UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Steven Alan Magritz,
Petitioner

v.

Case No. 18-C-0455

JON E. LITSCHER,
Respondent

MEMORANDUM IN SUPPORT OF Legal Representative's MOTION FOR RELIEF, Fed. R. Civ. P. Rule 60(b)(1)

The most compelling circumstances for the issuance of the writ of habeas corpus are when government officers acting under color of law, a state circuit court judge in this instant matter, abuse the power of the state for personal or political purposes to retaliate against and punish those with whom they disagree. The retaliation by, and pervasive, outrageous, *antagonistic,* extreme bias manifested by State judge Sandy Williams during a star-chamber "trial" replete with "structural errors" resulting in the unlawful incarceration of petitioner Steven Alan Magritz, has heretofore been swept under the rug by state appellate courts and now exacerbated, by mistake or inadvertence, by District Court Judge Lynn Adelman.

Summary

Incorporated herein by reference are the following documents previously filed with this court: Dkt. 8, Brief; Dkt. 9, Affidavit of Bias with attachments Dkt. 9-1 through 9-7; Dkt. 10, Mandatory Judicial Notice, with attachments Dkt. 10-1

through 10-10; Dkt. 13, Memorandum in Support of Motion for Summary Judgment; Dkt. 19, Memorandum in Support of Petitioner's Motion for Relief.

The November 28, 2018 Decision and Order of Lynn Adelman finding a "procedural default" evidences, on its face, *mistaken or inadvertent* disregard for the controlling law of this case, Wis. Stat. § 974.06(8), *which was taken directly from Title 28 U.S. Code § 2255.* Adelman substituted the controlling law with a *non-existent* "law", which was in fact an uttered *fabrication*, provided to Adelman by the ostensible attorneys for the respondent.

Federal Rule of Civil Procedure Rule 60, Relief from Judgment or Order, states in pertinent part:

> (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;

Mistake or Inadvertence.

Judge Adelman *mistakenly or inadvertently* used *non-existent* state "law" to dismiss petitioner's habeas corpus petition based on an alleged "procedural default". Regarding "Procedural Default", Dkt. 16-6, Adelman stated,

> Here, Magritz decided to forego his direct-appeal rights, and therefore the Wisconsin Court of Appeals' rejection of his federal claims involved a principled application of well-established Wisconsin law.

However there is no state law, *nor can there be any law, federal or state,* which denies a man remedy by habeas corpus merely because he does not file a direct appeal. Further, the record of this court *extensively* evidences egregious, unrefuted, pervasive, outrageous, *antagonistic* bias by State court judge Williams, therefore

remedy by way of motion to the sentencing court would be not only futile, inadequate or ineffective, but also foolish and ridiculous. The egregious exhibited bias of Williams, *known as a "structural defect" or "structural error"* in the proceedings, requires that the controlling, and "well-established Wisconsin law" relevant to this case be followed, to wit:

Wisconsin Statute § 974.06:

> (8) A petition for a writ of habeas corpus or an action seeking that remedy in behalf of a person who is authorized to apply for relief by motion under this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, **unless it also appears that the remedy by motion is inadequate or ineffective** to test the legality of his or her detention. (emphasis added)

Section (8) was taken *directly* from 28 U.S.C. § 2255. The Seventh Circuit recognized this prohibition on habeas corpus would have been unconstitutional except for the "saving" clause, *Stirone v. Markley*, 345 F.2d 473, (7th Cir. 1965), to wit:

> **"unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention."**

Take Notice of the word "appears". Notice also the disjunctive conjunction "or" between the words "inadequate" and "ineffective". Based upon the extensive evidence of manifested bias filed with this Court, see docket items referenced *supra*, it would "appear" that remedy by motion to the sentencing court would be "inadequate or ineffective" to test the legality of petitioner's detention.

In *Stirone*, 475-476, the Seventh Circuit Court of Appeals said:

> "For an even more fundamental reason section 2255 is not a deprivation of constitutional rights. Habeas corpus **continues to be available** when the

> remedy under that section is shown[1] to be "inadequate ***or ineffective***." The section 2255 provision merely prescribes a procedure different from that of habeas corpus whereby one ***may*** collaterally attack a conviction. So long as this procedure is available ***with provision for habeas corpus*** in the event a section 2255 proceeding is "**inadequate *or ineffective***," there is no constitutional issue." (emphasis added).

(Judge Adelman's "mistakes" in recitation of facts in the November 28th Decision and order were set forth in Dkt. 19.)

Procedural Default

There was *NO* "procedural default", but rather a *mistaken or inadvertent* application of a non-existent "rule" by Judge Adelman. On page 5 of the Decision and order Judge Adelman states:

> In the present case, the Wisconsin Court of Appeals rejected Magritz's habeas petitions based on a state procedural rule: the rule that a criminal defendant cannot seek habeas relief with respect to claims that he could have raised on direct appeal or in a motion under Wis. Stat. § 974.06. There is no doubt (sic) that the Wisconsin Court of Appeals actually relied on this state-law procedural ground in denying Magritz's habeas petitions, ..."

BUT - there is no such rule. Consider the following:

- ***If*** there is such a rule, ***then it is written.***
- Where is it written?
- What exactly is the wording of that rule?
- If there is such a rule, why wasn't it quoted or cited?
- If the alleged "rule" conflicts with the Constitution, is it lawful?
- Is the alleged rule judge-made?
- If the alleged rule is judge-made, what is the case cite?
- If the alleged rule is a statute, what is the wording of that statute?

The applicable "rule" is actually a statute, Wisconsin Statute § 974.06(8), set forth above, which Judge Adelman mistakenly or inadvertently omits. An extensive discussion of said omission is set forth in Dkt. 19, incorporated by reference.

[1] The statute uses the term "appears".

Wisconsin Statute § 974.06(8), the controlling statute in this case, clearly states that a person is not required in all cases or instances to file a motion with the sentencing court for remedy. A person can file a petition for habeas corpus if it *appears* that the remedy by motion would be *inadequate*. Also, *a person can file a petition for habeas corpus if it* ***appears*** *that the remedy by motion would be* ***ineffective***.

This provision in the statute to petition for habeas corpus rather than filing a motion with the sentencing court when it ***appears*** that the remedy by motion would be ***ineffective*** is clearly designed to be the remedy and is especially appropriate in cases where the judge manifests bias against the accused.

It is evident that State court judge Sandy Williams, who retaliated against and persecuted the petitioner, a whistleblower and victim of crime, in the most open, blatant, and brazenly manifested ways, and refused several times to recuse herself, as *extensively* and *exhaustively* evidenced to *this* Court, would *not* have a "come to Jesus moment" and provide remedy for the egregious injuries *she* had *intentionally* inflicted. For anyone to believe otherwise is akin to believing that a girl child who was viciously and brutally beaten and raped by a pedophile could return to the rapist and expect to be miraculously "un-raped".

The remedy by habeas corpus was and is clearly the only viable option for remedy in this situation in as much as Williams was retaliating against petitioner, a whistleblower, for having filed criminal complaints against Williams, suing Williams for misconduct in public office and breach of fiduciary duty, and publicly

exposing her malversation. The bias which Williams' manifested crossed the red line from "mere" misconduct in public office to felonious misconduct in public office. It was so egregious that the appellate judges in State of Wisconsin didn't want to touch it. The record of *this* Court uncontrovertibly evidences that fact. The Great Writ of habeas corpus ad subjiciendum was created to protect the people from tyranny such as that of Sandy Williams.

Judge Adelman thus failed, *by mistake or inadvertence*, to address the issue of obtaining remedy by habeas corpus when it *appears* that remedy by motion is *inadequate or ineffective*, which was clearly and obviously the sum and substance of the application of state law and the alleged procedural default. Petitioner's only possibility for remedy is in habeas corpus, which is constitutionally secured as well as explicitly recognized in Wis. Stat. § 974.06(8) when it ***appears*** that remedy by motion is ***inadequate or effective***. *The record of this Court evidences that petitioner did not procedurally default.*

Applicability of Fed. R. Civ. P. Rule 60(b)(1).

"However, if in granting the earlier judgment, the district court has *overlooked and failed to consider some controlling principle of law*, the district court may abuse its discretion by failing to grant 60(b) relief." *Harrison v. Byrd*, 765 F.2d 501, 503 (1985). "We likewise review the propriety of the initial summary judgment in the light of the factual opposition *inadvertently* overlooked by the district court, under the principle that, if the overlooked affidavit did preclude summary judgment, then *the district court abused its discretion* by failing to grant 60(b) relief

because of its *mistake or inadvertence* in overlooking that factual opposition creating a disputed issue of material fact had been timely filed." Id., 504. "Accordingly, we conclude that the district court abused its discretion in denying Harrison's Rule 60(b) motion." Id., 504. (Italics added)

"In *Jones v. Anderson-Tully Co.*, 722 F.2d 211, 212-13 & n. 3 (5th Cir.1984), the Fifth Circuit held that if an error affects the ***substantive rights*** of the parties, *it must be corrected under the provisions of Rule 60(b).*" "The mistake in the present case affects the *substantive rights* of the parties. It is not clerical, and if it in fact occurred, it is one of *mistake, inadvertence*, surprise, or excusable neglect governed by Rule 60(b)(1)." *OLLE v. HENRY & WRIGHT CORP.*, 910 F.2d 357, 363-364 (6th Cir., 1990). (Italics and bold added)

(Cites omitted) (noting that while relief from judgment is usually sought by motion of a party, "**nothing forbids the court to grant such relief** *sua sponte*") *JUDSON ATKINSON CANDIES, INC., v. LATINI-HOHBERGER DHIMANTEC*, 529 F.3d 371, 385 (2008). (Bold added)

Rule 60(b)(1) provides for relief from final judgments that are the product of *mistake, inadvertence*, surprise or excusable neglect. **This provision applies to errors by judicial officers** as well as parties. *See Buggs v. Elgin, Joliet & Eastern Ry. Co.*, 852 F.2d 318, 322 (7th Cir.1988); *Bank of California v. Arthur Anderson & Co.*, 709 F.2d 1174, 1176 (7th Cir.1983). *WESCO PRODUCTS CO. v ALLOY AUTOMOTIVE*, 880 F.2d 981, 984-985 (7th 1989). (Italics and bold added).

The November 28, 2018 Decision and Order by Judge Lynn Adelman and the Judgment signed by the clerk of court must be vacated and relief granted petitioner pursuant to the motion for relief under Fed. R. Civ. P. Rule 60(b)(1).

Dated this March 12, 2019 A.D.

By: /s Legal Representative, Attorney-in-Fact, Agent

Certificate of Service

Re: Steven Alan Magritz v. JON E. LITSCHER
Case No. 18-cv-455-LA

I certify the following is being served by United States mail, postage prepaid, on Daniel J. O'Brien, State of Wisconsin, Department of Justice, P.O. Box 7857, Madison, WI 53707:

Motion For Relief, Fed. R. Civ. P. Rule 60(b)(1)
Memorandum in Support

Dated this March 12, 2019 A.D.

By: /s Agent