

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
CINCINNATI, OHIO 45202

UNITED STATES OF AMERICA

v.

JANET MARCUSSE
WILLIAM FLYNN
GEORGE BESSER
DONALD BUFFIN

CASE NOS.

05-2586/05-2668
05-2556
05-2666
05-2667

WESTERN DISTRICT OF MICHIGAN

PETITION FOR PANEL REHEARING
SUGGESTION FOR REHEARING EN BANC

FRAP 40(a)
FRAP 35(b)

SUBMITTED BY:

Janet Marcusse
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501 Capital Circle, NE
Tallahassee, FL 32301

TABLE OF AUTHORITIES

A. CITATIONS

- Anders v. California, 386 US 738, 18 L Ed 2d 493, 87 S Ct 1396 (1967)
- Anderson v. Sheppard, 856 F. 2d 741 (6th Cir., 1988)
- Bruton v. United States, 391 US 123, 139-140, 20 L Ed 2d 476,
88 S Ct 1620 (1968)
- Castille v. Peoples, 489 US 346, 351-352, 103 L Ed 2d 380,
109 S Ct 1056 (1989)
- Chapman v. California, 386 US 18, 23, 52, 17 L Ed 2d 705,
87 S Ct 824 (1967)
- Cheek v. United States, 498 US 192, 112 L Ed 2d 617, 111 S Ct
604 (1991)
- Crane v. Kentucky, 476 US 683, 90 L Ed 2d 636, 109 S Ct 2142 (1986)
- Faretta v. Washington, 422 US 806, 819, 45 L Ed 2d 562,
95 S Ct 2525 (1975)
- Giglio v. United States, 405 US 150, 31 L Ed 2d 104,
92 S Ct 763 (1972)
- Glover v. United States, 531 US 198, 148 L Ed 2d 604,
121 S Ct 696 (2001)
- Humphrey's Ex'r. v. United States, 295 US 602, 79 L Ed 1611,
55 S Ct 869 (1935)
- In re Mark Benskin & Company, 309 F. 3d 170 (6th Cir., 1995).
- Krause v. Rhodes, 570 F. 2d 563, 567 (6th Cir., 1977)
- Kyles v. Whitley, 514 US 419, 131 L Ed 2d 490, 115 S Ct 1555
- Martinez v. California, 528 US 152, 163, 145 L Ed 2d 597,
120 S Ct 684 (2000)
- Mattox v. United States, 146 US 140, 150, 36 L Ed 917,
13 S Ct 50 (1892)
- McKaskle v. Wiggins, 465 US 168, 178, 79 L Ed 2d 122,
104 S Ct 944 (1984)
- Strickland v. Washington, 466 US 668, 711, 80 L Ed 2d 674,
104 S Ct 2052 (1984)

United States v. Agurs, 427 US 97, 49 L Ed 2d 342,
96 S Ct 2392 (1976)

United States v. Bagley, 473 US 667, 678, 87 L Ed 2d 481,
105 S Ct 3375 (1985)

United States v. Foster, 128 F. 3d 949, 953 (6th Cir., 1997)

United States v. Jamieson, 427 F. 3d 394, 411 (6th Cir., 2005)

United States v. Modena, 302 F. 3d 626 (6th Cir., 2002)

United States v. Olanø, 507 US 725, 123 L Ed 2d 508,
113 S Ct 1770 (1993)

United States v. Payne, 181 F 3d 781, 791 (6th Cir., 1989)

United States v. Stull, 743 F 2d 439, 447 (6th Cir., 1984)

Washington v. Texas, 388 US 14, 18 L Ed 2d 1019,
87 S Ct 1920 (1967)

B. CONSTITUTIONAL BILL OF RIGHTS

First, Fourth, Fifth, Sixth, Eighth Amendments

C. UNITED STATES STATUTES

26 U.S.C. §731

D. FEDERAL RULES OF LAW

Federal Rules of Evidence 1006

E. U.S.D.C. WESTERN DISTRICT OF MICHIGAN

Case No. 1:03-cv-00545-RAE

Case No. 1:06-cv-00694-RHB

NOW COMES APPELLANT, Janet Marcusse, pro se, to petition this Honorable Court for Panel Rehearing under FRAP 40(a), and suggest Rehearing En Banc per FRAP 35(b), if the panel does not substantially modify its decision once it considers Marcusse's pro se Appellant Brief, which was ignored in the 2/14/08 Non-Published Opinion. The Opinion further conflicts with decisions of the United States Supreme Court and of the Sixth Circuit Court of Appeals, and consideration of the full court may be necessary to secure and maintain uniformity of the Court's decision per FRAP 35(b)(1)(A). Under FRAP 35(b)(1)(B), there is also a question of exceptional importance:

Whether due process was denied where the Court considered only the brief prepared by incompetent and conflicted appointed counsel, who refused to correct gross errors and omissions, or in the alternative, file an Anders Brief, in the instance where Appellant had been granted permission by the Sixth Circuit to file a pro se brief as a remedy?

Marcusse submits that the fair consideration of her pro se brief would have resulted in several grounds requiring relief due to the structural errors of a biased judge, prosecutorial misconduct, denial of her right to proceed pro se, and Bruton violations over the Bosses (GX-7ldd). A direct appeal has always been the best forum in which to seek and obtain such a remedy, but in this case, a direct appeal has been functionally denied to her.

Marcusse was granted permission to file a pro se brief by Case Manager, Bryant Crutcher, on 8/8/06 (Exh. 1), as a remedy to the due process concerns raised in her 7/24/06 motion to remove appointed counsel Melvin Houston for cause. Houston had materially misrepresented the underlying record in his proof brief filed on 6/22/06 and refused to submit vital issues that only an incompetent attorney, or

one in collusion with the prosecution, would omit. Houston was provided sufficient notice of these serious errors and omissions, but he persisted in this conduct through his final brief of 6/22/07 and into the 11/29/07 oral arguments, where he sounded drunk on the tape made of it. AUSA Schipper, when asked by the panel, indicated that he had no objections to the other appellants' requests to join Marcusse in her Brief. Her pro se Brief had been accepted and filed on 7/5/07 by the Clerk. Thus, the appellants were led to believe the panel would consider Marcusse's pro se Brief in their Opinion.

To ignore this brief unfairly discriminates against them. The Sixth Circuit has long accepted and considered pro se briefs from represented prisoners. Indeed, one such case was quoted in the 2/14/07 Opinion, United States v. Stull, 743 F. 2d 439, 447 (6th Cir., 1984), where a "pro se" brief was considered. In United States v. Payne, 181 F. 3d 781, 791 (6th Cir., 1989), a pro se supplemental "alternative" brief was heard that was filed "just before oral arguments". In United States v. Modena, 302 F. 3d 626 (6th Cir., 2002), he was both pro se and represented by counsel. While it is true that Marcusse's pro se Brief was oversized, so too was AUSA Schipper's Brief, the only difference being that his was considered by the panel whereas hers was not.

Nor may consideration of the brief be blocked because this is a petition for rehearing. Castille v. Peoples, 489 U.S. 346, 351-352 (1989), held that if an issue is not spotted until after the Opinion is filed, it cannot be first raised upon rehearing. Marcusse's pro se Brief was timely filed prior to the Opinion.

In Martinez v. California, 528 U.S. 152, 163 (2000), the

denial of the appellant's motion to represent himself on appeal was "narrow", applying to those appellate courts that deny such a motion when made. This application may not be made where Marcusse's request to be heard was granted on due process considerations rather than on Faretta. The Martinez Court agreed, holding "any individual right to self-representation on appeal based on autonomy principles must be grounded in the Due Process Clause." Id. at 152. "Appellate courts have maintained the discretion to allow litigants to 'manage their own causes'--and some such litigants have done so effectively." Id. at 158. "We are not aware of any historical consensus establishing a right of self-representation on appeal. We might, nonetheless, paraphrase Faretta and assert: No State or Colony ever forced counsel upon a convicted appellant, and no spokesman ever suggested that such a practice would be tolerable or advisable. 422 U.S., at 382." Id. at 159. "Meanwhile the rules governing appeals...seem to protect the ability of indigent litigants to make pro se filings." See also Anders v. California, 386 U.S. 738 (1967). Id. at 164. "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people." (Justice Scalia, concurring). Id. at 165.

The manner in which Houston conducted Marcusse's appeal suggests it was done to prevent her from being meaningfully heard. He refused to change any errors or omissions (Exh. 2), persisting in material misrepresentations through oral arguments, only to then attest he had seen no grounds for relief (Exh. 3). If this was true, he should have filed an Anders Brief, which would have caused Marcusse's

pro se Brief to have to be considered. When the conduct of the trial lawyer, David Kaczor, the district court judge, and the prosecution team is added to that of Houston's conduct on appeal, there is sufficient cause to submit that substantial grounds exist in the record to establish this appeal has been unfairly prejudiced by unethical conduct and conflicts of interest, entitling the appellants to a rehearing and/or possible rehearing en banc.

At the district court level, Marcusse was also unexpectedly denied the right to proceed pro se or be heard after she had been granted the right over 10 months before (R. 17, R. 18). On 5/16/05, this right was denied the first morning of trial after she disagreed with Judge Bell's refusal to allow her to use bank records as evidence to dispute the government's allegations of a ponzi investment scheme and she questioned the constitutionality of such a denial (TR 8-9, 13-14, 18, Exh. 4). The court would not permit her intended defense, "bank records show the money was invested with other individuals":

"The allegation is that you and others--listen carefully to me. The allegation is that you and others fraudulently and deceitfully deceived other people, not that other people deceived you, which may be the case. I imagine the government might concede that if you ask them."

(TR 8, Exh. 4). The court further refused to permit Marcusse to cross examine witnesses or object in front of the jury (TR 18, 31, Exh. 4), under the threat of removal from the trial (TR 26-27, Exh. 4). Marcusse asked the judge to recuse himself for bias but he refused (TR 20, Exh. 4).

"[T]he Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'" Crane v. Kentucky,

476 U.S. 683, 690 (1986). The exclusion of "competent, reliable evidence" when it "is central to the defendant's claim of innocence" deprives him of the basic right to have the prosecutor's case "survive the crucible of meaningful adversarial testing." Id. The "pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the Faretta right. McKaskle v. Wiggins, 465 U.S. 168, 178 (1984).

The bank records had been in the government's possession, not Marcusse's, because the Bosses had stolen the records in 2001 to cover up their embezzlement of \$1.5 million Marcusse reported to law enforcement on 8/2/01 (R. 309-3; TR 3089-3091, 3110). Det. Crumb contacted the IRS in response (Crumb at TR 1486), causing the investigation against Marcusse. The Bosses gave the records to the IRS in 2002 in exchange for a plea agreement (TR 31921; Case No. 1:06-cv-00694, R. 6, p. 13, Boss "proffer" of evidence). Marcusse testified about the embezzlement at a 5/19/02 meeting of the grand jury.

These bank records were the underlying records to the IRS's summary exhibits, submitted under Rule 1006 of the Fed. Rules of Evidence. Marcusse was at odds with the prosecution over \$12.1 million, a substantial dispute, testifying that this amount had been "spent" on legitimate investments, whereas IRS witnesses, acting as "investigators", testified that \$12.1 million had been "spent" by the defendants "on themselves and others", using one-page summary exhibits to "prove" it (GX-170, GX-172, Exh. 5).

It was acknowledged in the Government's Trial Brief that the requirement for using Rule 1006 summary exhibits was that the underlying evidence "be admissible under some evidentiary theory" (R. 297,

p. 26). The defense was not permitted this by the court, nor was any breakdown provided for the IRS's bald assertions in these summary exhibits. For example, the \$7.3 million in alleged "other spending by defendants" is supported solely by "bulk" exhibits. "Bulk" exhibits consisted of banker's boxes containing the bank records, used as stage props at trial (TR 2649, 3498). Comparing the "supporting" exhibit numbers on GX-172 to the listing of exhibits on the transcript shows they were all "bulk" exhibits (TR 3890, GX-172, Exh. 5). In this manner, meaningful impeachment was prevented.

Kaczor refused to object on Marcusse's behalf; instead he provided her with erroneous advice when asked by the court to explain Rule 1006 evidence:

"I've explained to her that the rules of evidence allow her to review any of the bank records that were used to formulate the summaries, and therefore, she would be able to look at bank records. And I don't know if they're all the bank records that she's interested in, but the bank records that would be relevant in formulating the summary sheet, she would be able to review those."

DEFENDANT MARCUSSE: "I'm sorry, that doesn't answer the question."

THE COURT: "I think it does, I think it does."

(TR 14-15, Exh. 4). Knowing from the Trial Brief that it was required, Marcusse had asked to use the bank records as evidence, not just "review" or "look" at them.

According to United States v. Jamieson, 427 F. 3d 394, 411 (6th Cir., 2005), "We have held that all documents underlying a Rule 1006 summary must be admissible into evidence".

When Marcusse then suggests that the government might be withholding evidence, the court restates its position:

"I talked to you first to tell you at the outset what someone else may have done with the money that you may or may not have given to them is not the issue in this case. It's not the issue."

(TR 15, Exh. 4).

Kaczor admits to having received "reams" of evidence from Marcusse, but due to pressure from the court, agrees to "weed out" all evidence the court does not want admitted (TR 3049, Exh. 4). She is left with just 9 exhibits to support her testimony regarding \$12 million in investments made. As the court had admonished the defense attorneys the first morning of trial, "You know exactly what you can do and not do" (TR 77).

Throughout the entire four-week trial, Judge Bell acts to block Marcusse from using any actual bank records to impeach IRS witnesses (TR 3049, 3141-3142), or as defense evidence (TR 8, 13-15, 629-630, 3191, 3348-3349, 3408, 3677-3680, 3682). Marcusse refuses to close the evidence (TR 3348), but the court overrules her to proceed to closing arguments. As the result, Marcusse is never permitted to submit the government's case to "meaningful adversarial testing".

It was the misapplication of "ponzi law" that caused the trial to be fundamentally unjust. The Government's Trial Brief had posited from the non-published case, In re Mark Benskin & Company, 309 F. 3d 170 (6th Cir., 1995), the "intent to defraud can be inferred as a matter of law from the mere fact that a Defendant is running a Ponzi scheme" [emphasis added] (R. 297, p. 47). From this was also derived the court's Opinion in regards to denying 14 defense witnesses, "alleged investments" are "irrelevant" to the charges (R. 401). The morning following this ruling, Judge Bell meets

privately with the jury (TR 2035), which is "absolutely forbidden" according to Krause v. Rhodes, 570 F. 2d 563, 567 (6th Cir., 1977); Mattox v. United States, 146 U.S. 140, 150 (1892).

If a trial judge's involvement has resulted in an unwarranted prejudgment of the merits of the case, any resulting judgment in favor of the party so favored is invalid per Anderson v. Sheppard, 856 F. 2d 741 (6th Cir., 1988).

Glover v. United States, 531 U.S. 198 (2001), held that even one day's increase in a term of imprisonment flowing from defense counsel's failing to object to an error of law may constitute substantial prejudice.

Between the court's ruling, Kaczor, and the prosecution, Marcusse was deprived of at least 20 defense witnesses, including all direct witnesses to investments (Exh. 6). Houston misrepresents this vital issue as the denial of only 3 witnesses, including a Richard Williams (Issue III, p. 22), who did appear for the defense (TR 2271-2801). Houston is notified that his issue is substantially incorrect, including in the 7/23/07 Appellee Brief, yet he persists in arguing the issue incorrectly into oral arguments where AUSA Schipper argues Williams did appear and Houston is made to look foolish, along with this issue. Either Houston is incompetent, or this was a scheme concocted to damage the merits of this issue in front of the panel. In either event, Marcusse is entitled to relief as such games should not be rewarded by any appellate-level court.

A criminal defendant has a constitutional right to present his own witnesses to establish a defense. United States v. Foster, 128 F. 3d 949, 953 (6th Cir., 1997); Washington v. Texas, 388 U.S.

14 (1967).

After review of Houston's 11/29/07 letter (Exh. 3), and the oral arguments audio tape, Marcusse files a Petition for Writ of Mandamus to remove him for unethical behavior, opening Case No. 08-1003 on 1/3/08 at the Sixth Circuit. Judge Bell is sent a copy by the Court with instructions to respond by 1/14/08. He does not respond, which according to 52 Am. Jur. 2d, Mandamus, ¶ 424, "A failure to file an answer in a mandamus proceeding admits the truth of the allegations", yet the Clerk denies the petition on 1/17/08. A motion for reconsideration under 6 Cir. R. 45(b) is denied on 2/5/08 again by the Clerk.

The "ponzi law" opinion may also have derived from the prosecution's "prime bank" scheme theory, however, this theory was founded on evidence that was tampered with, as established by a pre-existing case in the district court (Case No. 1:03-cv-000545-RAE, R. 1-1, Item 34; R. 1-2, Exh. A). Both GX-31 and GX-33 (newsletters) were tampered with prior to submission with the "Instructions to Invest" and "Bahamas CD Program" (GX-2/GX-3) removed so that the program at Suisse Security Bank & Trust could be misrepresented as a "prime bank" scheme when instead it was described as a stock investment. Kaczor admits in his closing arguments that attachments to the newsletters were "missing" (TR 3598, Exh. 4), yet he would not object when this evidence was entered.

Thus, this charge also rests on a misapplication of law in that no "prime bank" program, a debt instrument, has ever been defined as a stock or equity investment, as admitted by FBI Agent Samuel Moore (TR 1675, Exh. 4). IRS Agent James Flink refuses to directly answer

the question (TR 2052, 2072-2073, Exh. 4). GX-1, the government's chief exhibit, a prime bank booklet, was simply plucked out of an earlier time than the 39 mail fraud counts, which began on 10/21/99, and falsely alleged as the only kind of investment shown to investors. The record establishes that no investor testified they believed GX-1 to be the only investment; out of 577, only 6 could be found that ever saw GX-1 (Exh. 7), and GX-33, a 10/99 newsletter, stated the investment was a stock program and not a bank debenture program. This theory further violated a contract made by the government with George Besser, wherein he had been deemed the "innocent victim" of a "prime bank" scheme (GX-380) and \$400,000 in funds seized in 5/99 were later returned (AUSA Reed Pixler, Phoenix, TR 774).

At a 7/28/04 detention hearing, Marcusse had objected to the entry of GX#2 (renamed GX-1 at trial) for its irrelevancy to the 39 counts (TR 19, Exh. 8), but she was allowed no evidence or witnesses. At trial, Kaczor argued that she had testified about GX-1, "No, that's not the one that we were using" (TR 3595, Exh. 3). He also recounts the contracts in which all investors agreed to "best efforts", diversification, and assigned discretion over the investment choices to the defendants (TR 3595, Exh. 4; Def. Exh. M-L; GX-63d). IRS Agents Flink (TR 2052, Exh. 4), and Steve Corcoran (TR 2292-2293, Exh. 4), admit they included no non prime bank investments in their summary exhibits, they did not include all related bank accounts, and that they made no investigation of any investment accounts. AUSA Gezon persists in representing GX-1 as his "believable evidence" that "many" of the investors were shown it (TR 3714-3715, Exh. 4), in spite of the fact that there was no

evidence to support it. Houston aids the prosecution by misrepresenting Suisse Security Bank and the Bahamas CD Program as two separate programs, and the Bahamas CD Program as "expected to return \$25 million on a \$350,000 investment" (p. 13).

The summary exhibit Marcusse was reduced to using at trial for the Bahamas CD Program, the stock program custodied at Suisse Security Bank (SSBT), showed wire transfers for it of \$4,226,000 (Def. Exh. M-AA, Exh. 9). AUSA Gezon torpedoed her exhibit and credibility by gesturing to the banker's boxes and claiming there was "nothing" in evidence by way of bank statements to support it (TR 3721, Exh. 4), calling her a "liar" at least 12 times. Had Marcusse been permitted the use of bank records as evidence, she could have attached each wire transfer to Def. Exh. M-AA to show the jury the real "liar" was not her. To illustrate, see Exh. 9 for a 7/15/99 wire transfer statement from "bulk" exhibit GX-210 that matches the same entry on Def. Exh. M-AA. Def. Exh. M-Q, a letter fax regarding the revocation of Suisse Security's banking license freezing all funds on 4/2/01 by the Central Bank of the Bahamas was improperly discredited by Gezon's claim it was, "Something she could have gotten off the internet" (TR 3721, Exh. 4).

The court denied summary exhibit Def. Exh. M-Z for \$4,186,700 into Crawford Ltd., because the underlying bank records had not been "proffered" (TR 3127), records already in the government's possession. The evidence to support that \$2 million was invested in MLC Development, a company in which Robert Plaster had been its Chief Financial Officer (R. 392-2, p. 2, Exh. 10), and who was a good friend of John Ashcroft's, was also blocked. Plaster personally

obtained \$1 million of investor funds from MLC (R. 157-2), only to renege on the contract made for \$4 million in returns on it. Anthony Valentine, William Flynn's attorney, blocks the contract from being submitted as evidence (TR 2980, Exh. 4). Plaster denies he was a principle in MLC (TR 2248), but admits he kept the money (TR 2256, Exh. 4). The prosecution had tried to keep Plaster out of the trial, but so many investors testified that they became involved due to it, that he was later called (R. 401). A falsified search warrant had been used to raid the home and office of the barrister handling the funds transferred to MLC under bogus "drug trafficking" charges, confiscating records to prevent their use at trial (R. 342; TR 14, Exh. 4; Exh. 11). Thus, while this evidence was blocked, the testimony that Plaster kept the money was damaging enough to the government's case that AUSA Gezon withdraws his ponzi scheme charge from the jury's consideration (TR 3713, Exh. 4), therefore, the jury did not find the defendant's "guilty" of a ponzi scheme.

Def. Exh. M-U was a letter regarding the \$1,861,330 that had been invested with Winfield Moon and Richard Gerry. Agent Flink had deceitfully alleged that because Marcusse "owned" Worldwide "E" Capital, LLC, \$600,000 in deposits to it were taxable income to her, but he admitted he added this \$600,000 after he first testified in front of the grand jury (TR 2098). The underlying bank records from "bulk" exhibit 219 could have proven Moon owned it, but they were not permitted (TR 3141-3142). Neither Moon nor Gerry were permitted by Kaczor to appear as defense witnesses (TR 2220-2223, 2231).

The misapplication of tax law in regards to "pass through"