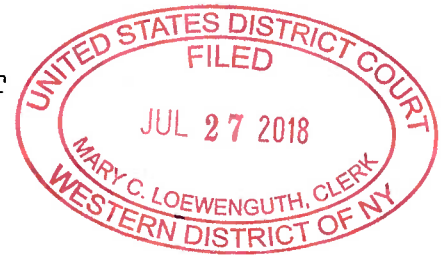


IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA
Plaintiff,

NOTICE OF MOTION

V

Case No.: 15-CR-6055-EAW-MWP

ROBERT LEE SWINTON JR
Defendant.

PLEASE TAKE NOTICE.

The defendant, Robert L. Swinton Jr., hereby bring forth motion for Modification and Correction pursuant to Federal Rule of Appellate Procedure 10(e). The defendant also motions the court for production of Audio of All Transcribed Proceedings, to be provided to The Second Circuit Court of Appeal, the Government and the Defendant.

Date: *July 24, 2018*

Respectfully Signed,

A handwritten signature in cursive script that reads "Robert L. Swinton Jr.".

Robert L. Swinton Jr. #22008-055
F.C.I. Loretto
P.O. Box 1000
Loretto, PA 15940

CERTIFICATE OF SERVICE.

The Defendant, Robert L. Swinton Jr., has provided service of this notice and affirmation to The Second Circuit Court of Appeals, The WDNY Clerk in Rochester, N.Y., and the U.S. District Attorney's Office, in Rochester, N.Y., on the above date via U.S. Mail.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
Plaintiff,

AFFIRMATION IN SUPPORT OF
MOTION FOR CORRECTION
PURSUANT TO FRAP 10(e)

V

Case No.: 15-CR-6055-EAW-MWP

ROBERT LEE SWINTON JR
Defendant.

The defendant, Robert L. Swinton Jr., hereby moves the court for modification and correction of the record, pursuant to Federal Rule of Appellate Procedure (FRAP) 10(e). Respectfully, the appellant/defendant alleges that the transcripts submitted in this case are not consistent with his memory of events, and vital omissions have taken place. The defendant hereby requests that the audio of proceedings be provided to the court of appeals for The Second Circuit and the appellant, and all letters to the court be provided to the same parties, as well as the government, that were written to the court. To be clear, the appellant requests that all recorded and transcribed proceedings and respectfully alleges a failure to comply with the Court Reporter Act, pursuant to 28 U.S.C.S. § 753(b), due to the prejudicial omissions in recording judicial proceedings. Prior motion was made to The Second Circuit, attached, and requested to be considered.

The facts that the defendant/appellant is alleging is as follows:

1. The court alleged that the defendant did not object to the two week extension, on November 1, 2017.
2. The defendant made allegations that he did object to the two week extension on April 28, 2017, in Notice of Constitutional Violations, Dk. #197. The court made its assessment based on the record that omissions were made from. The court did not make any speedy trial assessment prior to November 1, 2017, including dates of speedy trial calculations, despite two formal Speedy Trial Act motions by the defendant. See Dk. #142, 114 and 111. Dk. #114 stated that the defendant does not consent to any more continuances in the first paragraph. Objection was forgotten in 6 months.
3. The Second Circuit Court of Appeals decided United States v. Tigano, 880 F.3d 602 (2d Cir. 2017)(Wolford, J.) on October 12, 2017, which was dismissed for U.S. Sixth Amendment violation, which was presided over by this court. The defendant noticed that the omission from the record had occurred in Nov. 1, 2017, by the court's assertion that the defendant did not make an objection. See tr. of Dk. #206, pg.13, ¶13-21. The defendant, defending himself Pro Se, decided that it would be best if the records were requested after receiving a transcript of proceedings first, to solidify the defendant's belief of this issue.
4. In the transcripts of Dk. #126, April 28, 2017 hearing, pg. 11, ¶ 5-6, the defendant allegedly made an objection for due process violation. According to the transcripts, the court stated: "Okay. So Mr. Swinton's just preserving for the record the fact that he has objected in speedy trial due process claims to this case." The court could not have known that this was a speedy trial violation unless a prior objection was made in this hearing. See the next fact for further support. The defendant also alleges that this was not the words in which the objection was made, which alters the strength and context of the objection. Due process of law was

not afforded to the defendant concerning speedy trial claims that were asserted, as adjournments were made and credit for time was made against the defendant. At that time, the defendant believed that the court would not honor any speedy trial claim, hence the due process claim.

5. The defendant alleges that speedy trial objections were made twice on April 28, 2017, and were omitted from the record. They seem to be around the time that the record was held to be "unintelligible" and "off the record" on Dk. #126 tr. pg. 9, ¶ 12-16. The defendant/appellant hereby alleges that (1) he made an objection to any continuances and referred to Dk. #114, and requested an immediate trial, (2) that he did not receive a motion from the government to set a trial date, discussed and agreed to July 10, 2017 with government, see Dk. #130 tr. pg. 7, ¶ 9-14, and the court said it would not be beneficial if it was made to adjust its calendar for a sooner date, in which it referred to a September of 2017 date, in which the defendant denied, and July 10, 2017 was agreed, (3) the contemplated date ended up being the actual date, thereby mooting the government's motion made ex parte to stop the speedy trial clock, and (4) the defendant was not aware that the discussion on April 28, 2017 was off the record at this hearing, in which the court engaged as well to justify this assumption. The government also reiterated part of the discussion on May 15, 2017, Id. ¶ 9-14. The court, Mr. Tallon, Mr. Moynihan and the defendant engaged in a very significant amount of conversation that was omitted from the records that supports the defense challenges made, and appeal challenges as well. The defendant does not recall seeing the court waive the stenographer off of the record as well.

6. The only government witness was released from prison on June 20, 2017, barely in time for trial. The defendant also requested immediate trial. See Dk. #114, Dk. # 130, pg. 5-6.

7. On December 20, 2017, the defendant recall asking the court did it consider Judge Telesca's ruling in United States v. Lee before sentencing. This is missing from the records as well. This case held the Fla. conviction invalid.

8. The records have been purged of all dental complaints made in court, from 2012 to 2014, with the exception of Dk #44 and #45. These allegations of dental neglect were made in Swinton v. Schinski, 15-CV-53 and Swinton v. Serdula, 15-CV-47, both of which are ongoing and Judge Wolford made a ruling in 15-CV-47, in the W.D.N.Y. dismissing the claim without prejudice, which was eventually remanded by The Second Circuit Court of Appeals as Swinton v. Serdula, et, al.

9. The letters that were mailed to Magistrate Judge Payson, concerned ineffective assistance of counsel complaints, criminal history complaints and institutional complaints made to the court in writing. These letters also support the accusations herein, and are relevant to the Second Circuit's evaluation of events occurring in the District Court. These letters were also addressed in open court, yet substance of the letters was not addressed. The defendant requests that these letters be placed upon the record for appellate court evaluation, provided to the government and defendant.

Trial transcripts in this case have not been provided at this time, yet the integrity of the transcriptions is at issue at this time, and only an audio recording of proceedings can be trusted at this time. The defendant is requesting that a copy of all transcribed hearings be provided to him, and respectfully requests that an order issue to F.C.I. Loretto to allow a reasonable time to hear these records.

RELEVANT CASE CITATIONS.

The Government "may strike hard blows..... but not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935) and "Justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954). The defendant respectfully alleges that these omissions seem to have been made with purposeful intent to sanitize the record. The omissions only hurt the defendant's case on appeal, and bolsters the government's case. The defendant humbly ask that the audio of all hearings in this case be provided, to verify the truth of the matter asserted by the defendant, to review all allegations made, and to give the defendant/appellant a record to proceed on appeal as these issues are sorted out.

Both appellate court and district court have the authority to correct the record. United States v. Zichettello, (2d Cir. N.Y. 2000), 208 F.3d 72, cert. denied, 2001, 531 U.S. 1143, 121 S.Ct. 1077, 148 L.Ed.2d 954. If the record on appeal was falsified or plainly unreasonable, the appeals court may reject construction of the record. Accord United States v. Franklin, 250 F.3d 653, 663 (8th Cir. 2001), cert. denied, 534 U.S. 1009, 122 S.Ct. 495, 151 L.Ed.2d 406. These omissions alleged are many and plainly unreasonable and suspect to being delibertly falsified. In re W.T. Grant Co. (S.D.N.Y. May 10, 1977), 432 F.Supp. 105, aff'd, 2d Cir. 1977, N.Y., 559 F.2d 1206, states the "[D]ifferences concerning record on appeal should be submitted and settled by the district court only where there is issue as to whether the record truly discloses what

occurred in the district court." Also see FRAP 10(e).

In Natofsky v. City of New York, 2018 U.S. Dist. LEXIS 16836 (S.D.N.Y.), it states, "Thus, the movant in a Rule 10(e) motion "must demonstrate that the evidence to be supplemented was before the lower court in the course of its proceedings leading to the judgment under review and was mistakenly omitted from the record." Robinson v. Sanctuary Record Grps., 589 F.Supp.2d 273, 275 (S.D.N.Y. 2008). "It is well-settled that the purpose of Rule 10(e) is not to allow a district court to add to the record on appeal matters that did not occur there in the course of proceedings leading to judgment under review." Miro v. Plumbers & Pipefitters Nat'l Pension Fund, No. 01-CV-216, 2002 WL 31357702, at *2 (S.D.N.Y., June 10, 2002). The letters requested were apart of lower court proceedings and were not placed on the record, yet discussed in open court, and sometimes requested to be submitted to the court from the defendant on issues. The defendant humbly requests that these letters be included in the record on appeal for appellate court evaluation of issues presented to the lower court.

Respectfully, the defendant in this case has noticed a hoard of misstatements on the record, and have not received the trial transcripts of this case. Different statements that were made on the transcripts were not as the defendant made them, which changes the context.

I, Robert L. Swinton Jr., defendant/appellant, hereby believes all herein to be true, under penalty of perjury, pursuant to 28 U.S.C. § 1746.

Date: *July 24, 2018*

Respectfully Signed,



Robert L. Swinton Jr. #22008-055

F.C.I. Loretto

P.O. Box 1000

Loretto, PA 15940

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

RE: UNITED STATES v. SWINTON
Case No.: 18 - 101cr

Att: Judge Guido Calabresi

Dear Honorable Judge Calabresi,

Enclosed is a motion in this case that the appellant believes may warrant the court's attention. The appellant is humbly requesting your review, pursuant to Fed.R.App.Proc. §27. This letter was also mailed to all parties in this case stated in the Certificate of Service on page three of the motion. Thank you for your time and consideration in this matter.

July 13, 2018

Respectfully Submitted,

PRISON MAIL BOX RULE

A handwritten signature in cursive script, appearing to read "Robert L. Swinton Jr.", written in dark ink.

Robert L. Swinton Jr. #22008-055
F.C.I. Loretto
P.O. Box 1000
Loretto, PA 15940

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18- 101cr Caption [use short title] _____

Motion for: Production of L.T. Letters to Magistrate,
Production of transcript Audio of hearings,
Renew L.T. 4l motion and Intervention motion.

UNITED STATES OF AMERICA

Set forth below precise, complete statement of relief sought:

Production of Letters written to the Magistrate
by the appellant in this case and placed upon
the record, audio of all hearings and ruling
on Intervention motion for transcripts pursuant
App. R. 27(c), and renewal of motion to return
property, Rule 4l(g), Dk.# 133. See Attached.

v

ROBERT LEE SWINTON JR

MOVING PARTY: Robert L. Swinton/ Appellant

Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: United States/ Appellee

MOVING ATTORNEY: Appellant, Pro Se

[name of attorney, with firm, address, phone number and e-mail]

OPPOSING ATTORNEY: Tiffany Lee, AUSDA (WDNY)

F.C.I. Loretto, P.O. Box 1000
Loretto, PA 15940

100 State Street
Rochester, NY 14614

Court-Judge/Agency appealed from: Hon. Elizabeth A. Wolford

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency: _____

May 22, 2018. Transcripts were ordered on
January 17, 2018 and not completed as of this
date. Letters are needed in evaluation of
pending appellate issues as evidence.

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney:

Robert L. Swinton Jr.

Date: 7-13-2018

Service by: CM/ECF

Other [Attach proof of service]

Pg. 3 of Affirmation

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff/Appellee,

AFFIRMATION IN SUPPORT OF
MOTION

V.

ROBERT LEE SWINTON JR.,

Case No.: 18 - 101cr

Defendant/Appellant.

The appellant, Robert L. Swinton Jr., hereby motion the court to order the production of the letters submitted in this case to be produced by WDNY, Honorable Magistrate Judge Marion W. Payson, that were written to the court in this case. The appellant also humbly request that these documents be made appart of the public record. This is requested to document the actions complained of in The District of Western New York, and ineffective assistance of counsel claim evidence that these things were reported to the court. The appellant was having access to court issues as well and consistently wrote for help.

The appellant believes that somehow the motion for judicial intervention was not assessed by the court, and my belief is that the receiving clerk may not be advised of my pro se status and just sent it to my stand-by counsel. Transcripts are on the docket as being ordered on January 17, 2018 in this court and January 12, 2018 in the lower trbunal. The appellant respectfully alleges that there may have been an inadvedent mistake in the submission of this motion, since proceeding pro se in this forum is quite rare. This motion was mailed on May 22, 2018. Emergency relief was requested by this motion.

The appellant has noticed areas in the requested transcripts that are in possession of the appellant at this time, that seems to contradict the memory of the appellant. Since the transcripts for 2013 are in possession of the appellant, the appellant vividly remembers an incident when Magistrate Judge Payson entered the courtroom, and she began the hearing by asking "Mr. Swinton, are you alright?" and I responded "No", in which counsel then took over the conversasion about why my face was swollen and that he would address the situation. This appears nowhere on the record. During April 10, 2014 hearing, in addressing access to court issues, I remember Donald M. Thompson mentioning "due process" on the record, and this is not in the transcripts as well. This pertained to the prior dental issues and estoppel by the facility. The appellant continually wrote the court for help, and the court requested that I "stop writing or she must give the letters to the government" as well. The record does not reflect that the court told me to "stop writing" before it transcribed that the court would give the letters to the government. The appellant made multiple other dental complaints and IAC complaints, that are recorded on transcripts or reflected by the docket sheet. This is the reason the appellant requests that the audio of the proceedings be produced, and this would allow the appellant to prepair an appellate brief without further delay. This audio can be sent to my place of incarceration in care of Counselor Forlina - A-team counselor, at the appellant's address. The appellant humbly request that the court consider this request, due the amount of time that has elapsed and the discepancies already identified by the appellant. The appellant spent 57 months in detention prior to trial.

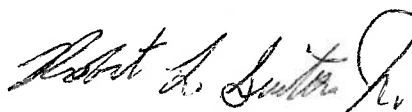
The appellant also respectfully requests the renewal of L.T. docket # 133, motion for return of property. The appellant motioned for these New York State/Electrical Construction worker identifications, along with the HTC phone to be returned.

Your Honor, I am humbly asking your assistance in these matters, as I have learned that the court must be asked and shown that a problem exists in order for the court to address it. I am respectfully requesting correction of the record if justice requires, pursuant to Fed.R.App.Proc. §10(e)(3), and this relief from your Honor, pursuant to Fed.R.App.Proc. §27(c).

Under penalty of perjury, I believe all herein to be true, pursuant to 28 USC § 1746.

Date: *July 13, 2018*

Respectfully Signed,



Robert L. Swinton Jr. #22008-055
F.C.I. Loretto
P.O. Box 1000
Loretto, PA 15940

CERTIFICATE OF SERVICE.

I, Robert L. Swinton Jr., have provided service of this motion and affirmation in support of motion on Robert Rosenthal, Stand-by counsel, Tiffany Lee, AUSDA, Rochester, NY, and The Honorable Judge Guido Calabresi, New York, NY, on the above signed date via U.S. Mail.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RE: U.S. v. Swinton,

Case No.: 15-CR-6055-EAW-MWP

Att: Clerk of Court

Dear Clerk,

Please forward this motion to the court in this case.
Thank you for your time and consideration.

Date: *July 24, 2018*

Respectfully Submitted,



Robert L. Swinton Jr. #22008-055
F.C.I. Loretto
P.O. Box 1000
Loretto, PA 15940