The Jan. 5 Tel. Conf.

The Judge's conduct at the Jan. 5 Tel. Conf. wasn't just unprofessional, it further manifested his bias and inability to remain impartial, and or created an impermissible appearance of bias and partiality. It also was a violation of the U.S. Code of Judicial Conduct. This is because during the conference the Judge essentially ignored Mr. Green, who was acting as pro se lead counsel; interrupted Mr. Green several times while he was attempting to speak, only to turn around and try and falsely make it appear as if it was Mr. Green who interrupted him; tried to falsely make it appear as though Mr. Green had the Waiver Form, and was unwilling to submit it and his Affidavit; made an inappropriate sarcastic comment directed towards him; acted hostile towards him; threatened him several times; told him he couldn't make a speech; and, disconnected the line abruptly ending the conference while he was speaking, after he (the Judge) invited him to speak.

The Jan. 5 Tel. Conf. was conducted to follow up on the Dec. 8 Conf., where Mr. Green was first appointed counsel, the attorney Steven Witzel, to assist him with his IAC and other post-conviction claims. Previously, the District Court had issued the Nov. 19 Order stating that these claims would be heard prior to sentencing, and that in order to do so Mr. Green would be required to execute and submit the Waiver form and Affidavit; and it set a deadline of December 9, 2021, for that to be done. Moreover, after the Judge discusses this, he goes on and, instead of asking Mr. Green, asks Mr. Witzel about the status of Mr. Green's Waiver Form: Whether it had been completed or not (A 173, ll. 3-8).[9]

In response, Mr. Witzel, after clarifying to the Judge that he's only

FOOTNOTES

9. It's worth noting that prior to this conference Mr. Green had written the District Court at least once if not more times stating that he'd not received the Nov. 19 Order or Waiver Form, and that he needed more time to submit it, and his Affidavit. One letter, dated Dec. 4, 2020, wasn't uploaded to his docket, prompting him to file several complaints. Doc. 928(A 144), and Doc. 938(A 146) (These establish that the District Court received this prior to the conference.

acting as shadow counsel, that Mr. Green is lead counsel, and can speak for himself, goes on to - incorrectly - claim that Mr. Green's "position is that he does not want to sign [the Waiver Form] and proceed with his [IAC] claims or claims for prosecutorial misconduct until he has received all the information he has requested."(A 173, ll. 9-16). The Judge then asks Mr. Green if "that [was] true." (id., l. 21). It wasn't, however, and Mr. Gren tried to explain and clarify this but was interrupted by the Judge:

> [MR. GREEN]: There are many reasons --
>
> A VOICE: Hello?
>
> [MR. GREEN]: There are many reasons why I would like to be given my case file and all the documents --
>
> THE COURT: We are not going to get into that.
>
> [MR. GREEN]: -- in this case.
>
> THE COURT: I asked you -- sir, sir, don't interrupt me. I. Asked you a yes-or-no question. Is it true that you are not prepared to sign the waiver form at this point?

(A 174).

The Judge Interrupts Mr. Green Again

After interrupting Mr. Green the first time the Judge goes on to set a deadline for another week for Mr. Green to complete the Waiver Form and Affidavit, without even further inquiring into his willingness and ability to do so. (id., ll. 20-21). So, Mr. Green tries to explain to the Judge that he'd never received the Waiver Form, and moreover, to clarify for the record that it was the Judge who interrupted him, and not the other way around--but he's again interrupted by the Judge, who again, instead of addressing Mr. Green, asks Mr. Witzel what's going on with Mr. Green and his never receiving the Waiver Form:

> [MR. GREEN]: First and foremost, nobody interrupted you. You interrupted me, your Honor. When I was talking just now, you asked me a question, and when I began to talk, you just cut me off. Nobody interrupted you.
>
> And, second, my second concern is, I never received any waiver form at all from no one here. So how could I fill something out if I don't have it? And--

THE COURT: All right. Stop right there.

Mr. Witzel, what's going on with respect to the waiver form?

(A 175, ll. 1-10).

The Judge Gets Hostile With Mr. Green; and Threatens to End the Conference

Mr. Witzel now says that "Mr. Green is saying he doesn't have [the Wiaver Form]." (A 175 , l. 12). Mr. Witzel further informs the Judge of the several phone conversations he and his colleagues had with Mr. Green since the Dec. 8 Conf.; and also of the difficulties they've encountered with Mr. Green not receiving the mail that's delivered to him at the institution. (A 175). Mr. Witzel then again states that Mr. Green is saying he doesn't have the Waiver Form, and that he (Mr. Witzel) thought that he (Mr. Green) had it--that he thought it was sent to him before he was appointed. (A 176, ll. 9-13). Mr. Green then tries to again clarify for the record that he had no problem signing the Waiver Form, but that he never received it, or the Nov. 19 Order. However, the Judge again interrupts him, and threatens to end the conference:

[MR. GREEN]: This is Mr. Green.

THE COURT: **Oh, no. No, no.** Stop.

[MR. GREEN]: This is Mr. Green. Nothing was ever sent to me. No waiver or nothing.

THE COURT: All right. **If you continue doing this, I'm going to end the conference.** So don't do it.

(A 176, ll. 16-24)(emphasis added). And then the Judge, instead of allowing Mr. Green - who was proceeding pro se as lead counsel - to speak for himself, again addresses Mr. Witzel instead. (id., 23 et seq).

The Judge's Inappropriate Sarcastic Comment

After Mr. Witzel again discussed the difficulties with getting Mr. Green materials delivered to him at the institution, (A 177, ll. 5-13), the Judge states his amazement with how Mr. Green still hadn't received the Nov. 19 Order and Waiver Form, and stresses the importance of getting it completed.

It's at this time that the Judge makes a sarcastic comment directed toward Mr. Green, and moreover, his alleged understanding of the importance of completing the Waiver Form:

> THE COURT: . . . . Because, as I said, we can't make any progress here on Mr. Green's [IAC] claims until we get a waiver. And everyone on the phone, other than perhaps Mr. Green, understands that. . . .

(A 178, ll.9-12)(emphasis added).

There was absolutely nothing to support this comment by the Judge. It was clearly sarcasm, and it was clearly directed towards Mr. Green. Such comment was at least inappropriate, and at worst indicative of bias against Mr. Green. However, even if it were true, and or even if the Judge felt it were true, then the Judge should have taken whatever measures were necessary to ensure that Mr. Green did understand the importance of this--especially before issuing the Feb. 10 Order declining to hear his IAC claims prior to sentencing for his alleged failure to submit the Waiver Form prior to the February 9 deadline. See Tracy v. Freshwater, 623 F.3d 90, 101 (2d Cir. 2010)(The solicitude afforded to pro se litigants takes a variety of forms, including liberal construction of papers, "relaxation of the limitations on the amendment of pleadings," leniency in the enforcement of other procedural rules, and "deliberate, continuing efforts to ensure that a pro se litigant understands what is required of him")(citations omitted); cf. Torres v. Bellevue S. Assocs. LLP, 2020 U.S. Dist. LEXIS 33947, 5 (The purpose of Local Civil Rule 56.2 "is to ensure that a party acting pro se understands its burden in responding to the motion for summary judgment, and the consequences of failing to do so.")(citations omitted).

The Judge Interrupts Mr. Green Again; and Abruptly Ends the Conference

Before ending the conference the Judge asks "[i]s there anything anyone else wants to say?" (A 181 , l. 5). Mr. Green said he did. (id., l. 6).

Because he'd been ignored thus far, interrupted, and had heard several misrepresentations by the Judge and Mr. Witzel, Mr. Green had a lot to say. Moreover, Mr. Green's rights up to this point in this case had been repeated violated. However, when he tried to talk about these concerns he was again cut off by the Judge, who said he couldn't make a speech:

> [MR. GREEN]: I have a serious concern here. I don't have a problem at all with signing the attorney-client waiver. I would be delighted.
>
> . . . .
>
> THE COURT: All right.
>
> (Indiscernible crosstalk)
>
> THE COURT: -- we are not --
>
> [MR. GREEN]: -- 97
>
> THE COURT: We are not going to hear a speech from you.
>
> [MR. GREEN]: The government --
>
> (Indiscernible crosstalk)
>
> [MR. GREEN]: -- reports --
>
> THE COURT: All right.

(A 182)(emphasis added). Mr. Green, obviously and rightfully frustrated by being interrupted again, goes on to inform the Judge of this, and of the fact that he has a right to be heard, among other things. (A 182). Mr. Green then continues to speak, and the Judge ends up disconnecting the line, ending the conference before he's finished presenting his case:

> THE DEPUTY CLERK: Mr. Green, let me cut in. The [J]udge disconnected. We are just going to have to go forward in February. Sorry.

(A 186).

The Problems With the Judge's Conduct

The Judge's conduct at the Jan. 5 Tel. Conf. was at least inappropriate, and at most indicative of bias. The Judge at times was "inappropriately sarcastic," Hajderasi v. Gonzales, 166 Fed. Appx. 580 (2d Cir. 2006), and demonstrated "pervasive bias and hostility" toward Mr. Green. In Meizi Liu v. BIA,

167 Fed. Appx. 871, 873 (2d Cir. 2006). Such conduct, especially considered in light of the record as a whole, demonstrates a "deep-seated . . . antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555; LoCascio, 472 F.3d at 495. Furthermore, this conduct resulted in repeated violations of the Code of Conduct for United States Judges, Canon 1, requiring a judge to "[u]phold the [i]ntegrity and [i]ndependence of the [j]udiciary", and Canon 3, requiring a judge to "[p]erform the [d]uties of the [o]ffice [f]airly, [i]mpartially, and [d]iligently"; and these repeated violations of Canons 1 and 3 violated Canon 2, which provides that "a [j]udge [s]hould [a]void [i]mpropriety and the [a]ppearance of [i]mpropriety in all [a]ctivities". Moreover, this conduct coupled with the Judge's statements at the July 25, 2019 Substitution of Counsel conference, and all the other relevant facts, would cause a reasonable person to question the Judge's impartiality. Accordingly, the Judge should have recused himself, and or assigned the case to another judge. See United States v. Yousef, 327 F.3d 56, 169 (2d Cir. 2003)(Recusal is appropriate when a reasonable person, knowing all the facts, would question the judge's impartiality.)(citations and quotations omitted).

Mr. Green's Jan. 6 Ltr.: Why the Judge Should Not Have Proceeded Without First Addressing Mr. Green's Allegations of Bias

Immediately after the Jan. 5 Tel. Conf. Mr. Green wrote a letter, dated January 6, 2021, to the District Court, to document some of his concerns that he was prevented from discussing at the conference because of the Judge's depriving him of an opportunity to be heard, when he abruptly ended the conference. This letter also informed the District Court that he objected to future telephonic conferences; that he wished to relieve Mr. Witzel, and to represnt himself soley pro; and, that he felt the Judge was bias. Doc. 932 (Jan. 6 Ltr.) (A 187). Specifically, regarding Mr. Green's complaints about the Judge being bias and partial, Mr. Green stated therein his Jan. 6 Ltr. that:

> I feel as though the [District] Court is bias; that it's trying to force me to address my [IAC] claims prematurely because [its] . . . already made its mind up about whether my trial attorneys were effective[.]

(id.). Moreover, in support of this Mr. Green submitted the Judge's statements made at the July 25, 2019 Substitution of Counsel conference, regarding his Trial Counsels' performance. (id.).

Now, Mr. Green argues that upon receiving this letter the District Court should have construed it as a motion to recuse, and moreover, shouldn't have proceeded until it addressed these allegations. See, e.g., Bromfield v. Bronx Leb. Special Care Ctr., Inc., 2021 U.S. Dist. LEXIS 229166 (2d Cir. 2021)(liberally construing pro se letter as a motion to recuse); Russo v. Times Herald Record Newspaper, 2019 U.S. Dist. LEXIS 84624 (same). However, the Judge didn't address these allegations. In fact, Mr. Green had trouble even getting the District Court to place the Jan. 6 Ltr. in his docket. This is troubling. Moreover, not only didn't the Judge address Mr. Green's allegations of bias contained therein, he also didn't address his request to relieve stand-by counsel, and to proceed solely pro se. In fact, the only thing the District Court did address within that letter was Mr. Green's objecting to future telephonic court appearances--which the Judge utilized as a guise to further impede and prevent Mr. Green's efforts to bring to light his IAC and other post-conviction claims. These things should be considered by this Court when addressing Mr. Green's issues raised in this appeal, and when considering the appropriate relief to grant him here. And althought Mr. Green did not raise this issue in the District Court, this Court should consider such because it resulted in a structural error. See Johnson v. United States, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 137 L.Ed. 2d 718 (1997)(observing that it had found "lack of an impartial judge" to be a structural error).

The Feb. 8 & 10 Orders: How These Orders Further Manifest the Judge's Bias and Partiality, and Inability to Render Fiar Judgment in Mr. Green's Case

On February 8, 2021, the District Court issued an order, Doc. 947(Feb. 8 Order)(A 198), adjourning the conference that was scheduled for February 9, 2021, "sine die"--due to what the Judge classified as Mr. Green's "refusal" to participate in further court proceedings by telephone. (id.). The purpose of that conference was to follow up on the Jan. 5 Tel. Conf., to see if Mr. Green received the Nov. 19 Order and Waiver Form, and to find out from him and Mr. Witzel his willingness to sign the Waiver Form, as well as to inquire into the status of his Affidavit. (See A 178 , l. 21) et seq). Both of these things, i.e., the Waiver Form and the Affidavit, were due that day (February 9, 2021).

Mr. Green disagreed with the District Court's Feb. 8 Order stating that he "refused" to participate in further court proceedings by telephone, so he wrote a letter dated February 8, 2021, to object and respond to it. Doc. 953 (A 199). Therein, he stated that he objected to the District Court's classification of his desire to appear in court only in person as a refusal. (id.).

Prior to the February 9 deadline, Mr. Green had written the District Court multiple times stating that he hadn't received the Nov. 19 Order and Waiver Form, and requesting more time to submit it and his Affidavit. See, e.g., Docs. 940, 941, 944, and 946. Therein those filings he also apprised the District Court of the other difficulties preventing him from being able to submit the Waiver Form and Affidavit prior to the deadlines set to do so. For example, Mr. Green informed the District Court that due to the problems associated with being incarcerated during the then very active COVID-19 pandemic, the fact that he still hadn't received his client files and other requested case documents, and, inter alia, because the institution ran out of paper for the printer, he needed additional time to complete and submit the Waiver Form and or Affidavit.

On or about January 17, 2021, Mr. Green finally received the Nov. 19 Order and Waiver Form. He wrote the District Court a letter dated January 17, 2021 to inform the court of this, and to again ask for more time to submit his Affidavit. Doc. 944. This, and his other requests for more time made before and after this all established good cause and extrordinary circumstances warranting the District Court's granting this request. Nevertheless, the Judge denied this.

Now, when Mr. Green received the Waiver Form, he seen that it needed to be notarized (A 201). No one told him this before. Unfortunately, however, the institution he was housed at has a policy which stated "only" sentenced prisoners could utilize the notary services. Fortunatley, though, Mr. Green discovered that he was able to get a prison official to stamp the Waiver Form under 18 U.S.C. §4004; but it took several weeks for him to get this done (only certain staff members could do this, and they were only around a few days a month, especially during the pandemic). Therefore, he wasn't able to get this done until February 7, 2021, two-days before the February 9 deadline. So, the next day he submitted the executed Waiver Form in the mail using the legal mail services at the institution. This was on February 8, 2021. He thought that under the prison mailbox rule the Waiver Form would be considered timely filed. See Houston v. Lack, 108 S.Ct. 2379, 101 L. Ed. 2d 245, 487 U.S. 266 (1988)(Under the so-called prison mailbox rule, a pro se prisoner's papers are deemed filed when they are handed over to prison officials for forwarding to the court); see also, Doc. 969, at 7 n. 4 (Gov. Response to Recusal Pleadings)(agreeing with Mr. Green that the Waiver Form was timely filed under the prison mailbox rule). Unfortunately, however, because there still wasn't any paper in the printer, and because he still hadn't received all of his requested case documents from Mr. Witzel and his previous attorneys, he wasn't able to complete and submit his Affidavit prior to the February 9 Deadline. Moreover, most of

Mr. Green's complaints dealt with his Trial Counsel; and it was their client file that he had to wait almost two-years to get. This was something that he needed to adequately prepare his post-trial motions, among other things. Furthermore, had not just Mr. Green, but any attorney representing him took over his case, they would have also needed the client file to do so. Cf. Love & Madness, Inc. v. Claires Holdings, LLC, 2021 U.S. Dist. LEXIS 190861 (E.D.N.Y. 2022)(finding party would be prejudiced by a delay in the litigation if prior counsel were to continue to delay production of party's client file; and therefore ordering prior counsel to deliver client file to party's new counsel); and, Walpert v. Jaffrey, 127 F. Supp. 3d 105 (E.D.N.Y. 2022)(mentioning defense counsel's inability to respond to issues raised by opposing counsel, because defense counsel still did not have defendant's client file). Therefore, Mr. Green's requests for these things, and moreover for adequate time to review such prior to submitting his Affidavit wasn't at all unreasonable. In fact, the District Court should have ordered Mr. Green's Trial Counsel to hand over his client file and other requested documents; especially being that Mr. Green had asked for this information several times, and even requested the District Court to order them to provide him with such. See Doc. 854 (Mr. Green's Ltr. requesting order compelling Trial Counsel to provide case documents). See Polanco v. United States, 2015 U.S. Dist. LEXIS 108323 (E.D.N.Y. 2022)(mentioning that court ordered defendant's previous counsel to provide defendant with "all materials in [counsel's] possession relating to [counsel's] representation of [defendant] to which [defendant] is entitled to", where defendant's counsel failed to turn over client file despite numerous letters by defendant requesting such to assist with his Section 2255 motion).

On February 5, 2021 the Government filed a letter opposing Mr. Green's requests for additional time to submit the Waiver Form and Affidavit. Doc. 945 (Gov. Opp.). Therein they argued that "[i]n light of the delay that [Mr.] Gr-

een has caused and continues to cause, addressing his [IAC] claims prior to sentencing is no longer efficient, and [that] the [District] Court should set a sentencing date." (id.). This, however, wasn't true. And they also argued that Mr. Green's "requests for more time, both before and after the most recent conference, appear to relate to his allegedly unfulfilled need to obtain and review virtually every document and communication relating to his case before executing his [Waiver] [F]orm and articulating his claims in an [A]ffidavit." (id.)(citations omitted). This also wasn't true. However, Mr. Green was never given an opportunity to contest any of this because he didn't first receive the Government's opposition letter until February 12, 2021--two-days after the District Court issued the Feb. 10 Order refusing to hear his IAC claims prior to sentencing, and setting a sentencing date. Doc. 950 (Feb. 10 Order)(A 34).

This was a serious violation of Mr. Green's due process. See Local Criminal Rule for the Southern District of New York, 49.1(c)(stating that any reply papers shall be filed and served within (7) days after service of the opposing papers). The District Court referenced the Government's Opposition in the Feb. 10 Order; however, Mr. Green was never givena an opportunity to reply. Had he, he would have pointed out that most the delay was not attributed to him, but to the failure to get him the Waiver Form, and moreover, the rest of the information he needed to meaningfully present his claims.

Therefore, Mr. Green argues that the Feb. 10 Order was completely unreasonable, and further manifests the Judge's bias and partiality. When the Judge issued the order, it was less than 24-hours after the February 9 deadline. The Judge couldn't have known yet whether or not Mr. Green had timely filed the Waiver Form pursuant to the prison mailbox rule; nor did he take into consideration the prejudices suffered by Mr. Green preventing him from submitting the Waiver Form and Affidavit sooner. Mr. Green hadn't yet received everything that he requested and needed to review prior to completing his

Affidavit; and the Judge had previously assured that this would happen. Moreover, there was "no paper" in the printer at the institution, so he couldn't have submitted the Affidavit anyway. Additionally, the Judge had said at the Jan. 5 Tel. Conf. that once Mr. Green received the Waiver Form, that the Judge would again hold another conference to discuss with him and Mr. Witzel the status of the Waiver Form and Affidavit. But this never happened. The Judge had a continuing duty, too, to ensure that Mr. Green, a pro se litigant, understood what was required of him before issuing the Feb. 10 Order. See Tracy, Supra (discussing the solicitude afforded pro se litigants, which includes "deliberate, continuing efforts to ensure that a pro se litigant understands what is required of him.")(citations omitted). This shows that the Judge wasn't able to act impartially here, and it's why he should have recused, and or assigned the case to a different judge. This Feb. 10 Order is also proof that justice could not be done here if the Judge did not recuse; and in light of everything presented herein, would cause a reasonable person to "question the [J]udge's impartiality." United States v. Yousef, 327 F.3d 56, 169 (2d Cir. 2003).

The Judge's Order Denying Mr. Green's Recusal Pleadings, And Motion to Reconsider the Feb. 10 Order

On February 26, 2021 the District Court received Mr. Green's Recusal Pleadings, Doc. 955 (A 1), and Motion to Reconsider the Feb. 10 Order, Doc. 956 (Mot. to Recons.). Mr. Green also sent therewith his Affidavit, which he was finally able to complete and mail to the District Court after he received Trial Counsels' client file, among other things, and moreover, because they finally got paper for the printer at the institution he was housed at. On June 16, 2021, the District Court issued an order denying these things, along with Mr. Green's motion for bail pending sentencing. Doc. 1024 (Order denying Recusal Pleadings, Mot. to Recons., and for Bail Pending Sentencing); Doc. 931 (Mot. for Bail Pending Sentencing). Mr. Green argues that this order further

manifests the Judge's bias and partiality, and shows that the Judge is incapable of rendering a fair decision, especially as it relates to his IAC and other post-conviction claims. Moreover, although "judicial rulings alone almost never constitute a valid basis for a partiality motion, Canady v. Univ. of Rochester, 736 Fed. Appx. 259 (2d Cir. 2018)(quoting Liteky, 510 U.S. at 555), Mr. Green submits that it's not just this order, but several others, i.e., the Feb. 8 and Feb. 10 Orders, along with inappropriate statements and conduct by the Judge, among other things, that support his contentions that the Judge is in fact bias and partial, and or that, at a minimum, there exists an impermissible appearance of bias and partiality requring recusal.

In the order the Judge continues to maintain that his decision to issue the Feb. 10 Order refusing to hear Mr. Green's IAC claims prior to sentencing was due to Mr. Green not submitting the Waiver Form and Affidavit prior to the February 9 deadline. (Add. 14). And, concerning Mr. Green's reliance on the prison mailbox rule for the timely filing of the Waiver Form, the Judge argues somehow that this shouldn't apply because "[Mr.] Green was represented by stand-by counsel, who stood ready to ensure [his] Waiver [F]orm was timely submitted."(Add. 6 , n.8). However, the Judge fails here to take into account Mr. Green's Jan. 6 Ltr. requesting to relieve stand-by counsel, and to proceed solely pro se. See United States v. Mills, 895 F.2d 897, 903 (A defendant may . . . waive his right to have standby counsel remain in a purely supporting role.). Moreover, Mr. Green was acting as lead counsel; Mr. Witzel's role was purely advisory. See Unites States v. Green, No. 3:12-CR-193 VLB, 2013 U.S. Dist. LEXIS 169418, 2013 WL 6230091, at *2 (D. Conn. Dec. 2, 2013)(noting that standby counsel is "limited to serving as a resource to [the d]efendant," and that where standby counsel is appointed, the "[d]efendant is in the driver's seat."). Also, the Judge fails to take into consideration the other prejudices suffered by Mr. Green in his attempts to timely submit the Waiver Form, to in-

clude, inter alia, the delay in getting it to him, the fact that it needed to be notarized, and the fact that he was incarcerated proceeding pro se during the then very active COVID-19 pandemic, which caused severe delays in the mail, among other problems. Furthermore, even if Mr. Green sent the Waiver Form to standby counsel, it still wouldn't have been docketed prior to the February 9 deadline. Therefore, it was more than reasonable for Mr. Green to rely on the prison mailbox rule.

As it relates to Mr. Green's inability to submit the Affidavit due to his not receiving his client files and all the documents he requested and needed, and moreover due to there not being any paper in the printer at the prison, as well as the other prejudices suffered by him, the Judge stated essentially that this argument was without merit because "[Mr.] Green ha[d] made dozens of submissions to the [District] Court over the past year." (Add. 14, n.12). This, however, is unpursuasive, and simply was a bad-faith attempt to justify the Judge's hasty draconian decision to not hear Mr. Green's IAC and other claims prior to sentencing him.

Furthermore, the Judge's inability to render fair judgment in Mr. Green's case can further be seen in his attempts to justify his conduct at the Jan. 5 Tel. Conf.. Moreover, this also creates an impermissible appearance of bias and partiality by the Judge. The Judge, knowing Mr. Green had never received the Nov. 19 Order or Waiver Form prior to the Jan. 5 Tel. Conf. (A 178 , ll. 17-18), falsely claims that that conference somehow "demonstrate[d] that [Mr.] Green had disobeyed the [District] Court's order to submit an executed [W]aiver [F]orm and [A]ffidavit[.]"(Add. 11). This clearly wasn't true, though. This is a serious problem; and it severely undermines confidence in the integrity of the proceedings.

Also troubling is how the Judge attempts to incorrectly claim that it was Mr. Green that interrupted him at the conference, when the truth is that it

was the Judge who, several times, interrupted him (id.). Additionally, the Judge also misstates the record by making it appear as if Mr. Green just out of nowhere began talking during the Jan. 5 Tel. Conf. (id.). The Judge further claims that he decided to disconnect the line, ending the conference, when Mr. Green began assimilating his case to the George Floyd case, and moreover, when he referenced Nelson Mandela. (id.). The Judge said that such conduct by Mr. Green served no useful purpose--and that's why he ended the conference while he was speaking. (id.). This is also extremely troubling; especially in the context of judicial recusal. Cf. Ali v. Mukasey, 529 F.3d 478, 490 (2d Cir. 2008)(Due process requires, at a minimum, that a criminal defendant "be afforded the opportunity to be heard at a meaningful time and in a meaningful manner . . . by an impartial and disinterested tribunal," free from "the appearance of bias or hostility. . . ."(citations and quotations omitted). Moreover, this was also a violation of the Code of Conduct for United States Judges. See, e.g., Canon 3(A)(3)(A judge should be patient, dignified, respectful, and courteous to litigants, . . . and others whom the judge deals with in an official capacity . . .); and, Canon 3(A)(4)(A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to the law.).

Now, it's never an easy decision to request a judge to recuse, and often the courts are reluctant to grant these requests. However, there's cause to do so here. There's a lot of issues here that when taken individually, and or collectively, support Mr. Green's contentions that the Judge was actually bias and partial, and or that there exists an impermissible appearance of bias and partiality. The question of recusal here, at a minimum, was at least close. Accordingly, the Judge should have recused himself, and or assigned the case to a different judge. Compare, Fletcher v. Conoco Pipe Line Co., 323 F.3d 661, 664 (8th Cir. 2003)(A judge is presumed to be impartial, and the party seeking

disqualification bears the heavy burden of proving otherwise.); with, Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980)(But even when the disqualification question is close, the judge "whose impartiality might reasonably be questioned must recuse" himself from the [case].); and, United States v. Wedd, 993 F.3d 104 (2d Cir. 2021)(In close cases, the balance tips in favor of recusal).

B. THE DISTRICT COURT SHOULD HAVE REVIEWED MR. GREEN'S IAC AND OTHER POST-CONVICTION CLAIMS, AND OR HELD AN EVIDENTIARY HEARING REGARDING THEM, PRIOR TO SENTENCING. FAILURE TO DO SO WAS AN ABUSE OF DISCRETION, AND DEPRIVED HIM OF HIS RIGHT TO DUE PROCESS OF LAW

1. Standard of Review

"A court's decision on a motion for a new trial is reviewed under an abuse of discretion standard. Unless the district court's findings are wholly unsupported by the evidence, it will be upheld on appeal. Likewise, the decision whether to conduct an evidentiary hearing on a motion for new trial is discretionary." United States v. Yuzary, 17 Fed. Appx. 43 (2d Cir. 2001). With respect to a claimed due process violoation, the appellate court reviews the district court's factual determinations for clear error, while the constitutional significance of those findings, including the ultimate determination of whether due process has been violated, is reviewed de novo. United States v. Bayuo, 809 Fed. Appx. 47 (2d Cir. 2020). However, an appellate court reviews unpreserved due process errors under plain error review. United States v. Richards, 667 Fed. Appx. 336 (2d Cir. 2016).

Legal Discussion

2. Motion for New Trial, and Evidentiary Hearings

"In determining whether to grant a rule 33 motion, the ultimate test is whether letting a guilty verdict stand would be a manifest injustice." United States v. Walker, 974 F.3d 193, 208 (2d Cir. 2020)(alterations and quotations omitted). "The standard for sufficiency of a pleading in order to obtain an evidentiary hearing on a motion for new trial is well known. Not every ap-

plication that is supported by a set of facially meritorious allegations will survive a motion to deny the application. To warrant plenary presentation of evidence, the application must contain assertations of fact that a petitioner is in a position to establish by competent evidence. Whether there is a genuine issue of material fact depends upon the sufficiency of those facutal allegations. And generalities, conclusory assertions, and hearsay statements will not suffice because none of these would be admissible at a hearing." United States v. Stantini, 85 F.3d 9 (2d Cir. 1996).

Analysis

3. Why the District Court Should Have Reviewed and or Held an Evidentiary Hearing Regarding Mr. Green's IAC and Other Post-Conviction Claims Prior to Sentencing Him

Shortly after Mr. Green's trial ended he began filing complaints about his Trial Counsels' performance, Government misconduct, and other violations of his rights and general complaints about his trial and the overall proceedings. See Doc. 665 (Suppl. Decl.)(A 51); and Doc. 680(Mot. for Stay)(A 59). And he continued to file and make similar complaints after he moved to have his Trial Counsel replaced. See, e.g., Doc. 760 (Sent. Mem.)(A 63). He even filed an Affidavit setting forth these claims. See Doc. 955, ECF at 41-59 (the Affidavit was filed along with his Recusal Pleadings, and Mot. for Recons.).

Therein those complaints Mr. Green argued, inter alia, that he was innocent; that his conviction was based upon fabricated testimony and evidence, illegally obtained evidence, and false testimony; that the Government engaged in misconduct; and, that his previous attorneys, primarily his Trial Counsel, failed to convey to him all plea offers before they expired, did not go over their pre- and post-trial motions and pleadings before filing them, and, inter alia, didn't call known and potentially helpful defense witnesses, and did not move to challenge the Government's use of a New York State Traffic Stop, and evidence illegally obtained from it. See, e.g., Doc. 665 (Suppl. Decl.)(A 51);

Doc. 680(Mot. for Stay)(A 59); Doc. 760(Sent. Mem.)(A 63); and Doc. 955, ECF at 41-59 (Affidavit).

These complaints made by Mr. Green were serious, and if true, which he maintains they all were, would result in a manifest injustice if left unaddressed. Moreover, such complaints were not conclusory assertions. If they were the District Court never would have adjourned Mr. Green's sentencing for nearly two-years while it ordered him to submit an Affidavit and Waiver Form. Furthermore, because his complaints raised throughout various court filings and in person raised disputed issues of fact, an evidentiary hearing was required. See United States v. Magini, 973 F.2d 261, 264 (4th Cir. 1992)(when material facts are in dispute, an evidentiary hearing is necessary). Therefore, the District Court should have reviewed or otherwise conducted an evidentiary hearing regarding, among other things, Mr. Green's IAC claims raised throughout his various court filings, and throughout various conferences. See United States v. Bannister, 467 Fed. Appx. 175, 175-176 (4th Cir. 2012)(case remanded for evidentiary hearing as to whether counsel was ineffective when he failed to communicate plea offer); Gardner v. United States, 680 F.3d 1006, 1013 (6th Cir. 2012)(case remanded for evidentiary hearing to determine whether counsel's failure to file a suppression motion prejudiced the defendant); but see, United States v. Atuana, 816 Fed. Appx. 592, 596 (2d Cir. 2020)(finding district court didn't abuse its discretion in denying defendant's pro se motion for new trial based on trial counsel's failure to file a pre-trial motion to suppress, and in declining to hold a full evidentiary hearing, where the circuit court found that "[a]lthough the district court stopped short of a full evidentiary hearing, it took some testimony . . . before concluding that . . . [nothing would have been] gained by having [trial counsel] present [at a full hearing]." Furthermore, the circuit court mentioned that the district court noted it was "trying to minimize the degree to which [it was] invading the pos-

sibility that [the defendant] (who was pro se at the time) might unknowingly waive the privilege)(some alterations in original). Mr. Green's case is distinguishable from Atuana, being that he openly stated several times that he had no problem waiving the attorney-client privilege; because he did eventually execute and submit the Waiver Form; and, because the District Court didn't conduct any kind of inquiry at all into his complaints.

4. Why a Waiver Form and or Affidavit Wasn't Necessary

The District Court's oral and written statements addressing Mr. Green's IAC and other post-conviction claims indicate that the Judge considered an attorney-client privilege Waiver Form and an Affidavit of facts executed and submitted by Mr. Green as a prerequisite to reviewing those claims. Mr. Green, however, disagrees. Nevertheless, even if either or both of those things were required, the District Court should have reviewed his IAC and other claims prior to sentencing him because he exercised due diligence by submitting them both as soon as he could given the difficulties he faced; and although he objected to telephonic court appearances, in-person court appearances started again by March of 2021, and it still took until the end of July of 2021 to sentence him. cf. United States v. Brown, 623 F.3d 104 (2d Cir. 2010)(court should have considered Sixth Amendment ineffective assistance of counsel claim prior to sentencing because it had relieved counsel as defendant's attorney, and it had no good reason to postpone inquiry into merits of cliam; and factors indicated facial plausibility against decision to postpone addressing it).

Now, the District Court was made aware of Mr. Green's IAC and other post-conviction claims from as early as May of 2019, when Mr. Green submitted his Suppl. Decl.. See Doc. 665(A 51). Therein, and in his Mot. for Stay submitted in July of 2019, Doc. 680(A 59), and in his Sent. Mem. that the District Court received in late October of 2019, Doc. 760(A 63), Mr. Green made clear several issues--many of which related to his Trial Counsels' performance at

trial, and with their written court submissions. Furthermore, from as early as October 31, 2019, at what was supposed to be Mr. Green's original sentencing hearing, the District Court began stating that an attorney-client privilege Waiver From would be required to be executed by him in order for the court to review those claims. (See A 89-90). The District Court reiterated this at the teleconference held on November 17, 2020 (A 119); and two days later issued the Nov. 19 Order stating, inter alia, that "in order [to] proceed with his [IAC] claims, [Mr.] Green must execute the accompanying Attorney-Client Privilege Waiver (Informed Consent) [F]orm." And that"[Mr.] Green is also directed to set foth all of his allegations concerning Breslin, Geller, and Dolan's advice and conduct in the form of an [A]ffidavit." Doc. 907. However, Mr. Green submits that a Waiver Form and or an Affidavit wasn't necessary.

Mr. Green contends that when he submitted his complaints against his former lawyers he implicitly waived the attorney-client privilege. See United States v. Pinson, 584 F. 3d 972, 978 (10th Cir. 2009)("When a [defendant] claims ineffective assistance of counsel, he impliedly waives the attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim[s]"); United States v. Bilzerin, 926 F.2d 1285, 1292 (2d Cir. 1991)("[T]he attorney-client privilege cannot at once be used as a shield and a sword . . . . Thus, the privilege may implicitly be waived when a defendant asserts a claim that in fairness requires examination of protected communications."). Mr. Green repeatedly stated he desired to pursue his claims against his former lawyers, and that he had no problem waiving the attorney-client privilege. Therefore, what the District Court could and should have done here, if it felt that it needed affidavits from Mr. Green's former lawyers, is ordered them to respond to his claims against them raised throughout his various court filings and elsewhere. See Rudaj v. United States, 2011 U.S. Dist. LEXIS 66745 (S.D.N.Y. 2011)(ordering attorney to submit an affidavit in re-

sponse to defendant's IAC allegations against him, without a waiver of the attorney-client privilege, and over the request of the attorney that such first be done, based upon the premise that "when a [defendant] claims [IAC], he impliedly waives [the] attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim")(paraphrasing and internal citations omitted). Moreover, even if Mr. Green's previous lawyers submitted conflicting affidavits, an evidentiary hearing still would have been necessary. See Bender v. United States, 387 F.2d 628, 630 (1st Cir. 1967)(counter affidavit from allegedly ineffective attorney "could not conclusively disprove petitioner's allegations of [attorney] extra-record misrepresentations" necessitating a hearing); Freidman v. United States, 588 F.2d 1010, 1015 (5th Cir. 1979)(contested fact issues cannot be resolved on basis of conflicting affidavits). Nevertheless, Mr. Green submits that his allegations made throughout various pro se submissions, and at various conferences, were sufficient to warrant further review by the District Court prior to sentencing him.

Therefore, Mr. Green argues that a Waiver Form and or Affidavit weren't necessary. The District Court should have reviewed his IAC and other post-conviction claims; and it should have, in the intereset of justice and judicial economy, considered them prior to sentencing him. However, considering arguendo that a Waiver Form and Affidavit were required, Mr. Green did make a due diligent effort to - and did - submit them as soon as he could given the obstacles he faced; for example, the delays in getting him the Waiver Form, and his client files and other requested case information, as well as the problems caused by the COVID-19 pandemic, which included extended periods of time locked in his cell, and delays in the mail (which Mr. Witzel made known at the Jan. 5 Tel. Conf.), as well as there being no paper in the printer at the institution, among other problems. Cf. Marshall v. Annucci, 2020 U.S. Dist. LEXIS

97858 (S.D.N.Y. 2020)(granting prisoner-plaintiff's motion for reconsideration of order entered against plaintiff for alleged failure to comply with a filing deadline where plaintiff, relying on and utilizing the prison mailbox rule, delivered complaint to prison officials for mailing prior to the deadline. Moreover, in doing so the court noted that the judge who had issued the order "simply could not have known whether Plaintiff prepared and delivered the . . . complaint to prison officials prior to the docketing of the pleading. [And that] [g]iven the current state of affairs caused by the [COVID-19] pandemic, resulting in delays both for mail services and docketing, it is entirely plausible that Plaintiff timely complied with the . . . order."). "The result of what happened here is that this [C]ourt has been burdened with an appeal that never should have had to be taken and, more important, that [Mr. Green] has been denied an evidentiary hearing that he should have had [over] a year ago." Taylor v. United States, 487 F.2d 307 (2d Cir. 1973). Moreover, Mr. Green contends that the failure of the District Court to review his IAC and other post-conviction claims was more than an abuse of discretion; that it also deprived him of his right to due process, because he wasn't given a meaningful opportunity to be heard, or to otherwise confront his previous attorneys and the Government. Cf. Abbott v. Latshaw, 164 F.3d 141, 146 (3d Cir. 1998)("At the core of procedural due process jurisprudence is right to advance notice of significant deprivations of liberty or property and to a meaningful opportunity to be heard."). And this, he argues, deprived him of his rights to the effective assistance of counsel, and moreover, to a fair trial.

Mr. Green had made the District Court aware from the time he first seen his Trial Counsels' motions for new trial and judgment of acquittal that he wasn't satisifed with such, as well as, inter alia, his Trial Counsels' overall performance. See Doc. 665 (Suppl. Decl.)(A 51). He also apprised the District Court that his Trial Counsels' replacement, Ms. Dolan, also failed to

raise the issues he requested, and had never actually received his Trial Counsels' client file for him, so she couldn't have possibly raised all meritorious issues. See, e.g., Doc. 955, ECF at 41-59(Mr. Green's Affidavit setting forth his IAC claims); and, Doc. 932 (Mr. Green's Jan. 6 Ltr. discussing, inter alia, how Ms. Dolan lied to the District Court about receiving his client file from his Trial Counsel)(A 187). He was never, however, given an opportunity to be heard regarding his motions for new trial and judgment of acquittal.

Therefore, Mr. Green argues that he shouldn't be required to raise his IAC and other post-conviction claims in a post-conviction motion under 28 U.S.C. §2255. See Doc. 1024(District Court discusses therein this order denying Mr. Green's Recusal Pleadings and Mot. for Recons. that Mr. Green won't be prejudiced by the court not hearing his IAC claims prior to sentencing, because those claims are often brought in a motion under 28 U.S.C. §2255)(Add. 13). Instead, Mr. Green's case should be remanded back to the District Court for him to be given an opportunity to be heard regarding his IAC and other post-conviction claims via a motion for new trial and judgment of acquittal; and if need be, Mr. Green avers that he can establish excusable neglect for any alleged failure to timely file those motions. Cf. United States V. Brown, 623 F.3d 104 (2d Cir. 2010)(finding district court abused its discretion by requiring defendant's IAC claim to be brought in a post-conviction motion pursuant to 28 U.S.C. §2255; that the court should have considered that claim prior to sentencing; and vacating the sentence, and remanding the case back to the district court to, inter alia, engage in further factfinding, and, in the event the defendant can show excusable neglect for his delay in filing his Fed. R. Crim. P. 33 motion, decide defendant's IAC claim in the first instance).

C. THE DISTRICT COURT VIOLATED MR. GREEN'S RIGHT TO SELF-REPRESENTATION BY FAILING TO ADDRESS HIS EXPLICIT REQUESTS TO REPRESENT HIMSELF

1. Standard of Review

A court's denial of the right to self-representation is not subject to harmless error analysis, and requires automatic reversal of a criminal conviction. Wilson v. Walker, 204 F. 3d 33 (2d Cir. 2000).

Legal Discussion

2. The Right to Represent Oneself

The Sixth Amendment guarantees a criminal defendant the right to self-representation. Faretta v. California, 422 U.S. 806, 819-21, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975). A criminal defendant may invoke his right only by a "knowing, voluntary, and unequivocal waiver of the right to appointed counsel." Johnson v. Kelly, 808 F.2d 214, 216 (2d Cir. 1986)(discussing Faretta, 422 U.S. at 835-36).

Analysis

3. Why the District Court Should Have Granted Mr. Green's Requests to Represent Himself Solely Pro Se

Mr. Green had issues with every attorney in this case. He had "been misinformed or lied to by every lawyer that [he] had, in some way, shape or form." Nov. 17, 2020 Tel. Conf. Tr. at 15, ll. 15-16 (quoting Mr. Green)(A 110 , ll. 15-16). Because of this, he wanted to represent himself solely pro se, but he decided against it due to the incessant threats of the District Court warning against it during the Nov. 17 Tel. Conf.. (See, e.g., A 109 , ll. 13-14;A 115 ; A 117 , ll. 13-22; and A 133). Instead, he requested to be appointed counsel, as co-counsel, to assist him with, inter alia, raising his IAC and other post-conviction claims. (A 138 , ll. 1-10). However, the District Court assured Mr. Green that if he later chose to represent himself, that that was his right; that he could do so at any time. (A 115 , ll. 9-10; A 117 , ll. 10-11;

id., ll. 13-17; and A 136 , ll. 2-4).

When Mr. Green's counsel was appointed it wasn't as co-counsel as he requested, but was more so as stand-by counsel. Mr. Green took on the role of lead counsel, with the assitance of Mr. Witzel as shadow counsel. (A 173 , ll. 9-11). And it didn't take long for Mr. Green to realize that he couldn't trust Mr. Witzel, and moreover, that his best - and possibly only - opportunity at receiving justice would require him to relieve Mr. Witzel, and to represent himself solely pro se. Ergo, on January 6, 2021 he wrote the District Court requesting, inter alia, to relieve Mr. Witzel, and to represent himself. See Doc. 932 (Mr. Green's Jan. 6 Ltr.)(A 187). Mr. Green also informed Mr. Witzel of this, who also wrote the Judge stating that Mr. Green no longer wanted his assistance, and that he desired to represent himself. See Doc. 923 (Mr. Witzel's Jan. 6 Ltr.)(A 188). However, the District Court didn't honor or otherwise acknowledge Mr. Green's requests to represent himself. The Judge did relieve Mr. Witzel, but not until Mr. Green was sentenced in July of 2021. This was a severe violation of his rights, especially his Sixth Amendment right to self-representation.

"In the present case, [Mr. Green] clearly and unequivocally asserted his right to represent himself." Wilson v. Walker, 204 F.3d 33 (2d Cir. 2000). He made his desire known multiple times before and during the Nov. 17 Tel. Conf.; and the District Court, in response, assured him that he could do so at any time. However, when he informed the District Court in his Jan. 6 Ltr. that this is what he wanted to do, the court never acknowledged his request. Moreover, considering the obstacles faced by Mr. Green, his previous requests to represent himself, and the District Court's refusal to acknowldge his explicit requests to represent himself, he can not be said to have abandoned his desire to do so here. Cf. United States v. Allt, 41 F.3d 516, 523-24 (2d Cir. 1994) (concluding that the defendant was under no obligation to renew his request to