No. 19-3026

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Yorie Von Kahl,
Appellant,

v.

M. Segal, Warden,
Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS (Peoria)
JAMES E. SHADID, UNITED STATES DISTRICT JUDGE
District Court Case No. 18-cv-01245

APPELLANT'S REPLY BRIEF

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REPLY TO APPELLEE'S OPPOSITION BRIEF

Appellee purports there are but two issues in this appeal -- (1) that Appellant seeks by writ of habeas corpus to vacate his criminal conviction because his trial judge was biased and that judgment was obtained by a fraud on that court, App. Doc. 45, pp. 3, 16-17, and (2) that he seeks release from imprisonment because (8 U.S.C. § 4206(d) mandated that the U.S. Parole Commission ("USPC") release him after serving 30 years of his sentence, which the USPC determined to be February 12, 2013, but that without statutory authority the Bureau of Prisons ("BOP") altered the date to February 12, 2023 pursuant to which Appellee now detains him. Id., pp. 3, 26 et seq.

I. Appellant alleged that his entire trial was conducted by a biased judge who colluded and conspired with the prosecution throughout to deprive him of due process of law and to obtain the judgment by a fraud on that court, which continued through direct appeal, his § 2255 proceedings and into the court below infecting its own judgment with the fraud

Below, Appellant alleged that his criminal trial judge was biased, but that his "entire criminal proceedings were a product not only of a biased judge, but that the biased judge colluded and conspired with the highest echelon of the Department of Justice [DOJ], the U.S. Marshals Service [USMS], the FBI, and the U.S. Attorney's [USA] Office for the District of North Dakota to obtain the judgment in issue," R59(e) Mot. [D.Doc. 17], p. 8, and that the fraud on the trial court continued in "every court thereafter in which the fraudulent judgment has been and continues to be used" and "infects" the court's "own judgment with the fraud." Id., pp. 10, 12. He alleged three incidents in support in which his trial judge, Chief U.S. District Judge Paul Benson, secretly participated with the prosecution in ex parte proceedings in which he (1) issued a secret ex parte order to disseminate propaganda in the form of an IRS report in respect to Appellant's criminal case, (2) participated in a secret "prosecutive

strategy"" conference with the USA, FBI, USMS, and DOJ hierarchs -- both pre-trial -- and (3) participated with the prosecution in the secret mid-trial rehearsal of a government witness' testimony. R59(e) Mot. [D.Doc. 17], pp. 9-10. He supported these allegations were supported by official FBI documents and sworn affidavits of record. Id.

Appellee did not address the claim in any manner or to any degree, raised no defense or argument whatsoever, nor contested the evidence supporting the claim in the court below. The district court acknowledged that in his "pro se Rule 59(e) motion," Appellant "argue[d] that [his] criminal judgment ha[d] been obtained by collusion with a biased judge and a fraud on the Court," App. 20 (citing R59(e) Mot. [D.Doc. 17], p. 6), and held that "[i]f [Appellant] intended to bring an amended claim with his allegations of fraud, then it is dismissed with prejudice pursuant to 28 U.S.C. § 2255(e)." Id. The district court raised and applied § 2255(e)'s procedural defense sua sponte, without acknowledging Appellant's argument that through the unconstitutionally and fraudulently obtained judgment the fraud continued into its court infecting its own judgment with the fraud and that such continuing fraud into its own court required redress under its "inherent power." R59(e) Mot. [D.Doc. 17], pp. 6-8, 10-11 (citing cases). The district court purported that the "factual dispute" "underlying" Appellant's criminal judgment was left unresolved in its prior order because they "did not impact his mandatory release date," App. 20, and that his biased judge/fraud on the court claim "attack his sentence and conviction itself, not the calculation of his sentence." Id., 21. The district court purported that a judgment obtained by "fraud and collusion with a biased judge do not fall within the § 2255(e) savings clause," Id. 22, and, as Appellant's criminal judgment "cannot be attacked in this proceeding, the Court has not erred in relying on it in the Court's decision here," and, he is, therefore, "not entitled to any relief." Id. 22-23.

1. Appellee's argument that Appellant did not allege any fraud in the court below and that he seeks to vacate his criminal judgment are waived and, in any case, are patently false and misleading

Appellee argues that Appellant "alleges that a fraud led to the judgment in his prior criminal case, and the relief he seeks is to vacate that judgment," App. Doc. 45, p. 17 (emphasis by Appellee), and that Appellant "does not allege any fraud in this case." Id. (emphasis by Appellee). "'[A] party has waived the ability to make a specific argument for the first time on appeal when the party failed to present that argument for the first time in the district court.'" Quincy Bioscience, LLC v. Ellishbooks, 957 F.3d 725, 730 (7th Cir. 2020)(quoting Fednav Int'l, Ltd. v. Cont'l Ins. Co., 624 F.3d 834, 841 (7th Cir. 2010)). Appellee raised no argument whatsoever in respect to Appellant's biased judge/fraud on the court claim thus waiving any such argument here, Id., and, in any case, its argument here is false and misleading.

Appellant indisputably alleged that the fraud committed in his criminal case continued into the court below by the DOJ's use of the unconstitutional and fraudulent criminal judgment and infected its own judgment with the fraud. R59(e) Mot. [D. Doc. 17], pp. 10, 12. Moreover, rather than seeking to vacate the unconstitutional and fraudulent criminal judgment, Appellant expressly sought from the court below to "withdraw it's [own] judgment... and either declare the J&C illegal and void for the fraud and/or Judge Benson's bias... consider[ing] the fact that the DOJ conspired with Judge Benson to obtain the fraudulent judgment.., or order further proceedings, including full discovery of the matter, 'to the end that the very truth and substance of [his] detention may be disclosed and justice done.'" Id., p. 12 (citing cases). See also Id., pp. 38-39 (requesting Court to "withdraw it's [own] judgment," reassess the petition, traverse, and amended grounds together, and "do what law and justice require.") (citing 28 U.S.C. § 2243 ¶ 8).

Appellee was expressly ordered to respond to Appellant's Rule 59(e) motion, see App. Doc. 1-1, pp. 2-3, and given every opportunity to raise any argument it deemed relevant or viable, intentionally elected to argue the biased judge/fraud on the court claim in any respect thus waiving it's ability to do so here.

Quincy Bioscience, supra, 957 F.3d at 730. It's argument that Appellant never argued a fraud in the court below is plainly belied by the record, R59(e) Mot. [D.Doc.17], pp. 10-12; see also App. Doc. 36-1, pp. 5-6, 13-14, 58-59, and Appellant here has alleged that the fraud having succeed in the court below now "continue[s]... into this Court." Id., pp. 59-60.

2. Appellee's § 2255(e) and "abuse of the writ" defenses are waived and its argument that the district court dismissed the biased judge/fraud on the court claim pursuant to Rule 4 of the Rules Governing Section 2254 Cases is deliberately misleading

Appellee purports (in footnotes no less) that it did not waive § 2255(e)'s procedural defense, it's "abuse of the writ" defense, or "any arguments below," because the district court "screened" out the biased judge/fraud on the court claim "without ordering respondent to respond" pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts citing to "R. 23, at 12" [App. 21]. App. Doc. 45, pp. 18-19 n.6, 22 n.9.

The district court expressly ordered Appellee to respond to Appellant's Rule 59(e) motion, App. Doc. 1-1, pp. 2-3, which included the biased judge/fraud on the court claim. R59(e) Mot. [D.Doc.17], pp. 6-12. With full opportunity to raise a § 2255(e) or an "abuse of the writ" defense or any other arguments to that claim, Appellee intentionally elected to raise no defense or argument in respect to that claim whatsoever nor even mentioned it. Resp. to R59(e) Mot. [D.Doc. 22].

After Appellee filed its response, the district court held that "[i]f [Appellant] intended to bring an amended claim with his allegations of fraud, then it is dismissed with prejudice pursuant to 28 U.S.C. § 2255(e)." App. 21 (emphasis added). At the time the district court ordered Appellee to respond and at the time it rendered its opinion, it had not screened out any claim from the motion nor so much as mentioned Rule 4. In its opinion, it plainly dismissed the biased judge/fraud on the court claim not pursuant to Rule 4 but expressly "pursuant to... § 2255(e)." Id. Dismissals pursuant to Rule 4 and § 2255(e) are so distinct in their purposes and applicability that Appellee's attempt to obfuscate the dismissal here can hardly be other than deliberate misrepresentation.

Rule 4 preemptively addresses "'a deficiency in the pleadings'" Shelton v. Gudmanson, No. 94-3384, 1996 U.S. App. LEXIS 9717, at 7 (7th Cir. 1996) (quoting

Dellenbach v. Hanks, 76 F.3d 820, 822 (7th Cir. 1996)), to eliminate needless litigation of issues that are plainly and "prudentially meritless." Id., at 5. The question before a court under Rule 4 is simply whether "the factual allegations in the petition, if true, would show that the petitioner is being held in custody in violation of the Constitution or laws of the United States," Davis v. Franzen, 671 F.2d 1056, 1057 (7th Cir. 1982). See also Small v. Endicott, 998 F.2d 411, 414 (7th Cir. 1993)), and such allegations, unless patently false, are presumed to be true. Blackledge v. Allison, 431 U.S. 63, 76 (1977). "In short, Rule 4" permits summary dismissal only where "the petition and any attached exhibits either fail to state a claim or are factually frivolous." Small, supra (following Blackledge, supra, at 74-75). See also Szemborski v. Endicott, No. 97-3386, 1999 U.S. App. LEXIS 6930, at 3 (7th Cir. 1999). Under "Rule 4, 'if it appears from the petition... that the petitioner is not entitled to relief in the district court,' the court must summarily dismiss the petition without ordering a responsive pleading. If the court orders the [respondent] to file an answer, that pleading must 'address the allegations in the petition.'" Mayle v. Felix, 545 U.S. 644, 656 (2005).

Section 2255(e) is a waivable defense to an otherwise meritorious claim, see Webster v. Caraway, 761 F.3d 764, 770 (7th Cir. 2016); Hicks v. Stancil, 642 Fed. Appx. 620, 621-22 (7th Cir. 2016)(citing cases), as is, for that matter, "abuse of the writ." See Crist v. Dotan, No. 97-4116, 1998 U.S. App. LEXIS 17558, at 2 n.1 (7th Cir. 1998)(citing Burris v. Parke, 95 F.3d 465, 470 (7th Cir. 1996)(en banc); Robinson v. Fairman, 704 F.2d 368, 370 (7th Cir. 1983). Section 2255(e) provides a court with "'adjudicatory authority' to determine whether § 2255 is inadequate or ineffective" as a remedy for an otherwise meritorious claim for relief "in a given situation." Webster v. Caraway, supra, at 769 (citing Gonzales v. Thaler, — U.S. —, 132 S.Ct. 641, 648 (2012)). While Rule 4 requires a court to preliminarily determine whether a meritorious claim exists, Szemborski, supra, 1999 U.S. App. LEXIS 6930, at 3, "'[W]hether [a habeas] proceeding is allowable under § 2255(e) is a question on the merits,'" Webster v. Caraway, supra, at 768 (citing Sperberg v. Marberry, 381 Fed. Appx. 602 (7th Cir. 2010));

see also Prevatte v. Krueger, 865 F.3d 894, 901 (7th Cir. 2019), and courts should take due care not to "confuse the question whether the petition may be dismissed summarily with the question whether the petitioner is entitled to relief on the merits of his claim." Herrera v. Collins, 506 U.S. 390, 441 (1993)(Blackman, J., dissenting).

Obviously, had the district court summarily dismissed Appellant's biased judge/fraud on the court claim as meritless, its dismissal "pursuant to... § 2255(e)," App. 21, is a non sequitor. Had it been summarily dismissed pursuant to Rule 4, there simply would have been no occassion to dismiss it again pursuant to § 2255(e) and, of course, there would be an order and opinion somewhere on the record reflecting a summary dismissal pursuant to Rule 4. Appellee cites no such ruling and no such record simply because there is none. and, misrepresenting the district court's dismissal as pursuant to Rule 4 in face of a record plainly to the contrary, simply evinces a bad faith attempt to evade its deliberate waiver to raise its arguments below. For purposes of this appeal, Appellee has waived every part of its argument in respect to the biased judge/fraud on the court claim, Quincy Bioscience, supra, 957 F.3d at 730, such intentional "waiver precludes review," Henry v. Hulett, 969 F.3d 769, 786 (7th Cir. 2020)(en banc), and this Court has repeatedly held that it "will 'not affirm a judgment based on an affirmative defense raised for the first time on appeal.'" Id., at 785-86 (quoting McDonald v. Adamson, 840 F.3d 343, 347 (7th Cir. 2016)).

Regardless of Appellee's waiver, it defenses and argument in respect to the biased judge/fraud on the court claim are as specious as they are unsound.

3. The three ex parte proceedings in issue in issue show that Judge Benson was not impartial but a zealous partisan of the prosecution

Below, Appellee did not contest (or mention) the three ex parte proceedings in which Judge Benson participated with the prosecution involving plainly material and prejudicial matter, it now argues -- quite speciously -- that the proceedings suggest no bias by Benson.

(a). The 2/19/1983 proceeding

While not disputing that Judge Benson issued the secret ex parte order on 2/19/1983 to disseminate an IRS report about purported tax protesters of or associated with the Sheriff's Posse Comitatus ("SPC") in relation to Appellant's case, it now argues (for the first time) that issuing the order was simply a "routine judicial function[]" "analogous to issuing a search warrant which also occurs through an ex parte proceeding," App. Doc. 45, pp. 22-23, and surreptitiously insinuates that the IRS report was a "tax form" permitted pursuant to 26 U.S.C. § 6103(a)(1)(A) to be disclosed to federal officers by an ex parte order. Id., pp. 23-24. Appellee's trial court, the USA's office, and the DOJ (including Appellee's DOJ attorneys) continue to hide and conceal from Appellant, his co-defendants, and the public Judge Benson's ex parte order, the motion or other device and/or communications by which the order was sought, and all facts and circumstances relative to the contact and communications as to the interactions of Benson and the DOJ prior to and during the proceedings.

While search warrants issue ex parte and may be filed under seal, Appellee's DOJ attorneys well know that they must be filed in the court's public record with a record of the proceedings upon which they issue to ensure judicial review. See e.g., United States v. Copeland, 538 F.2d 639, 641-42 (5th Cir. 1976); United States v. Gitcho, 601 F.2d 369, 372 (7th Cir. 1979); In re EyeCare Physicians of Amer., 100 F.3d 514, 517 (7th Cir. 1996). Such proceedings are judicial. The proceeding for issuance of the ex parte order here was never filed in the court's record. Such "[o]ff-the-record" proceedings are not public, but "private," Edgar v. K.L., 93 F.3d 256, 259-60 (7th Cir. 1996), and, rather than a "routine judicial function[]," is entirely "extrajudicial." Id., at 262 (ex parte off-the-record proceedings which "can neither be accurately stated nor fully tested" are "'extrajudicial'") (citing cases). See also Franklin v. McCaughtry, 398 F.3d 955, 961 (7th Cir. 2005) (judge's "memorandum" filed in another case reflecting on defendant and off-the-record ex parte contacts in respect thereto "were extrajudicial activities vis-a-vis [defendant's] case").

Insofar as Appellee's DOJ attorneys insinuate that the IRS report disseminated

by Judge Benson's order is a "tax form" permitted by 26 U.S.C. § 6103(a)(1)(A) to be disclosed to federal officers by an ex parte order, App. Doc. 45, pp. 23-24, it reflects bad faith. Section 6103(a)(1)(A) expressly applies to "any return or return information with respect to any taxable period or periods." It applies to tax returns or tax return information and the limited evidence available plainly shows that the IRS report ordered to be disseminated by Benson's ex parte order is neither a "return or return information."

The evidence (of record here) includes a revised version of the IRS report and FBI documents reporting the anticipated and ultimate issuance of the ex parte order, Tr. [D.Doc. 14-1], pp. 6-7 & n. 2; Tr. Apx. 103, 106, 134-143 [D.Doc. 13-2, pp. 43, 46 & D.Doc. 13-3, pp. 4-13], and a letter by the USA hand delivered to the FBI (purportedly with a copy of the order) stressing the need to ensure permanent secrecy. App. Doc. 5, p. 4 & Attachment 18. The introduction to the revised report indicates that the original report was compiled in respect to the "GORDON KAHL" case for the purpose of identifying (targeting) for its readers individuals and organizations purported to be made up of illegal tax protesters defined by religious, racial, and/or philosophical views whose "main goal" was "to overthrow the government" and that their "tax protest activities" were directed to that end. See Tr. [D.Doc. 14-1], p. 8 n. 3; Tr. Apx. 137 [D.Doc. 13-3, p. 7] (introduction to revised report).

In light of the continuing concealment and non-disclosure of the original report, the revised report and FBI documents relating to the ex parte order are the best (and only) evidence of the nature and content of the original report. See e.g., Moore v. United States, No. 90-1071, 1999 U.S. App. LEXIS 19679, at 5-6 (7th Cir. 1999) ("the subsequent existence of a condition is some evidence of its prior condition" absent "intervening circumstance that might call its previous condition into question") (citing 2 Wigmore, Evid., § 437(1) (Chadbourn rev. ed. 1979); Cook v. United States, 320 F.2d 258, 260 (5th Cir. 1963) (principle applies to prior "'existence of an object condition, quality, or tendency'") (citing 2 Wigmore, Evid., §§ 413, 437); United States v. Hindman, 284 Fed. Appx. 694, 698 (11th Cir. 2008) (applying principle); Morgan v. Dist. of Col., 824 F.2d 1049, 1064-65 (D.C. Cir. 1986) (same). As such the original report appears to be exactly as Appellant alleged -- i.e., part and parcel of the very same propaganda contemporaneously generating within and through the FBI "falsely portraying

the defendants as [SPC] members" attending "SPC/tax protest meetings in North Dakota," Tr. [D.Doc. 14-1], p. 7 (citing FBI reports in Tr. Apx. 81-116 [D.Doc. 13-2, pp. 21-56]), and into and through the media. See e.g., United States v. Faul, 748 F.2d 1204, 1227-30 (8th Cir. 1984)(Lay, Ch. J., dissenting)(providing sampling of pre-trial front-page headline stories from North Dakota's largest newspaper, the Fargo Forum, beginning on February 14, 1983).

The fact that Judge Benson issued the order is itself evidence that he believed the contents of the original report was true and that whatever else information he was provided was true as well. While the precise "information passed" to him is unknown and "unknowable" and its reliability is equally unknown, Edgar, supra, 93 F.3d at 262, the available evidence strongly infers that he was informed and believed that Appellant and his co-defendants were illegal tax protesting members of the SPC whose activities were directed to the overthrow of the government. Such evidence provided a judge in secret off-the-record extrajudicial ex parte proceedings by "partisans carries an unacceptable potential for compromising impartiality," Id., at 260, and, where the judge relies on such evidence indicating that he prejudged defendants before him, a sufficient showing of bias is made to establish a due process violation. Franklin, supra, 398 F.2d at 961-62. With the fact that Judge Benson ensured that the proceeding, the order, and the IRS report would never show up on the court docket or other public record thus concealing his role in the matter, no objective observer would suspect he was other than biased and corrupted.

(b). The 2/21/1983 ex parte proceeding

Appellee concedes that the 2/21/1983 ex parte proceeding occurred at which "various [DOJ] officials held a meeting with the judge, at which the 'charges against the subjects were discussed and prosecutive strategy was reviewed as well as plans for preliminary hearings to be held'" the following day. App. Doc. 45, p. 24. Appellee, however, while acknowledging the "fact that the judge was briefed on the charges and the upcoming proceedings," says that the FBI report "does not suggest that the judge took part in formulating any prosecutive strategy" nor that he "was part of the prosecution or was biased against Kahl," Id., relative to which it cited United States v. Rubashkin, 655 F.3d 849, 856

(8th Cir. 2011) without discussion.

Rabashkin has no relevance here, but involved only anticipated arrests of large numbers of illegal immigrants and meetings held involving personnel from the USA's office, immigration authorities, and the Chief Judge regarding "the need for additional judges, interpreters, and courtrooms, and for advance arrangements with the Public Defenders office," 655 F.3d at 856. The ex parte proceedings there were apparently recorded in "the minutes," Id., and later discovered extrajudicial records merely reflected the same information "previously made public in... recusal proceedings" in a related case, which was available to Rabashkin all along. Id., at 856-57. And, perhaps most distinguishing from the instant proceeding, the judge in Rabashkin "had never been informed of 'the targets of the prosecutions'" and the "'planning'" with the USA's office and immigration authorities "'was limited to ensuring that a sufficient number of judges, court-appointed attorneys and interpreters would be available'" to deal with the anticipated arrests of potentially hundreds of immigrants. Id.

Here, Judge Benson knew the targets of the prosecution but also participated with the prosecution in the secret discussion of their charges and a review of prosecution strategy with no minutes or other proceedings disclosing the information passed to (or reciprocated from) the judge. While Appellee otherwise accurately quoted the FBI report, it did not identify the DOJ "officials" that it acknowledged met "with the judge." App. Doc. 45, p. 24. They included USA Rodney Webb, an unidentified FBI agent, an unidentified U.S. marshal, and the Chief of the DOJ's Criminal Litigation Section, Lawrence Lippe. Tr. Apx. 111 [D. Doc. 13-2, p. 5]. The report does not say, as Appellee suggests, that the judge was merely "briefed" on the charges, but that the cabal -- including the high-level DOJ Chief from DOJ Headquarters and Judge Benson -- "discussed" the "charges" and "reviewed" the "prosecutive strategy." Id. While there are no minutes, transcripts, or anything approaching a verbatim record of the extent to which the "charges" were "discussed" or to which the "prosecutive strategy" was "reviewed," the report leaves no doubt that the "prosecutive strategy" included the incorporation of Judge Benson as a secret member of the prosecution team. And, once again, Judge Benson kept the secret proceeding and his participation off the court's record and

hidden from the defendants and the public leaves no doubt of his bias.

(c). The Mid-trial rehearsal of a government witness' testimony

Appellee argues that Judge Beason's participation in the mid-trial rehearsal of government witness Vernon Wegner's testimony, even if "true, ... do[es] not show bias on the part of the judge." App. Doc. 45, p. 25. Acknowledging that Wegner's affidavits state that the secret rehearsal "took place in the courthouse with the judge present," Appellee says that "they do not indicate that the judge took part in the questioning, nor do they provide any reason to believe the judge was biased against Kahl." Id.

Appellee purports that "this same argument" was made in Appellant's § 2255 Motion." Id. (citing Applt's Br. on appeal in Kahl v. United States, 242 F.3d 783 (8th Cir. 2001)(No. 00-1322), 2000 WL 33977713, at *88), in which he used one of his current affidavits. Id., pp. 22 (citing Applt's Br., supra (citing 1999 affidavit of Jeffrey Jackson). Appellee suggests that Wegner's statements are "doubtful" footnoting a similar suggestion in the government's opposition brief on the § 2255 appeal that Wegner "likely confused his change-of-plea with his testimony at trial," Id., p. 25 n.11. (citing Govt's Opp. Br. in Kahl, supra, 2000 WL 33477714, at *94-96), surreptitiously adding that "[t]he record confirms that an in-chambers conference took place with the prosecutor, the witness's lawyer, and the judge before the change-of-plea hearing, but that the judge was not present during any pretrial witness preparation." Id. (citing Govt's Opp. Br., supra)(emphasis added).

There is no "record confirm[ing]" that "the judge was not present during any pretrial witness preparation." Appellee's citation to an unsupported suggestion in the government's opposition brief on an appeal as such a "record" is simply part of a pattern of deception continuing since Appellant's criminal proceedings. Appellee has failed to inform this Court that the affidavit presented to that appellate court was not available in 1996, when the § 2255 motion was filed and was submitted with supplement evidence on appeal, which that court refused to consider. Kahl, supra, 242 F.3d at 788. No hearing was ever had on the rehearsal matter, that court looked only

to Judge Benson's rulings to reject his appearance of bias claim pursuant to 28 U.S.C. § 455(a) and Liteky v. United States, 510 U.S. 540, 555 (1994). Id., at 793. Appellant's argument vis-a-vis the secret rehearsal has never been heard or decided in any court and Wegner's affidavits remain unimpeached.

Like the secret ex parte proceedings of 2/19/1983 and 2/21/1983, the secret ex parte rehearsal of Wegner's testimony was entirely off-the-record and "extrajudicial," Edgar, supra, 93 F.3d at 259, and indisputably concerned the merits of the case. While it is true that Wegner's affidavits do not "indicate that the judge took part in the questioning," as Appellee says, App. Doc. 45, p. 25, they plainly state that Judge Benson was present sitting at the same table with Wegner and the other participants, that Wegner knew who Benson was, and that the rehearsal took place at the courthouse the night before he testified at trial. Tr. Apx. 046-049 [D.Doc. 13-1, pp. 51-54]. Whether Judge Benson was the specific partisan that asked questions is hardly the point. The point is that he was a partisan. Wegner was then awaiting sentencing before Benson. Benson's presence at the rehearsal sitting at the same table could only have been to intimidate him to respond to questions the following day as dictated by AUSA Crooks. Id. 046, 049 [D.Doc. 13-1, pp. 51, 54]. While there are no minutes, transcripts, or other recording of the rehearsal, there is no way to determine the actual things said or by whom they were said, and, while Benson may not (or may have) asked any questions or offered comments, the rehearsal was a team effort to present Wegner's testimony the following day "all preplanned and pre-rehearsed," Id. 51 [D.Doc. 13-1, p. 51], while hiding from Appellant and his co-defendants these off-the-record, extrajudicial, out-of-court statements -- matter that should have been disclosed under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny and 28 U.S.C. § 455(e), matter the jury had a right to hear. See e.g., Gordon v. United States, 344 U.S. 414, 422-23 (1953). Simply put, employing the biased and corrupt Judge Benson as a secret partisan of the prosecution was part of the "prosecutive strategy" to obtain convictions and judgments. No objective person would believe Judge Benson was other than biased.

None of the proceedings, the underlying evidence, or these arguments were challenged, argued, raised, or even mentioned by Appellee in the court below. They are thus waived, Quincy Bioscience, supra, 957 F.3d at 730, and, in any case, are at best specious and disingenuous.

4. Section 2255(e) does not foreclose redress by habeas corpus under the circumstances of this case nor for the fraud alleged here

Long before the Constitution was ratified, the writ of habeas corpus would discharge a prisoner from unlawful imprisonment in "cases which had gone to conviction and sentence." In re Nielsen, 131 U.S. 176, 184 (1889)(citing cases). See Ex parte Siebold, 100 U.S. 371, 376 (1880)(citing Gilbert's rule from Bacon's Abridgment, B10); Fay v. Noia, 372 U.S. 391, 405 & n. 14 (1963)(citing Bacon's Abgmt., supra; 2 Hale, History of the Pleas of the Crown, 144). See e.g., Rex v. Collyer, Sayer 55, 96 Eng. Rep. 797 (K.B. 1752)(discharging on habeas corpus prisoners under conviction where "judgment is illegal," because "it would be very hard" to await "reversal... upon a writ of error"); Kuig v. Hawkins, Fortesque, 272, 92 Eng. Rep. 849 (K.B. 1715)(issuing writ "after conviction" w/order to bring up prisoners to determine the "facts"). The writ had issued to release prisoners committed by another court "on the plain denial of due process, violative of Magna Charta," Fay v. Noia, supra, at 404 (citing Bushell's Case, Vaughn, 135, 124 Eng. Rep. 1006, 6 Howell's State Trials, 999 (C.P. 1670)), and where the committing court failed to strictly follow statutorily prescribe procedural requirements. Rex v. Nathan, 2 Strange, 880, 93 Eng. Rep. 914 (K.B. 1724); Hollingshead's Case, 1 Salkeld, 351, 91 Eng. Rep. 309 (K.B. 1703). Courts by habeas corpus would review post-conviction sufficiency of indictments and revise judgments sometimes (and sometimes not) aided by certiorari. See Prof. Paul D. Halliday, Habeas Corpus: From England to Empire, pp. 118-19 & nn. 102-105, 107-113 (Belnap Press of Harvard Univ. Press, Cambridge, MA/London, Eng. 2010).

With this long history the Constitution commanded that: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Article I, § 9, Cl. 2, U.S. Const. While never "foreclosing the possibility that the protections of the Suspension Clause have expanded with post-1789 developments that define the present scope of the writ," Boumediene v. Bush, 553 U.S. 723, 746 (2008),

(citing INS v. St. Cyr, 533 U.S. 289, 300-301 (2001), nevertheless, "'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified." Id. (citing St. Cyr, at 301). Section 14 of the Judiciary Act of 1789 authorized federal courts to issue writs of habeas corpus, which like the pre-Constitution writ, "comprehended executions or judgments." Custer v. McCutchen, 283 U.S. 514, 517 (1931) (cite omitted). In any case, the Act of "1867, 14 Stat. at L." extended the scope of habeas corpus "to all cases where any person may be restrained of his liberty in violation of the Constitution, ... or law of the United States," was held to establish the true meaning of the Constitution and law" as to the availability of the writ, Ex parte Yerger, 75 U.S. (8 Wall.) 85, 102 (1869), the scope of which "remains the same under the current habeas statute. Williams v. Taylor, 529 U.S. 362, 375 n. 7 (2000) (citing 28 U.S.C. § 2241(c)(3)).

Section 2255 was originally enacted in 1948 with "the sole purpose ... to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another more and convenient forum," United States v. Hayman, 342 U.S. 205, 219 (1952), "simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." Hill v. United States, 368 U.S. 424, 427 (1962). See Sanders v. United States, 373 U.S. 1, 13-14 (1963) (citing Hayman & Hill, supra); Bourmediene, supra, 553 U.S. at 775 (same). Section 2255's motion proceedure is "not a habeas proceeding," Hayman, supra, at 220, but, "[a]s a remedy is intended to be as broad as habeas corpus." Id. It included a special provision commonly called its "Savings Clause" -- i.e., § 2255(e), to ensure "traditional habeas corpus relief" via the writ "would be available if the alternative process proved inadequate or ineffective," Bourmediene, supra, at 776, that is, "'inadequate of ineffective to test the legality of his detention.'" Brown v. Caraway, 719 F.3d 583, 588 (7th Cir. 2013) (quoting § 2255(e)) (emphasis by Court).

Reviewing § 2255(e) in light of its language and legislative history, Hayman found that it was intended to apply in cases which the movant was unable "'to be present at the [Merits] hearing, or for other reason,'" 342 U.S. at 218 n.

23 (citing legislative record); see also id., at 218-19 & nn. 26-28, and avoided the constitutional questions in that case "if respondent is present for a [merits] hearing... on remand," id., at 223, as otherwise mandated by the statute. Id., at 219-20 & n. 30 (citing § 2255 ¶ 3)(1952)) (omitting case cite). The "'opportunity to be heard'" in person on the merits was "'indispensible,'" Id., at 220 & n. 31 (cite omitted), and "where the § 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus shall remain open to afford the necessary hearing." Id., at 223.

The issue here is not simply whether Appellant's trial judge was biased, but whether he proceeded with bias in a conspiracy and collusion with and as a partisan with the prosecution to defraud the trial court and obtain the criminal judgment by such fraud and whether the DOJ's use of such judgment in the court below by which it obtained the judgment here in issue. See App. Doc. 36-1, pp. 8, 13-14 (citing record). However dissected, the biased judge and/or the fraud on the trial court issue are each redressible by habeas corpus, as is the continuing fraud claim, while the latter is redressible notwithstanding habeas corpus under the court's inherent powers.

Since the Supreme Court decided Tumey v. Ohio, 273 U.S. 510 (1927) and In re Murchison, 349 U.S. 133 (1955), due process of law has been held to prohibit a man as a judge "not only for actual bias, but also for the appearance of bias." Jones v. Luebbers, 359 F.3d 1005, 1012-13 (8th Cir. 2004). See Bracy v. Schomig, 286 F.3d 406, 410-11 (7th Cir. 2002)(en banc); Gatcho v. Wills, 986 F.3d 1067, 1073-74 (7th Cir. 2021). And see Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 884 (2009) (emphasizing that, since Tumey, due process has been "implemented by objective standards that do not require proof of actual bias") (citing cases). While due process has been held to "require[] an absence of actual bias in the trial of cases," it also precludes a man as "judge where he has an interest in [its] outcome." Murchison, supra. See Bracy v. Gramley, 520 U.S. 899, 204-05 (1997) (citing cases). "That interest cannot be defined with precision," thus, "[c]ircumstances and relationships must be considered." Murchison, supra. However, "'every procedure which would offer the average man as judge... not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'" Id. (quoting Tumey, supra, at 532). "'[T]o weigh the scales equally.... in the best way 'justice must satisfy the appearance of justice.'"

id. (quoting United States v. Offutt, 348 U.S. 11 (1948)). Moreover, the judicial oath requires that judges "impartially discharge" their duties "under the Constitution and laws of the United States," 28 U.S.C. § 453, a principle tracing back more than 800 years to Magna Carta binding judges to "exercis[e] strict neutrality." Williams-Yulee v. Florida Bar, 575 U.S. —, 195 L.Ed.2d 570, 584 (2015)(citing cases). And, to ensure that partiality, in 1974 Congress mandated that federal judges disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, 28 U.S.C. § 455(a), if they have a personal bias against a litigant or knowledge of matter touching the merits of the case, id., § 455(b)(1), or if particular relationships or circumstances exist that reflect upon their impartial adjudicatory requirements. id., § 455(b)(2)-(5). Section 455 was enacted to address the "problem" of the public's tendency to "indulge suspicions and doubts concerning the integrity of judge" -- a "concern [that] has constitutional dimensions." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864-65 & n. 12 (1988)(cite omitted).

Trial before an impartial judge is both a "substantial" and "structural right." United States v. Hardin, 250 F.3d 532, 542-43 (7th Cir. 2001). See Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991); Bracy v. Schomig, supra, 286 F.3d at 427-28 (Rovner, C.J. w/Ripple, Wood & Williams, C.Js., concurring in part & dissenting in part). Trials by non-impartial judges "catagorical[ly]" "implicate basic protections" and "render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," Hardin, supra, at 542 (citing Fulminante, supra & Neder v. United States, 527 U.S. 1, 14 (1999)), and the very "presence" of such judge permeates a "structural defect[] in the constitution of the trial mechanism" affecting its "entire conduct from beginning to end." Fulminante, supra. A litigant is "entitled to a neutral and detached judge in the first instance," Ward v. Monroeville, 409 U.S. 57, 61-62 (1972), and a "trial and conviction by an admittedly prejudicial judge constitute[s] a gross miscarriage of justice," Walker v. Lockhart, 763 F.2d 942, 961 (8th Cir. 1985)(en banc), automatically "vitiates the conviction," Sullivan v. Louisiana, 508 U.S. 275, 279 (1993), and the "judgment." Lockheart v. Hilick, 443 F.3d 927, 929 (7th Cir. 2006)(citing Edwards v. Balisok, 520 U.S. 641, 647 (1997).

Secret judicial proceedings "'frustrate'" a vital "'public interest,'" Doe v. Elmbrook Sch. Dist., 658 F.3d 710, 721 (7th Cir. 2011)(citing Doe v. Smith, 429 F.3d 706, 718 (7th Cir. 2005)), but, here, the ex parte proceedings were "'extrajudicial'" effecting "an unacceptible potential for compromising impartiality," Edgar, supra, 93 F.3d at 259-60.

Appellant had no knowledge of the three ex parte proceedings during his trial and direct appeal and discovered the first two long after his § 2255 proceedings were closed. While he did obtain evidence of Judge Benson's secret mid-trial participation in the rehearsal of government witness Wegner's testimony and was only able to file it with supplimental evidence on appeal, the appellate court refused to consider it; Kahl, supra, 242 F.3d at 788, and no evidentiary hearing was was ordered and no due process issue was ever heard or decided in respect to the rehearsal in those proceedings, and the appellate court only held that Benson's rulings showed nothing by which his impartiality could be reasonably questioned under § 455(a). id., at 793. In respect to the two pre-trial ex parte proceedings, Appellant did not discover them until long after the § 2255 proceeding were closed. His inability to timely introduce the evidence of the pre-trial proceedings in his § 2255 proceedings was due to their concealment by Benson, the USA's office, and the other DOJ officials involved.

Insofar as Appellant's due process/fraud on the court claim rests upon the secret mid-trial rehearsal of testimony, the evidence was unavailable to him when he filed his § 2255 motion due to Benson and the DOJ's concealment, as he alleged, App. Doc. 13-1, pp. 22-23, and his attempt to include the evidence for consideration was rejected by that court foreclosing his efforts to be heard. Insofar as the claim rests upon the secret upon the secret pre-trial proceedings, Benson and the DOJ successfully concealed them from Appellant until long after his § 2255 had passed and he only discovered them by accident nearly a decade later.

Construing § 2255's "prompt hearing" requirement vis-a-vis a meritorious claim for relief, the Supreme Court held that a § 2255 movant "denied an opportunity to be heard, 'has lost something indispensible.'" Hayman, supra, 342 U.S. at 220 & n.31 (citing Snyder v. Massachusetts, 291 U.S. 97, 116 (1934)). Snyder's indispensible loss was, of course, due process of law, and the Court held that, if Hayman was provided § 2255's prompt hearing upon remand, then § 2255 would not be "'inadequate or ineffective,'" 342 U.S. at 223, and, where it is otherwise, "the habeas remedy shall remain open to afford the necessary hearing" via the savings clause. id.

A biased judge claim is redressible by habeas corpus. Harrison v. McBride, 428 F.3d 652, 670 (7th Cir. 2005); Franklin, supra, 398 F.3d at 962; Cartilino v. Washington,

122 F.3d 8, 11 (7th Cir. 1997); Walker v. Lockhart, supra, 763 F.2d 942. Post-conviction discovered fraud committed by prosecuting officers is as well. Price v. Johnston, 334 U.S. 266, 290-91 (1948). A fortiori, a fraud committed by a biased judge in collusion with prosecuting officers, as alleged here, is redressible by habeas corpus.

Appellant's claim, however, alleged that his trial judge was biased and colluded with the prosecution to defraud the trial court and obtained the judgment by such fraud AND that the DOJ's attorneys representing Appellee knowingly used the fraudulent judgment to obtain the judgment below. App. Doc. 36-1, pp. 13-14. The issue was forced upon him by Appellee's false portrayal of facts in its response to his habeas petition, which the court below admonished him to contest, but which it then refused to resolve. Id., pp. 3-6 (citing record). While § 2255 was "inadequate or ineffective" to test the legality of Appellant's detention due to concealment of the crucial facts, it is structurally defective, as Appellant argued, as a "remedy in the sentencing court for a fraud committed on another court in another jurisdiction 37 years after sentencing." Id., p. 25.

The court below had jurisdiction and, thus, as Appellant argued, had "'the right to decide every question arising in the cause,'" App. Doc. 36-1, p. 23 (quoting Elliott v. Piersol, 26 U.S. (1 Pet.) 328, 340 (1828), with full power "by collateral review to '"inquir[e] into every other court when the proceedings in the former"' are corrupted by fraud and '"are relied upon and brought before the latter [by a party] claiming the benefit of such proceeding"' regardless of the nature or jurisdiction of the court issuing the questionable '"decree or judgment."'" Id. (quoting Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 15-16 (1907); and citing Dotson v. Bravo, 321 F.3d 663, 667-69 (7th Cir. 2003); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 421-28 (1923)).

Like every other court, appellate courts are "'entrusted'" with the duty "'to achieve the ends of justice,'" Price, supra, 334 U.S. at 279, and the government's official "'"interest...in a criminal prosecution...is not that it shall win a case, but that justice shall be done."'" Turner v. United States, 582 U.S. —, 198 L.Ed.2d 443, 452 (2017)(quoting Kyles v. Whitley, 514 U.S. 419, 439 (1995)(quoting Berger v. United States, 295 U.S. 78, 88 (1935))). See also Young v. United States ex rel. Vuitton et Fils SA, 481 U.S. 787, 803 (1989). Justice is also the "end" of habeas corpus. Holiday v. Johnston, 313 U.S. 342, 351 (1941). Due process does not permit prosecutors to play "hide" and "seek" crucial material evidence, Banks v. Dretke, 540 U.S. 668, 696 (2004), nor to withhold evidence that might disclose "a possibility of fraud" by the

prosecution. Kyles v. Whitley, 514 U.S. 419, 446 n. 15 (1995). And, Appellant did argue below that the "fraud perpetrated by the biased Judge Benson in collusion with the prosecution" continued into the court below "infect[ing] its own judgment" with the fraud, R59(e) Mot. [D.Doc. 17], p. 12, and that, under Brady v. Maryland, 373 U.S. 83 (1963), the government had a "constitutional duty to have disclosed it." Id.

Here, Appellee's DOJ attorneys have falsely argued to this Court that Appellant "does not allege any fraud in this case." App. Doc. 45, p. 17. He not only alleged a fraud continued into the court below, R59(e) Mot. [D.Doc. 17], pp. 10, 12, but fully argues that fraud here, App. Doc. 36-1, pp. 13-14, 58-59, and that it now continues into this Court as well. Id., pp. 59-60. A fraud on the court violates "the very institutions set up to protect and safeguard the public" thus affecting the greatest public interests, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), and such fraud is redressible under the court's inherent power. Id., at 245-46; Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946); Chambers v. NASCO, Inc., 501 U.S. 32, 44, 46, 49 (1991); Citizens for Appropriate Rural Rds. v. Foxx, 815 F.3d 1068, 1080 (7th Cir. 2016); Dotson v. Bravo, 321 F.3d 663, 667-68 (7th Cir. 2003). That power does not arise by statute, Hazel-Atlas, supra, at 245-48; Universal Oil, supra; Chambers, supra, at 44, 46, 49, and neither statutes nor rules are "substitutes" for that power. Id., at 46. A court has power thereby to assess the impact, effect, and egregiousness of all fraudulent conduct in respect to the entire course of litigation, Fuery v. City of Chicago, 900 F.3d 450, 464 (7th Cir. 2018); Dotson, supra, at 667-68, even if it began in other courts in other jurisdictions. Id.; Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 421-28 (1923); Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 15-16 (1907).

It would be hard to find a fraud on a court more egregious than one committed by the very judge appointed to preside and, who, burdened with his own bias colluded with prosecutors, indeed the very hierarchy of the DOJ and its investigating officers in the case, to effect the fraud and, as alleged here, to endeavor to continue the fraud into court after court obstruct justice at every juncture. If such action does not violate substantive due process and "shocks the conscience," See e.g., GAFT Outdoors, LLC v. City of Westfield, 922 F.3d 357, 368 (7th Cir. 2019) (citing cases), nothing could.

"'It is arguable that a litigant who defrauds the court should not be permitted to press his case.'" Fuery, supra, 900 F.3d at 466 (quoting Allen v. Chicago Transit

Auth., 317 F.3d 696, 703 (7th Cir. 2003)). Appellee (represented by DOJ attorneys) did not argue or raise any defense to the biased judge/fraud on the court claim in the court below and now, attempting to do so for the first time in its opposition brief, deliberately misrepresents the fraud allegations as limited to Appellant's trial court and not, as Appellant plainly alleged, as continuing in court after court thereafter and into the court below. Arguably, the DOJ (through its attorneys here) should not be permitted to argue at all in this case, Fuery, supra, particularly in light of it inherent conflict of interest with the public interest both against the obvious continuing pattern of secrecy and the well supported showing of continuous and continuing fraud.

This Court has the duty to protect itself from the continuing fraud and has the power and authority to address it to its source, Dotson, supra, 321 F.3d at 667-69; Toledo Scale Co., supra, 261 U.S. at 421-28, and to provide complete justice under the habeas statute, 28 U.S.C. § 2241 et seq., the All-Writs Act, id., § 1651(a), and the Declaratory Judgment Act, id., §§ 2201-22 -- the authority upon which this case arose.

II. Section 4206(d) mandates Appellant's release on parole upon serving thirty years of his aggregate life plus 15-year sentence

Section 4206(d) provides that:

> Any prisoner serving a sentence of five years or longer who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: Provided, however, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

18 U.S.C. § 4206(d).

The parties agree that the "operative provision" of the subsection is that portion preceding the proviso, App. 45, p. 34, and that the proviso creates "an exception," id., p. 42, which is the general rule for construing provisos. See Nayab v. Capital One Bank (U.S.A.), N.A., 942 F.3d 480, 494-95 (9th Cir. 2019)(citing cases); Judge v. Quinn, 612 F.3d 537, 551 (7th Cir. 2010); Meacham v. Knolls Atomic Power Lab, 554 U.S. 84, 91-92 (2008). And, the parties agree that the "operative provision" contains "two disjunctive clauses (two-thirds or

thirty years)," App. 45, p. 34, which "speaks in Mandatory terms." Id., p. 43. See § 4206(d)(upon serving one of the periods of the disjunctive clauses the "prisoner...shall be released.., whichever is earlier").

Appellee, however, argues that the qualifier "whichever is earlier" does not apply to the disjunctive clauses, but to "each consecutive sentence," App. Doc. 45, p. 33, because "the alternatives address how much time a prisoner must serve on each consecutive term, not on which consecutive terms he must serve." Id., p. 34. To perform this feat, Appellee argues that the disjunctive "or" between the disjunctive clauses must be read to mean "'to which is added,'" Id., p. 35 (quoting from Hackley v. Bledsoe, 350 Fed. App'x 599, 602 (3rd Cir. 2009)), and, ironically, says that to apply the alternative service periods defined by the respective disjunctive clauses "would run afoul of the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause or word of a statute,'" Id., pp. 29-30 (citing cases), while arguing that the words "'term or terms'" as used elsewhere in the PCRA (and other early release statutes) to interchangeably mean "'sentence'" (as argued by Appellant) are "immaterial" because § 4206(d) uses the word "'each'" in respect to the disjunctive "consecutive term or terms" release periods requiring "those terms" to be considered "individually" and not, as Appellant argued, to mean each single "aggregate sentence." Id., p. 32 & n. 15.

It is, in fact, highly material that Congress used the words "term or terms" in a related section of the PCRA to interchangeably mean "sentence," because standard rules of statutory construction construes a term or phrase to have the same meaning throughout the statute, as Appellant argued. See App. 36-1, pp. 52-53. (citing State Farm Mut. Auto Ins. Co. v. Comm'r, 698 F.3d 352, 370 (7th Cir. 2012); Ratzlaf v. United States, 510 U.S. 135, 143 (1994); Comm'r v. Lundy, 516 U.S. 235, 250 (1996)). See also e.g., Veprinsky v. Fluor Daniels, Inc., 87 F.3d 881, 888 (7th Cir. 1996)(words in one section of a statute must be considered in light of "'related sections'")(citing cases). Moreover, in determining the meaning of a provision courts "also consider the construction of similar terms in other statutes," United States v. Patel, 778 F.3d 607, 613 (7th Cir. 2015)(citing cases), and Appellant expressly showed that "the words and phrases 'term,' 'term or terms,' 'term of sentence,' and 'consecutive sentences'" have long been used by Congress "'to interchangeably mean 'the aggregate of the several sentences'" in other early release statutes, App. 36-1, p. 53 (citing 18 U.S.C. §§ 4161-65), and that this Court has long interpreted such words to "mean

"the aggregate of the ... terms." id. (citing United States ex rel. Johnson v. O'Donovan, 178 F.2d 810, 811-12 (7th Cir. 1949)).

Appellant also showed that this Court affirmed that "the words 'term or terms'" used in the pre-PCRA parole statute to require "'consecutive sentences [to] be aggregated for [parole-related] purposes,'" App. Doc. 36-1, p. 53 (citing United States v. Franklin, 313 F. Supp. 43, 45-46 (S.D. Ind. 1970), aff'd, 440 F.2d 1210, 1212 (7th Cir. 1971)), and that in enacting the bill which became the PCRA, Congress used the words "sentence" and "term or terms" interchangeably. Id., pp. 54-55 (citing legislative record). And, the USPC interchanges the word "sentence" in § 4206(d) to "term or terms" in its regulation for administering the section. See Id., p. 54 (citing 28 C.F.R. §§ 2.1(1), 2.53(a)).

Parole statutes define "the precise time" of parole eligibility as part of a criminal sentences, Warden v. Marrero, 417 U.S. 653, 658 (1974), and are thus construed like other criminal penalty statutes. See Bifulco v. United States, 477 U.S. 381, 387-401 (1980); United States v. Neese, 901 F.2d 585, 602-03 & n.7 (7th Cir. 1990). "Congress the possibility of parole as an element of punishment." Rodriguez v. U.S. Parole Comm'n, 594 F.2d 170, 176 (7th Cir. 1979). See also e.g., United States v. Paskow, 11 F.3d 873, 879 (9th Cir. 1993)("'[P]arole eligibility is considered part of the sentance'")(citing cases).

Below, Appellee argued that "[s]ection 4206(d) plainly requires that prisoners that prisoners serve an aggregate of two-thirds of all consecutive terms before being eligible for a 'mandatory' parole hearing," Resp. to Pet. [D. Doc. 9], p. 6, and the district court simply repeated that comment, App. 4, without textual analysis, although § 4206(d) contains no such language. Appellee now concedes that § 4206(d) does not require a hearing before effectuating mandatory-release, App. 45, p. 43 n. 20. Yet, while "the statute speaks in mandatory terms," Appellee argues that it is not "self executing," but "requires action by the Commission to be released on parole," Id., p. 43, and, after running circles around its text and through a series of non-precedential and not-for-publication opinions -- not one of which construed § 4206(d) holistically in context with the PCRA as a whole and in light of the whole law -- argues that "even if [Appellant's] mandatory [release on] parole date was in 2013, he would not be entitled to release, only to a hearing before the Parole Commission." Id., p. 44 (citing Walker v. Adams, 151 F.3d 1034, No. 97-2475, 1998 WL 516780, at *2 (7th Cir. 1998) (Table decision)). This, of course, is essentially what the district court held: § 4206(d) "creates a presumption of release upon reaching the mandatory release

date, but a prisoner still must have a hearing before the Commission to determine if release is appropriate," App. 18 (citing Walker; Bruscino v. True, 708 Fed. Appx. 930, 935 (10th Cir. 2017); Dufer v. U.S. Parole Comm'n, 314 F. Supp. 3d 10, 19 (D.D.C. 2018)), and that, because Appellant "is serving a life sentence," pursuant to § 4206(d), he "can have no entitlement to release until and unless the Parole Commission makes the decision to release him." Id. 29.

Effectively, the district court construed and Appellee argues that § 4206(d) prohibits a prisoner's release on parole unless the Parole Commission holds a hearing and makes specific findings that the statutory conditions overcome the prohition. Unlike the non-precedential opinions cited by the court below and Appellee, the Eleventh Circuit, while not providing full analysis (which was not necessary to the narrower issue) did consider § 4206(d)'s plain text together with the text of 28 C.F.R. § 2.53(a) in holding that § 4206(d) plainly "entitles an inmate to 'mandatory parole' unless the Parole Commission makes specific findings to overcome the presumption of release," Bowers v. Keller, 651 F.3d 1277, 1279-80 & n. 3 (11th Cir. 2011), while applying the USPC's official interpretation that absent such findings by a "majority vote" of its Commissioners, the USPC "'must grant [the] prisoner Mandatory parole in order to comply with... § 4206(d).'" Id., at 1286 (quoting Memorandum of USPC General Counsel Rochne Chickinell, May 13, 2005).

Reading § 4206(d) with § 4206(a), the meaning of the command "shall be released on parole" loses the confusion wrought upon it by Appellee. Section 4206(a) commands that the subject prisoner "shall be released on parole" "if the Commission... determines" that two defined conditions exist, which this Court has held "does create a liberty interest" protected by due process of law. Solomon v. Elsea, 676 F.2d 282, 285 (7th Cir. 1982)(apply rule of Greenholtz v. Nebraska, Penal & Corr. Complex, 442 U.S. 1 (1979)). See also Prater v. U.S. Parole Comm'n, 802 F.2d 948, 950 (7th Cir. 1986)(en banc)(§ 4206(a) "entitl[es] the prisoner to parole if certain conditions are met rather than leaving him at the mercy of parole authorities")(citing Solomon). The Supreme Court has since expounded on the Greenholtz rule by holding that where a statute mandates release on parole, "unless certain findings are made" or otherwise "mandates release, 'if,' 'when,' or 'subject to' [specific] findings being made" that "any such statute, 'creates a presumption that parole release will be granted'" as "a liberty interest protected by the Due Process Clause." Bd. of Pardons v. Allen, 482 U.S. 369, 378, 381 (1987)(quoting Greenholtz, supra, 442 U.S. at 12).

Section 4206(d), unlike § 4206(a), commands that the prisoner "shall be released on parole" upon serving one of the two periods defined in the disjunctive clauses, "whichever is earlier," not if the conditions precluding mandatory release are found, but with a limited exception permitting its preclusion "if the Commission determines" the specific conditions exist. Thus, the plain terms of the statute creates a presumption that parole will be effected as a matter of course upon serving the requisite period, "unless the Parole Commission makes specific findings to overcome the presumption of release." Bowers, supra, 651 F.3d at 1279-80 & n.3. The district court and Appellee have reversed the formula of the statute by making the exception qualified in the proviso as mandating the USPC to determine that the conditions do not exist with the failure or refusal to do so as obviating the mandate for release. Such construction renders the "operative provision" of the subsection, App. Doc. 45, p. 34, inoperative by reversing the terms of the proviso as forbidding its operation unless or until the Commission finds the exceptional conditions do not exist.

Appellee cites the USPC's implimenting regulation for § 4206(d), while noting that it has "minor variations that do not affect its interpretation," which it purports as "stat[ing] in relevant part, that a prisoner becomes eligible for mandatory parole 'after completion of two-thirds of each consecutive term or terms or after completion of 30 years of each term or terms of more than 45 years (including life terms), whichever comes earlier[.]'" App. Doc. 45, p. 28 n. 13 (citing 28 C.F.R. § 2.53(a)). In fact, the regulation has great effect on the interpretation of § 4206(d), as is evident from the Bowers decision, and the authority of the USPC as primary interpreter of the section.

Congress vested exclusive authority in the USPC to promulgate rules and regulations for the administration of parole-related decision-making under the PCRA. 18 U.S.C. § 4203(a)(1). To impliment § 4206(d), the USPC did so by providing in actual relevant part that:

> A prisoner... serving a term or terms of 5 years or longer shall be released on parole after completion of two-thirds of each consecutive term or terms or after completion of 30 years of each term or terms of more than 45 years (including life terms), whichever comes first, unless pursuant to a hearing under this section, the Commission determines that [one of two conditions exist]....

28 U.S.C. § 2.53(a) (emphasis added). Words and phrases in its regulations are intended to convey the same meanings in the statute itself. Id., 2.1(i). Thus,

just as Congress used the words "sentence" and "term or terms" interchangeably in the PCRA, the PCRA understood the word "sentence" in § 4206(d) to mean "term or terms" and, the language used in the regulation to give effect to the proviso reflects the USPC's understanding that release is, in fact mandatory upon service of the requisite period, "whichever comes first, unless" the Commission determines the congressionally defined conditions exist at a hearing. This is precisely the construction placed upon § 4206(d) by the Bower Court, and, as it represents the USPC's official interpretation of the subsection, it carries the force and effect of law, Encino Motorcars, LLC v. Navarro, 579 U.S. —, 195 L.Ed.2d 382, 392 (2016); Rodriguez, supra, 594 F.2d at 173, to which deference must be given. Encino, supra; Cafi v. U.S. Parole Comm'n, 268 F.3d 467, 472-73 (7th Cir. 2001); Slader v. Pitzer, 107 F.3d. 1243, 1249-50 (7th Cir. 1997).

The regulation does not say, as Appellant says it does, "that a prisoner becomes eligible for mandatory parole..," but plainly that "[a] prisoner... shall be released on parole...." 28 C.F.R. § 2.53(a) (emphasis added). It is notable that in respect to the 30-year mandatory release clause, the regulation applies it relative to "each term or terms of more than 45 years (including life terms)" omitting the word "consecutive" altogether. If Appellant's reading of "term or terms" as meaning simple the single aggregate sentence, which he has shown has always been its meaning whether it included one or more consecutive terms (or sentences), see App. Doc. 36-1, pp. 52-55; see also Mem. P&A w/Pet. [D. Doc. 2], pp. 18-23; R59(e) Mot. [D. Doc. 17], pp. 17-19. Because "consecutive term or terms" and "term or terms" has, as a term of art, always simply meant the single aggregate sentence with or without the "consecutive", its omission in respect to the 30-year cut-off period for mandatory release is without relevance.

Appellant expressly argued that the USPC was vested by Congress with exclusive authority to make parole-related decisions and administer § 4206(d) and that the BOP had no such authority whatsoever. The district court acknowledged the argument and noted that Appellee did not address it, App. 3, 5, but refused to decide the issue, because agreeing with the BOP's purported re-calculation of the MPR date determined he was entitled to no relief. Id. 6. On reconsideration, Appellee, again, did not address the challenge to the BOP's authority to alter the MPR date and, again, the district court refused to decide it.

Lawful agency action depends upon a grant of authority by Congress. Thus, whether the BOP can lawfully determine Appellant's MPR date for purposes of § 4206(d) or otherwise construe and apply that subsection is a preliminary question

of law, which must be determined. City of Arlington ("Arlington") v. FCC, 569 U.S. 290, 296 (2016); Encino, supra, at —, 195 L.Ed.2d at 392.

In its opposition brief on this appeal, Appellee cites through its series of non-precedential case rulings (not one of which conducted analysis under the relevant and traditional canons governing statutory construction), through a Supreme Court decision (United States v. Wilson, 503 U.S. 329, 332, 335 (1992)(citing former 18 U.S.C. § 3568 and current 18 U.S.C. §§ 3585(b) and 3621(a) -- a case involving a non-paroloable prisoner sentenced under the Sentencing Reform Act of 1984 ("SRA") and with no apparent relevance to Appellant, his case, or the issues here), and grossly out-of-context limited quotation from the USPC's single aggregate sentence rule, 28 C.F.R. § 2.5, App. Doc. 45, pp. 30-35, 38-40, for the proposition that "the Bureau's long-established responsibility for calculating sentences, including applicable parole dates, is amply amply grounded in the law." Id. (emphasis).

Like its misrepresentation of the USPC's implementing regulation for § 4206(d) -- i.e., 28 C.F.R. § 2.53(a), see App. Doc. 42, p. 28 n. 13, Appellee applies the same tactic with its single aggregate sentence regulation, 28 C.F.R. § 2.5, which it purports supports an "arrangement" for the BOP to determine MPR dates. Id., p. 40, by arguing that § 2.5 "states that a prisoner 'has a single parole eligibility date as determined by the Bureau of Prisons.'" Id. (emphasis by Appellee). The full text of the regulation provides that:

> When multiple sentences are aggregated by the Bureau of Prisons pursuant to 18 U.S.C. 4161 and 4205, such sentences are treated as a single aggregate sentence for the purpose of every action taken by the Commission pursuant to these rules, and the prisoner has a single parole eligibility date as determined by the Bureau of Prisons.

28 C.F.R. § 2.5. Contrary to Appellee's surreptitious suggestion by its emphasized out-of-context snippet from § 2.5, the BOP does not, under that or any other regulation or any statute, have authority to "determine" any "parole eligibility date" and that is a deliberate misrepresentation of what the regulation means. The BOP determines the total length of a sentence for good-time credit purposes by aggregating all consecutive sentences into a single aggregate sentence pursuant to 18 U.S.C. § 4161 and provides the length of that aggregate sentence to the USPC pursuant to 18 U.S.C. § 4205(d). For pre-SRA prisoners, the BOP deducts pre-trial jail credit from the total aggregate sentence pursuant to 18 U.S.C. § 3568, which it includes with the information it provides the USPC pursuant to 18 U.S.C. § 4205(d). This entire function is performed immediately upon the prisoner's admission into BOP custody and in respect to Appellant was performed shortly after his admission into BOP custody in mid-1983 establishing his single aggregate sentence as life plus

15 years with 131 pre-trial jail credit days. See Pet., Exh. A, Attach. 2, p. 17 [D. Doc. 1-1, p. 2] (BOP's Sentence Data Summary).

In context then, 28 C.F.R. § 2.5 effectively says that "a prisoner has a single parole eligibility date as determined by the Bureau of Prisons[' aggregation of his sentence minus pre-trial jail credit]." However, Appellee fails to inform the Court that that last portion of the rule applies only to prisoners sentenced pursuant to 18 U.S.C. § 4205(a), and has no application to prisoners like Appellant, who were sentenced pursuant to 18 U.S.C. § 4205(b)(2) and who are immediately made eligible for release by force of law at the USPC's discretion. Even in respect to § 4205(a), the parole eligibility date is determined by the sentencing court in imposing the sentence under that subsection, which establishes parole eligibility upon service of 1/3rd of the prisoner's sentence with a cut-off at 10 years for any sentence of 30 years or longer. And, as for § 4206(d), it is not a parole eligibility statute, but a mandatory parole release statute under which the mandatory release date operates by the terms of the text in light of the single aggregate sentence (established ministerially by the BOP pursuant to § 4161) minus pre-trial jail credit (also established ministerially by the BOP pursuant to § 3568). The BOP has no statutory authorization to determine parole eligibility dates, mandatory parole release dates, or other parole-related subject-matter and surreptitious suggestion of authority through the snippet from 28 C.F.R. § 2.5 is disingenuous.

Appellee cites no authority from any statute giving the BOP to make any parole-related decisions or to administer § 4206(d) in any respect and has abandoned its reliance upon BOP Program Statement ("PS") 5880.30, upon which it relied entirely in the court below. See Resp. to Pet. [D. Doc. 9], pp. 5-6. It doesn't even mention PS 5880.30 in this appeal and, of course, it is no statute, rule, or regulation, in any case, but an internal program statement -- hardly a source of agency authority. Ironically, not a single one of the cases cited by Appellee cites or identifies any statutory authorization for the BOP to make parole-related decisions or to administer § 4206(d). There simply is no such authority.

Appellee argues that, while § 4206(d) requires a "single mandatory-parole date," it weaves into the matrix a deceptive power source by stating that "the Bureau has to first determine the amount of time a prisoner must serve on 'each consecutive term or terms'" (the heart of § 4206(d)), App. Doc. 45, p. 32, while suggesting that Appellant's argument that the words "'term or terms'" used elsewhere in the statute and related statutes to mean "'sentence'" are immaterial, because § 4206(d) uses the word "'each'" in respect thereto. Id., p. 32 n. 15. Noting Appellant's citation to Congress' statement in the legislative report underlying § 4206(d) that "this section provides more liberal criteria for release on parole for prisoners with long

sentences after they have completed two-thirds of any sentence, or 30 years, whichever occurs first,'" Id., pp. 32-33 (citing App. Doc. 36-1, p. 55 and quoting H.R. Conf. Rep. 94-838, 27, as reported in 1976 U.S.C.C.A.N. 351, 360), Appellee makes much of the Report's next sentence, which says, "'In calculating two-thirds of a term, all sentences imposed consecutively should be considered separately and the time on each sentence added together,'" Id., to which Appellee says, "That is precisely what the Bureau did." Id. Appellee claims the Report's last statement supports its position. Id., p. 36 n.16. Hardly so.

First, Appellant was sentenced but once. He had no sentences imposed consecutively. He was sentenced to multiple terms with some such terms ordered to run consecutively. But, even if his sentence is construed to fall within the meaning of the Report's comment, it doesn't aid Appellee's argument a wit. The comment is limited to the calculation of "two-thirds of a term" not the 30-year period clause. It implies that "two-thirds of a term" consists of "the time on each [consecutively imposed] sentence added together" -- the very single aggregate sentence rule Appellant has argued. It does not say that two-thirds of each consecutively imposed sentence should be added together, but the entire time of each. That is not what the BOP did, even if it had authority to meddle in the matter. The BOP added the two-thirds periods of Appellant's 10- and 5-year sentences together, which it then added to a 30-year period drawn from his life sentence to create two distinct mandatory release periods and added them together to create a single mandatory release period. The quoted comments, when read together, like § 4206(d) itself, separates the two-thirds period from the 30-year period with a disjunctive "or" and plainly requires the release to be effected upon completion of one or the other "whichever occurs first" with the 30-year completion period a limiting maximum.

Appellee's confusion, like the court's below, seems to turn upon the word "consecutive," which it apparently reads to mean one-running-after-another-yet-separate. But typical dictionary definitions treat "consecutive" to mean "'following one another in uninterrupted sequence'" synonomous with "'continuous,'" as Appellant pointed out. App. 36-1, p. 53. Thus, when the sentencing court ordered his 10-year sentence to "run consecutively" to his life and his 5-year sentence to "run consecutively" to the 10, it simply established a single aggregate uninterrupted life-plus-10-plus-5-year continuous sentence.

The phrase "each consecutive term or term" can reasonably only mean "each aggregate or totally continuous sentence" for the obvious reason that a prisoner with a single life sentence or a single sentence over 45 years reach their mandatory release date upon serving 30 years. Such prisoners don't even

have a "consecutive" term or sentence, as Appellee, the court below, or the cases cited by Appellee, treat the word. If Congress meant "each consecutive term or term" to literally mean only each "consecutive" term, as Appellee construes it, § 4206(d) could never apply to a prisoner with a single sentence. Why does Appellee say that § 4206(d) requires Appellant to serve 30 years on his life sentence to which an 10 years (two-thirds) must be served on his 10-and 5-year consecutive sentences? His life sentence is not consecutive to any sentence and § 4206(d) does not suggest required release after serving a period for each non-consecutive term and each consecutive term or terms.

Under Appellee's view, a prisoner with a single 92-year sentence would reach his MPR date at 30 years, while a prisoner with a 46 year sentence followed by a consecutive 46-year sentence would be required to serve 60 years to reach his MPR date, and a prisoner with a 46-year sentence followed by a consecutive 1-year sentence would have to serve 30 years and 8 months to reach his.

Appellant's argument, below and here, is simply that "each consecutive term or terms" is a term of art meaning the total aggregate sentence and that § 4206(d) mandates a prisoner's release on parole upon serving two-thirds of his total aggregate sentence "or" upon serving 30 years of his total aggregate sentence of more than 45 years including any life sentences. This is more than just a reasonable interpretation. It was so understood by the USPC, the BOP, and Appellant when he was sentenced. And, as he has shown, such interpretation comport with long settled usage up to and after Congress enacted the PCRA; the words "term or terms" long used in other early release statutes and in other related sections of the PCRA; the PCRA's legislative history; the USPC's single aggregate sentence rule (28 C.F.R. § 2.5) and its purpose (as published in the Federal Register); the USPC's implementing regulation (28 C.F.R. § 2.53(a)); and, not least, was so applied to Appellant's sentence by the USPC and the BOP for a full decade until the BOP arbitrarily changed his MPR date without notice pursuant to PS 5880.30.

The BOP's action not only usurped the USPC's exclusive jurisdiction to administer § 4206(d) (and parole matters generally), but Congress' legislative authority, and effectively altered Appellant's sentence as imposed, which incorporated § 4206(d) and USPC regulations as they stood (and where understood) then. See Pet. [D. Doc. 1], pp. 8-9 (alleging separation-of-powers violations as grounds for relief). Section 4206(d) being an inherent part of his sentence insofar as it may be found ambiguous, should be construed under the rule of lenity. Bifulco, supra, 477 U.S. at 387-401; McNeese, supra, 901 F.2d at 602-03.

Ironically, Appellee has abandoned its argument raised below justifying the BOP's actions solely upon application of PS 5880.30, upon which it now remains silent. Virtually none of its arguments here were raised below, and are waived. Quincy Bioscience, supra, 957 F.3d at 730. See also Stark v. Redbox Animated Retail, LLC, 770 F.3d 618, 627 (7th Cir. 2014) (arguments "'underdeveloped, conclusory, or unsupported by law'" and "'skeletal "argument[s]"'" in the district court are waived on appeal) (citing cases).

Appellant argues (if it can be deemed an argument) against Appellant's argument that the USPC's last record (May 4, 2002) regarding his MPR date "reflected" such date as "February 12, 2013" and, as the final repeal of the PCRA was effected on November 1, 2002, the USPC's determination that his MPR date was February 12, 2013 "became permanent" entitling

App. Doc. 45, p. 41. See App. Doc. 36-1, pp. 57-58; Mem. P & A w/Pet. [D. Doc. 2], 12, 14-15 & n. 4; Tr. [D. Doc. 14-1], pp. 32-33; R59(e) Mot. [D. Doc. 17], pp. 31-32. It argues that Congress has extended the USPC beyond the repeal on November 1, 2002 to 2022 and, thus, the USPC "continues to exist and retains its ability to act, and [Appellant] is not entitled to (and has not received) any final release date." App. Doc. 45, pp. 41-42. Appellee neglects to inform the Court that the purported extension was enacted on November 2, 2002 after the repeal had become final the day before and included no retroactivity provision for application to Appellant precluding such retroactive application under the rule of Landgraf v. USI Film Products, 511 U.S. 244 (1994) and INS v. St. Cyr, 533 U.S. 289 (2001), as Appellant argued, or that the repeal has been held to treat the USPC's last pre-repeal decision as final. See e.g., United States v. Feist, 585 F. Supp. 2d 1107, 1112 (D.N.D. 2008). Appellee did not raise its instant argument on this matter in the court below and it is waived, Quincy Bioscience, supra, 957 F.3d at 730, and is so insubstantial and non-responsive as to be frivolous.

Below, Appellant challenged USPC actions upon regulations argued to violate the ex post facto clause upon which Appellee relied. Tr. [D. Doc. 14-1], pp. 41-49; R59(e) Mot. [D. Doc. 17], pp. 37-38. Appellee raised no argument against the challenges at all. The district court ruled against them without full consideration of their effects and by purporting to find facts not of record without an evidentiary hearing. App. 26-27. While Appellant noted the arguments raised below, App. 36-1, p. 4, but unable to argue it in his opening brief due to the Court's refusal to permit him sufficient space, he was compelled to ask the Court to consider it on the record as argued below. Id., p. 1 n. 2. While Appellee presents no argument on the matter, it nonetheless argues that Appellant cannot contest any action by the USPC (irrespective that Appellee and the court below relied upon such action), because he did not exhaust his administrative remedies in respect to the USPC's actions below. App. 45, p. 45 n. 1. Too little, too late. The district court already ruled on them and arguing exhaustion on this appeal now for the first time constitutes a waiver. Quincy Bioscience, supra, 957 F.3d at 730. While Appellant was precluded from arguing the ex post facto violations in his opening brief, his arguments below are part of the record, and this Court has jurisdiction and certainly the power to consider them hear de novo and sua sponte. See e.g., United States v. Smith, 775 F.3d 879, 880 (7th Cir. 2014). That Appellant points it out, as he has no means to do more, affects neither its jurisdiction or power.

For the above reasons, the district court's judgment should be reversed and Appellant should be ordered discharged.

Respectfully submitted,

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DECLARATION OF SERVICE

Yorie Von Kahl, undersigned, hereby declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that he mailed a copy of the foregoing Reply to the Opposition Brief by placing the same in the legal mail system at the Federal Correctional Institution at Pekin, Illinois with First Class postage addressed to:

Jeffrey D. Kienstra
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on this 30th day of September, 2021.

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