ORIGINAL

No. 18-8860

In the
Supreme Court of the United States

DAVID CLUM, Jr.

Petitioner,

v.

GENE BEASLEY, WARDEN

Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI - AMENDED

David Clum, Jr., *Pro se* Petitioner,
Inmate No. 20962-075
FCC-AR
P.O. Box 9000-Low
Forrest City, Arkansas 72336

QUESTIONS PRESENTED

1. Whether the Eighth Circuit Court of Appeals violated the *Fifth Amendment-Due Process Rights* of the Petitioner by applying different standards and methods to his *Pro se* Appeal which was filed in objection to the erroneous and prejudicial dismissal of his Habeas Corpus Petition, originally filed in the United States District Court?
2. Whether the unfair and unequal treatment of *Pro se* litigants (this litigant) has violated the *Fifth Amendment-Equal Protection Rights* of the Petitioner, in the Courts in *toto*?
3. Whether the unfair treatment and methods of the Courts below of the instant *Pro se* Petitioner has deprived the Petitioner of his *Fifth Amendment-Due Process* guarantee and rendered an *actually innocent* man in prison, therefore invoking the supervisory powers of this Court to correct a *manifest miscarriage of justice*?
4. Whether the ever-evolving methods being used by Courts below to dispose of *Pro se* challenges and attacks on erroneous convictions is in violation of the *United States Constitution*?
5. Whether the Petitioner has been systematically deprived of his *Sixth Amendment-Due Process Right to Effective Assistance of Counsel.*

LIST OF PARTIES

David Clum, Jr., *Pro se* — **Petitioner**
Inmate No. 20926-075
FCC-AR
P.O. Box 9000-Low
Forrest City, Arkansas 72336

Warden Gene Beasley — **Respondent**
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PETITION FOR WRIT OF CERTIORARI

The Petitioner, David Clum, Jr., respectfully petitions the Court for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in *David Clum, Jr. v. Gene Beasley, Warden* 18-2706, EDAR.

OPINIONS BELOW

The United States Magistrate Court in the Eastern District of Arkansas issued a *Dispositive Report and Recommendation* [at Appendix 1] on April 27th, 2018 in *David Clum, Jr. v. Gene Beasley, Warden,* 2:18cv00028 which was timely objected to by the Petitioner. The District Court adopted the Report and Recommendation on July 23, 2018 and dismissed the matter, without prejudice [at Appendix 2.]

The Petitioner filed a timely notice of appeal in the Eighth Circuit Court of Appeals on August 9th, 2018 [*David Clum, Jr., v. Gene Beasley,* No. 18-2706.] The District Court findings were affirmed on November 1st, 2018 [at Appendix 3.] The Petitioner filed a timely request to stay the mandate and for *rehearing* and *en banc* review. On January 8th, 2019 the Eighth Circuit denied all motions, finalizing the appeal [at Appendix 4.]

JURISDICTION

Pursuant to 28 U.S.C. § 1291 and § 1295, a (3) three judge panel of the Eighth Circuit Court of Appeals affirmed the erroneous judgment of the United States District Court for the Eastern District of Arkansas on November 1st, 2018. The Eight Circuit Court of Appeals denied a *rehearing* or *en banc* review on January 8th, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court also has jurisdiction pursuant to its own promulgation in *McNabb v. United States*, 318 U.S. 332 (1943) where the Supreme Court promulgated the power to supervise lower federal courts by devising procedures for them not otherwise required by the

Constitution or a statute. This Court also has jurisdiction pursuant to 28 U.S.C. § 2241 to remedy this manifest miscarriage of justice and release an actually innocent man.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the U.S. Constitution provides:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In ***Bolling v. Sharpe***, 347 U.S. 497 (1954) this Court observed that the *Fifth Amendment* to the United States Constitution lacked an *Equal Protection Clause*, as in the *Fourteenth Amendment* to the United States Constitution. The Court held, however, that the concepts of Equal Protection and Due Process are not mutually exclusive, establishing *the reverse incorporation doctrine.*

28 U.S.C. § 2241 holds:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.
(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.
(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has

been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. 2243 provides in part:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

Statutory provisions involved that are also applicable and exempt from citation pursuant to Sup. Ct. R. 14(f)

28 U.S.C. § 2242

28 U.S.C. § 2255

STATEMENT OF THE CASE

In the lower Court proceedings;

On November 10th, 2011 a Grand Jury in the Southern District of Florida returned an indictment against Laura Barel ("Barel",) Penny Jones ("Jones",) Michael D. Beiter, Jr. ("Beiter",) David Clum, Jr. ("Clum",) Dale Peters ("Peters",) Christopher Marrero, ("Marrero",) and John Michael Smith, Jr. ("Smith".) **In Count 1**, the government alleged a conspiracy to defraud the United States in violation of 18 U.S.C. § 286. **In Counts 2-42,** the government alleged substantive crimes in violation of 18 U.S.C. §§ 287 and 2, all of which revolved around alleged tax code violations involving a process known as *"OID[1]"*, which, is explained later herein.

Judge William P. Dimitrouleas ("Judge") was assigned to the case. On May 17th, 2012, a superseding indictment was returned. Barel and Smith pled guilty to reduced charges and Jones

[1] "OID" is an acronym for Original Issue Discount.

took an "open plea" the first day of trial. Trial began October 1st, 2012 and ended in conviction on October 29th, 2012. As a result, Clum was sentenced to 293 months.

On April 13th, 2015, Clum appealed to the Eleventh Circuit Court of Appeals through appointed Counsel who represented him at trial. [*United States v. Clum*, 607 Fed. Appx 922 (11th Cir. 2015.)] The Eleventh Circuit denied a petition for rehearing and *en banc*.

The case revolved around the government's claim that Clum and the others combined, conspired and confederated to use a process within the IRS known as IRS form 1099-OID, which is essentially a process where the government provides refunds to the filer in exchange for his expenditures in business. Although the IRS admitted at trial that there is no criminal penalty for any misuse of the OID process and that all wrongful actions under OID only result in a civil penalty, Clum was slammed with 293 months in what was clearly a political persecution. At trial, the government knowingly represented (falsely) to the jury that; once Clum discovered there were issues with OID he continued to do business with the others and in fact entered into a successor company with the others to continue the "scam." Nothing could be further from the truth.

It is vital for this Court to know that Clum fought tooth and nail to gain access to his incredibly voluminous discovery and to terminate his appointed lawyer before trial that would have allowed him to obtain proof he is actually innocent. Although Clum was ordered released on $25,000 signature bond where he lived, just following his arrest, the Government convinced Judge Dimitrouleas to order him detained pending trial, making discovery and pre-trial preparation impossible. One contributing factor to the instant *manifest injustice*, as seen in the § 2241 and preceding documents, Clum filed a *Pro se* motion with the Dimitrouleas Court (just

before trial) demanding criminal charges be brought against his appointed Counsel for complicity in what was nothing short of a kangaroo proceeding, as will be seen later herein.

Some of the other more outrageous actions of the trial Court came during discovery when the Court appointed a special *"discovery lawyer"* to assist in dealing with more than (3) three terabytes of discovery that was estimated to take more than (7) seven years to review. What was not made known to Clum until long after trial was that the *"discovery attorney"* was a non-practicing attorney, who was a sales person for an untested software (still in BETA) that ended up a disaster and did not work. As this petition progresses, the incredulous nature becomes more striking by the event.

In yet another incident, during jury selection, the trial Court was asked by a co-defendant's counsel (in Miami, Florida) how they would deal with non-English speaking jurors. The Court annunciated that *"the jurors would get it by osmosis."* During trial the trial Court told the jury it was permitted to sleep during trial; *"And just one other thing, you know, sometimes after lunch, it's kind of tough. It's okay to rest your eyes, but don't rest them for too long, Okay?"* In a post trial § 2255 challenge regarding sleeping jurors, the Dimitrouleas Court wrote in his order that, *he was just joking.* A list of jurors who took the judge up on sleeping, with times, dates and names was presented, yet ignored. The Courts below refuse to hear any of this. [See trial record docket entry 756 page 1055.]

Just prior to trial, Clum demanded that the Court listen to him and the Court did. Clum advised the Court that he had not seen hardly any discovery at all and that there was proof he was innocent buried in the unseen material. The Court suddenly announced, *"You will get to see the evidence, I guess, as it unfolds and you're confronted with it at trial, Mr. Clum."* [T.R.

transcript docket entry 830 at pages 14-18.][2] Yes, all of these actions by the trial court are reminiscent of the infamous *"Star-Chamber"* yet, nothing beats what was discovered several years later and the way Clum has been treated as a *Pro se* litigant who can now prove he is not only *"actually innocent,"* Clum is a victim. In every element of legalese, Clum had a *"Complete defense"* to the charges. The government knew Clum had such a lethal defense and they knew his appointed lawyer refused to even look for the evidence to support such a defense in the more than (3) three terabytes of discovery.

Long after trial, Clum discovered shocking facts that would have been revealed prior to trial, had the government offered up what they knew and that the government were co-defendants in related matters themselves. Yes, the government was defending claims of fraud that would have exonerated Clum. In addition, the trial Court's refusal to cause constructive and meaningful discovery made certain Clum would never find what would prove his holy grail of innocence.

Adding to all of this, Clum's appointed Counsel was partly complicit in obstructing the discovery process. As seen in the lower court challenges, Clum detailed in his § 2241 how he filed a *Pro se* motion in the trial Court, (2) two months before trial (on July 25th, 2012) to have his appointed Counsel criminally charged[3], *inter alia*. Clum also detailed how the trial Judge coerced him into proceeding to trial and appeal with the same counsel that he asked charges be brought against.

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[2] Some of the more bizarre behavior of appointed counsel revealed itself at this hearing where Clum complained of no access to discovery. Trial Counsel told the Court he was ready for trial and in the same breath handed a petition for a writ of mandamus to the trial court where he had filed a petition with the 11th Circuit the day before demanding the 11th Circuit command the trial Court to provide the defense access to the discovery.

[3] The trial Court ordered the motion struck from the record however, a hearing was held on the matter August 1str, 2012 where the Court coerced the undersigned into allowing his appointed counsel to proceed. It is noteworthy that Clum's trial counsel later wrote in a motion that he was in fact ineffective counsel for Clum.

POST TRIAL CASE HISTORY[4]

Post trial, Clum was appointed the same counsel that he had at trial. The work product was the same haphazard production which continued to miss the startling material that proved Clum was a victim. Proof of this indisputable victimization is described below.

- **Direct Appeal:** 11th Circuit, *United States v. David Clum, Jr.* 607 Fed Appx. Conviction affirmed 4/13/2015
- **Petition for Certiorari to the Supreme Court:** *David Clum, Jr. v. United States*, 136 S. Ct. 557, Cert Denied 11/30/2015
- **Petition for rehearing to the Supreme Court:** *David Clum, Jr. v. United States*, 136 Sup. Ct. 1252, Rehearing Denied 2/29/2016

Clum Begins Pro se attacks on conviction

- Eastern District of Arkansas, *Clum v. Rivera, et al*, 2:16-cv-000149-KGB filed a Habeas Corpus petition on 11/16/2016 pursuant to 28 U.S.C. § 2241. Arkansas District Court re-characterized § 2241 as § 2255 and sent case back to trial Court Southern District of Florida on 08/22/2017.
- Case transferred to Southern District of Florida to Trial Judge William P. Dimitrouleas; *Clum v, Rivera, et al*, 17-61687-cv-WPD on 08/23/2017. Petition Denied 12/04/2017
- *Clum v. Gene Beasley, Warden,* 2:18-cv00028-KGB, § 2241 Habeas Corpus filed 02/20/2018, denied on 07/23/2018 denied.
- Eighth Circuit Court of Appeals *David Clum, Jr. v. Gene Beasley, Warden,* No 18-2706 filed 08/09/2018, *informa pauperis* granted 09/11/2018. No briefing was allowed, Denied 11/01/2018, Rehearing denied 01/08/2019.

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[4] **NO CRIMINAL LAW REPORTER IS AVAILABLE IN THE PRISON TO PROVIDE CASE CITATIONS**

DISCOVERY OF MANIFEST MISCARRIAGE INJUSTICE AND ACTUAL INNOCENCE

On October 24th, 2017 the Petitioner learned what the government had been concealing all along when his daughter contacted a detective. The Detective learned what the government knew and Clum's trial Counsel ignored. This concealed discovery, once and for all cures any argument that Clum is an actually innocent man who has been subjected to a *Manifest Miscarriage of Justice* simply because he was denied *Due Process* and has been forced to continue *Pro se* while the government sat on proof of his innocence.

As this Court is aware, reliance on Accountant and or Counsel is a complete defense to the instant charges[5]. At trial Clum tried in futility to show the Jury that he believed he was acting within the law in his work in the OID process because he relied on a Certified Public Accountant ("CPA") and he relied on his co-defendant (Jones) who was an enrolled IRS Agent. Clum continued to beg his trial counsel to look into the CPA (Rick Abdallah) because Abdallah and his co-defendant (Penny Jones, an enrolled IRS agent) as professionals advised, directed and supervised Clum's activities that led to the instant charges and conviction. As this Court is aware, jury instructions would require the Court to direct the Jury that they must acquit Clum if they find he relied on Accountant and or Counsel in his actions. This Court held in *Cheek v. United States*, 498 U.S. 192 (1991), that the defendant could not be convicted if the jury found that he

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[5] Good-Faith Reliance upon Advice of Counsel/Accountant

Good-faith is a complete defense to the charge in the indictment because the Government must prove beyond a reasonable doubt that the Defendant acted with [intent to defraud] [bad purpose to disobey or disregard the law] [a specific intent to violate a known legal duty]. Evidence that the Defendant in good-faith followed the advice of counsel would be inconsistent with such an unlawful intent.
Unlawful intent has not been proved if the Defendant, before acting:
• made a full and complete good-faith report of all material facts to an attorney he or she considered competent;

• received the attorney's advice as to the specific course of conduct that was followed; and

• reasonably relied upon that advice in good-faith.

honestly believed the tax laws did not make his conduct criminal, even if that belief was unreasonable, this defense is often thought of in connection with tax offenses. In addition to the Abdallah issue, what was discovered is horrifying and goes unheard by any Court.

As pled in the Courts below, (and never reviewed,) in October 2017 Clum was made aware that CPA Abdallah was working with the government in multiple scams. In fact, in the same Federal District that Clum was tried in, Abdallah and the Internal Revenue Service ("IRS") were jointly sued for related frauds and at least one judgment was returned in the plaintiff's favor. The plaintiff in said judgment was the victim of other like and kind frauds of Abdallah and the IRS, just like Clum. Lucky for them, they sued before the IRS charged them too. As it was discovered, Abdallah was actually being referred to clients by the IRS to *"assist them"* in dealing with *complex* tax issues. It has also been discovered that the IRS knows Abdallah is a complete fraud, in every imaginable fashion, yet, he continues to work with the IRS, even today[6].

The ultimate slap in the face of our Constitution and the laws of this Court came when the government, post trial, ordered restitution to Clum's wife for a like and kind scam that one of Clum's codefendants, Michael Beiter, was involved in; and in which the Clum's lost a great deal of money. Given these factors alone (Abdallah and restitution paid to Clum,) it is hard to imagine a more compelling cause of acquittal and actual innocence. The problem was, the government knew about this and withheld it against the *Jencks Act* and a host of case law of this Court, i.e., *Brady v. Maryland, et al.,* (cite omitted.) Appointed trial counsel, as seen in the § 2241 in courts below rightfully stated he was ineffective in defending Clum.

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[6] Some of the information pled in the Courts below are that Abdallah falsely represents himself as a General in the United States Marines (reserve) and the government knows it. He had convinced Clum and a multitude of professionals, including bankers and other professionals that he was also the son of a Judge and was one of the most qualified CPA's in the Country. This was made possible by his alignment with the IRS who was promoting him to others. All of this goes to show Clum's *good faith, reliance on Counsel, complete defense.*

PRO SE PREJUDICE

Under *Bolling, **Supra,*** this Court recognized that an essential part of *Due Process* involves *Equal Protection* of the law. *Equal Protection* requires equal application or it is meaningless. Just because I was (wrongly) convicted of a crime, does not mean I am not telling the truth. In fact, I have only asked that the Courts look at the evidence that is more than enough to show I am *actually innocent.*

In recent months, United States Justice Richard Posner of the Seventh Circuit (now retired) made the following revelation; *"The basic thing is that most judges regard these people (Pro se's) as kind of trash not worth the time of a federal judge."* [7] [8]As propounded by Justice Posner, this case verifies his concerns and sadly, validates the resulting damage. An innocent man is in prison and cannot even get his case heard because he is *Pro se*, and the laws of this Court are ignored when a *Pro se* comes to Bar.

Although the *Fifth, Sixth and Fourteenth Amendments* guarantee *Due Process* and *Equal Protection*, in the instance of *Pro se* litigants, it just does not exist. This Court has enacted laws but, as seen in this case and the multitudes of others, the Courts below rarely follow them.

For example, this Court held in *Mathews v. Eldridge*, 47 L. Ed. 2d 18, 424 US 319 (1976) *"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner,"* yet, the undersigned has been to every door of every court of competent jurisdiction to find the door locked and the court silent- Excepting the trial Court, who is clearly trying to vindicate its prior orders and actions. Nowhere in any laws can it be found that *Pro se* litigants are to be *treated like trash.*

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[7] Posner has stated his intention to file an Amicus Curiae brief in the instant matter.
[8] Posner interview Posted September 17th, 2017 by the ABA Journal.

At trial, appointed Counsel was afraid to confront the Court in such wrongful actions. Post trial, the Court has manipulated facts, at times creating new fact sets and made statements regarding extremely serious issues; - were just his way of joking with the jury.

As a *Pro se*, Clum has been deprived of being heard on the merits. The Courts have continually ignored this Court's prior, yet controlling ruling in *McQuiggan v. Perkins*, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) where this Court was crystal clear in holding; *"[i]n other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits notwithstanding the existence of a procedural bar."*

In the trial Court, Clum has been harassed, maligned, and intimidated. At one point, the undersigned sat for a very lengthy time waiting for a ruling and had to file a mandamus to move the Court. Pro se litigants are ignored. Another time, following fourteen months (14) months of repeated requests, I had to resort to a hunger strike to get attention[9]. This was not an act of desperation, it was the only way to be heard. And the trial Court made fun of the hunger strike, totally ignoring my respectful, valid and substantiated pleas for Due Process. This is truly the level of disdain the Courts have shown to most Pro se litigants.

This Court has entered multiple orders regarding the treatment of *Pro se* litigants. Nothing is more telling than the instant matter as to how the Courts below have either misused or ignored those orders. For example, *Pro se's* are supposed to be treated with a more liberal construction of the proceedings. In the instant matter, the Petitioner has followed the law and procedures to the letter, actually making fewer mistakes than his appointed counsel. When the

[9] The Bureau of Prisons is required to notify the trial court in the event of a hunger strike.

instant *Pro se* petitioner presented irrefutable proof of his *actual innocence* in a § 2241 (under objection, converted to a § 2255,) in the form of Federal Judgments in other Federal Courts (in the same district,) the trial Court was obligated to hold a hearing pursuant to 28 U.S.C. § 2243[10]. Instead, the trial Court simply created his own set of incorrect facts and denied the writ. If this Court reviews the actions in the Court below, it will see that the trial Court engaged in substantial *structural error*[11] from the very beginning by refusing to allow the undersigned to respond to reports and in one instance, knowingly (as per the documented proof) manipulating mail to prevent the Petitioner from filing a response.

The Eighth Circuit also has law that was not followed due to the Petitions being filed *Pro se*. In *Flanders v. Graves*, 299 F3d 665 (8th Cir. 2002) the Court held: *"A petitioner who can show actual innocence can get his constitutional claims considered on their merits"*- unless you are *Pro se.* One major issue is that the Eastern District of Arkansas is using a *"boiler plate" Report and Recommendation* to dismiss all comers in § 2241 and § 2255. Inmates talk and in the law library they compare. In multiple Habeas challenges the inmates, in completely separate and distinctly different cases, have received the identical *Report and Recommendations*. Contained in the verbiage the Court writes that they had hearings, when in fact, no hearings took place. The facts cited do not address the allegations in the Habeas Petitions and are designed to get the Eighth Circuit to simply affirm the dismissal. This is not only in the Eighth Circuit. As seen in Posner's statements and certainly coming in an expected Amicus brief, this is a systemic

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[10] Federal Habeas Corpus Practice and Procedure, 7th Ed. Re. No. 9, December 2017- [d] Hearings- § 2243 **(Hearing Required)** unless it "appears from the application that the applicant or person detained is not entitled to relief.") (Emphasis mine)

[11] The Supreme Court has long recognized that where a proper objection is made at trial, there exists a limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." See, *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). "Errors of this type are so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome." See, *Neder v. United States*, 527 U.S. 1, 7 (1999).

epidemic. Again, in *Estes v. United States*, 883 F2d 645 (8th Cir. 1989) the Court held; *"An evidentiary hearing is mandatory (emphasis mine) whenever the record does not affirmatively manifest the factual or legal invalidity of the petitioner's claims."*

In the unheard petitions of this matter in the Courts below, the Courts have gravitated to not allowing Clum to be heard, in complete opposition of prevailing law. Although the catch-all to being heard in § 2241 comes from *McQuiggen, et al,* ***Supra*** (that actual innocence overcomes all procedural barriers,) the Courts never address the *"actual innocence"* element and go straight to the procedural dismissal. Again, this only happens in *Pro se* petitions. These due process depravations are diametrically opposed to the commands of this Court that are well founded in our Constitution. Adding to this is the horrific unequal application of the law when a *Pro se* comes to the Bar of the Court. As this Court has held in a multitude of cases, *Structural Error* is immediate grounds for reversal. When this Court reviews the underlying cases, it should shock the conscience of the Court and is an ongoing shock to society, as to how far we have strayed from normally expected protections of our Constitution.

As a *Pro se* of more than (7) seven years, it is clear, with little exception, that [for a *Pro se*] Courts do not review cases from *Pro se's*., Some will manipulate and even create new fact sets (as here) and others will hide behind the lack of jurisdiction-dismissal, also as here. These are all in direct opposition to the Constitution and the previous commands of this Court.

In *McQuiggan,* ***Supra,*** this Court dealt with a like and kind situation where a litigant could not get his case heard. *McQuiggen* was able to get a lawyer and was heard, overcoming procedural barriers due to an *actual innocence* claim. In then instant matter, the undersigned had a lawyer at trial and through direct appeal and petition for cert. That lawyer admitted to being ineffective and allowed the government to devastate my defense. Once the direct appeal is over, I

have no Constitutional right to counsel. In a case like this, lawyers refuse to challenge Federal Judges, regardless of the level of misconduct. The record below, is full of egregious misconduct, yet, no one but me is willing to state the obvious.

REASONS FOR GRANTING WRIT

The undersigned is a *Pro se* litigant out of necessity, not by choice. I am also *actually innocent*. At this stage of litigation, this matter should have been well heard and decided on facts, not blocked by a judge who lays down illicit findings of fact and enters orders not consistent with the law. The trial Court distorted the facts sufficiently to make the Petitioner seem like just another *Pro se* whiner, willing to say anything to get released. The new evidence I present says everything that I need to say to gain my freedom, in an honest and unbiased Court.

The bigger problem is the Court's treatment of non-lawyer litigants, *Pro se's.* Although the Constitution is there to protect us all, it is not applied that way. This Court has been struggling with this issue for years. The laws in place are inadequate to guarantee the protections promised by the Constitution. This is resulting because there is nothing in place that overcomes a judge trying to vindicate prior orders, although there is case law that directly recognizes such conduct of judges, the net effect is, *Pro se's* are ignored.

Pro se's are not believed and great lengths are expended to overcome the *Pro se* Petitioner. In the instant matter, the government has never once disputed the undersigned's allegations, it is the actual trial Court who has by distorting and or completely changing the facts to maintain an erroneous conviction of an actually innocent man.

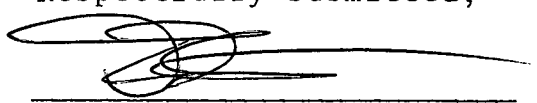
The Courts are overworked and many *Pro se* litigants engage in subterfuge. In the instant matter, as commanded by the law of this Court, yet not followed, *"actual innocence overcomes procedural barriers."* There is no law that controls the review process that would compel the

Courts below to make a finding of fact regarding an actual innocence claim. In all of the findings in this case and hundreds of other cases, the Courts never review the allegations for actual innocence, only the procedural status of the case and then summarily dismiss a petition. This needs to be rectified. This result alone would free multitudes of *actually innocent* men and women.

CONCLUSION

This Court should GRANT this writ immediately. I ask that this Court grant *Certiorari* review immediately to create a remedy for myself and others who have been victims of a *Manifest Miscarriage of Justice.*

Respectfully submitted,



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