THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

v. Case No. 24-5474

AUBURN CALLOWAY, APPELLANT

I. CASE INTRODUCTION

Before this Court is the appeal from the judgment of the U.S. District Court, Western District of Tennessee, case # 94-cr-20112-TLP, denying a motion on 4/17/24 for sentence reduction under 18 USC 3582 (C)(1)(A)(i) and (ii), and other substantive motions filed by Calloway, a federal inmate sentenced to life for multiplicitous convictions in 1995 for [a]ttempted air piracy [a]nd interference with flight crew stemming from his assault on 3 FedEx flight crew members on a cargo aircraft over Arkansas in 1994 heading west to California. **U.S. v. Calloway,** 116 F.3d 1129 (6th Cir 1997).

Calloway is a familiar face as this appeal marks his sixth visit to this Court after he was convicted nearly 30 years ago receiving two life sentences from the district court despite no criminal history, no deaths nor life threatening injuries in the unsuccessful insanity defense case. As a result, there is a dense factual and procedural background here.

Calloway will brief only explanations for 1) why his recusal motions were improperly denied; 2) why the sentence reduction denial was wrong; 3) why the denial of Calloway's other "many motions" was also wrong; 4) why this Court should follow its binding precedents set by e.g. **U.S. v. Nash**, 2024 U.S. App. LEXIS 10519 and also vacate the denial order remanding this case with an order to reduce Calloway's sentence to time served with a recusal and/or reassignment order.

Calloway propounds that this Court go even further and consider under moral standards a vacatur of the conviction in view of the 2006 remand of his Rule 59(e) motion never resulting in its purpose but seeing only a wrongful denial to end the habeas case without a final judgment on all unadjudicated claims. This error was cited as an "extraordinary and compelling reason" (ECR) for sentence reduction (RIS). It is cited here on appeal of the lower court's blanket denials.

The 5 QUESTIONS posed on this Court's "Pro Se Appellant's Brief" form are prioritized here in a different order: 1) What specific issues does appellant raise on appeal and what action should the appeals court take to resolve these issues? 2) Did the district court incorrectly decide the facts? 3) Did the district court apply the wrong law? 4) Are there other reasons the district court's judgment is wrong? 5) (combined with #1).

II. FACTUAL AND PROCEDURAL BACKGROUND

Calloway, an honorably discharged decorated (Humanitarian Service medal, Pistol Expert medal, inter alia) veteran of the U.S. Navy, was indicted in 1994 by then-U.S. Attorney Veronica F. Coleman with a multiplicitous indictment. He was convicted in 1995 on both charges when an insanity defense failed. The govt. deposed a black psychiatrist flown to Memphis from Washington DC to testify that he diagnosed "malingering" after interviewing Calloway twice. The 3 other experts, all psychologists, diagnosed "Paranoid Personality Disorder" to which the govt. psychiatrist agreed. No suicidality assessment protocols were pursued and diagnosed. Therefore the district court's manifest non sequitur that Calloway was suicidal does not rely on any psychological assessment nor any other part of the record but only on the govt.'s prejudicial pretrial news media announcement that Calloway was "suicidal". The fact of the district court being an AUSA under U.S. Attorney Coleman in 1995 makes the false accusation unsurprising.

On direct appeal, the crew interference conviction was vacated as a lesser-included offense of the multiplicitous charges with a knowing concession by the govt. represented by John Thomas Fowlkes, Jr., also an AUSA under Veronica F. Coleman. Counsel Robert C. Brooks was queried

by a panelist about the oddity of the offense but Brooks never mentioned the insanity defense, according to cassette tapes Clerk of the Court Leonard Green graciously sent to Calloway. Brooks did argue that it was undeterminable as to whether Calloway wanted to take control or leave no one in control. Brooks was laughed out of the courtroom for that inane argument but it does fly in the face of the district court now saying, 30 years later, that there was an intent to crash into a specific target.

In 1998, Calloway filed a timely pro se motion to vacate sentence under 28 U.S.C 2255 raising many objections to his conviction and sentence. On July 1, 1999 Julia Smith Gibbons denied relief without addressing all the claims in the action. Seven days later, Calloway submitted a Motion to Alter or Amend Judgment Pursuant to Rule 59(e) F.R.C.P. In it, Calloway requested that [all] his asserted 2255 petition claims be adjudicated.

Relying on case law outside the circuit and not involving Rule 59(e), Gibbons ruled that "any motion to alter or amend or vacate an order denying a 2255 motion is subject to the same procedural requirements as a successive motion." She then docketed the motion as a new case and transferred it to this Court under 28 USC 2244(b)(3). This created case number 99-6288.

Pursuant to the advice of the Clerk of this Court, Calloway also filed a

notice of appeal on August 20,1999 which Mr. Green docketed as 99-6186. A C.O.A. was denied on 3/30/2000.

On August 6, 2001, Mr. Green entered an order dismissing 99-6288 as "moot". Feeling hopeless and helpless, on 5/6/03, Calloway filed a mandamus. More than a year later, on 8/20/04, this Court denied all requested relief [but] discovered that "[u]pon review of the prior proceedings,...case no. 99-6288 was improperly dismissed." and ordered Mr. Green to restore it to the active docket. This Court then appointed Benjamin G. Dusing, 0078572, and Scott C. Holbrook of Baker Hostetler. For this reason, Calloway requests reappointment of Dusing for this appeal.

In a duel of legal memorandums, Dusing prevailed over the govt.'s threadbare opposition by AUSA Monica M. Simmons, who conceded that Gibbons failed to adjudicate all of the 2255 claims but that it was "harmless error." After this Court remanded the Rule 59(e) motion, then-district judge Bernice Donald delayed it for another 2 years only to dismiss it without appointing counsel nor adjudicating unaddressed claims. Thus the 2255 litigation languished from 1998 until 2008 without a final judgment as it still stands today. But as an ECR, the district court now finds that quandary among other ECRs "unpersuasive".

The district court has also failed to list, weigh, and balance [all] of the 18

USC 3553(a) factors e.g. sentencing disparities, Calloway's post-conviction conduct for the past 30 years, etc., choosing instead to mischaracterize the nature of the offense 30 years ago instead of the nature of the offender today, 30 years later, all the while misremembering that the 1995 trial was an insanity defense, albeit incompetently and unsuccessfully presented.

III. LAW AND ARGUMENT

The District Court Erred and Abused Its Discretion by Denying All Recusal Motions:

The ORDER denying sentence reduction includes "The Court therefore DENIES his many motions for sentence reduction or for immediate release." "Many motions" include recusal motions for former AUSA John Thomas Fowlkes, Jr., Calloway's prosecutor under then-U.S. Attorney Veronica F. Coleman. Also included is a recusal motion for Thomas L. Parker, who was an AUSA under Coleman concurrent with the trial, convictions, and sentences here. Prior to her U.S. Attorney appointment, she was the "Senior Litigation Attorney" for the Federal Express Corporation (see **Winston v. FedEx**, 853 F.2d 455 (6th Cir 1988) and continued owning FedEx stock while U.S. Attorney according to her FOIA requested DOJ file.

After completing his J.D., Thomas L. Parker joined the Memphis law

firm of Waring Cox in 1989. FedEx was their client from before Parker joined until well after he left in 1995 to become Coleman's AUSA for 9 years spanning Calloway's convictions, sentences, appeal, and the stalled habeas litigation. In 2004, Parker became a "shareholder" in Memphis' Baker, Donelson, Bearman, Caldwell, and Berkowitz P.C., which also represented FedEx as a client but Parker continued to also represent the govt. in criminal cases e.g. see **U.S. v. Cleaves**, 2006 U.S. Dist. LEXIS 67248; **U.S. v. Williams**, 2009 U.S. Dist. LEXIS 142766. Since his judicial appointment in 2018, Parker has ruled in favor of FedEx in every published civil case Calloway could google. Now, with no basis in truth, facts, nor the record, Judge Parker begins his denial order with the clearly erroneous statement "Defendant Auburn Calloway, a pilot for FedEx, tried to hi-jack a FedEx jet hoping to crash that jet into the FedEx terminal."

Calloway was [not] a [pilot] but a flight engineer for FedEx and had not piloted a plane for at least 6 years. Yet Judge Parker foists a far-fetched fantasy that fails in the face of the facts underlying the record. The question arises, a fortiori, as to whether there would be a credible attempted air piracy charge had the assault occurred on the ground [before] the plane took off [or] after it landed in California? If so, why isn't [every] assault on

flight crew also "attempted air piracy"?

The district court's suicidality mens rea unsurprisingly comports with the govt.'s pretrial publicity stunt, but its specific mass homicide intent allegation does not. Then-AUSA John Thomas Fowlkes, Jr. told the jury that "all of Memphis was in danger", not "all of the occupants of the (then non-existent) FedEx terminal", as Fowlkes' former and present colleague now states from the bench.

1. Prosecutorial Misconduct, Disqualification, and Judicial Recusation Vitiate the RIS Denial

When the Houston U.S. Attorney recused his entire office from the Enron prosecutions despite no one in his office owning stock in Enron nor being previously employed there, his office-wide recusal was noteworthy. Veronica Coleman should have recused her entire office. Her successor, David Kustoff, joined FedEx as a vice-president when his stint ended leaving the impression of a revolving door and incestuous relationship between FedEx and the Memphis U.S. Attorney's office. The present U.S. Attorney, Kevin Ritz, clerked for Julia Smith Gibbons after graduating from her law school alma mater. Yet there seems to have been no recusals nor 28 USC 455 challenges in the countless cases Ritz has successfully represented the govt. before her over the years.

Disqualification is self-evident here where Due Process requires judges to self-disqualify from proceedings where their impartiality might reasonably be questioned. 28 U.S.C. 455(a). They must self-disqualify from proceedings involving personal knowledge or actual or probable judicial bias. 28 U.S.C. 455(b). Recusal is allowed either sua sponte or when prompted by a motion as in this case.

2. The Law and Precedent Require Recusal or Reassignment

Due Process often demands recusal even when a judge has no actual bias if the probability of bias is "too high to be constitutionally tolerable". **Rippo v. Baker**, 580 U.S. 285, 287 (2017); **Williams v. Pennsylvania**, 579 U.S. 1, 8 (due process violated because judge failed to recuse himself after serving as prosecutor); **In re Al-Nashiri** 921 F.3d 226, 236-37 (DC Cir 2019)(due process violated because judge's job application to DOJ...created "disqualifying appearance of partiality"); **In re U.S**. 158 F.3d 26,27-28, 30 (1st Cir 1998)(actual bias required for motion to disqualify under 28 USC 144 but only appearance of bias for recusal under 455).

The district court abused its discretion by denying Calloway's "many motions" calling for recusal of former AUSAs Fowlkes and Parker who were employed under Veronica F. Coleman, former FedEx staff attorney and stockholder who signed a [multiplicitous] indictment used to violate

due process at trial and at sentencing in this case.

Alternatively, this Court should follow binding precedent in **U.S. v. Nash** 2024 U.S. App. LEXIS 10519, which "granted the inmate's request for reassignment to a different judge on remand; the district court ignored the facts of the inmate's allegations and allowing the same judge to preside over this case on remand would compromise the appearance of justice." **Nash** at 1. Likewise, this case should be remanded with orders for recusal, reassignment, and reducing Calloway's sentence to time served.

3. The District Court Did Not Duly Consider the 18 USC 3553(a) Factors and Assessed Evidence Erroneously:

This court requires district courts to "engage in due consideration of the 18 U.S.C. 3553(a) factor[s]" and rejects basing their rulings "on a clearly erroneous assessment of the evidence." **U.S. v. Nash**, supra, citing **U.S. v. Jones**, 980 F.3d 1098, 1112 (6th Cir 2020). The district court omits that Calloway faced an insanity defense trial and brought 4 hammers, not all of which were "claw hammers" (but this was the only one shown to the jury), along with cartons of nails, and personal paraphernalia including hundreds of dollars in cash.

4. The District Court's Categorical Dismissal of [All] Extraordinary and Compelling Reasons as "Unpersuasive" is Reversible Error:

The extraordinary and compelling reasons (ECRs) presented to the district court conform to generally accepted ECRs for FSA sentence reductions in this and sister circuits for motions granted [a]nd denied (e.g. based on unfavorable 3553(a) factors). Lacking a "reasonable basis" for categorically dismissing [all] ECRs as "unpersuasive" does [not] "adequately explain the chosen sentence to allow for meaningful appellate review" **Gall v. U.S**., 552 U.S. 38, 50 (2007). Nor is a broad dismissal as "unpersuasive" --a term for dismissing claims, objections, arguments, etc.— [legally] permissible here for the reasons that follow.

In **U.S. v. Owens**, 2021 U.S. App. LEXIS 13656, Judge Thapar astutely asks "What are ECRs?" Rubricating that it is a "mixed question of law and fact" makes "unpersuasive" erroneous as the term cannot be applied to a "fact" nor to a "law". Can a "fact" be "unpersuasive"? No, especially when the fact hinges on evidence, it actually occurred and exists, and has an objective reality based in truth. Can a law, rule, or statute be "unpersuasive"? No, as it would make no sense except for those not intending to comply.

Therefore the district court abused its discretion by relying on a legally impermissible consideration in its presumptive denial that fails as a legal conclusion but succeeds as a subjective opinion tainted by a cognitive bias

rooted in a former AUSA's prosecutorial predisposition toward a previously prosecuted case.

5. Other Relevant Reasons for Immediate Release:

As of 4/6/24, appellant completed 30 years of federal incarceration with pretrial detention credit. This invokes FBOP policy 5050.50 and 18 U.S.C. 3582(c)(1)(A)(ii). Per **U.S. v. Linsley**, U.S. Dist. LEXIS 127488 and the policy statement, the only eligibility requirements are: A) at least 70 years of age (Calloway is 72); B) at least 30 years [federal] imprisonment; C) inmate no longer a danger to the community (n.b. the inmate could well have been a serious danger to the community 30 years ago but the criteria applies to [current] circumstances.) The **U.S. v. Linsley** compassionate release rationale needs no repeating here as Judge Breyer's dicta 'nails it'.

Pursuant to the "Holloway Doctrine" footnoted in **U.S. v. Owens**, supra, Calloway's [conviction] should be vacated. In his "Memorandum Regarding the Vacatur of Two Convictions", Judge John Gleeson said "Even people who are indisputably guilty of violent crimes deserve justice, and now Holloway will get it." With Calloway's 1998 collateral attack nonfinal judgment still pending, pursuant to the Holloway Doctrine, this Court should, in the interest of justice, VACATE Calloway's conviction for attempted air piracy under 28 U.S.C. 2106, even if the panel reinstates the

lesser-included offense whose statutory maximum sentence was and remains 20 years.

Alternatively, at least vacate the sentence reduction denial and remand with orders for recusal, reassignment, and immediate release. The govt.'s prejudicial pretrial publicity underpinnings of this misconviction has inspired devastating domestic and international repercussions.

The dicta of former Chief Judge Gilbert Merritt serves this appeal well in closing. Unintentionally enhancing Dr. William C. Dement's diagnosis and admonition to the district court in 1998, Judge Merritt's discussion of the gravitas of the missed automatism diagnosis is apropos to the gravamen of RIS relief as it would have been for the 1998 collateral attack which never gained the kind of relief Judge Merritt argues is warranted in his reference to "Strickland v. Washington". Merritt's second sentence is worth repeating: "I believe that if Haskell's counsel had presented his automatism defense (a form of unconsciousness) as negating the mens rea or intent element of the case, the jury may well have returned a verdict of not guilty because of the absence of intent." The "intent" the district court now uses to deny relief was certainly absent 30 years ago. That court's manifest non sequitur is not reliant on the truth nor the record but instead on the power of the govt. and FedEx to promulgate fiction as fact.

See **Haskell v. Berghuis**, dissent, 2013 U.S. App. LEXIS 1321.

IV. CONCLUSION

For the foregoing reasons, the district court's denial of appellant's sentence reduction must be vacated and appellant's motions remanded with instructions to reduce his sentence to time served by a different judge other than appellant's former prosecutors Thomas L. Parker and John Thomas Fowlkes, Jr., as well as former persecutor J. Daniel Breen. Calloway, an honorably discharged decorated veteran with release plans of bringing a veterans community mentor program to at-risk communities nationwide, also propounds that this Court apply both legal and [moral] standards to the consideration of vacating the underlying conviction in light of the manifest injustices emerging from this three decades-long case along with any other relief this Court deems necessary. Visit the website: www.veterancommunitymentors.org.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon Reid Manning, <reid.manning@usdoj.gov>, as a word processed version, and a handwritten duplicate mailed to him via U.S. mails postage prepaid at the Federal Bldg., 167 N. Main St., Suite 800, Memphis, TN, 38103, on this 31st day of July, 2024.

Auburn Calloway
14601-076
Federal Correctional Complex USP1
P.O. Box 1033 Coleman, FL 33521