not only addressed the original issue of suppression of evidence and the unconstitutional seizure that ensued, but also the other four issues listed in Petitioner's MOTION FOR PAUPER STATUS.

On August 2, 2017, Petitioner filed a SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ARGUMENT #3 addressing the knowing and voluntarily standard of the plea agreement.

On October 31, 2017, the Court of Appeals **DENIED** Petitioner's motion for a certificate of appealability and Petitioner's motion for leave to proceed in forma pauperis was **DENIED** as moot.

On November 9, 2017, Petitioner filed a MOTION FOR REQUEST FOR REHEARING/ REHEARING EN BANC and on December 13, 2017, the Sixth Circuit Court of Appeals Clerk referred the matter to all the active members of the court for further proceedings on the suggestion for en banc rehearing.

On **JANUARY 3, 2018**, the panel of judges from the Sixth Circuit Court of Appeals **DENIED** Petitioner's motion for rehearing en banc.

REASONS FOR GRANTING THE PETITION

WHEN COUNSEL IS INSTRUCTED TO APPEAL AND NO RETRACTION IS MADE OF THIS STATEMENT, IS COUNSEL'S ASSUMPTION THAT "HE THOUGHT" HIS CLIENT HAD CHANGED HIS MIND ENOUGH TO STRIP THAT CLIENT OF HIS APPELLATE RIGHT?

On September 1, 2016, Magistrate Judge Guyton ruled that the Petitioner has failed to make a substantial showing of a denial of a constitutional right for the two claims he raised in his § 2255 motion and recommended that the District Judge deny a certificate of appealability.

Three days later, Attorney Moffatt met with Petitioner to discuss his options. Counsel informed Petitioner that "he thought the motion regarding the search of the box found in the garage was a strong motion with positive case law from the circuit court (APX. F), and that there was a strong chance for success if we go through the appellate process." (APX. D)(pg.25, line 11-18);(pg. 7, line 5-8).

At the conclusion of this statement made by counsel, Petitioner testified that he instructed counsel to **"lets do that then."** (APX. D)(pg. 7, line 9). This testimony was not disputed or revisited by the Government. A rather odd strategic move, considering that the sole purpose of the evidentiary hearing, as District Judge Reeves states, was to determine "whether Petitioner timely requested that his attorney to file a direct appeal on his behalf."

Magistrate Guyton states in his Report and Recommendation that "the Court finds that the Petitioner did not ask or imply that he wanted counsel to file a direct appeal." (APX. B)(R&R, pg. 13). Is the statement of "lets do that then" not an implication to pursue an appeal of the suppression hearing when spoken immediately after counsel stated that he thought we could win if we appealed the motion? (APX. B) (pg. 25, line 11-18)(paraphrasing). This "lets do that then" statement made by the

Petitioner cannot have been taken for anything less than an "express instruction" to appeal the suppression motion and would not have been an ambiguous instruction to competent counsel. "Counsel is constitutionally bound to make a reasonable effort to discover defendant's wishes to appeal." *Roe v. Flores-Ortega*, 528 U.S. 476, 470 (2000).

Counsel testified that after informing Petitioner that we had case law supporting our motion and that he thought we could win the suppression of the illegally obtained evidence seized in the garage if we appeal, that at this time, "he thought" Petitioner had changed his mind and wanted to pursue plea negotiations. (APX. D)(pg. 25, line 9-18). "Counsel's reasonably effective assistance must be based on professional decision and informed legal choices..." *Strickland v. Washington*, 466 U.S. 668, 680 (1984). The fact that counsel "thought" Petitioner wanted to forgo his appellate rights after counsel informed him of the situation is unreasonable in itself, but "If counsel rendered ineffective assistance either in failing to file a Notice of Appeal as instructed or in failing to determine his clients wishes, prejudice is presumed..." *Campbell v. United States*, 686 F.3d 353, 359 (6th Cir. Court of Appeals 2012).

If what Attorney Moffatt claims happened, actually happened (which it did not), then counsel has rendered himself ineffective at his own admittance because he was not objectively reasonable and did not make a reasonable choice to pursue the appeal. "A purportedly strategic decision is not objectively reasonable when the attorney does not make reasonable choices." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). There was no penalty to be implemented had Petitioner wished to proceed (which he did) with appealing the suppression motion and the plea agreement would not have been withdrawn had Petitioner pursued the motion. "The concerns about too much judicial second-guessing after the fact is simply not raised by the claim that a lawyer should have counseled her client to make an intelligent decision to invoke or forgo the right to appeal or the opportunity to seek appeal..." *Flores-Ortega*, 528 U.S. @ 492.

Petitioner testified that at the point of reviewing and signing the plea agreement, he specifically asked counsel about whether signing the plea agreement would adversely affect the appeal of the suppression issue and was informed that it would not. (APX. D)(pg. 7, line 24-25); (pg. 8, line 7-9).

When the Government questioned counsel about this issue on direct, counsel did not dispute the testimony, he merely stated. "I don't recall." (APX. D)(pg. 30, line 16-18).

Finally, immediately after sentencing, Petitioner asked counsel, **"Is there anything else we can do besides what we are already doing?"** (APPX. B)(R&R, pg. 5); See also (APPX. D)(pg. 14, line 8-10)(R.P.R. ~~error/done~~ should read doing as reflected in Magistrate Guyton's R&R). Neither counsel or the Governemnt dispute this extremely pertinent testimony. In fact, when counsel was questioned about this statement, he testified that **"IT'S POSSIBLE"** that Petitioner said to him after sentencing. (APX. D)(pg. 45, line 18).

The discussion and the direction to appeal the adverse ruling was, without any doubt, subsequent to the issuance of the Report and Recommendation. District Judge Pamela Reeves confirms this understanding in her Memorandum Opinion when she states, "The testimony at the evidentiary hearing supports finding that...Petitioner initially wanted to pursue the motion to suppress..." (APX. B). Further more, and perhaps most importantly, counsel's testimony was that "he thought" that the Petitioner had changed his mind with regards to the appeal. (APX. D)(pg. 40, line 23). However, Petitioner testified that at the point of signing the plea, he specifically asked counsel about whether signing the plea would adversely affect the appeal of the suppression issue and was informed that it would not. (APX. D)(pg. 7, line 24-25, 8, line 1). Petitioner also testified that, had he been advised that his appeal was not being pursued, he "never would of taken the plea." (APX. D)(pg. 8, line 12).

The very exercise of effective assistance is to ensure that the communication between trial counsel and client is clear, and that the action taken by the client

is knowing, intelligent and voluntary. Such clarity can hardly have existed when counsel is forced to express his "thought[s]" regarding the Petitioner's desire or intentions at a critical time surrounding the withdrawal of appeal or entry of a plea agreement.

Petitioner addressed the suppression issue on three pertinent occasions; (1) right after receiving the adverse ruling of Magistrate Guyton's Report and Recommendation when he stated "lets do that then", (2) prior to signing plea agreement when Petitioner question counsel about signing the plea and the adverse effects pertaining to the suppression issue, and (3) after being sentenced were. Petitioner asked counsel "is there anything else we can do besides what we are already doing." Neither counsel nor Government disputed that these statements occurred. The first two were not even revisited by the Government and counsel actually concedes to (3) when he states "it's possible" that he said this to me.

Counsel's state of mind regarding the issue of the suppression motion is irrelevant. Counsel has a duty to "know" his clients wishes and intentions and to not react until he 100% sure of them. What matters most is what the client reasonably believes, not what counsel "thought".

IS THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT OFFENDED WHEN A JUDGE THAT PRESIDED OVER A DEFENDANT'S PRETRIAL LITIGATION IS ALLOWED TO PRESIDE OVER THE SAME DEFENDANT'S POST CONVICTION HEARING ADDRESSING THE CONSTITUTIONAL VALIDITY OF THAT JUDGE'S PRETRIAL LITIGATION RULING?

Petitioner has a constitutional right to a hearing before an unbiased judge. *Bracy v. Gramely*, 520 U.S. 899, 904-05 (1997). The Due Process Clause of the [Fifth] Fourteenth Amendment requires a fair trial tribunal before a judge with no actual

bias against a defendant or an interest in the outcome. Id. @ 904-05; *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

Magistrate Judge H. Bruce Guyton not only authorized the search of the box that was seized unconstitutionally (APX. F), but when a suppression hearing was conducted to determine the constitutional merits of the seizure, Magistrate Guyton was chosen to preside over the hearing. Petitioner's attorney presented all the relevant circuit case law regarding Apparent Authority, and defined in detail how Petitioner's Fourth Amendment was violated. (APX. F). Magistrate Guyton then went against pertinent circuit law and denied Petitioner's suppression motions to validate the illegal search and seizure that was aided by the search warrant that he signed.

There are two types of judicial misconduct, both of which Petitioner is alleging took place. The first type is "**judicial bias**" stemming from a trial judge's personal interest in the outcome of a cause, usually derived from some extra-judicial association with the cause or one of the parties. Id. (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). The second type concerns charges of "**judicial misconduct**" in which the trial judge is accused of conducting the proceedings in which strongly suggests that the judge believes the defense or favors the prosecution. Id. (citing *Litely v. United States*, 510 U.S. 540, 555-56 (1994)).

After nearly two years of waiting and instructions from the Court of Appeal to respond to Petitioner's mandamus motion within 30 days, District Judge Pamela L. Reeves ruled that the Petitioner was intitled to an evidentiary hearing on the sole issue of whether Petitioner timely requested that his attorney file a direct appeal on his behalf. Judge Reeves referred the matter to Magistrate Guyton and instructed him to appoint counsel to represent Petitioner. In addition, Judge Reeves instructed Magistrate Guyton to address the merits regarding a Certificate Of Appealability on all issued raised in the evidentiary hearing when filing his Report and Recommendation.

At this point, Magistrate Guyton has issued an unconstitutional search warrant, presided over the suppression issue that determined the constitutional merits of that seizure, and now referred to the evidentiary hearing that will determine if Petitioner instructed his attorney to appeal his ruling in that suppression hearing. In addition

to presiding over that evidentiary hearing, Magistrate Guyton is instructed to appoint Petitioner his attorney and determine the merits of Petitioner's claim that he instructed his attorney to appeal Magistrate Guyton's very own ruling of the suppression hearing. To violate a defendant's right to a fair proceeding, the judge's intervention in the case must be "significant and detrimental to the defendant to a substantial degree." *Burnett v. Bell*, 2010 U.S. Dist. LEXIS 50852 (citing *McBee v. Grant*, 763 F.2d 811, 818 (6th Cir. 1985)). By ruling in favor of Petitioner on any grounds that may give Petitioner another bite at the apple, Magistrate Guyton would be aiding Petitioner in overturning his UNCONSTITUTIONAL ruling of the suppression motion and exposing his abilities to ethically preside over forthcoming litigations.

The bias inquiry is objective, asking "whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872, 881 (2009) (internal quotation marks omitted) (citing *Unger v. Sarafite*, 376 U.S. 575, 584 (1964)). Recusal is required when probability of actual bias rises to an unconstitutional level." *Id.* @ 887.

A judge's misconduct "may be 'characterized as bias or prejudice' only if 'it is so extreme as to display clear inability to render fair judgement', so extreme in other words that it 'display[s] a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Lyell v. Renico*, 470 F.3d 1177, 1186 (6th Cir. 2006) (quoting *Litely v. United States*, 510 U.S. 540, 551, 555 (1994)).

To establish bias, [a petitioner] need not prove actual bias, but merely an unconstitutionally high probability of actual bias. *Caperton*, 556 U.S. @ 887; *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir.).

Upon Petitioner's first meeting with counsel that Magistrate Guyton appointed, Petitioner conveyed his concerns and displeasures with having Magistrate Guyton presiding over Petitioner's Evidentiary Hearing. Petitioner stated that "for us to succeed, Magistrate Guyton will have to go against his initial ruling that he made in the suppression hearing." Attorney Varner assured Petitioner he had a good track

record with Judge Guyton and this issue. Reluctantly, Petitioner took attorney's advice.

Before either party was heard, Magistrate Guyton displayed favoritism toward the defense [Government]. Attorney Varner stated that "on each occasion, concerning this same issue, with you [Magistrate Guyton] presiding over the hearing, the government has been instructed to proceed first." (APX. D)(pg.3-4). The Government objected and after a brief conversation between Magistrate Guyton and his personal lawyer, Magistrate Guyton informed the Court that it did not matter which party proceeds first. Even though Magistrate Guyton made this statement and it was the Petitioner that initially requested that the Government proceed first, Magistrate Guyton still instructed Petitioner to proceed first. Throughout Petitioner's testimony against the one witness requested by the Government, that witness, United States Federal Defender Jonathan Moffatt, was allowed to remain in the courtroom and hear Petitioner's testimony in its entirety. A clear violation of Rule 615.

Rule 615 provides: "At a party's request, the court must order witnesses excluded so that they cannot hear other witness' testimony. Or the court may do so on its own." Fed. R. Evid. 615. The Trial management order for this case in this case includes the following provision:

A. EXCLUSION OF WITNESSES. A witness who may testify at the trial or at an evidentiary hearing will not be permitted to hear the testimony of any other witness before testifying, and is excluded from the courtroom during the trial or hearing until after the witness has completed his or her testimony, unless exclusion of the witness is not authorized by the Federal Rule of Evidence 615 or unless the court orders otherwise...the sequestration of any witness not exempted by Rule 615 is automatic, unless the court orders otherwise."

"the purpose of sequestration is to prevent witnesses from tailoring their testimony to that prior witness and to aid in detection of dishonesty." United States v. Engelmann, 701 F.3d 874, 877 (8th Cir. 2012)(quoting United States v. Collings, 340

F.3d 672, 681 (8th Cir. 2003).

Upon conclusion of Petitioner's Evidentiary Hearing, Magistrate Guyton recommended that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 be **denied** and that **no** certificate of appealability be issued with regard to any of the Petitioner's claims in his : 2255 motion or his reply.

A judge can and should be disqualified for "bias, [] a likelihood of bias,[] or [even] an appearance of bias." Unger v. Sarafite, 376 U.S. @ 588; See also In re Mirchison, 349 U.S. @ 136("[O]ur system of law has always endeavored to present even the probability of unfairness."); accord Anderson v. Shepard, 856 F.2d 741, 756 (6th Cir. 1988)(opining that due process "require[s] not only an absence of actual bias, but an absence of even the appearance of judicial bias").

Magistrate Guyton's ethics and responsibilities to ensure a defendant of a fair trial/litigation is highly questionable and this Court's bias created a structural error that tainted the Petitioner's entire judicial process.

**CAN A PLEA AGREEMENT BE KNOWING AND VOLUNTARY WHEN WHAT A DEFENDANT
REASONABLY BELIEVES TO BE HIS BARGAIN IS NOT WHAT THE GOVERNMENT HAD
INTENDED IT TO BE?**

Magistrate Judge H. Bruce Guyton bases much of his analysis and foundation of his recommendation on the actions of trial counsel surrounding the signing of the plea agreement and the entry of the Petitioner's plea. Petitioner testified that "had [he] known that the appeal was not being pursued, [he] never would have signed a 20-year deal, never." (APX. D)(pg. 20, line 16-19); see also(pg. 8, line 12).

Magistrate Guyton stresses that counsel explained to Petitioner that his plea agreement was under the provisions of 11(c)(1)(c) and that there would be no appeal

with regards to the suppression issue. However, upon careful review of the testimony, when asked specifically about such a discussion on redirect, court documents show that he was referencing what he, as a lawyer understood with regards to provisions of a 11(c)(1)(c) agreement and what he usually does with his clients. (APX. D)(pg. 29, line 10-25); see also (pg. 30, line 1-2). Not what he did with the Petitioner. In fact, when asked about his actual conversation with the Petitioner, he stated, "I don't recall the specific discussion..." (APX. D)(pg. 48, line 22).

The Government contends that Petitioner was "familiar" and "experience[d]" with appellate waivers and provides Petitioner's previous plea agreement with the State of New Hampshire to support their statement. Specifically, United States Assistant Attorney, Kelly Norris, refers to page 13 of that New Hampshire plea agreement (APX. D)(pg. 17, line 16) where the waivers in the previous plea agreement state, "the defendant knowingly and voluntarily waives any right to appeal or to collaterally challenge the defendant's guilty plea and any ruling on pretrial suppression motions or any other pretrial dispositions or any imposition by the court of a sentence which does not exceed a sentence recommended by the United States, etcetera, etcetera. You are familiar with appellate waivers, correct? (APX. D)(pg. 17, line 16-25).

Petitioner's **ONLY** experience with appellate waivers prior to the one presented to Petitioner by the Government, was this New Hampshire agreement that **specifically addressed a suppression motion and the forfeiture thereof**. The plea agreement that the Government presented to Petitioner did not contain such provisions, and to infer that it did, as United States Assistant Attorney, Kelly Norris has done, is disrespectful to the integrity of justice. If District Attorney Kelly Norris intended for these provisions to be part of the Government's plea agreement, then Kelly Norris should have implemented them when she was writing the waivers provisions section of the plea agreement that she presented to Petitioner. Instead, the Government chooses to proclaim that Petitioner knew these provisions were in place because Petitioner was "familiar with appellate waivers...". Even an "experienced" defendant cannot

reasonably be expected to comprehend the provision of a plea agreement that is not clearly stated in that plea agreement.

The Sixth Circuit traditionally use contract law principles when interpreting and enforcing plea agreements because they are contractual in nature. (citing *United States v. Bowman*, 634 F.3d 357, 360 (6th Cir. 2011)). In determining whether a plea agreement has been breached, the Sixth Circuit Courts examines what the defendant "reasonably understood" when he entered into the agreement. *United States v. Phibbs*, 999 F.2d 1053, 1081 (6th Cir. 1993). Petitioner clearly stated what he "reasonable understood" was happening in regards to the suppression issue. (APX. D) (pgs. 12-13, line 20-25; 1-8). "The most persuasive evidence of what a defendant reasonably appreciated as his bargain is found in the plain language of the court-approved agreement." *Id.* Moreover, plea agreements are to be interpreted strictly, with ambiguities construed against the government "because the government can take steps in drafting a plea agreement to avoid imprecision." *Bowman*, 634 F.3d @ 360-61. Any ambiguity on the question of whether the waiver precludes the subject claim is resolved in favor of securing Petitioner's Rights. *Id.*

On page 2 of the plea agreement that the Government did present to Petitioner, it further justifies Petitioner's beliefs of a pending appeal of the suppression motion when it states, **"Both the defendant and the United States RETAIN THE RIGHT to present additional facts to the Court to ensure a fair and appropriate sentence in this case."** (APX. E).

As previously cited, plea agreements are contractual in nature and are measured by contract law. *Id.* *Bowman*, 634 F.3d @ 360. In construing an agreement, the court must determine what the defendant reasonably understood to be the terms of the agreement when pleading guilty. As with other contracts, provisions of plea agreements are occasionally ambiguous; the government "ordinarily must bear responsibility for a lack of clarity." *United States v. Anderson*, 970 F.2d 602, 607 (9th Cir. 1992).

Attorney Moffatt testified that "[he] take[s] it as his job to make sure...

legal words are understood by [his] clients." (APX. D)(pg. 46, line 13-17), but when counsel was questioned if he "agreed that the issue of suppression of evidence is not necessary subsumed at least in the mind of an uninitiated individual in the appeal of conviction or appeal of sentence", counsel testified that "[he] can see that it would mean something different to lawyers that review these documents over and over than to a criminal defendant." (APX. D)(pgs. 41-42, line 12-25;1)

Attorney Moffatt further supports Petitioner's state of mind about his appeal pending on the issue of the suppression motion and the signing of the plea agreement when Petitioner asked "is this going to effect the search of the garage" and counsel stated that "it wouldn't." (APX. D)(pgs. 12-13, line 24-25;1-8).

Finally, after Petitioner was sentenced, counsel came to see him in Federal Court lockup. Petitioner asked counsel, **"Is there anything else we can do besides what we are already doing?"** (inferring that we are already doing something)(that "something", was appealing the suppression motion). Counsel concedes that **"IT'S POSSIBLE"** that Petitioner spoke these words to him, but "it wouldn't have been in the context of an appeal in my mind..." and then counsel further states, he "really can't say what was on the Petitioners mind when he stated this." (APX. D)(pg. 45, line 13-25).

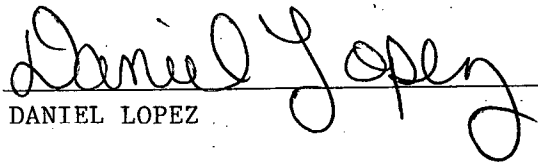
The issue surrounding the plea agreement reek with ambiguities and the knowing and voluntary provision of the statute is completely non-existent. The Petitioner asked the pertinent questions at ambiguous situations and was given misleading information (if not completely false information) from his trial counsel. Petitioner was of the understanding that his suppression motion appeal was pending when he signed the plea and after he was sentenced. Petitioner did not receive information that his appeal was not being pursued from his trial counsel until Petitioner was timebarred from pursuing the issue. For the reasons stated in this petition, Petitioner's plea agreement **CANNOT BE KNOWING AND VOLUNTARY** and therefore, Petitioner should be **GRANTED** a CERTIFICATE OF APPEALABILITY on the merits presented throughout Petitioner's petition.

In closing, Petitioner would invite this Honorable Court to consider the plain error of Magistrate Judge Guyton's SUPPRESSION HEARING RULING. All questions presented, stem from this OBVIOUS Fourth Amendment violation and Petitioner has provided six pages of pertinent testimony from the suppression hearing that clearly address the illegal search. Petitioner has addressed the merits of every question presented, and without changing the substance of any questions, Petitioner's Fourth Amendment violation remains the foundation on which all questions presented derive from. Petitioner has weaved the Fourth, Fifth, Sixth, and Fourteenth Amendments throughout this petition. Counsel's actions were ineffective on multiple grounds. Magistrate Judge Guyton's ethics and responsibilities, or lack there of, to provide a fair and unbiased litigation process has been thoroughly addressed. As for the plea agreement, the provisions given within it amount to mere window dressing, fore the KNOWING AND VOLUNTARY PROVISION of the plea is/was virtually **NON-EXISTANT**. For the Government to infer that Petitioner was prohibited from pursuing the appeal of his pretrial motion to suppress is injudicious. Even an expert in waiver provisions cannot be expected to understand a provision that simply is not there. Petitioner has briefed this Honorable Court on all merits concerning the questions presented and is confident that the merits have been conveyed clearly to this Honorable Court. Therefore, Petitioner should be **GRANTED** a **CERTIFICATE OF APPEALABILITY** on any and all issues presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


DANIEL LOPEZ

Date: APRIL 1, 2018