No._____

In The

Supreme Court of The United States

James Everett Dutschke

Petitioner

v

United States of America

Respondent

On Petition for a Writ of Certiorari from

United States Court of Appeals for the

Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

James Everett Dutschke

US BOP # 15536-042

Petitioner

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PO Box 24550

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Questions Presented

1-Is it constitutional for an Article III judge to act as an Article I lawmaker by rewriting or nullifying existing written law, writing new law or as an Article II President in nullifying or expanding treaties as part of an unreviewable discretion?

2-Considering the following previously unwaivable jurisdictional examples:

a-The Legislative jurisdictional issue specifically asked for by Justice Scalia (Bond 2014) regarding 'treaty enactment' and if other countries can write US law (via treaty)

b-The Legislative jurisdictional of constitutional validity of a statute not properly enacted and whether such a 'treaty enforcing statute' "lies outside Congress' (jurisdictional) reach" (Justice Alito-Bond)

c-The Territorial jurisdiction in 'enforcing' an international treaty without a nexus to 'international intercourse' (This was the debate specifically asked for by Justice Thomas- Bond)

d-Legislative/Executive jurisdictional power to expand one treaty/statute to enforce a completely unrelated act covered by an unrelated treaty/statute

e-The Subject-matter reach of indicting for a biological toxin to prosecute for "developing" a product that is not biological nor toxic (applying Bond to biological weapons treaty)

f-The Subject-matter jurisdiction of a fatally flawed indictment by fraudulent misrepresentation to Grand Jury

g-The Subject-matter of a unique statutory BAR to a plea

waiver of rights (can a waiver survive the explicitly written will of Congress- 22 USC §6712)

h-If a breached and otherwise invalid plea agreement is still enforcable as a waiver

Considering that, traditionally, jurisdictional challenges are not procedurally barred or waived, are the above jurisdictional issues (including the Thomas, Scalia, Alito issues) above now, suddenly, no longer reviewable?

3-Do Nonfrivolous habeas issues & grounds that are raised, but not addressed or are misconstrued by the courts forfeit COA?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A3 to the petition and is No 15-60794

[ ] reported at USDC No 1:15-cv-79 5th Cir; or,

[ ] has been designated for publication but is not yet reported; or,

[✓] is unpublished. En Banc @ A7

The opinion of the United States district court appears at Appendix A1 to the petition and is

[✓] reported at 2015 US Dist LEXIS 24838; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished. COA denied @ A2

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

Jurisdiction

The judgement is appealed from the denial of Certificate of Appealability sought from the 5th Circuit occurring with the Northern District of Mississippi (NDMS) dismissal of 28 USC § 2255 Habeas. The 5th Circuit, after much controversy denied COA on 8-23-2017.

This court has jurisdiction to review the 5th Circuit's unconstitutional denial of COA

Statement of the Case

The following facts are true, correct and well documented, whether relevant to the Justices or otherwise:

In April of 2013, just after the Boston Marathon Bombing, the FBI arrested Paul Kevin Curtis as the mailing suspect of the 2013 "KC letters", three letters which the FBI claimed contained 'ricin', which caused evacuations of federal buildings in Washington, D.C. (addressed to POTUS, Senator Roger Wicker and a Lee County Mississippi Judge). The evidence of his mailing the letters was and is overwhelming. During the initial proceedings, his defense strategy suddenly changed from - he stopped taking his anti-psychotic medication to - simply blaming me; and the FBI's focus seemed to suddenly change from who mailed the letters to "who made the product they claimed was 'ricin'".

The administration very publicly claimed the letters contained "ricin" and via press releases, the worldwide media reported the KC letters contained, "a deadly poison with no known antidote".

Failing to prosecute Curtis for the mailing, on April 27th, 2013, I was arrested and charged with "knowingly developing/producing" a biological weapon in violation of the Biological Weapons Convention (treaty-"BWC") which is 'enforced' by 18 USC § 175(a).

The prosecution's "smoking gun" claim (regarding the making) was that a dustmask was recovered from the public trash from in front of an abandoned office that contained 'ricin' and my DNA. That claim was repeated very publicly via the press, at Grand Jury and the preliminary hearing.

Procedural History

A) It is a factual matter of public record, in October of 2013, six months after my arrest, the actual final toxicity analysis was completed on the contents of the KC letters by the government's very own laboratory (National Bioforensics Analysis Center). This was final analysis that I'd been waiting on and was exculpatory. It confirmed that there was NO "deadly toxin" in the KC letters at all. The administration's "deadly ricin" claim was, in fact, false (and documented so). But I'd already been indicted.

B) It is a matter of documented fact that within a day after the special prosecution team discovered their claim (of a 'deadly poison') was false, Attorney General Eric Holder, personally and by his own hand, signed and ordered a "Special Administrative Measures" (SAM) executive order which stripped me of all my legal discovery and casework and any contact with any human being into very, very extreme solitary confinement. (The SAM is ONLY invoked in matters of espionage and national

security - i.e., Ramzi Yousef, Harold Nicholson, Zaccarious Moussoui, etc). This administration's executive SAM order was done without any notice at all or ability for me to challenge either the conditions or rationale. A special counsel, Kenneth Coghlan, was appointed to my defense and also bound by the Holder SAM order from any contact with any other person, including the press and media, on my behalf. This meant that even if we had the exculpatory labwork, the discovery could not be released to the public to countermand the administration's narrative of a deadly poison. In short - the very moment the administration discovered that their "deadly poison" claim was, in fact, a lie, they were too far publicly invested. All my discovery and legal casework was confiscated and I was silenced from the press (and my defense crippled).

C) Because Counsel Coghlan believed that absolute lack of toxicity did not matter and because he was unaware that "ricin" (by law) is specifically defined under the Chemical Weapons Treaty and statute (NOT a Biological Weapon, as indicted), he encouraged me to sign the prosecutor's plea, which included the claims of the mailing as well as the making. Being innocent, I refused their plea. After additional pressure and threats to arrest/prosecute my wife, Janet, I later capitulated to a more comprehensive sentence of 300 months in federal custody. It is clear, however, from the change of plea hearing transcripts, the refusal to admit to any of their bizarre 'facts' of the PSI and the sentencing hearing transcripts that I entered an Alford Plea (signed the contract while maintaining my innocence).

D) The Alford Plea was accepted (after much controversy). The plea agreement contained a waiver of the right to collaterally attack the conviction/sentence (excepting allegations of ineffective assistance of counsel). I was sent to the national security unit (SAM unit) at the US Supermax ("ADX") in Colorado.

Subsequently, a filed § 2255 habeas to the Northern District of Mississippi district (NDMS) revealed that: (1) the district court lacked jurisdiction (criminal, territorial, subject-matter & legislative) to convict/impose sentence; (2) I am actually innocent of what I was indicted/convicted; (3) Counsel's performance was grossly deficient to handle a high-profile case of this magnitude; and other equally important claims. Because the Government's SAM created an obstacle (not allowed casework or discovery) which still exists (currently pending in Tucson District Court), that (the instant) § 2255 was/is limited to only the conviction of "development and production" (making, not mailing) of a biological weapon, since

I need the casework/discovery to properly appeal the mailing, of which all parties already know I am not actually guilty.

E) That (the instant) § 2255 habeas was dismissed October 19th, 2015 by NDMS Judge, Aycock, citing the plea waiver, and did not address (in fact, misconstrued and ignored) the actual merits. Most of the grounds and issues of the habeas were not answered at all, thus remain, even now, completely unadjudicated.

Among those ignored issues are: (1) the issues specifically asked for by US Supreme Court Justices Thomas and Alito (in Bond, 2014) regarding domestic enforcement of an international treaty; (2) Justice Scalia and Alito whether or not foreign countries can write US law (Bond, 2014); (3) the entire Supreme Court in whether a war-crimes statute can apply to a harmless product; and (4) an explicitly (unique) written statute, never before invoked in any court, which PREVENTS any "waiving" of any constitutional right in regards to a plea agreement (contract with the government) if it involves 'ricin' (by law, a Schedule I chemical) - in short, my right to appeal cannot be waived - per 22 USC § 6701 (of the Chemical Weapons Convention Implementation Act). Because these non-waivable issues remain completely unaddressed, and they are clearly 'debatable by jurists of reason' the dismissal should have warranted a COA (Slack). Nevertheless, she dismissed it citing procedural grounds (plea waiver).

The primary issue, the (jurisdictional) indictment/Grand Jury errors, was only superficially addressed in the dismissal, though not fully, and in doing so the district judge, Aycock, sua sponte created an entirely new law (and completely reversing her own previous on-record statements), a law that does not exist, then relied on that made-up law ("the asterisk rule") as the basis to dismiss (explained further herein). There is no such law as she cited. It does not exist. As of that moment, this created an entirely new constitutional issue which must be reviewed: whether or not a judge can make law. Because this would create a very serious constitutional crisis, this must be reviewed by the Appeals Court. However, with the district's dismissal, she denied COA. I immediately sought COA from the 5th Circuit (2016).

F) Nearly a year later, May 2017, I received the delayed (due to prison mail) April 2017 'denial' of COA from 5th Circuit Judge Dennis. Judging by his response, it is clear it was never fully read, understood or considered. No merits were addressed among the cavalcade of constitutional errors and misapplications of law, ignoring Slack and Buck v. Davis (2017 US LEXIS 1429) which included several issues which several Justices of the US Supreme Court (Alito, Thomas and Scalia)

specifically asked for (in Bond) and several issues of first impression (all of which must be reviewed). His denial was generic and unexplained.

G) I immediately filed a motion for rehearing en banc. The motion was very specifically labeled as such (en banc) - (I'll call this - "en banc-1"). However, almost immediately I received notice that the circuit "considered" my en banc motion as just a motion for rehearing (but without the 'en banc' part) and that motion was intentionally misconstrued as such and denied. In other words, because "en banc-1" was misconstrued as NOT en banc, the circuit took FROM me my constitutional right to even request en banc review. This notice was dated June 19th.

H) I immediately prepared and filed (July 3rd) ANOTHER (a second) motion for rehearing en banc ("en banc-2"). I believed that this motion, "en banc-2" was being reviewed. It wasn't ...

I) On July 24th, I received a letter from a deputy circuit clerk claiming that "time for rehearing en banc ... has expired". It hadn't. Once again, the circuit misapplied the law in order to deny review. I then prepared and filed yet ANOTHER motion to correct the misapplication of law and to rehear en banc ("en-banc-3"). The response was - "motion to rehear out of time is granted" (but it was not such a motion, nor was it out of time) then followed shortly by another generic 'denial'.

The final denial to review caused my realization that the Slack/Buck standard was not ever going to be respected in this case, so I immediately began preparing this application for the Supreme Court, including those ('debatable') arguments that were specifically asked for (by the 'reasonable jurists' Justices Thomas, Scalia and Alito).

In 2014, (Bond), in a unanimous reversal of a chemical weapons conviction, Justices Scalia, Thomas and Alito did, in fact, specifically and separately and in great detail say they should be addressing a certain argument. They asked for an argument on certain issues.

Well ... here it is. The exact issues they asked for.

Reasons for Granting the Petition

The denial of COA in this case is highly erroneous and violates 28 USC § 2253(c)(2) ("To obtain a certificate of appealability, a petitioner is required to make a substantial showing of the denial of a constitutional right"). In this case - my right to appeal:

I cannot be procedurally barred from appealing the conviction of "developing

or producing" what the administration claimed was deadly "ricin" because:

(A) - The Chemical Weapons Implementation Act at 22 USC § 6712 (Appendix-C, Exhibit-11) expressly states that I "cannot be required to waive ANY constitutional right" (such as 'enforcement via statute) "as a condition for entering into a contract with the government" (a plea agreement is a contract with the government) related to this Act (the very same 'Implementation Act' which specifically identifies 'ricin' as a Schedule I Chemical) "or its Convention" (the very same treaty which, by an explicitly written schedule, specifically lists 'ricin').

(B) - I cannot be procedurally barred by plea waiver because the explicitly written will of Congress forbids it by way of this very unique statute (22 USC § 6712) (Appendix-C, Exhibit 11) which has never been invoked in any court before. When this act, 22 USC § 6701 et al, was passed by Congress (The Chemical Weapons Implementation Act, [CWCIA] which specifically defines ricin), it nullified any "waiver" in any contract which involves a Schedule I Chemical ('ricin'). Because this is the written law itself, a "substantial showing" is made and COA must issue.

THE GROUNDS

Faulty Indictment - Structural Error (reversible)

1) They indicted for the wrong thing. Because "ricin" is NOT "biological". It is common knowledge and elementary that 'biological' involves life (the science of living things). The very name defines it. A biological weapon is often called "germ warfare" for a reason; it involves viruses, bacteria, microorganisms or pathogens capable of reproducing (a tiny amount of anthrax, for example, left unchecked, could become or create mass destruction / a global epidemic). Therefore, even small children understand the difference between a living pathogenic 'germ' and a chemical. This should be easy for anyone to see.

2) But, ricin is not a "biological agent" and can never be a "biological weapon" by ANY definition (it is simply not biological). As a matter of record, the prosecutors alleged I developed "ricin". As a matter of scientific fact (and law), 'ricin' is not biological, yet the prosecutors still indicted me for a BIOLOGICAL weapon (18 USC § 175(a)). This is a massive fraud committed upon the Grand Jury which invalidates the indictment (a NON-waivable jurisdictional error).

3) Even Congress understood this elementary principle that the prosecutors did not. In fact, it is Congress itself (the ones who write the very laws the prosecutors are supposed to enforce) that specifically and explicitly defined 'ricin' as a Schedule I Chemical under the Chemical Weapons Convention, its 'enforcing' statutes

and regulations; specifically: 18 USC § 229F(6)(B) and (8)(B) (See Appendix-C), 22 USC § 6701(10)(H) and Supplement No. 1 to 15 CFR § 712.

4) So Congress knew (just like any 5th grade student) that 'ricin', since it is not a living microorganism could not possibly be misconstrued by any (reasonable, rational) person as biological - In fact, they specifically wrote it into law as a CHEMICAL, and specifically DISqualified it as a biological agent. Two different concepts. Two different statutes (§ 175 - biological, § 229 - chemical). And two different treaties (a decade apart from each other. If chemicals are to be included under the biological treaty, then there would be no need for the later chemical treaty or law). Ricin is a chemical. Elementary science says so. The entire reason 'ricin' is specifically defined by the lawmakers as a chemical (§ 229) instead of a biological is to avoid precisely the indictment fraud committed by the prosecutors in the instant case. (They alleged a chemical ['ricin'] but indicted for a biological agent.) This flagrant violation of Federal Rules of Criminal Procedure, Rule 7(c) is a fatal variance and is unwaivable subject-matter jurisdiction for which COA must issue since the law itself (as written by Congress) proving the variance is clearly a "substantial showing".

5) The (actual) government's actual position on this issue is NOT the same as the prosecutor's position. (This is why I am unable to refer to the prosecutors in the instant case as 'the government', because the prosecutors are, in fact, misrepresenting their own client, the government.) The government (Congress, POTUS and its executive agencies along with 195 other countries and their governments) have actually published their position explicitly and in writing (into law) - that published position is - if you are accusing someone of developing an actual Schedule I Chemical, the correct charge can only legally be § 229 (under the Chemical Weapons treaty 'enforcement' statute). The prosecutors chose instead to not follow the government's (published) position by indicting me for § 175 (the wrong statute; violating the biological treaty) which cannot (legally) apply to 'ricin'. To allow this fraud is to encourage a prosecutor to indict for one crime, then present evidence to convict for something entirely different.

6) This is the primary argument of this case, prosecutors intentionally misrepresented both the legal test for the biological statute to the Grand Jury (the element of a 'biological weapons' statute that requires that the product actually be 'biological' can never be met, scientifically or legally). The indictment was (as a matter of law & record) obtained by fraudulent misrepresentation and a jurisdictional defect to which a plea waiver cannot apply and must be reviewed. Because the record

and the law obviously do not match, a "substantial showing is made" and COA must issue.

6)[b] Additionally the petition must be granted because the required element of 'toxicity' was also misrepresented to the Grand Jury. Grand Jury was presented with and I was indicted for "ricin", "a deadly toxin". That claim was knowingly false at the time the prosecutors sought the superseding indictment. Their claim of "a deadly toxin" was proven false by their very own laboratory's final toxicity analysis confirming the product's harmlessness. At the moment they learned the fertilizer product was harmless, they should have dropped the war-crimes charge (§ 175). (Instead Holder issued the SAM to cover-up, bury and hide their false claims, their failure, from the public.)

Actual Innocence

7) The biological weapons statute's elements REQUIRE (among other things) that the developed product be: (a) biological, obviously (not met); and (b) toxic (also not met). Because neither of these elements were or ever could be met, and Grand Jury misinformed, I am Actually Innocent of "developing" any sort of "biological" "toxin". Actual Innocence cannot ever be procedurally defaulted or waived and a COA should have issued accordingly.

8) There is no question that the prosecutors admit the product was NOT toxic; but they only did so when directly confronted, in front of the world-wide press present in court at the sentencing hearing when I read aloud from their very own internal FBI e-mails showing that they knew (PRIOR to indictment) that there was NO "ricin" on any dustmask and it was NOT my mitochondrial DNA (the DNA was female) as well as the non-toxicity of the fertilizer product that they (and only they) claimed was "ricin".

Nor did anyone (only the DOJ) ever make ANY claim that 'ricin' was ever "developed or produced" (or even mailed - at no point did even the mailer, in the text of the letters make such a threat or claim). In short - as I said during the very same sentencing hearing where I proclaimed, loudly and at great length, my innocence, "there is no 'ricin'. There never was" ... "You have all been lied to (by prosecutors)" I never admitted or conceded toxicity; in fact I disproved it and showed prosecutors knew it all along. And because my plea was obviously an ALFORD plea (never conceding a single one of prosecutor's bizarre "facts"), Actual Innocence cannot be waived. And because Actual Innocence can never be waived, a COA must issue. There can be no question that "a substantial showing" was made because

it is a matter of record and the statute's very own elements require that which the prosecutors could never prove and (now) admit are elements that cannot be met. There has never been, in any case, a more clear example of a "substantial showing".

9) The result is a shocking miscarriage of justice - someone was convicted of 'developing a biological toxin' that is neither biological nor toxic.

Constitutional Crisis - Erroneous Interpretation of Law

10) The Supreme Court should grant the petition to review the sudden constitutional crisis of a Judge's authority to make new (non-existent) law. The "asterisk rule" cited by NDMS Aycock does not exist. The "Tier 2 toxin" cited by NDMS Aycock does not exist. (Exhibit-20, ft# 5 of her dismissal). Both are entirely made up. Both are what she depended upon in her dismissal to falsely somehow avoid the prosecutorial thresholds, "Round to Zero Rule" (15 CFR § 712.1) written for Schedule I Chemicals ('ricin'). Avoiding the prosecutorial thesholds was key to these prosecutors. That is WHY they specifically chose to prosecute under the (incorrect) biological treaty statute instead of the chemical treaty statute in the first place, because the biological statute doesn't have the prosecutorial thresholds that the statute written for 'ricin' does. (Just like the 'legal limit' in a DUI. If you don't "blow" over that threshold, there is no conviction.)

11) Her attempt to avoid the toxicity theshold specifically written for 'ricin' - 15 CFR § 712.1 (Schedule I Chemical) caused her, on habeas review, to make a claim depending on a law that does not exist, thus creating a constitutional issue that also did not exist prior to her habeas decision (dismissal). Therefore, unless reviewed, her made up law becomes accepted law. But Congress wrote otherwise. Congress' explicitly written language DOES, in fact, set prosecutorial thesholds for 'ricin' (15 CFR § 712.1) and 42 CFR § 73.3(d)(2) and (3). Thus, it is a matter of published record, the law itself, that the prosecutor's position (accepted and parroted by NDMS Aycock) is the polar opposite of the actual government's published (into law) position. "A substantial showing" is not only made, but painfully obvious to anyone who can simply read. COA must issue to review the judge's (un)constitutional power to make law and overrule the government's published (into law) stance. Because this happened subsequent to the plea - No plea waiver can possibly apply.

Justices Alito, Thomas and Scalia ASKED for this Argument

12) The petition should be granted to review the exact jurisdictional (unwaivable) arguments that the 'reasonable jurists' Justices Alito, Thomas and Scalia already specifically asked for (dealing with chemical weapons treaty 'enforcement' statute)

Bond v. US, 134 S.Ct. 2077, 187 L.Ed.2d (2014).

13) Justice Scalia (Bond, 2014) 'debated' (meeting Slack v. McDaniel standard 529 US 473) the legislative jurisdiction - can (195) other countries legally write US law (can a treaty become law?) Justice Alito agreed.

14) Justice Thomas wrote that he felt the court should address domestic enforcement. Or in Justice Thomas' words, there can be no 'enforcement' of a treaty in this case (or its 'enforcing statute' such as § 229 or § 175) because it "must involve international intercourse." Again, Justice Alito agreed with Thomas' territorial jurisdictional related (not waivable) concurrence. (Bond, 2014).

15) Because the very same issues of precisely the same exact nature are part of this case and were specifically brought as grounds in the instant habeas and it is already known that the issues "are debatable by jurists of reason" (Justices Scalia, Thomas and Alito are 'jurists of reason' and it is THEY that made the argument first and asked for this very issue to argue), then a "substantial showing" is obviously made here (to deny COA is to claim, in effect, that the Justices are somehow not 'jurists of reason'.)

16) However, the NDMS Judge Aycock's failure to address either the Jurisdictional Scalia or Thomas argument (both of which Alito concurred with, in writing) left these issues completely unadjudicated (despite the Justices Thomas, Scalia and Alito said needed to be adjudicated). Because several issues in this case are issues of First Impression, COA must be granted to address those issues, Holcomb v. US, 622 F.2d 937 (7th.Cir.1979).

17) The failure of the 5th Circuit to fully understand, read or recognize the jurisdictional Thomas argument ("must involve international intercourse") or the Scalia argument (the 'enforcement' law is not valid since not properly enacted) violated my right to appeal since denial of COA is essentially the same as saying these jurisdictional arguments postulated by Justices Thomas, Scalia and Alito are so meritless that they should be ignored. The 5th Circuit should no longer be so quick to deny (again) pro se petitions for COA because issues like this, unresolved and questions opened by the Supreme Court. It only put the 5th Circuit in conflict with other circuits (and the Supreme Court) but makes the 'threshold bar' for COA impossible for cases of 'first impression' or where clear error exists but is not allowed to be reviewed (or even seen) or presented. The 5th Circuit's denial of COA is the same "back door justice" reminiscent of Buck v. Davis (2017 US LEXIS 1429).

18) Here we have two issues - Justices Alito, Thomas and Scalia specifically ASKED

for ... then I give the district, then the Circuit these very same issues ... then they pretend I never raised them so as to ignore them. What then is the point of seeking COA (or any kind of review at all) in the 5th Circuit if issues which are clearly NOT 'meritless' are going to be completely ignored? It leaves important questions (of LAW) unanswered and violative of the Supreme Court's reversal of the similar 5th Circuit denial Buck v. Davis, US 2017 US LEXIS 1429.

19) COA must be granted to resolve the Scalia issue (invalid law) and the Thomas issue (no international intercourse); there could not have been any procedural bar for these jurisdictional issues and the district and circuit were in error for leaving them unaddressed (violative of Slack since these were obviously 'debatable by jurists of reason').

20) There is now a very serious conflict created between the 5th Circuit and all the others because of the NDMS decision to dismiss. The basis for the NDMS to avoid addressing the Thomas/Scalia jurisdictional Bond arguments OR the 'reach of the statute' jurisdictional discussion of the unanimous US Supreme Court in the very same case was for NDMS Aycock to simply claim "Bond doesn't apply".

21) The habeas ground went like this ... In Bond, the entire key was the NON-toxicity of the chemical that was developed (then 'deployed' on a mailbox). The Bond court established two things about chemical weapons treaty enforcement: (a) Federal prosecution of Bond's simple assault on her romantic rival with a harmful, but not deadly arsenic compound is "an overreach" into the province of the state; and (b) the war-crimes 'enforcement' statute of the Chemical Weapons Treaty was NOT intended by Congress to reach development of the "unremarkable chemical used here" ... or in Chief Justice Roberts (majority) words, Bond's "substances, while dangerous (it DID cause injury) ... bear little resemblance" to the chemical attacks "on the western front" and "no educated user of English" would characterize the defendant's crime as involving a chemical weapon (the war-crime statute "did not reach her conduct", Bond v. US, 134 S.Ct. @ 2091).

22) Therefore, it would be legally hypocritical for any court to consider Bond's chemical (which did cause harm) to "bear little resemblance" to "the global need to prevent chemical warfare" and yet consider the harmless fertilizer product of the instant case to violate a war crime statute (when Bond did not). Yet the NDMS dismissal, and the circuit's denial of COA exemplifies such legal hypocrisy. Aycock avoided the inevitable reversal of conviction (via Bond) by simply claiming "Bond doesn't apply" to the biological weapons treaty 'enforcing' statute of § 175.

However, other courts, other circuits, disagree. Conflict. The bizarre thing is the (documented fact) that the prosecutors in the instant case even cited one of the cases that DID "apply" Bond to § 175!

23) In the Hale case, Hale v. US, 742 F.3d 1214 (10th.Cir.2015), the 10th Circuit specifically rejected § 175 (same charge as the instant petition) and instead affirmed § 1038 (5 yr max.) BECAUSE of the NON-toxicity of Hale's mailed prduct. In other words, the 10th Circuit said because Hale's mailed product was NOT toxic (like in this case) § 175 could not stand, but § 1038 was proper; and they did so applying the Supreme Court Bond decision! The 5th Circuit is now in conflict with the 10th!

24) And now the 9th ... In 2016, the Northern District of California (NDCA - San Francisco) in the 9th Circuit contradicted the NDMS. To be exact, in regards to Chamberlain's 'ricin'/abrin prosecution, the NDCA court ruled "the jurisdictional limitations imposed by Bond MUST also apply to the biological weapons statute." US v. Chamberlain, 2016 US Dist. LEXIS 21355.

25) Those "jurisdictional limitations" the NDCA court spoke of were specifically identified as "the erroneous allegation by the US Attorney's office" regarding toxicity; just as in the instant case. ("Erroneous allegation" is a nice way to say that, just like in my case, the prosecutors lied - a matter irrefutable in both cases).

26) The difference is this - according to the 10th Circuit (Hale v. US, 362 F.3d 1223) Bond does apply to § 175. Judging by Judge ChHabria's very explicit ruling (2016 US Dist. LEXIS 21355), it is law in the 9th Circuit that Bond "MUST" apply to § 175. But for some bizarre reason, Aycock has determined that (unlike the other circuits - 3rd, 9th, 10th), for the sole reason of preserving the instant conviction, Bond does not apply in the 5th Circuit. That conflict must be resolved, and the 5th Circuit's fear of even looking at the case (by unconstitutionally denying COA) does not resolve either (a) the conflict created by Aycock's lonely stance that "Bond doesn't apply to § 175"; and (b) the made up "asterisk rule", which is entirely fabricated for the sole purpose of avoiding Congress' explicitly written "Round to Zero" threshold that "APPLIES to (ricin) Schedule I Chemicals" (15 CFR § 712.1).

27) So the Supreme Court should resolve the conflict between the circuits that Aycock created and determine whether or not Article III district judges inside the 5th Circuit are allowed to act as Article I lawmakers.

Additionally, during the habeas process, it was pointed out (in multiple briefs)

that just because a product is 'extracted from castor seeds' it cannot qualify as a chemical weapon without the required toxicity and 'castor extract' is commercially prevalent in lipsticks, lubricants, and even the very same ubiquitous Fabreeze (air effects spray) likely used in the homes and offices of the 5th Circuit and NDMS judges! (seriously, check the label - see for yourself) Proclaiming any product 'extracted from castor seeds' is a war crime (by denying COA) is not only shockingly absurd, it simply does not comport with the Supreme Court's Bond as under Aycock's antiquated position it "turns each kitchen cupboard and cleaning cabinet in America into a potential weapons cache" (Bond-III, 681 F.3d at 154, n.7 (3rd.Cir.)).

28) Aycock's bizarre logic (now law in the 5th Circuit after their denial of COA) now literally means that the law in the 5th Circuit stands that millions of households and offices inside the 5th Circuit that use Fabreeze spray are deploying a "chemical weapon" every time they do so ... wait ... sorry ... in the 5th Circuit a chemical weapon is a "biological weapon" after she completely reversed her previously admitted stance (sentencing hearing - Exhibit-18) and made up a new law which somehow UNwrites Congress' (the actual government) position published (and promulgated by the CWCIA-22, USC § 6701, et al) into law including: 22 USC § 6701 (10)(h); Supplement No. 1 to 15 CFR § 712(8); 18 USC § 229F(6)(B) (See Appendix of Exhibits). All these errors should be difficult to keep up with, but in the instant case are so very well documented into the record as to be undeniable and unforgettable. Because the NDMS actions create and perpetrate a Constitutional crisis (issues that did not exist until her dismissal since it is the dismissal that created them) the plea waiver (from a year prior) cannot apply (to review the 'law' she made up) and there is no procedural bar.

Sidenote - Although there is no defense or rational excuse for NDMS making up "law", there might be for her conclusive statement that "Bond doesn't apply to § 175", but only because the 10th Circuit panel Hale decision that DID apply Bond to § 175 did not publish until Aug. 12th, 2014 (notable - the 'reasonable jurist' panel of the 10th Circuit rejected § 175 because the mailed Hale product was not toxic!) While this was months after my conviction, it was available as case law for a year. Perhaps Aycock really didn't have time to keep up with case law, even case law that is (obviously) very pertinent to the instant case. That Bond "MUST apply to § 175" was later confirmed by Chamberlain (NDCA), but that ruling was after her habeas dismissal which conflicts with the other circuits, so she couldn't have known of

the Chamberlain ruling as it didn't exist yet. She had no idea that, in essence, Chamberlain overturned HER Dutschke (instant case) decision, and maybe was too busy to consider the 10th Circuit applied Bond to § 175. (although, it really would be hard to miss since I specificaly addressed Hale in my reply - a reply obviously not fully understood or read at all.)

29) The full (convoluted and confusing) text of what she said (the statement on which her opinion depended) must be read to be believed, and even then numerous reads only make the utter fabrication more obvious. There has never been, in any case in my research, a more convoluted, untrue and nonsensical statement in legal history. It is found as footnote #5 (see Exhibit-20) of her many very flawed, very wrong (untruthful) footnotes of her decision (Exhibit-20) (footnote #2 is completely irrelevant; #3 is factually false, an outright and debunked lie; #4 is legally untrue, #5 is just plain bizarre). This is what she wrote:

> "The Court otherwise notes with approval the Government's argument that there is no trace impurities exemption under § 175. "Petitioner also argues for use of the "Round to Zero Rule" found in 15 CFR § 712.1, which does not apply in this case. Under the plain meaning rule, the title of the statute can be used to clarify a section. The title "Round to zero rule that applies to activities involving Schedule I Chemicals" plainly refers to Schedule I chemicals which are used in conjunction with § 229, the Chemical Weapons Convention statute. Under the § 229 list, Ricin is a Schedule I Chemical, but in the "Select Agent and Toxins list" applicable to § 175 "[t]he select agents and toxins marked with an asterisk (*) are desginated as Tier 1 select agents and toxins ..." Under 42 CFR § 73.3(b), Ricin is not marked with an asterisk. This is because Ricin is a Tier 2 Toxin, and because Ricin is not a Tier 1 toxin which could be considered parallel to the classification of Schedule I chemicals § 229 then the "round to zero" arguably considered a "trace exception" does not apply to Ricin."

What does any of that mean? None of that is true, and is the most convoluted gibberish ever written.

The Ever-Expansive Treaty Power

Finally on this point - there is another danger she has created (now allowed by 5th Circuit's COA denial) which is bigger than the conviction she is trying to protect, bigger than the (written) laws she ignored (which prevent that conviction), and at least as big as the constitutional crisis she now creates (Article III Judge acting as Article I lawmaker) and that is this:

NDMS Judge Aycock has completely nullified all treaties.

Here's how:

30) The (1989) biological treaty ('enforced' by § 175) does NOT reach or explicitly

cover 'ricin'. In fact, every statute which defines what a biological agent is, also excludes any possibility that 'ricin' could ever be considered as such. For example, see 22 USC § 6771(c); 38 CFR § 9.20(6)(x).

31) However, the (1999) CHEMICAL weapons treaty ('enforced' by § 229) DOES expressly, directly and explicitly cover and control 'ricin' (by law) - for example: 22 USC § 6701(1)(H); 18 USC § 229F(6)(B) and (8)(B); 15 CFR § 712(8).

32) Yet, because of this case, the first to ever bring this issue (ricin - Chemical or biological?) to light, it is the biological treaty 'enforcement' (§ 175) that is somehow being used to 'enforce' something explicitly written for control by a completely different treaty (& statute).

(It must be noted that, as passed by Congress and signed by President Clinton in 1999, 22 USC § 6701, et al - the Chemical Weapons Convention Implementation Act - CWCIA - Section 9 specifically directs "the FBI" to investigate any violations [of 'ricin' - Schedule I Chemical] under § 229 ... not § 175).

33) Aycock acknowledged that 'ricin' is a Schedule I Chemical (at sentencing hearing - See Exhibit-20), but that was BEFORE the habeas whereupon she somehow ... DISacknowledged (?word?) her previous admission once she was presented with the habeas.

34) She has (now) made it law, then, that one treaty should be used (for 'enforcement') instead of the treaty written specifically for the 'violation'. If the Biological Weapons Convention (and its 'enforcing' statutes) covers everything (as she has now made law), then what on earth was the purpose of the Chemical treaty which followed a decade later? She has nullified the Chemical treaty and any statutes or regulations that were promulgated by the CWCIA, not just by her bizarre "asterisk rule" or her claims of "Tier 2 toxin" (which does not exist), but by proclaiming the biological treaty ('enforcement statute' - § 175) is a "catch-all". The developed product need not be toxic (even if harmless) and it need not be biological. (I hope it's obvious that this literally leaves NO defense possible, hence my ALFORD plea).

35) Aycock has now created case law that tells nearly 200 other countries that the entire CWC (Chemical treaty) is moot. Thus now, extrapolated out and from this point forward - a treaty that regulates Internet usage can now extend to imported car safety or bird migration or endangered species or carbon emissions or some other such nonsense since there are no subject-matter boundaries anymore (under her application).

36) Common sense tells a "reasonable' person that one treaty (and its 'enforcement') has nothing to do with the other. However, this "Aycock Rule" has (now) blurred the

lines as much as her made up 'asterisk rule' (which does not exist) or her 'Tier 2 toxin' (which also doesn't exist) she cited as the basis for her dismissal. It seems that this newly created blurring should be an urgent matter for review because, as of now, the "Aycock Rule" jeopardizes the very fabric of this country's integrity and its commitments, pledges and its very word. If allowed to stand (as 5th Circuit's COA denial does), the "Aycock Rule" nullifies some treaties, but worse expands the power of others exponentially.

Either Way - Indictment Still Fraudulent

In the end, it does not matter whether biological or chemical. Here's why:

a) It is a matter of well documented statutory law (which is all that should matter) that 'ricin' is legally considered a chemical weapon, not a biological weapon.

b) It is a documented matter of record that NDMS Aycock acknowledged that 'ricin' is a chemical (admitted 5 times. See sentencing transcripts, Exhibit-18).

c) It is indisputable and a matter of record that when confronted with the habeas revealing that the same "Schedule I Chemical" she previously admitted had its own statute and treaty which made the statute and treaty I was indicted for invalid, she completely reversed herself and cited a different (a third) statute to try to suddenly "qualify" 'ricin' under § 175(a), (using 1756).

d) It is an undisputable matter of fact that the government's very own laboratory toxicity analysis confirmed there was nothing at all harmful about the product; specifically two different measurements (of the same product at issue) but with two different results, both results so low as to be physically immeasurable and far beneath the margin of error of the analysis itself ... AND below (of course) the required 'Round to Zero' rule (which requires toxicity over .5%) written specifically to "apply" to 'ricin' (Schedule I Chemical) for § 229.

e) It is well documented history and a matter of record that immediately upon discovery of the final analysis results that NO ricin toxin exists, the AG (Holder) issued the silencing SAM order and instead of dropping this count, continued prosecution.

f) It was a matter of record that this final analysis was PRIOR to the superseding Grand Jury indictment, showing, then, that the indictment was obtained by fraud; Grand Jury was never made aware of 'Round to Zero' threshold that 'applies' to 'ricin' - 15 CFR § 712.1.

g) It is a matter of record and indisputable that Aycock's habeas proclamation (parroting the prosecution) that 'ricin' is suddenly a 'biological agent' (completely

reversing herself to do so) had the prosecutor's intended effect of avoiding the 'Round to Zero' theshold that applies to § 229 (chemical).

h) It is a matter of record that she (clumsily) used the 'Select Agent & Toxin' statute to do so. THIS is the third statute - § 175b is the statute against "possession or transfer" of a "Select Agent or Toxin" (it must be noted here that I was never accused of either "possession or transfer"). This statute § 175b, has a 5 year maximum sentence for whichever element. This is a far cry from the maximum of Life, § 175(a). I was not charged with § 175b (the 5 year statute), but § 175(a) (with lifetime max for 'developing or producing').

She even cited Levendaris (a § 175b case). The § 175b statute is irrelevant.

i) Nevertheless, she invoked it using the § 175b list called the 'Select Agent & Toxins' list. This is found at 42 CFR § 73.3 (Exhibit-9) and is specific to § 175b not § 175(a). Because 'ricin' is a CHEMICAL on that HHS list, she claims it is a biological agent that qualifies it for § 175(a).

Not so. The HHS list includes chemicals, but it has nothing to do with biological WEAPONS or "for use as a weapon". This is also where/how she applied her made up bizarre "asterisk rule" (which does not exist anywhere in law) and claims 'ricin' is a "Tier 2 Toxin" to magically make it no longer a Chemical and this "Tier 2 Toxin" status means the chemical law written for it is null and void (See Exhibit-20); that is actually her actual claim.

37) Here's the first problem with her "Tier 2 Toxin" claim of hers to avoid the chemical weapons law & regulations controlling 'ricin' -- It doesn't exist. There is no such thing as a "Tier 2 Toxin"! She made it up. (like the 'asterisk rule').

38) Here's the second problem. Even IF the chemical weapons statutes (written by Congress) really were magically made void by her 'lack of an asterisk' and some made up "Tier 2 Toxin" allowed her to use the HHS list to AVOID the prosecutorial theshold of 'Round to Zero' as she intended, then prosecution is STILL prevented by a prosecutorial theshold also written for 'ricin'; and it is written in the VERY SAME regulation she used to avoid it! 42 CFR § 73.3(d)(2) and (3).

39) It is a matter of written law, the same HHS list she used to qualify the product (as biological agent) is the same one that DISqualifies it. Yes, 'ricin' is on the list, but all she (or any 'reasonable jurist') had to do was keep reading just a little further; 42 CFR § 73.3(d)(2) [Exhibit-10] specifically EXcludes "nonfunctional toxins"! (in other words, NOT toxic - such as the instant product at issue, as measured and confirmed by the government's very own labs).

40) But that's not all ... Her inattention to the very regulation she cites, 42 CFR § 73.3, caused her to completely miss (d)(3), which - get this - specifically EXcludes "less than 100 mg of ricin"!! [Exhibit-10]. She kind of neglected to point out THAT part of the very regulation she cited.

41) Therefore, either way, prosecution is precluded. If one follows the correct explicitly written (chemical) law for 'ricin' (§ 229), then prosecution is precluded by 'Round to Zero' (15 CFR § 712.1) because 0 (or 0.01%) is less than the .5% theshold.

42) OR, if one chooses NOT to follow the actual law and does as NDMS Aycock (now) suggests by using the HHS list [to make § 175b somehow apply to § 175(a)], then prosecution is STILL precluded by 42 CFR § 73.3(d)(2) since the instant product is a "nonfunctional toxin" and EXcluded by (d)(3) since 0 is (obviously) "LESS than 100 mg of ricin". How convenient that this exclusion was missed. Perhaps, just like the fabricated 'asterisk rule' and the completely fabricated, nonsensical "Tier 2 Toxin", this was just a coincidental oversight. Perhaps, but not likely. One thing is for certain, these errors are not harmless. The immense media and political pressure of this, the highest profile case ever in her court, was to convict, and from the highest levels of that particular administration. But, the high level of pressure should have led to an equally high level of diligence. If the 5th Circuit panel endeavored to read and understand the request for COA, this gross miscarriage of justice would have been apparent as no fair minded 'reasonable jurist' could condone applying (and even citing) PART of a regulation (42 CFR § 73.3) but not all of it, (d)(2) & (3). COA must issue as the 5th Circuit refusal to even look at the written law constitutes a premature 'merits' denial violating Slack and Buck v. Davis.

43) For the purposes of COA (Slack, Buck v. Davis and § 2553(c)(2)), a "substantial showing has been made" and in spades. If the written law is not "substantial" enough, then what is?

All Jurisdictional - Not Waivable

44) Every issue mentioned (#1-43) is either a constitutional issue which occurred after sentencing (created by NDMS during habeas) or directly related to misrepresentations to Grand Jury and indictment.

45) There is no doubt that the indictment charges (Grand Jury presented with) a biological agent yet alleges 'ricin' (by law, a chemical). Thus the 'biological' element (of a biological weapons charge) was never alleged and instead a different element (chemical) presented for trial.

46) There is no doubt that the indictment charges (Grand Jury presented with) "a deadly poison" a "toxin", yet prosecutors knew PRIOR to Grand Jury indictment the product was harmless (matter of record). Therefore a "toxic" "deadly poison" was alleged but a confirmed harmless fertilizer presented for trial (indicted for one thing, yet evidence presented for something else), although that final analysis evidence was not made available until AFTER the plea was signed.

47) There is no doubt that 195 countries signed a treaty (I didn't), and that treaty was 'enacted' into law (Justice Scalia-postulates invalid in 2014 Bond) and this case did not involve "international intercourse" (Justice Thomas-is not enforceable by treaty).

48) There is no doubt that the 'reasonable jurists' of the unanimous Supreme Court (Bond) do not allow a harmless product to be considered a war-crime: "is not a realistic assessment of Congress' intent" (There is NO law against developing a harmless product, no matter what it contains)!

49) There is no doubt the indictment did not properly allege (present to Grand Jury) that the chemical was harmless and not biological and this is a clear Apprendi indictment error.

50) There is no doubt that the actual evidence proves that the product is harmless and therefore can never meet the prosecutorial thresholds (of either the chemical or Select Agent regulations).

51) There is no denying that these issues (#44-50) are jurisdictional in nature (subject-matter, legislative and even territorial), therefore denying COA is in error because:

52) "Because the jurisdiction of federal courts is limited, there is a presumption AGAINST ... jurisdiction, and the party invoking federal jurisdiction bears the burden of proof". McMillan v. Wiley, 813 F.Supp.2d 1238 (DCO 2011); Marida Delgado v. Gonzales, 428 F.3d 916, 919 (10th.Cir.2005) (quoting Marcus v. Kans. Dept. of Revenue, 170 F.3d 1305, 1309 (10th.Cir.1999)).

53) "There is absolutely NO presumption in favor of jurisdiction", Hanford v. Davis, 163 US 273, 16 S.Ct. 1051, 41 L.Ed. 157 (1896) and US v. Townsend, 474 F.2d 209 (5th. Cir.1973). "Since lack of (subject-matter) jurisdiction cannot be waived, we MUST examine the contention". US v. Griffin, 303 US 226, 82 L.Ed. 764, 58 S.Ct. 601 (1958) and City of Kenosha v. Bruno, 412 US 507, 37 L.Ed.2d 109, 93 S.Ct. 2222 (1963).

54) "Entry of a guilty plea does NOT act as a waiver of jurisdictional defects such as indictments." US v. Meachum, 626 F.2d 503, 510 and

"Jurisdictional defects cannot be waived or procedurally defaulted and (I) need not show cause and prejudice to justify (my) failure to raise the issue". McCoy v. US, 266 F.3d 1245, 1249 (11th.Cir.2001).
"Subject-matter jurisdiction cannot be waived", Ins.Corp. of It Ltd.. 456 US @ 702, "even if the parties fail to raise the issue" and "Jurisdictional defects canNOT be procedurally defaulted", US v. Harris, 149 F.3d 1304 (11th.Cir.1981); Kelly v. US, 29 F.3d 1107 (7th.Cir.1994) and
"A petitioner who raises a valid jurisdictional challenge in a habeas IS entitled to obtain collateral relief without any additional showing ... it is the essence of a court's criminal jurisdiction", 'reasonable jurist', Judge Barkett in McCoy v. US, 266 F.3d 1245.
"Jurisdictional issues, including subject-matter, cannot be waived and may be raised at any time", Short v. US, 471 F.3d 686, 691; "Subject-matter jurisdiction is not subject to waiver", US v. Titterington, 374 F.3d 453, 459 (6th.Cir.2004) and US v. Rickards, 2007 US Dist. LEXIS 74769 (EDKY 2007); "Jurisdictional issues are never waived and CAN be raised on collateral attack", US v. Cook, 997 US 1312, 1320 (10th. Cir.1993); "and REQUIRE correction ... regardless of whether error was raised in district court", US v. Cotton, 535 US 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).
55) In the instant case "the 5th Circuit has exceeded the LIMITED scope of COA analysis", quoting Chief Justice Roberts in Buck v. Davis, 137 S.Ct. 759 (2-22-17).
56) In Chamberlain, the NDCA judge identified (the government's false claims of) toxicity as a "jurisdictional" stricture "imposed by Bond" (US Supreme Court) - Therefore, 'toxicity' (Apprendi required essential element) isn't a waivable issue.
57) The CONFLICT between circuits as to "applying Bond to § 175" (thanks to NDMS, the 5th Circuit is the only circuit that doesn't) and the jurisdictional issues raised by Justices Alito, Scalia and Thomas in Bond (briefed as grounds in the instant Dutschke case) as well as the newly created "Aycock Rule" of expanding one (older) treaty to enforce another (newer) treaty are novel claims of first impression that must be addressed sua sponte, Holcomb v. US, 622 F.2d 937 (7th.Cir.1979).
58) Furthermore, as mentioned in the beginning, the very unique statute of 22 USC § 6712, "No abridgement of Constitutional Rights" of the CWCIA is unique to 'ricin' (Schedule I Chemical) and "any contract with the government" (plea agreement) and nullifies any 'waiver' to prevent appellate review -- COA must issue to review all merits.

Ineffective Assistance

59) This was not waived by plea. It is clear, as a simple matter of record that appointed counsel Coghlan was completely unaware of a single one of the errors outlined herein. Yes, I concede that Coghlan did know (by date of sentencing hearing) that the product was not toxic. I never disputed that he (finally) knew that. NDMS judge Aycock even quoted from the transcripts showing that he was aware of the non-toxicity of the product. However, what she inadvertently showed, in those very same transcripts, is that there is absolutely NO mention of WHY it (non-toxicity) is legally important in this case.

60) It is a matter of record that there is not - in ANY filing, mention, statement or scrap of paper anywhere in existence (by Coghlan) that mentions: 18 USC § 229; 22 USC § 6701(10)(H); Supplement No. 1 to 15 CFR § 712; 22 USC § 6771(c); 18 USC § 175b; 42 CFR § 73.3(d)(2) or (3) or 15 CFR § 712.1, or any of the other relevant statutes and regulations I've introduced (during habeas). In short, the record itself is entirely devoid of any indication whatsoever that appointed counsel Coghlan had a clue.

"A cogent argument can be made that appointed counsel knew so little about this case as to be incapable of rendering ANY meaningful service", Steno v. Dugger, 846 F.2d 1286 (CA11, 1988).

61) There is absolutely no doubt, and no amount of searching in the universe can uncover even a single mention, reference or allusion at all by Coghlan of the Chemical Weapons Treaty or its 'enforcing' statutes. In a case that was this media-intensive, it is unthinkable. There is NO evidence that either the prosecutors or the judge can provide that shows Coghlan was aware of any of the issues, statutes, and regulations above. In a case allegedly about 'ricin', it would be a good idea to know any laws or regulations that are written for 'ricin', (the thing you are defending against). To not know anything about what you are defending against is the quintessential definition of ineffectiveness.

62) It is a constitutional requirement that the defendant receive effective assistance: Reece v. Georgia, 350 US 85, 90 (1955) and McMann v. Richardson, 397 US 759, 771 & n.14 (1970). There is nothing, NOTHING in the record that mentions or suggests that Coghlan knew a thing about what he was dealing with, so it is, literally impossible to say exactly what he should have done if he had.

63) The 'two-pronged' Strickland test, entails (1) deficiency and (2) outcome. Strickland v. Washington, 466 US 658, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), showing

that Strickland is met.

64) The deficiency (Strickland prong-1) is that appointed counsel Coghlan was completely clueless of a single ricin specific law or regulation. That much is easily and already shown by the absence in the record of 'Round to Zero', the chemical weapons list of § 229, the 'biological agent definitions' (including 22 USC § 6771(c)), which excludes ricin, the Schedule I Chemical list of the CWC annex of 15 CFR § 712.1 (supplement No.1), the 'Select Agents & Toxins' HHS list and its exceptions (written specifically for 'ricin'), the CWCIA list of 22 USC § 6701(10)(H) (specifically listing 'ricin'), 22 USC § 6712, which prevents any 'waiving' of rights when dealing with a 'ricin' case, the defining statute of the biological weapons treaty (18 USC § 178 - which by definition, must exclude 'ricin' from a 'biological agent') or even reference to a 5th grade science book. His lack of investigation into ricin controlling law and cases (like Bond) rendered his assistance non-existent, and deprived me of the most critical right I have. The right to counsel.

"Of all the rights that the accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have", US v. Cronic, 466 US 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984); Herring v. New York, 422 US 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975). Coghlan's complete failure to submit the prosecutor's assertions to any meaningful adversarial testing (using the law itself which was unknown to him) resulted in a Cronic absence of counsel, which demands reversal.

65) Additionally, during the change of plea hearing, NDMS Aycock's instructions were faulty (matter of record) as she said, "... they must prove CERTAIN elements (beyond reasonable doubt)". "Certain Elements" ... those were her exact words. This is not legally true since at trial it is 'EVERY element", but according to her instructions, the prosecutors only need to prove "certain elements" in her courtroom. Well, which elements? Obviously, for 'development of a biological toxin' they didn't need to prove the element "biological" OR "toxin" since the indictment was already lacking those elements. An effective attorney, however, would have known and recognized Aycock's fatally faulty plea instructions immediately. The judge's instructions, on which I based my ALFORD plea, was illegal, thus the conviction is illegal. An effective attorney could not have allowed me to plea under that illegal instruction that did NOT properly inform me that EVERY element must be proved. That failure, and Coghlan's lack of knowledge of any 'ricin' laws and regulations in the middle of a 'ricin' case and

that he should have recognized the Apprendi deficient indictment but did not, easily meets prong one (deficiency) of Strickland with room to spare.

66) Counsel Coghlan should have recognized the Apprendi deficient indictment. The elements 'biological' and 'toxic' could never have been met and were both fraudulently misrepresented to Grand Jury. Thus, since there was no biological agent (ricin is a chemical - and there was no 'ricin' either) and no 'toxin', yet that's what they alleged, then the indictment did not charge that (biological) offense. Coghlan became aware of the NON-toxicity of the product, and toxicity does, unquestioningly, affect sentencing - therefore 'toxicity' (and 'biological') "fit squarely within the definition of an element", (Justice Thomas in) Apprendi v. New Jersey, 530 US @ 494, n.19.

67) The quality/quantity (in this case amount & toxicity) is "legally essential" to the alleged crime Apprendi, 530 US at 490, n.15, and in the instant case was misrepresented. The indictment did not charge an actual biological agent at all (by law) because it alleged 'ricin' instead; nor did it allege that a harmless product was being purported to be a biological agent.

Any legal thresholds and claims of toxicity are necessarily essential elements that:

"must be charged in the indictment and proven beyond a reasonable doubt", US v. Rogers, 228 F.3d 1318, 1327 & US v. Cotton, 261 F.3d 397, 2001 US App. LEXIS 18152; US v. Gayton, 74 F.3d 545, 552 (5th.Cir.1992); US v. Deitsch, 20 F.3d 139, 145 (5th.Cir.1994); US v. Chaney, 964 F.2d 437, 446 (5th.Cir.1992); & Russell v. US, 369 US 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

68) The outcome prong (2) of Strickland is also easily met. Defense counsel's first duty is to his client, the defendant. The outcome of his failures is that he simply did not inform me, his very own client. Because he didn't know, he didn't inform me of the chemical weapons laws that (properly) cover 'ricin'. Because he didn't recognize the indictment was fatally defective, he didn't inform me that it violated Apprendi. Because he didn't recognize the improper plea instructions from judge Aycock at the plea hearing, he didn't inform me that "EVERY element" was required instead of her "CERTAIN elements" instructions, this would have made all the difference since EVERY element could never have been met/proven (since 'toxicity & biological' were already missing).

His failure to investigate the law, his failure to know WHY the non-toxicity of the product was legally important, his failure to recognize the fraudulent Apprendi

defective indictment or illegal instructions from the judge resulted (partially) in my signing of the Alford plea (maintaining my innnocence throughout the proceedings) (See Exhibit-31). (note - Aycock claimed in her dismissal that I "reaffirmed my guilt". This is NOT true. I said no such thing and refused to. I did "reaffirm the agreement", but continued to deny every one of their false accusations and admitted to none of their "factual basis" - because to admit to their bizarre 'framing' theory would be a lie.)

69) "Any facts (other than a prior conviction) that increase a (sentence) are 'elements' of a crime".

Alleyne v. US, 133 S.Ct. at 2160-63 (2010) and the Constitution "require(s) that any factual finding that (affects) sentence MUST be charged in the indictment and admitted by the defendant or proven to a jury beyond a reasonable doubt", Alleyne, 133 S.Ct. @ 2156, 2160-63.

In the instant case - the NON-toxicity ('toxicity' is an element as it affects the sentence) was NEVER properly alleged in the indictment; nor was it ever "admitted by the defendant (me) or proven to a jury beyond a reasonable doubt"; in fact, the exact opposite because the prosecutors were (eventually) forced to admit the product was not toxic at all!; and "an indictment is defective if it does not fully and expressly and without any ambiguity (factually) set forth all the elements", US v. Ramos, 666 F.2d 469, 474 (11th.Cir.1992).

70) At NO time did I ever concede or admit the element of 'toxicity' (because the product wasn't); or even the mailing for that matter (because everyone knew I was not the mailer). Nor did any jury "find" these elements. This was illegally (Apprendi/ Alleyne) done during the sentencing hearing by a judge. And in doing so, NDMS Aycock based her 'finding' on an erroneous assessment of both law and evidence. (In multiplicitous fashion using one count's elements to support another count which could not stand on its own).

"A district court abuses its discretion if it bases its decision on an error of law or clearly erroneous assessment of evidence", US v. Urias-Manufro, 744 F.3d 361, 364 (5th.Cir.2014). Her ignoring of the product's non-toxicity begs the questions, 'If toxicity does not actually matter to either sentencing or conviction, then why bother testing it in the first place?'

71) "A judge's finding based on acceptance of the prosecutor's allegation violate(s) the VI Amendment."

Ring v. Arizona, 536 US 584, 122 S.Ct. 2428, 153 L.Ed.2d 556; and Hurst v. Florida,

136 S.Ct. 616 (2012), 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017).

The Supreme Court has instructed time and time again the circuits (and their districts) on proper indictments:

"It MUST descend to particulars", US v. Cruikshank, 92 US 542, 558, 23 L.Ed. 588 (1876), and still quoted to this day, US v. Hillie, 2017 US Dist. LEXIS 1390 (DC Dist. 2017).

"To be legally sufficient ... the indictment must assert facts ... which, if proved, would establish prima facie the accused's commission of the crime", US v. Silverman, 745 F.2d 1386, 13892 (11th.Cir.1984).

Merely listing the statutory elements of a crime is NOT the same as listing the FACTS that meet those elements. An indictment that does not allege specific facts fails. As it applies to criminal law, here is the definition of a fact:

- A fact is something that can be proved -

It is that simple. See US v. Staiti, 397 F.Supp. 264, 267 (DMass 1975); US v. Nance, 533 F.2d (DC App. 1976) at 701-02 ("an indictment must do more than simply repeat the language of the criminal statutes").

72) In the instant case, it is impossible to prove that I committed the biological weapons crime because no biological crime ever occurred. It is a serious stretch to say the indictment "establish(es) prima facie the accused's (me) commission of the crime" (Hillie/Silverman) of "developing a 'biological weapon'" since no 'biological weapon' was ever developed.

Nor did I ever admit to even a single 'fact' that could have (Alleyne) allowed such a 'finding'. The indictment, from its inception, was fraudulent. And:

"If an indictment is defective, a guilty verdict does not cure the defective indictment", Morales v. Wilkerson, 238 F.2d 252 (CA5, 1960). "An explicit finding ... is required", US v. Patterson, 2017 BL 328137 (7th.Cir.2017) and an essential element of the offense (i.e., non-toxicity) "MUST be specified in the indictment" (Justice Thomas in) Alleyne, 186 L.Ed.2d 317. The court allowing a hypothetical 'finding' "calls into question ... fairness and integrity", US v. Patterson, 2017 BL 328137 (7th.Cir.No 16-2119, 9-18-17).

73) Because these Apprendi issues are jurisdictional, 'waiver' does not enter into proper discussion of being "procedurally barred from habeas" and COA must be granted.

74) Also, by law, available even after a guilty plea, are claims that:

"If asserted before trial would forever have precluded the government from obtaining a valid conviction", US v. Curcio, 712 F.2d 1539 (2nd.Cir.1983) and Hanes v. US, 390 US 85. The only proper charge for prosecuting a mailed NON-toxic substance that is

purporting to be toxic is 18 USC § 1038, (such as the Hale, oddly cited by prosecutors here, and a myriad of "anthrax" cases, biological or chemical), not a war-crime treaty enforcement statute. But the record shows, in the instant case, Grand Jury was never presented with the proper charge (§ 1038) and was fraudulently misled regarding toxicity and therefore had no choice but to indict for this overreaching and incorrect statute. If Grand Jury was presented the truth, they might have indicted for § 1038, but in no way, § 175.

75) Thus an effective counsel would have "asserted before trial" attacks against the Apprendi deficient indictment.

76) "Finally, a guilty plea does NOT bar claims attacking events subsequent to the plea, including those arising during the imposition of sentence", Curcio @ 1532.

This, then, means that the issues created by NDMS Aycock at the plea hearing (illegal instructions) and the constitutional crisis she created once confronted with the habeas.

77) Either Coghlan knew or he didn't know. Those are the only two possibilities. Either way, he was ineffective.

- If he did NOT know, (as it appears from the record itself), then he was clearly and obviously ineffective; or
- If he DID know and didn't inform me (his client) then he is obviously ineffective.

Either way, it is an inescapable conclusion of any 'reasonable jurist' that Coghlan was ineffective. There is nothing about the record itself that could possibly be construed as "Dutschke makes only conclusory assertions" (as Circuit Judge Dennis claimed in the 5th Circuit's first denial of COA). Since this is an issue OF the record itself, how can the record itself be "insufficient"?

The IAC issues are NOT about severance (I made that clear at both levels) but are about Coghlan being (or at least acting) clueless about the relevant laws controlling the very thing he was defending against. I stress again, this canNOT be characterized as a "conclusory assertion". The RECORD is entirely devoid of ANY indication at all that Coghlan knew the relevant material. If the record itself is not good enough to review a claim OF THE RECORD, then what is?

The Plea Itself

78) Evidence was provided that the plea was, in fact, breached, and is therefore void. Not NDMS or the 5th Circuit addressed this important issue at all. But because of the breached invalid plea, the grounds cannot be barred (by the invalid plea) and must be addressed on its merits. As the US Supreme Court held recently in Buck v. Davis, the 5th Circuit's refusal to even look at the petition (by not granting COA) is a 'backdoor justice' denial of the unread merits.

The circuit cannot determine if COA is merited unless they review and understand the request/petition, and they won't review a petition unless they grant COA!

The invalid plea (and the unwaivable issues) should be enough to break the impossible Catch-22 cycle. In this case, however, the 5th Circuit gave the petition its usual pro se treatment.

79) Briefly, the dropped Count 5 ('copycat' 'ricin' mailing) from the superseding indictment, per the plea agreement, should have been entirely off limits for ANY prosecution as was my understanding. Yet Count 5's allegation suddenly and improperly wormed its way into the PSR, recommendations and sentencing hearing which AFFECTED the sentence. Part of my inducement to sign was no further prosecution of Counts 5 & 6, but was improperly mentioned and used to increase the sentencing points. In other words, I ended up punished for a dropped count (that I was never found guilty of) and treated as though it was never dropped. This, too, is 'back-door' justice.

80) Those same 'dropped' allegations were written into the executive SAM order as if they had been adjudicated as true. They had not. That SAM order DID adversely affect me (to the extreme), thus, in effect, sentenced to those unadjudicated (dropped) claims and they are still part of the BOP record as if true to this day. This is not a 'bald assertion', it is a matter of record still and currently the subject of a civil action in Tucson Arizona district court (4:18-cv-00156-tmc-jgz). The breach is clear.

81) The plea was invalid from the beginning. Both the plea and the indictment fraudulently misrepresented the penalties for Count 4. The penalties (avoidance of them) are a key inducement for signing a plea (which is why it is required 'notice' in the first place). If the inducements are falsely represented, the plea is simply not valid.

82) The plea agreement (page 2, paragraph 1 - Exhibit-43) states that the max penalty for Count 4, 18 USC § 876(c) is 20 years. This is false. In this case, the maximum penalty for Count 4 is 5 years, not 2 decades. A huge disparity in a document that has to be so meticulously drafted that ZERO misrepresentations should be allowed. I'm sure the US Supreme Court agrees that a plea agreement cannot misrepresent the penalties.

83) That very same misrepresentation was presented to Grand Jury to fraudulently obtain the indictment, as follows:

a) Doc (#47-1, Exhibit-44) clearly shows (top) 18 USC § 876(c) on The Notice of Penalties page of the indictment.

b) The bottom (same page) clearly shows 18 USC § 876(c).

c) However, immediately under that shows "20 years imprisonment" (instead of 5) [Exhibit-44] and it shows § 876(a) instead of the indicted § 876(c)! § 876(a) is the kidnapping statute (I was never indicted for kidnapping). Yet another example of these prosecutors indicting for one crime but seeking to punish for a different crime.

84) This breach is a clear and undeniable matter of record. A "substantial showing" is made. COA must issue since review is not barred by a valid plea waiver. (Note - shouldn't an effective counsel [& a fair judge] recognize such a glaringly obvious misrepresentation in such an important document? And is any attorney that urges his client to sign a fraudulent contract effectively representing his client?)

85) Ironically, the prosecutors will respond (and did) by claiming that counsel Coghlan must be effective because he urged me to sign that fraudulent contract (plea). While it is true that Coghlan is very experienced at delivering plea agreements from the prosecutor's office to his clients (something a trained pigeon can do), let's examine this exact plea the prosecutors praise Coghlan for:

No other such case in US legal history has ever gotten a sentence as long as this one (300 months). 25 years - the longest biological weapons sentence in history - and for a product that was NOT biological and was, in fact, entirely harmless. Are we now to believe that a (confirmed) harmless product that was NOT the "deadly biological toxin" they portrayed, a crime for which I am actually innocent, that resulted in the longest ever sentence of its kind, ever, is somehow an example of his legal prowess and effectiveness? If THAT is excused, then anything is excused and there is no such thing as ineffectiveness either in practice or in theory.

The signing of a fraudulent invalid (on its face) plea and its acceptance by a court (that should have also noticed this reversible structural error), solidifies the parade of cumulative errors, any one of which should be fatal to conviction, but the cumulative effect of these too numerous to count, is an infection so contagious that allowing it is precedent to systemic failure of fair due process.

86) Just as the US Supreme Court had to step in and correct the mistakes of the 3rd Circuit in Bond, they are called upon again here, and to answer some of the same exact questions left open that should have been resolved then. Because these issues involve jurisdictional questions, COA must issue as: "jurisdiction is a threshold question which must be examined", Whitney Nat'l Bank v. New Orleans Bank & Trust, 116 US App. DC. 285, 323 F.2d 290 (DC Cir. 1972) and "may not be ignored", US v. Anderson, 150

App. DC (DC Cir.1972) or evaded, Owen Equip. & Erection Co. v. Kroger, 437 US 365, 57 L.Ed.2d 274, 98 S.Ct. 2396 (1978). The 'reasonable jurists' of the US Supreme Court unanimously agreed that it was an utter absurdity to prosecute Bond under the Chemical Weapons statute for developing a (mostly) harmless chemical and is "not a realistic assessment of Congressional intent" and "an educated user of English would NOT describe Bond's crime as involving a "chemical weapon" (Justice Roberts, Bond).

However, three of the judges who agreed with the unanimous majority about the absurdity, Justices Scalia, Alito and Thomas, DEBATE that it wasn't just Bond's conduct that failed the statute, but the statute itself that was the root of the problem; it was not a valid statute "for constitutional reasons".

Justice Alito's words could not have been clearer, "No such (constitutional) justification for this statute," and the statute "lies outside Congress' reach". 87) Even the Actual Innocence ground is based on jurisdictional issues, but even so ... merits of an Actual Innocence claim MUST be considered and cannot be procedurally defaulted, US v. Maybeck, 23 F.2d 888, 893-94 (4th.Cir.1994). "The actual innocence exception applies to even a single element of the offense", Sawyer v. Whitley, 505 US @ 329, 333, 336, 120 L.Ed.2d 269 (and in the instant case even prosecutors concede a 'single element' of toxicity).
"Where petitioner can demonstrate Actual Innocence, the petitioner IS entitled to review", Haley v. Cockrell, 306 F.3d 257, 264 (5th.Cir.2002) especially at the threshold level because there is no procedural bar to debatable (meeting Slack) claims of Actual Innocence, McQuiggin v. Perkins, 133 S.Ct. 1924, 1928, 185 L.Ed.2d 1019 (2013).

This is, "the fundamental purpose" of § 2255 and the waiver exceptions "is to see that constitutional errors (like these) do not result in the incarceration of innocent persons", Haley v. Cockrell, 306 F.3d at 265, 267 (5th.Cir.2002).

Conclusion:

A) Bond applies to § 175 in every other circuit except the 5th Circuit, either the NDMS is wrong or everyone else is. The Supreme Court, with the same unanimity that decided Bond, should reunify the circuits.

B) Because of the NDMS decision in the instant case (and denial of COA), the United States now has a treaty problem. Are 195 other countries allowed to make US law? Does treaty enforcement allow for domestic only affairs? The new question - does the 'Aycock rule' allow one treaty to suddenly cover actions specifically written under a different treaty? The US Supreme Court should say resoundingly, 'No!'

C) Because of the NDMS decision the United States now has a constitutional crisis - denial of COA makes it allowable for Article III judges inside the 5th Circuit to act as an Article I lawmaker, without a single vote from Congress. The 'asterisk rule' that NDMS court fabricated to completely nullify the entire chemical weapons statute was never in existence as law anywhere until judge Aycock dismissed the habeas citing it. It is now law in the 5th Circuit that the lack of an asterisk in one regulation suddenly invalidates some other regulation elsewhere.

Equally as absurd and dangerous is the "Tier 2 Toxin" concept of Aycock's that also does not exist in written law, anywhere, never enacted by Congress; but is controlling law, now, in the 5th Circuit. To quote Justice Scalia (Bond, 2014), the US Supreme Court "should eagerly grasp - the obligation to consider and repudiate it".

D) All I've ever asked for is that the law, as written, be followed. Denial of COA allows the NDMS to practice its particular style of law without any oversight and with impunity; ignoring the explicitly written law and cherry pick which part of which law applies (i.e., the 'list' part of 42 CFR § 73.3 applies, but not the exceptions written into (d)(2) & (3)). District judges don't have to be creative to intentionally misinterpret the law since as soon as it happens they can deny COA so no one can correct them.

As Justice Scalia (Bond) quoted, "When a statute includes an explicit definition, we must follow that definition", (quoting Stenberg v. Carhart, 530 US 914, 942 (2000)). In this case, for example, 'ricin' is specifically defined as a Schedule I Chemical (not a biological), thus the indictment is clearly and obviously wrong and the only way to preserve it is to stretch the reach of the biological statute (and treaty) to cover it, "distorting the law to preserve that (wrong) assertion." (Scalia, Bond). The US Supreme Court should insist that courts even inside the 5th Circuit simply follow the law; that begins with complying with Buck v. Davis, even for 5th Circuit pro se requests for COA.

All of these issues were raised during the habeas proceedings yet the majority were never addressed at all. Not the NDMS or the circuit mentiond the valid (debated) issues that Justice Alito and Scalia convinced me of in Bond (legislative jurisdiction and a statute's proper enactment) and the (domestic enforcement) issue raised and specifically asked for by Justice Alito and Thomas. Nor did either NDMS or the circuit even acknowledge my briefing of the explicitly written will of Congress in the form of 22 USC § 6712, which prevents "any waiving" of rights in a 'ricin' (Schedule I Chemical) this case.

Whenever a petitioner neglects to brief an issue, the court considers that issue forfeit. The courts should operate on the same standard. Whenever a non-frivolous issue is raised, it must be addressed. If not, or if misconstrued, then the court forfeits COA on that issue.

I urge the Supreme Court to review and address these issues most thoroughly and grant Certiorari.