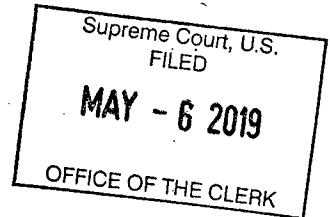


No. 18-9178 ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES



Matthew Oliver Alford — PETITIONER  
(Your Name)

vs.

Erik A. Hooks, et. al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

4<sup>th</sup> Circuit Court of Appeals  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Matthew Oliver Alford  
(Your Name)

600 Amity Park Road  
(Address)

Spruce Pine, N.C. 28777  
(City, State, Zip Code)

None  
(Phone Number)

QUESTION(S) PRESENTED

- 1) Did the District Court (W.D.N.C.A.D.) and the 4<sup>th</sup> Cir. C.D.A.'s violate Petitioner's Right to access a federal court, & Right to due process by applying the wrong procedural rules/laws to said case, by failing to take notice, as requested, of the unique and specific circumstances, as to why he filed a 28 U.S.C. § 2241 Petition for a writ of habeas corpus and not a § 2254 petition?
- 2) Does the U.S. Congress mandate, as set forth in 28 U.S.C. § 2254 (b)(1)(B) (i) & (ii) prohibit the Petitioner from invoking the jurisdictional provisions of 28 U.S.C. § 2254 (b)(1)(A) & (d) (1) & (2)?
- 3) Did the State of North Carolina, when it failed to allege the material averment, Matthew Oliver Alford (Petitioner's Name) in the body of the indictment violate Petitioner's Right to indictment by a grand jury, Right to due process, & Right to be informed of the nature and cause of the accusation against him?
- 4) Does this court's holding in Almendarez-Torres v. U.S., 523 U.S. 224 (1998) violate (1) Petitioner's Right to due process, Right to be informed, Right to trial by jury, & Right to equal protection? and (2) this court's holdings in U.S. v. Cruikshank et. al., 92 U.S. 542 (1875)? Wilkes County v. Coler, 180 U.S. 506 (1901)? and Apprendi v. N.J., 530 U.S. 466 (2000)?

(i)

## 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:

CARLOS HERNANDEZ, Superintendent of Avery-Mitchell Correctional  
Institution

State of North Carolina

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	5
REASONS FOR GRANTING THE WRIT .....	8
CONCLUSION.....	23

## INDEX TO APPENDICES

APPENDIX A -- 4<sup>th</sup> CIR. C.O.A.'S PER CURIAM OPINION

APPENDIX B -- U.S.D.C., W.D.N.C. A.D. ORDER

APPENDIX C -- 4<sup>th</sup> CIR. C.O.A.'S ORDER

APPENDIX D -- 28 U.S.C. § 2241 Petition habeas corpus

APPENDIX E -- Informal Brief, Declaration of Matthew Oliver  
Alford, 4<sup>th</sup> CIR.

APPENDIX F -- Petition for Rehearing and Rehearing EN BANC

APPENDIX G -- N.C. G.S. § 15A-924

## TABLE OF AUTHORITIES CITED

CASES -- <u>Bounds v. Smith</u> , 430 U.S. 817 (1977)	PAGE NUMBER 10
<u>Johnson v. Avery</u> , 393 U.S. 483 (1969)	10
<u>Lonchar v. Thomas</u> , 517 U.S. 314 (1996)	10
<u>Stem v. Turner</u> , 370 F.2d 895 (4 <sup>th</sup> Cir. 1966)	12
<u>Evans v. Cunningham</u> , 335 F.2d 491 (4 <sup>th</sup> Cir. 1964)	12
<u>Burton v. Stewart</u> , 549 U.S. 147 (2007)	13
<u>U.S. v. Winestock</u> , 340 F.3d 200 (4 <sup>th</sup> Cir. 2003)	13
<u>Alford v. McCormac</u> , 90 N.C. 151 (1884)	13
<u>Matter of Green</u> , 313 S.E.2d 193 (N.C. App. 1984)	13
<u>State v. Phelps</u> , 65 N.C. 450 (1871)	14 (cont. next p.)
STATUTES AND RULES -- 28 U.S.C. § 2241	8, 9, 13, 14
28 U.S.C. § 2254	5, 6, 8, 10, 11, 12, 13
28 U.S.C. § 2403	5
FRCP Rule 5.1(b)	5
N.C.G.S. § 14-17	18
N.C.G.S. § 15-144	15, 18, 19
N.C.G.S. § 15-172	18, 19
N.C.G.S. § 15A-641(a)	14
N.C.G.S. § 15A-924	15
N.C.G.S. § 15A-1419	11
OTHER -- Act of 1893 (Ch. 85)	18, 19
N.C. Sess. Laws Ch. 58 (1887)	18
<u>Treatise on the law governing Indictments</u> , Joyce, Howard, C. (1908)	14, 16, 17
One chit. Pl. 233 and 235	16
Bishop, Jr., CRIM. PROC. Vol. 1 & 2 (1872)	16, 17, 19, 22
	(ivii)

cont. cases -- <u>State v. ARNOLD</u> , 107 N.C. 861 (1890)	14,15
<u>State v. McCallum</u> , 181 N.C. 584 (1921)	14
<u>State v. Finch</u> , 218 N.C. 511 (1940)	14
<u>State v. Simpson</u> , 302 N.C. 613 (1981)	14
<u>State v. Thomas</u> , 236 N.C. 454 (1952)	14,16
<u>Hewitt v. State</u> , 25 Tex. 722 (1860)	14,17
<u>Williams v. State</u> , 12 Tex. Ct. App. 395 (1882)	14,17
<u>State v. Russell</u> , 282 N.C. 240 (1972)	15,16
<u>State v. BROWN</u> , 184 N.C. App. 539 (2007)	15,16
<u>U.S. v. Howard</u> , 132 F. 325 (W.D. Tenn. 1904)	15
<u>State v. Wasden</u> , 4 N.C. 596 (1817)	15
<u>U.S. v. Thompson</u> , 28 F. Cas. 98, 6 McLean 56 (1853)	15
<u>State v. Eason et. al.</u> , 70 N.C. 88 (1874)	16
<u>U.S. v. Cook</u> , 84 U.S. 168 (1872)	16
<u>U.S. v. Cruikshank et. al.</u> , 92 U.S. 542 (1875)	16,19,20,21
<u>State v. Moses</u> , 154 N.C. App. 332 (2002)	16
<u>Descamps v. U.S.</u> , 570 U.S. (2013)	16,20
<u>Alleyne v. U.S.</u> , 570 U.S. (2013)	16,20,21
<u>Carachuri-Rosendo v. Holder</u> , 560 U.S. 563 (2010)	16
<u>U.S. v. Simmons</u> , 649 F.3d 237 (4 <sup>th</sup> Cir. 2011)	16
<u>Huntsman v. State</u> , 12 Tex. App. 619 (1882)	17
<u>NORRIS' House v. State</u> , 3 Greene 513 (Iowa S. Ct. 1852)	17
<u>Hamling v. U.S.</u> , 418 U.S. 87 (1974)	17
<u>Jones v. U.S.</u> , 526 U.S. 227 (1999)	17,20
<u>Apprendi v. N.J.</u> , 530 U.S. 466 (2000)	17,19,20,21
<u>Blakely v. Washington</u> , 542 U.S. 296 (2004) (V)	17,20 (cont. next p.)

cont. cases -- <u>Hodgson v. Vermont</u> , 168 U.S. 262 (1897)	17
<u>U.S. v. Cari</u> , 105 U.S. 611 (1882)	17
<u>U.S. v. Hess</u> , 124 U.S. 483 (1888)	17
<u>State v. Garcia</u> , N.C. S. Ct. No. 504 AD1 (2004)	17
<u>Almendarez-Torres v. U.S.</u> , 523 U.S. 224 (1998)	19, 20, 21, 22
<u>Wilkes County v. Coler</u> , 180 U.S. 506 (1901)	19, 22
<u>Shepard v. U.S.</u> , 544 U.S. 13 (2005)	21
<u>State v. Powell</u> , 254 N.C. 231 (1961)	22
<u>State v. Smith</u> , 291 N.C. 438 (1976)	22
<u>Von Moltke v. Gillies</u> , 332 U.S. 708 (1948)	22
<u>Argersinger v. Hamlin</u> , 407 U.S. 25 (1972)	22
<u>McCoy v. Louisiana</u> , 200 L. Ed. 2d 821 (2018)	22
<u>Gonzalez v. U.S.</u> , 553 U.S. 242 (2008)	22

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 A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The <sup>order</sup> ~~opinion~~ of the United States district court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

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

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 12-21-18.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 2-5-19, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution -- Art. I § 9 clause 2 -- "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Amendment ONE in Relevant part -- "... the Right of the people ... to petition the Government for a Redress of grievances."

Amendment Five in Relevant part -- "No person shall be held to answer for a capital, or otherwise infamous crime, unless on ... indictment of a grand jury; Right to counsel; 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."

Amendment Six in Relevant part -- "In all criminal prosecutions, the accused shall enjoy the Right to a speedy and public trial, by an impartial jury, ... and to be informed of the nature and cause of the accusation, and to have the assistance of counsel for his defense."

Amendment NINE -- "The enumeration in the Constitution, of certain Rights, shall not be construed to deny or disparage others retained by the people."

Amendment Fourteen in Relevant part -- "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; 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."

FRLP Rule 5.1(b) -- Certification by the court. The court must, under 28 U.S.C. 2403 certify to the appropriate attorney general that a statute has been questioned.

28 U.S.C. § 2241 (c) -- The writ of habeas corpus shall extend to a prisoner unless -- (3) He is in custody in violation of the Constitution or laws or treaties of the United States;

28 U.S.C. § 2254 (b)(1) -- An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that -- (A) the applicant has exhausted the remedies available in the courts of the state; OR -- (B)(i) there is an absence of available state corrective process; OR -- (ii) circumstances exist that render such process ineffective to protect the rights of the applicant. -- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; OR -- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

## STATEMENT OF THE CASE

- 1) ON 23 March 1993, Petitioner was allegedly indicted by the State of North Carolina, Haywood County grand jury for MURDER. (see EX. A of App. D)
- 2) ON 3 June 1993, an alleged plea arrangement was done.
- 3) ON 3 June 1993, Petitioner was sentenced to an enhanced/aggravated sentence of "Life," for 2<sup>nd</sup> degree MURDER, by Judge Forrest A. Ferrell. (see EX. S B & C of App. D)
- 4) Petitioner had NO state remedy available to him and CIRCUMSTANCES existed that rendered such process ineffective to protect his Rights, when he learnt of his facially & fatally defective indictment and the unconstitutional Statute said indictment was drawn under.
- 5) Therefore, NO state court proceedings were held, no adjudication on the merits was made, NO state court decision existed & the language of 28 U.S.C. § 2254 (b) (1) (A) and (d) (1) & (2) is mandatory, by federal law Petitioner could NOT invoke the district courts 28 U.S.C. § 2254 (b) (1) (A) and (d) (1) & (2) jurisdiction to determine a § 2254 Petition for a writ of habeas corpus.
- 6) Therefore, Petitioner submitted to the U.S. D.C. W.D. N.C. A.D. a 28 U.S.C. § 2241 Petition for a writ of habeas corpus dated 7-26-18, filed 8-1-18, challenging the jurisdiction of the trial court, the unconstitutional N.C. Gen. Stat. § 15-144, which the district court failed to certify to the State Attorney General that a state statute had been questioned as required by 28 U.S.C. § 2403 & F.R.C.P. Rule 5.1(b)-- Certification by the court, and an ineffective

assistance of counsel claim tailored to these issues. (see App. D)

7) IN AN ORDER dated, filed 8-14-18, said petition (aforesaid #6) was recharac-  
terized as a § 2254 petition and dismissed without prejudice, on procedu-  
ral grounds. (see App. B)

8) ON 8-17-18 Petitioner deposited into the prison mailbox his timely Notice  
of Appeal to the 4<sup>th</sup> Cir. Court of Appeals, filed 8-22-18.

9) Petitioner submitted his informal brief & declaration of Matthew Oliver  
Alford dated 9-12-18, filed 9-17-18, challenging the lower courts recharac-  
terization & dismissal of his § 2241 petition. (see App. E)

10) IN AN UNPUBLISHED PER CURIAM OPINION dated, filed 12-21-18 the 4<sup>th</sup> CIRCUIT  
dismissed Petitioners appeal, by applying the wrong PROCEDURAL RULES/laws to it.  
(see App. A)

11) Petitioner submitted a timely Petition for Rehearing and Rehearing En Banc  
dated 1-3-19, filed 1-7-19, challenging the dismissal of his appeal based on the  
WRONG PROCEDURAL RULES/laws. (see App. F)

12) The 4<sup>th</sup> Cir. Clerk filed the stay of mandate in response to said Petition  
(aforesaid #11) ON 1-7-19.

13) The 4<sup>th</sup> Cir. Court denied said Petition (aforesaid #11) filed 2-5-19. (see App. C)

14) Petitioner appealed to this court by missive dated 2-10-19.  
6.

15) The Mandate of the 4<sup>th</sup> Cir. Court issued, filed 2-13-19.

16) Both the district court & the 4<sup>th</sup> Cir. Court applied the wrong procedural rules/laws to the instant case, to Petitioners detriment.

## REASONS FOR GRANTING THE PETITION

### § I.

Question #1-- In the instant case, did the district court (W.D.N.C.A.D.) and the 4<sup>th</sup> Cir. C.D.A.'s violate Petitioner's Right to access a federal court, & Right to due process by applying the wrong procedural rules/laws to said case, by failing to take notice, as requested, of the unique and specific circumstances, as to why he filed a 28 U.S.C. § 2241 Petition for a writ of habeas corpus and not a § 2254 Petition? The need for this court to decide this question(s) is of the upmost importance to not only the Petitioner but to others similarly situated and to the public as a whole.

- 1) Petitioner incorporates by reference as if fully set forth herein, his 28 U.S.C. § 2241 habeas petition, Informal Brief, Declaration of Matthew Oliver Alford, & Petition for Rehearing and Rehearing En Banc. (See App's D,E,F)
- 2) A petition for a writ of habeas corpus under 28 U.S.C. § 2241 is a request for the federal court to MAKE a decision regarding Petitioner's federal claims.
- 3) A petition for a writ of habeas corpus under 28 U.S.C. § 2254 is a request for the federal court to REVIEW a state courts decisions regarding Petitioner's federal claims.
- 4) Congress's intent pursuant to the mandatory language of 28 U.S.C. § 2241 is for a federal court to make a decision concerning the federal claims submitted by the Petitioner to the federal court.

5) Congress's intent pursuant to the mandatory language of 28 U.S.C. § 2254 is for a federal court, (once the state court(s) has exercised its chance to address the petitioner's federal claims), to review the state courts decision concerning those federal claims submitted by the petitioner.

6) To interpret these two codes in any other way would deny a person in state custody his/her right to challenge the legality of the states detention of him/her. To have a federal court MAKE a decision, not REVIEW a state courts decision.

7) The district court & the 4<sup>th</sup> Cir. C.O.A.'s violated the unambiguous mandatory language of 28 U.S.C. §§ 2241, 42, & 43 & Congress's intent for a person in state custody & petitioner's right under the 1<sup>st</sup> Amend. to Access a federal court for a decision by said federal court on his federal claims.

8) Congress mandated by code a specific process or procedure that the federal courts are to go by, depending upon which one of the codes authority is invoked. A habeas corpus petition submitted, under 28 U.S.C. § 2241 has a specific process or procedure, § 2243, it has to go by; Under 28 U.S.C. § 2254 it has a different specific process or procedure, Rule 4 of the rules governing § 2254 cases, it has to go by.

9) The district court & the 4<sup>th</sup> Cir. C.O.A.'s failure to obey the mandate of congress as set forth in 28 U.S.C. § 2241, 42, & 43 violated petitioner's right to due process under the 5<sup>th</sup> & 14<sup>th</sup> Amendment, U.S. CONST.

10) Congress mandated by code, 28 U.S.C. §§ 2241, 42, & 43, that a person in state custody has the right to (1) Petition a federal court & (2) for said federal court

to make a decision concerning said persons federal claims. (see also ART. I § 9,  
1<sup>st</sup> Amend., 5<sup>th</sup> Amend., 9<sup>th</sup> Amend., & 14<sup>th</sup> Amend., U.S. Const.)

11) Petitioner exercised aforesaid (#) Right by submitting a Petition for a writ of habeas corpus, under 28 U.S.C. § 2241, dated 7-26-18, filed 8-1-18, to the U.S.D.C.W. D.N.C.A.D.:

12) The Right of access to the Courts is a substantive Right retained by prisoners. The U.S. Const. guarantees prisoners the Right to adequate, effective, & meaningful access to the Courts. This Right covers all courts, state & federal. (Bounds v. Smith, 430 U.S. 817 (1977); Johnson v. Avery, 393 U.S. 483 (1969))

13) The district court & the 4<sup>th</sup> Cir. C.D.A.'s dismissals subjected Petitioner to the cruel and unusual punishment of being denied the protections of the Great Writ entirely which violated his 8<sup>th</sup> Amend. Right to be free from cruel and unusual punishments. (Lonchar v. Thomas, 517 U.S. 314 (1996))

14) The district court & the 4<sup>th</sup> Cir. C.D.A.'s actions denied Petitioner his Right to have his Petition reviewed under the correct standard of review, which violated his 1<sup>st</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, & 14<sup>th</sup> Amend. Rights, to his detriment.

## § II

Question # -- Does the U.S. Congress mandate, as set forth in 28 U.S.C. § 2254(b)(1)(B)(i) & (ii) prohibit the Petitioner from invoking the jurisdictional provisions of 28 U.S.C. § 2254 (b)(1)(A) & (d)(1) & (2)? The need for this Court to decide this Question(s) is of the upmost importance to not only the Petitioner but to others similarly situated and to the public as a whole.

1) Petitioner incorporates by reference as if fully set forth herein aforesaid § I.

2) Pursuant to its mandatory language, A § 2254 Petition can only be granted if -- (1) the applicant has exhausted the remedies available in the courts of the state, (2) the claim was adjudicated on the merits in state court proceedings, and (3) said adjudication (a) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the U.S.; OR (b) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. (See 28 U.S.C. § 2254)

(b) (1)(A) & (d) (1) & (2) Thus, by U.S. Congress mandate both of these said provisions must be complied with in order to invoke the Courts § 2254 jurisdiction.

3) In contrast to the aforesaid (#2) mandatory provisions of § 2254 is another U.S. Congress mandate, the exceptions to the exhaustion requirement -- § 2254 (b)(1)(B)(i) there is an absence of available state corrective process, or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant. Thus, when either one of these exceptions is invoked, both the petitioner and the court are prohibited, indeed are commanded by said mandate, from invoking the aforesaid (#2) § 2254 jurisdictional provisions.

4) In the instant case, petitioner is prohibited by N.C. G.S. § 15A-1419 from presenting his federal constitutional claims to a state court. The 4<sup>th</sup> Cir. Court addressed this issue and held that this does not bar me from seeking federal

habeas corpus relief. (see stem v. Turner, 370 F.2d 895 (4<sup>th</sup> Cir. 1966))

5) In the instant case, petitioner would be raising the exact constitutional issues to the state supreme court that fellow prisoners had already litigated and lost, therefore state remedies are ineffective to protect his rights. The 4<sup>th</sup> Cir. Court addressed this issue and held that petitioners did not need to raise these issues again in state post-conviction proceedings. (see Evans v. Cunningham, 335 F.2d 491 (4<sup>th</sup> Cir. 1964))

6) In the instant case, petitioner is prohibited from exhausting state remedies due to unavailable and ineffective state remedies, consequently he meets all requirements of both exceptions to the exhaustion requirement of § 2254, as a direct result of the prohibition.

7) In the instant case, Due to the aforesaid (#'s 4-6) prohibitions, no state court proceeding was held, no adjudication on the merits was made, therefore petitioner cannot comply with the aforesaid (#2) mandatory language of § 2254 (b) (1)(A) and (d) (1) & (2). As no state court decision exists petitioner cannot invoke the district courts jurisdiction to determine a 28 U.S.C. § 2254 petition for a writ of habeas corpus.

8) Jurisdiction is the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it. A court cannot undertake to adjudicate a controversy on its own motion; before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question. For code created causes of action, a federal courts subject-matter jurisdiction over the action does not fully rest unless the action

is properly initiated. § 2241 & § 2254 proceedings are code created causes of action by the U.S. Congress who devised separate procedures for determining each and granted federal courts with subject Matter jurisdiction to conduct these determinations pursuant to specific code procedures set forth in each.

(See 28 U.S.C. §§ 2241, 42, & 43; and 28 U.S.C. § 2254 & the Rules governing § 2254 cases in the U.S.D.C.;) Therefore, before a federal court has jurisdiction over a § 2241 or a § 2254 proceeding, the § 2241 or § 2254 proceeding must be properly initiated under each one's specific code procedures as mandated by the U.S. Congress.

9) This court, the 4<sup>th</sup> Cir. Court of Appeals, the N.C. S. Ct., & the N.C.C.O.A.'s all hold that the failure to make the appropriate application/Motion/Petition invoking the judicial power of the court deprives the court of jurisdiction to determine the matter before it. (Burton v. Stewart, 549 U.S. 147 (2007); U.S. v. Winestock, 340 F.3d 200 (4<sup>th</sup> Cir. 2003); Alford v. McCormac, 90 N.C. 151 (1884); Matter of Green, 313 S.E.2d 193 (N.C. Ct. App. 1984);)

10) By U.S. Congress mandate, as set forth in federal code, & the holdings of this court (& others), Petitioner cannot file a § 2254 Petition. That only leaves a § 2241 Petition, OR a common-law Petition, (ART. I § 9 & Amend. 9 U.S. const.). I did not give up any of my Rights under the common-law, and those Rights are some of the Rights that are retained under the 9<sup>th</sup> Amend., U.S. const..

### § III

Question #3 -- Did the state of North Carolina, when it failed to allege the material averment, Matthew Oliver Alford (Petitioner's Name) in the body of the indictment violate Petitioner's Right to indictment by a grand jury, Right 13.

to due process, & right to be informed of the nature and cause of the accusation against him? The need for this court to decide this question(s) is of the upmost importance to not only the petitioner but to others similarly situated and to the public as a whole.

1) Petitioner incorporates by reference as if fully set forth herein, his 28 U.S.C. § 2241 habeas petition, Informal Brief, Declaration of Matthew Oliver Alford, & Petition for Rehearing and Rehearing En Banc. (App. S D, E, F)

2) A indictment is the written accusation, on oath of a grand jury, accusing a person therein Named of some act or omission which, by law, is declared to be an offense. (State v. Phelps, 65 N.C. 450 (1871) & authority cited; State v. Arnold, 107 N.C. 861 (1890) & authority cited; State v. McCollum, 181 N.C. 584 (1921) & authority cited; State v. Finch, 218 N.C. 511 (1940) & authority cited; State v. Simpson, 302 N.C. 613 (1981) & authority cited; State v. Thomas, 236 N.C. 454 (1952) & authority cited; Treatise on the Law Governing Indictments, Joyce, Howard, C., (1908) & authority cited; ART. 32 N.C.G.S. § 15A-641(a); Hewitt v. State, 25 Tex. 722 (1860) & authority cited; Williams v. State, 12 Tex. Ct. App. 395 (1882) & authority cited;)

3) The name of the accused is a material averment of the crime(s) charged, and said name, when known, must be alleged in the body of the indictment(s); and the omission of said name is a fatal and incurable defect; and any judgments must be arrested. (State v. Phelps, *supra*; State v. Arnold, *supra*; State v. McCollum, *supra*; State v. Finch, *supra*; State v. Simpson, *supra*; pp. 230-31 § 213, pp. 235-36 § 218, Joyce, *supra*; Hewitt v. State, *supra*; Williams v. State, *supra*;

4) It is well-settled law, both state & federal, that referencing is count to count ONLY. (State v. Russell, 282 N.C. 240 (1972) & authority cited; State v. Brown, 184 N.C. App. 539 (2007) & authority cited; U.S. v. Howard, 132 F. 325 (W.D. Tenn. 1904) & authority cited; N.C.G.S. § 15A-924 (a)(2);)

5) It is well-settled law, both state & federal, that the caption and commencement constitute a part of the record of a criminal proceeding but are not technically or substantially a part of the indictments themselves and have no influence over that which the grand jury have found; and neither may be incorporated into an indictment; they not being a part of it, but only an outside record relating to it. State v. Wasden, 4 N.C. 596 (1817) & authority cited; State v. Arnold, *supra*; U.S. v. Howard, *supra*; U.S. v. Thompson, 28 F.Cas. 98, 6 McLean 56 (1853) & authority cited;)

6) N.C.G.S. § 15-144 in pertinent part -- quote "... but in the body of the indictment, after naming the person accused, ... as is now usual, ..." (1887 to 2019) End quote (see Ex. E of App. D)

N.C.G.S. § 15A-924 in pertinent part -- quote "(a) A criminal pleading must contain: (1) The name ... of the defendant ... repeated in each count ..." (1973 to 2019) End quote (see App. G pp.3) (as referencing is count to count only the accused name must be alleged in one of the counts of a multiple-count indictment before said name can be expressly referenced by the other count(s).)

The mandate and intent of the N.C. General Assembly, that the accused must be named in the body of the indictment, is unambiguous.

7) The authority that allows a sufficient description, other identification and/or

Referencing from another count does NOT apply and cannot be used to supply the (any) material averment(s) of my name because (1) is allowed ONLY when the accused name is UNKNOWN, my name was known, (2) Ex. A of App. D is a single-count indictment, & (3) the district attorney failed to allege my name in the only count of Ex. A of App. D; Ex. A of App. D is facially defective; said count in Ex. A of App. D is incomplete & cannot stand alone. A person must be accused of the entire crime, (which includes any enhanced/aggravated crime(s)), by the grand jury; judgment cannot be imposed for a crime I have not been accused of committing. (State v. Eason et. al., 70 N.C. 88 (1874); One Chit. Pl. 233 and 235; One Bish § 48; pp. 230-31 §§ 213-14, pp. 232-33 § 215, pp. 235-36 § 218, p. 240 § 224, Joyce, supra; State v. Russell, supra; State v. Brown, supra; State v. Moses, 154 N.C. App. 332 (2002);)

8) A constitutionally valid indictment is the bedrock of the framework of the trial mechanism itself; all other proceedings stems from it; it is a structural Right; No criminal trial can serve its function as a vehicle for determination of guilt or innocence, & No criminal punishment will be regarded as fundamentally fair without this structural bedrock. It is both a substantive & procedural essential of the trial proceedings. Without this bedrock the court has no jurisdiction; the entire trial (plea) proceedings are null & void. U.S. Const. Amend's 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, & 14<sup>th</sup>; N.C. Const. Art. I §§ 19, 22, 23, 24; The common-law; U.S. v. Cook, 84 U.S. 168 (1872) & authority cited; U.S. v. Cruikshank et. al., 92 U.S. 542 (1875) & authority cited; Descamps v. U.S., 570 U.S. \_\_\_\_ (2013) (No. 11-9540) & authority cited; Alleyne v. U.S., 570 U.S. \_\_\_\_ (2013) (No. 11-9335) & authority cited; Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) & authority cited; U.S. v. Simmons, 649 F.3d 237 (4<sup>th</sup> Cir. 2011) (en Remand from U.S. S. Ct.), (citing Holder, supra), & authority cited; State v. Thomas, 16.

Supra; Hewitt v. State, supra; Huntsman v. State, 12 Tex. App. 619 (1882); Norris' House v. State, 3 Greene 513 (Iowa S. Ct. 1852);

9) Pursuant to the common-law and the U.S. Const.'s, 5<sup>th</sup> & 14<sup>th</sup> Amend.'s due process clauses and the 6<sup>th</sup> Amend.'s, informed of the nature & cause of the accusation against him/her and trial by jury clauses and the 9<sup>th</sup> Amend.'s, retained clause and the 14<sup>th</sup> Amend.'s equal protection clause, the material averments set forth in § VI pp. 3-5 of App. D, are (1) essential elements of the crime(s) charged and (2) must be alleged in the body/count of the indictment and submitted to a jury & proved beyond a reasonable doubt. This also applies to a person's prior convictions, i.e. whatever affects the degree or kind of punishment to be inflicted for the offense must be specifically alleged in the indictment. (Hamling v. U.S., 418 U.S. 87 (1974); § 568-571, Bishop, Jr., Crim. Proc., Vol. 2, 2ed. (1872); Jones v. U.S., 526 U.S. 227 (1999); Apprendi v. N.J., 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004); Joyce, supra; Hewitt v. State, supra; Huntsman v. State, supra; Norris' House v. State, supra; Williams v. State, supra.)

10) In all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offense, so that he may appear in court prepared to meet every feature of the accusation against him. (Hodgeson v. Vermont, 168 U.S. 262 (1897); U.S. v. Carroll, 105 U.S. 611 (1882); U.S. v. Hess, 124 U.S. 483 (1888); State v. Garcia, N.C. S. Ct. No. 504 (A.D. (6-25-2004)) Justice

ORR's dissenting opinion;)

1) IN my case, I was not found by the grand jury under oath to be the accused of the alleged crime(s), in violation of my structural right to indictment by a grand jury, Right to due process, Right to be informed, & numerous other constitutional Rights, Federal & state, and the common-law, (my conviction & sentence was obtained & imposed in violation of these same rights), all to my detriment. This fundamental defect inherently resulted in a complete miscarriage of justice.

12) FOR these reasons the trial court lacked jurisdiction in this cause, because the indictment fails to allege, as required, in the body/contit this (all the) material averment(s) of the crime(s) charged, to my detriment, therefore my conviction and sentence are null and void.

13) IN addition to the foregoing, the trial court also lacked jurisdiction because this same afore-said authority also proves that N.C.G.S. § 15-144, 144.1, 144.2 is unconstitutional on its face, thus depriving the trial court of jurisdiction.

14) PRIOR to the Act of 1893 (chapter 85) there were NO degrees of MURDER in North Carolina. But by sections one and two of said Act (Now N.C.G.S. § 14-17) murder was divided into two degrees-- first and second. By section three it was provided that the division should not be construed to require any alteration or modification of the existing form of indictment for murder, ... . Section three is now N.C.G.S. § 15-172 (2019). "The existing form of Indictment," to which this section referred, was prescribed by N.C. Sess. Laws, Ch. 58 (1887) and is now N.C.G.S.

§ 15-144 (2019). Said Act added material averments to the crime of common-law murder (now 2<sup>nd</sup> degree murder) to make it 1<sup>st</sup> degree murder. Hence, Since the enactment of the Act of 1893 (ch. 85), N.C. G.S. § 15-144 (1887 to 2019) and 15-172 (1893 to 2019) have been & are unconstitutional. (see <sup>also</sup> Issue II, pp. 8-10 & Ex. E of App. D.)

15) All elements, including enhancing/aggravating elements must be alleged in the body/count of the indictment & submitted to a jury & proved beyond a reasonable, in order to give the court jurisdiction to impose the punishment sought to be inflicted. (See §§ 568-571 Bishop, J., Crim. Proc., Vol. 2, 2 ed. (1872) & authority cited (Ex. G of App. D); U.S. v. CRUIKSHANK et. al., 92 U.S. 542 (1875) & authority cited;)

16) The trial court lacked jurisdiction in this cause, therefore, Petitioners conviction and sentence are null and void. The Petitioners Constitutional Rights under the U.S. Const., Amend. 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 13<sup>th</sup>, & 14<sup>th</sup> and under the N.C. Const. Art. I §§ 1, 17, 18, 19, 22, 23, & 36 and under the common-law have been violated to his prejudice.

#### § IV

Question #4 -- Does this Courts holding in Almendarez-Torres v. U.S., 523 U.S. 224 (1998) violate (1) Petitioners Right to due process, Right to be informed, Right to trial by jury, & the Right to equal protection? and (2) this courts holdings in U.S. v. CRUIKSHANK et. al., 92 U.S. 542 (1875)? Wilkes County v. Coler, 180 U.S. 506 (1901)? and Apprendi v. N.J., 530 U.S. 466 (2000)? The need for this court to decide this question(s) is of the upmost importance to not only the petitioner but to others similarly situated and to the public as a whole.

1) Any fact that has to be submitted to a jury & proved beyond a reasonable doubt or admitted by the accused, including facts that raises/increases/enhances/aggravates the degree or kind of punishment sought to be inflicted for the offense are elements of said offense & must be alleged in the indictment, submitted to the jury & proved beyond a reasonable doubt, in order to give the court jurisdiction to impose the punished sought to be inflicted. (U.S. v. CRUIKSHANK et.al., 92 U.S. 542 (1875) & authority cited; Almendarez-Torres v. U.S., 523 U.S. 224 (1998) (dissenting opinion) & authority cited; Jones v. U.S., 526 U.S. 227 (1999) & authority cited; Apprendi v. N.J., 530 U.S. 466 (2000) (including Justices Scalia & Thomas's CONCURRING opinions) & authority cited; Blakely v. Washington, 542 U.S. 291 (2004) & authority cited; Descamps v. U.S., 570 U.S. \_\_\_\_ (2013) (No. 11-9540) & authority cited; Alleyne v. U.S., 570 U.S. \_\_\_\_ (2013) (No. 11-9335) & authority cited; The aforesaid "any fact" must include prior convictions; If it does not include them, it violates that persons, in the instant case mine, Right to due process, Right to be informed, & Right to equal protection. Every person accused of a crime, (state or federal), in this country has said rights, i.e. the Right to have all elements of the crime alleged in the indictment, submitted to a jury, & proved beyond a reasonable doubt, except for people who have prior convictions, said exception violates said rights. In the instant case, Petitioner received an enhanced/aggravated sentence of "Life" because it was alleged that he had prior criminal convictions that carried more than 60 days, (see Ex. C of App. D for the list of said priors, which list is incorrect); A "Life" sentence that was imposed upon the finding by the Judge of this single enhancing/aggravating incorrect element (fact) which was used in violation of Petitioner's Right to due process, Right to be informed & Right to equal protection of the law & the aforesaid holdings of this court. With said enhanced/aggravated element I received "Life".

without it I could receive NO MORE than 15 years. Thats a vast amount of difference between the two -- "Life" with a 20 year parole eligibility date, that is cut in half by the parole commission to a 10 year parole eligibility date, which was 2003; I am now in my 26 year with NO infractions since 2004 -- OR 15 years with a max out date.

2) Petitioner contends that Almendarez-Torres v. U.S., supra, was wrongly decided and cannot be reconciled with this court's reasoning before it in U.S. v. Cruikshank et. al., supra, & authority cited and after in Apprendi v. N.J., supra, & authority cited; Alleyne v. U.S., supra, & authority cited; NOR with 5<sup>th</sup> & 14<sup>th</sup> Amend's due process clauses; the 6<sup>th</sup> Amend's informed & trial by jury clauses; the 9<sup>th</sup> Amend's retained clause; the 14<sup>th</sup> Amend's equal protection clause; the common-law; All elements must be alleged in the indictment, submitted to the jury and proved beyond a reasonable doubt.

3) Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of Almendarez-Torres; Almendarez-Torres, 523 U.S. 224 (3-24-1998) has been eroded by this court's subsequent 6<sup>th</sup> Amendment jurisprudence, and a majority of the court now recognizes that Almendarez-Torres, was wrongly decided, Justice Thomas's concurring opinion in Shepard v. U.S., 544 U.S. 13 (2005). see also the dissenting opinion Almendarez-Torres, (Scalia, J. joined by Stevens, Souter, and Ginsburg, J.J.) and Justice Scalia's and Thomas's concurring opinions in Apprendi v. N.J., supra;

4) As petitioner had (have) the right to have any prior convictions alleged in the indictment, submitted to a jury & proved beyond a reasonable doubt, before

the decision was made in Almendarez-Torres, *supra*. (State v. Powell, 254 N.C. 231, 118 S.E.2d 617 (1961); State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976); §§ 568-571, Bishop, J., CRIM. PROC., Vol. 2, 2ed. (1872), EX. G of APP. D; This holding (Torres) took away that right & that violates this courts holdings in Wilkes County v. Coler, 180 U.S. 506 (1901).

5) An accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his/her informed opinion as to what plea should be entered. Effective assistance of counsel includes investigation of the law and relevant facts. Any lawyer that files any documents or gives any advice, such as advising to pled guilty or failing to advise about direct consequences, etc., without first researching such issues as jurisdiction, venue, standing, etc., and without first knowing what the law is before giving advice or taking the action(s) violates their clients 6<sup>th</sup> Amend. structural right to autonomy because in such cases, it would be impossible for the lawyers client to make any informed, intelligent, and voluntary decisions concerning the objectives of representation. (Von Moltke v. Gillies, 332 U.S. 708, 721 (1948); Argersinger v. Hamlin, 407 U.S. 25 (1972); Bounds v. Smith, 430 U.S. 817 (1977); McCoy v. Louisiana, 200 L.Ed.2d 821 (2018); Gonzalez v. U.S., 553 U.S. 242 (2008);) Petitioners 6<sup>th</sup> Amend. structural right to autonomy was violated.

(e) Petitioners constitutional Rights under the U.S. Const. Amend.s 5, 6, 8, 9, 13 & 14<sup>th</sup> and under the N.C. Const. Art. I §§ 1, 17, 18, 19, 22, 23, & 36 and under the common-law have been violated to his prejudice.

7) Petitioner, Matthew Oliver Alford, has been deprived of his basic fundamental Rights guaranteed by the common-law, and the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 13<sup>th</sup> & 14<sup>th</sup> Amendments of the U.S. Constitution and seeks relief in this court to restore those Rights. The failure to consider Petitioners claim(s) will result in a fundamental miscarriage of justice.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Matthew Oliver Alford

Date: 2<sup>nd</sup> May, 2019