No. 19-5661

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID M. ROBINSON — PETITIONER
(Your Name)

vs.

WARDEN FORT DIX FCI;
UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David M. Robinson, pro se
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QUESTIONS PRESENTED

1. WHETHER THERE EXIST A CONFLICT BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN THIS CASE AND THE UNANIMOUS DECISION OF ALL CIRCUIT COURTS OF APPEAL (INCLUDING THE THIRD CIRCUIT ITSELF) ON THE SAME ISSUE.
2. WHETHER THE EXTRAORDINARY CIRCUMSTANCES IN THIS CASE RESULT IN THE UNCONSTITUTIONAL "SUSPENSION OF THE WRIT" OF HABEAS CORPUS AND VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT WHICH ARE OF UTMOST IMPORTANCE TO ALL "PRO SE" HABEAS PETITIONERS SIMILARLY SITUATED AS WELL AS THE PUBLIC.
3. WHETHER EXTRAORDINARY CIRCUMSTANCES EXIST TO SHOW THAT THE HABEAS REMEDY UNDER 28 U.S.C. SECTION 2255 IS "INADEQUATE OR INEFFECTIVE" TO TEST THE LEGALITY OF DETENTION WHEN THERE EXIST A "FUNDAMENTAL" JURISDICTIONAL DEFECT IN THE INDICTMENT BECAUSE IT FAILS TO STATE A CRIME COUPLED WITH THE REPEATED PROCEDURAL "PLAIN ERRORS" OF THE SENTENCING DISTRICT COURT IN VIOLATION OF SUPREME COURT AUTHORITY IN CASTRO v. UNITED STATES, 540 U.S. 375, 124 S.Ct. 786 (2003)(ESPECIALLY WHEN THAT COURT WAS WITHOUT JURISDICTION TO IMPOSE A JUDGMENT OF CONVICTION AND SENTENCE).
4. WHETHER THE SECTION 2255 REMEDY WOULD BE "INADEQUATE OR INEFFECTIVE" TO TEST THE LEGALITY OF DETENTION UNDER THE AFORESAID EXTRAORDINARY CIRCUMSTANCES WHEN THESE CIRCUMSTANCES RAISE SERIOUS DUE PROCESS QUESTIONS CONCERNING CONGRESS' INTENT TO CLOSE OFF ALL AVENUES OF REDRESS IN ITS ENACTMENT OF AEDPA ESPECIALLY WHEN THE PRISONER IS PRECLUDED FROM RAISING HIS

CLAIM OF ACTUAL INNOCENCE IN A SINGLE SECTION 2255 OR 2241 MOTION--WHICH APPEARS ON THE RECORD--IN AN EFFECTIVE FASHION AT AN EARLIER TIME.

5. WHETHER THE PHRASE "INADEQUATE OR INEFFECTIVE" SHOULD BE RESTRICTED TO INCLUDE ONLY THOSE INSTANCES INVOLVING AN "INTERVENING CHANGE IN SUBSTANTIVE LAW" (MADE RETROACTIVE BY THE SUPREME COURT) WHICH MAKES CRIMINAL CONDUCT ALLEGED IN THE INDICTMENT NON-CRIMINAL AND THEREBY PRESERVING ACCESS TO THE "SAVINGS CLAUSE" IN SECTION 2255 UNDER SECTION 2241.

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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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 "E" 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 United States district court 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.

[ ] 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 May 6, 2019.

[ ] 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: June 21, 2019, and a copy of the order denying rehearing appears at Appendix "D".

[ ] 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

STATUTES AND RULES

Federal Constitution's Suspension Clause
(Art. 1, Section 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."

Fifth Amendment Due Process Clause:
" 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 or naval forces, or in the Militia, when in actual service in time of War or public danger; 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."

Eighth Amendment Cruel and Unusual Punishment Clause:
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

28 U.S.C. Section 2241(c)(3):
As Amended by the AEDPA states "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is 'inadequate or ineffective' to test the legality of his detention."
(See, 28 U.S.C. Section 2255(e)).

28 U.S.C. Section 2255:
"...a federal prisoner may file a [2255] motion at any time to 'vacate, set aside or correct [a]...[federal] sentence" upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to

impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."

Federal Rules of Civil Procedure Rule 60(b)(4):

"On motion and just terms, the court may relieve a party or its legal representatives from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; and

*(4) the judgment is void.

Federal Rules of Criminal Procedure Rule 12(b)(3)(B):

*Rule 12(b)(3)(B) has been deleted and replaced by Rule 12(b)(2) which states that "A motion that the court lacks jurisdiction may be made at any time while the case is pending."

OTHER

None.

STATEMENT OF THE CASE

In 1948, Congress adopted section 2255 of the Judicial Code. Section 2255 created a new postconviction remedy for federal prisoners analogous to--but separate from--the longstanding federal habeas corpus remedy that Congress simultaneously re-codified in section 2254. Pursuant to section 2255, a federal prisoner may file a motion AT ANY TIME to "vacate, set aside or correct [a]...[federal] sentence" upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the COURT WAS WITHOUT JURISDICTION TO IMPOSE SUCH SENTENCE, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. See, 28 U.S.C. Section 2255. (Emphasis added).

By enacting section 2255, which channels collateral attacks by federal prisoners to the sentencing court (rather than to the court in the district of confinement) so that they can be addressed more efficiently, Congress restricted (but did not eliminate) the right of federal prisoners to proceed under 28 U.S.C. section 2241(c)(3). See, United States v. Hayman, 342 U.S. 205, 210-19, 96 L.Ed. 232, 72 S.Ct. 263 (1952)(detailing the history and purpose of section 2255). Section 2255 was not intended to limit the collateral rights of federal detainees in any way. It was simply designed to serve as a convenient substitute for the traditional habeas corpus remedy. Id. at 219.

Significantly, section 2255 as originally enacted, and as amended by the AEDPA, contains an explicit exception to the general rule that a federal prisoner must use section 2255 instead

of seeking a writ of habeas corpus under section 2241:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is 'inadequate or ineffective' to test the legality of his detention." 28 U.S.C. section 2255(e).

It is on this provision that Petitioner relies. He argues that because his claim of a "fundamental" jurisdictional defect in his indictment (based on its failure to state a crime) and "judicial misconduct" (sentencing district court ignoring applicable Supreme Court law) is not based on a new rule of constitutional law or newly discovered evidence, then the AEDPA has rendered section 2255 "inadequate or ineffective" to test the legality of his detention and therefore, by the express terms of section 2255, he remains free to seek a traditional writ of habeas corpus under section 2241. See, Triestman v. United States, 124 F.3d 361 (2d Cir. 1997)(concluding that a petitioner in Triestman's extraordinary situation may seek a traditional writ of habeas corpus because section 2255 is "inadequate or ineffective" to test the legality of his detention). Consequently, the Second Circuit [and all sister circuits including the Third Circuit] is in conformity with Congress' intent not to unduly restrict the habeas-preserving provision of section 2255. The so-called "savings clause" of section 2255 has been traditionally recognized as being broadly defined so as not to raise serious constitutional concerns involving due process or a prisoner's

right to access the courts. To date, there has been no circuit which has limited the "scope or procedure" of the section 2255's "savings clause" to include only rare occasions where there might exist an "intervening change in substantive law"...even the Third Circuit's general interpretation of the phrase "inadequate or ineffective" makes it perfectly clear that "only those 'unusual circumstances' which limit the scope or procedure of the section 2255 remedy" will satisfy this phrase. See, Cradle v. United States, 290 F.3d 536 (3d Cir. 2002). Thus, the Third Circuit's denial of Petitioner's section 2241 petition conflicts with its own circuit case precedent in Cradle!

The Third Circuit has denied Petitioner's request for review under section 2241 despite the **FUNDAMENTAL, JURISDICTIONAL DEFECT** in the indictment along with the egregious procedural "plain errors" by the sentencing district court in violation of Supreme Court mandates decided in Castro v. United States, 540 U.S. 375, 124 S.Ct. 786 (2003). The **ADMITTED** Castro violation by the sentencing district court (a matter of record) and subsequent repeated violations, have prevented Petitioner from any procedural opportunity for habeas corpus relief under a single section 2255 proceeding. The only reason given by the lower Third Circuit courts is that Petitioner's case does not involve an "intervening change in substantive law" which makes him actually innocent of the criminal charges in the indictment. Thus, Petitioner's procedural due process rights have been violated, and he has been denied his constitutional right of access to the courts. (Emphasis added).

The uncontroverted fact of the matter is that Petitioner was actually innocent of the alleged charges in the indictment because his indictment failed to state a crime pursuant to Supreme Court authority in Neder v. United States, 527 U.S.1, 20, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). As a reminder, his indictment charges criminal conduct based on a scheme or artifice to defraud involving silence or "failure to disclose" material information. However, under Neder, this Honorable Court has decided that such conduct does not constitute actionable fraud under common law doctrine without an independent legal disclosure duty...only "active concealment" of material information is actionable because such conduct includes the "intent" element of the federal criminal fraud statutes demonstrated by specific conduct and not mere silence or non-disclosure. Id. Thus, these "plain errors" in violation of Castro along with the lack of subject matter jurisdiction of the sentencing district court should qualify as the required extraordinary circumstances to warrant relief under the "savings clause" of section 2255. Without access to section 2241 habeas review, Petitioner's case involves a fundamental miscarriage of justice.

This does not, of course, mean that habeas corpus is preserved whenever a federal prisoner faces a substantive or procedural barrier to section 2255 relief. If it were the case that any prisoner who is prevented from bringing a section 2255 motion could, without unusual circumstances in their case, establish that section 2255 is "inadequate or ineffective," and

therefore that he or she is entitled to petition for a writ of habeas corpus under section 2241(c)(3), then Congress would have accomplished nothing at all in its attempts--through statutes like the AEDPA--to place limits on federal collateral review. Courts have understandably refused to adopt this reading of the statute. See, e.g., Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996); McGhee v. Hanberry, 604 F.2d 9, 10 (5th Cir. 1979) ("It is well established that a prior unsuccessful section 2255 motion is insufficient, in and of itself, to show the "inadequacy or ineffectiveness" of the remedy.").

Still, "inadequate or ineffective" must mean something, or Congress would not have enacted it in 1948 and reaffirmed it in the AEDPA. See, National Union Fire Ins. Co. v. City Sav., F.S.B., 28 F.3d 376, 389 (3d Cir. 1994)("'In construing a statute we are obliged to give effect, if possible, to every word Congress used' (Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L.Ed.2d 931, 99 S.Ct. 2326 (1979)), and without good reason, we will not assume that a portion of a statute is superfluous, void or insignificant.") (citation omitted). But what, precisely, does it mean? While there have been hundreds of cases reciting this statutory provision, **COURTS HAVE YET TO ARTICULATE A SPECIFIC, EXCLUSIVE SCOPE AND MEANING (including the Third Circuit).** See, Tripati v. Henman, 843 F.2d 1160, 1163 (9th Cir. 1988)(noting that the case law "has not fully explained what constitutes an 'inadequate or ineffective' remedy"); Echavarria-Olarte v. Rardin, 1997 U.S. Dist. LEXIS 3262, No. C 97-0691, 1997 WL 135905 (N.D. Cal. Mar. 18, 1997)

(noting that "there is little guidance from any court on when section 2255 is an 'inadequate or ineffective' remedy").

In Triestman, the Second Circuit defined the phrase "inadequate or ineffective" to mean "the set of cases in which the petitioner cannot, **FOR WHATEVER REASON**, utilize section 2255, and in which the failure to allow for collateral review would raise [1997 U.S.App. LEXIS 49] serious constitutional questions." (Emphasis added). It is both taken for granted and yet profoundly sound that [the Supreme Court] must "construe a federal statute to avoid constitutional questions where such a construction is reasonably possible." See, Cheek v. United States, 498 U.S. 192, 203, 112 L.Ed.2d 617, 111 S.Ct. 604 (1991)("It is common ground that this Court, where possible, interprets congressional enactments so as to avoid raising serious constitutional questions."). In Johnson v. Robison, 415 U.S. 361, 366-67, 39 L.Ed.2d 389, 94 S.Ct.1160 (1974), the Supreme Court held that the "cardinal principle" is that courts should [1997 U.S.App. LEXIS 51] construe a statute purporting to limit federal court jurisdiction in a potentially unconstitutional way to avoid the constitutional question whenever it is "fairly possible" to do so. By construing the habeas-preserving paragraph of section 2255 to provide that habeas corpus remains available to federal prisoners when section 2255 is not available and when the failure to allow for some forum for collateral review would raise serious constitutional questions, the Court does just that. In Triestman, the Second Circuit avoided deciding whether the AEDPA would be unconstitutional if it denied Triestman a judicial forum. More generally, this particular circuit

[similar to all sister circuits including the Third Circuit in Cradle] encourages the district courts to continue to find that habeas corpus may be sought under section 2241 whenever situations arise in which a petitioner's inability to obtain collateral relief would raise serious questions as to section 2255's constitutionality.

The Petitioner argues that the Second Circuit's interpretation of the phrase "inadequate or ineffective" to test the legality of detention is the most restrained way because the cases in which serious questions as to section 2255's constitutional validity are presented will be relatively few such as in his case. This interpretation does not permit the ordinary disgruntled federal prisoner to petition for habeas corpus. Nor, however, does it keep the courts closed in cases where justice would seem to demand a forum for the prisoner's claim in so pressing a fashion as to cast doubt on the constitutionality of the law that would bar the section 2255 petition. In this regard, Petitioner respects Congress' intent to streamline collateral review and to discourage repetitive and piecemeal litigation, while at the same time give meaning to Congress' express decision (reaffirmed in the AEDPA) to preserve habeas corpus for federal prisoners in those extraordinary instances where justice demands it. See, Schlup v. Delo, 513 U.S. 298, 322, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995).

If section 2255 forecloses all judicial review in "a case in which a federal prisoner claims that, on the record, he is innocent of the crime of which he stands convicted--in unusual circumstances in which that claim could not have been presented earlier (e.g., lack of jurisdiction of the court and judicial

misconduct), it is unconstitutional to that extent. Specifically, Petitioner argues that in such a case, the AEDPA would violate both the Suspension Clause and the Due Process Clause of the Fifth Amendment. Moreover, Petitioner argues that in unusual circumstances, the continued incarceration of an innocent person violates the Eighth Amendment's prohibition of "cruel and unusual punishment", and for that reason alone, such a person must have recourse to the judicial system. See, Herrera v. Collins, 506 U.S. 390, 432 n.2, 122 L.Ed.2d 203, 113 S.Ct. 853 (1993).

Petitioner also argues that the extraordinary circumstances in his case presents an open and significant due process question. The Supreme Court has stated that a procedural limitation "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as "fundamental". See, Medina v. California, 505 U.S. 437, 445, 120 L.Ed.2d 353, 112 S.Ct. 2572 (1992). Since Petitioner cannot bring his claim of actual innocence under the newly-amended section 2255, and since any attempt by Congress to preclude all collateral review in an extraordinary situation such as in Petitioner's case raises serious questions as to the constitutional validity of the AEDPA's amendments to section 2255, then a restricted interpretation of the phrase "inadequate or ineffective" would completely negate the purpose and intent of Congress' enactment of the "savings clause" under section 2255. Consequently, under the same rationale used by the Second Circuit in Triestman, Petitioner must be entitled to bring a petition for a writ of habeas corpus pursuant to

28 U.S.C. Section 2241(c)(3).

REVIEW OF PROCEDURAL "PLAIN ERRORS" IN VIOLATION OF CASTRO

In addition to there being a fundamental, jurisdictional defect in Petitioner's indictment which fails to state a crime, and where the sentencing district court failed to have subject matter jurisdiction, that court **ADMITTED ON THE RECORD** that it violated the mandate in Castro when it erroneously recharacterized Petitioner's prior collateral motion under former FRCrimP Rule 12(b)(3)(B) [now Rule 12(b)(2)] (which attacked the jurisdictional defect in his indictment) as his "first" habeas motion under section 2255 without providing the Castro notice and warning. It was procedural "plain error" for the court to do so. See, United States v. Salemo, 91 F.3d 127 (3d Cir. 1996)(Third Circuit acknowledged the applicability and authority of the Supreme Court's decision in Castro). Salemo argued that he was denied his constitutional and statutory right of access to the court as a result of the district court's improper "re-characterization" of his prior non-section 2255 motion under Rule 33 as one filed pursuant to section 2255 without providing the Castro notice and warning. The appellate court held that because of the Castro error, Salemo **NEVER** filed a section 2255 motion; consequently, he did not need appellate authorization to file a second or successive section 2255 motion, and denied the COA request as **unnecessary.** (Emphasis added).

In the case at bar, the designation of former FRCrimP Rule 12(b)(3)(B) as Petitioner's "first" section 2255 motion was "void".

See also, United States v. Miller, 197 F.3d 644 (3d Cir. 1999). Subsequently, Petitioner filed another proper collateral motion under FRCivP Rule 60(b)(4) attacking his final judgment as being "void" because his indictment failed to state a crime under Neder. This time, the sentencing district court did provide the Castro notice and warning as well as giving him the opportunity to "agree" or "disagree" with the court's intention to recharacterize the Rule 60(b)(4) motion as his "first" section 2255 motion. In response, Petitioner timely notified the court objecting to its intention and specifically insisted that his Rule 60(b)(4) motion be treated and ruled upon **"AS FILED"**. (Emphasis added). However, the case record confirms that the court deliberately disregarded Petitioner's response (also in violation of Castro), and proceeded to "unilaterally convert" this motion as his "first" section 2255 motion. Such a conversion (without consent) is also to be "voided" as the "first" section 2255 motion in this case. Id. Subsequently, in accordance with applicable law in Miller, Petitioner timely filed his "true" section 2255 motion in 2013 in compliance with the dictates of both Castro and Salemo. This "true" section 2255 motion should have been construed as the "first" section 2255 motion and adjudicated on the merits as such. However, once again, the sentencing district court ignored the dictates of Castro and Miller, and recharacterized his "true" section 2255 motion as being "successive" and time-barred under AEDPA's one-year limitations period. These procedural "plain errors" obstructed any procedural opportunity for Petitioner to have a single section 2255 motion properly heard and adjudicated on the merits.

In conclusion, Petitioner's case involves extraordinary circumstances which entitle him to access the "savings clause" of section 2255 and file the instant petition for habeas corpus review under section 2241. Pursuant to applicable Supreme Court authority in Neder, the indictment in this case is "insufficient" and fails to state a crime under the mail and wire fraud statutes. As such, the sentencing district court lacked subject matter jurisdiction to prosecute him on "non-offenses" and his conviction and sentence are "void" from their inception. In addition, the court's own judicial misconduct (in addition to its lack of jurisdiction) involved deliberate indifference to the mandates in Castro (involving multiple procedural "plain errors"), and restricted him from filing a single habeas motion under section 2255. Thus, Petitioner has had no effective opportunity to raise his claim of actual innocence. Despite Petitioner's due diligence in seeking post-judgment review of his "void" conviction and sentence, the court's own malfeasance, coupled with the denial of his section 2241 petition, has foreclosed his right to due process to avail himself of any habeas remedy. Furthermore, due to the denial of his present habeas petition under section 2241, he has been denied a forum in which to have his claim heard. Indeed, to assume that Congress did so intend would be to imperil the constitutional validity of the AEDPA. Under these extraordinary circumstances, section 2255 has become "inadequate or ineffective" to test the legality of his detention, and the Petitioner is therefore entitled to raise his claim of actual innocence in the

lower federal courts.

WHEREFORE, the Petitioner, David M. Robinson, pro se, prays that this Honorable Court will **VACATE** the denial of his section 2241 petition based solely on jurisdictional grounds; remand this case to the Third Circiut Court of Appeals with instructions to follow its own circuit precedent in Cradle (along with all its sister circuits); to issue the writ of habeas corpus pursuant to the "savings clause" in section 2255 (i.e., 28 U.S.C. Section 2241(c)(3)) based upon the extra-ordinary circumstances confirmed by the record in this case; release Petitioner immediately from custody; and for any other and further relief deemed just and necessary in the interest of justice.

Reasons for Granting the Petition

Historically, there is little guidance from any court on when 28 U.S.C. Section 2255 is an "inadequate or ineffective" remedy to test the legality of detention. All judicial circuits (including the Third Circuit) have defined this phrase in general terms involving some extraordinary circumstances that "limit the scope or procedure" of the Section 2255 remedy to test the legality of detention. See, Cradle v. United States, 290 F.3d 536 (3d Cir. 2002). For example, the Second Circuit generally defines this phrase to mean "the set of cases in which the Petitioner cannot, **FOR WHATEVER REASON,** utilize Section 2255, and in which the failure to allow for collateral review would raise serious constitutional questions." (Emphasis added). See, Triestman v. United States, 124 F.3d 361 (2d Cir. 1997). The Third Circuit's denial of Petitioner's Section 2241 petition is based erroneously on a "restrictive" interpretation of this phrase to mean that Section 2255 is only "inadequate or ineffective" when an "intervening change in substantive law" makes the criminal conduct alleged in the indictment non-criminal. The extraordinary circumstances in Petitioner's case do not include such a restriction!

The Third Circuit's restrictive interpretation conflicts with all circuits that have addressed this issue. Moreover, as mentioned, it conflicts with its own applicable circuit precedent in Cradle!

Undoubtedly, there exist a compelling reason for this Honorable Court to exercise its discretionary jurisdiction and

supervisory power to clarify and uphold the accepted "general" interpretation of this phrase in compliance with past and present Congressional intent. Specifically, Congress has made it clear that its intent in the enactment of the AEDPA's amendments to Section 2255, by establishing the "Savings Clause" in this section, is to make habeas corpus relief available in any case where extraordinary circumstances "limit the scope or procedure of the Section 2255 remedy". This is particularly true in cases where justice demands a judicial forum to review a claim of "actual innocence".

Petitioner argues that the extraordinary circumstances in his case involve a **"FUNDAMENTAL" JURISDICTIONAL DEFECT** in his indictment (based upon its failure to state a crime pursuant to Supreme Court law in Neder v. United States, 527 U.S. 1, 20, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999)) coupled with egregious "judicial misconduct" by the sentencing district court in deliberately disregarding applicable Supreme Court mandates promulgated in Castro v. United States, 540 U.S. 375, 124 S.Ct. 786 (2003). These unusual circumstances have prevented Petitioner from having any effective review of his habeas claim of "actual innocence" in a single Section 2255 motion (without any lack of due diligence or fault of Petitioner). Moreover, the denial of Petitioner's Section 2241 petition by the Third Circuit's restrictive interpretation of "inadequate or ineffective" raises serious constitutional questions concerning whether Congress' enactment of AEDPA's amendments to Section 2255 causes the "Suspension of the Writ" and violates the Due Process Clause of the Fifth Amendment. (Emphasis added).

The Third Circuit has ignored its own circuit case precedent in Cradle and departed unreasonably from the accepted and usual "broad" interpretation of when Section 2255 becomes "inadequate or ineffective" to test the legality of detention.

It is of national importance to all pro se petitioners similarly situated as Petitioner to clarify whether the phrase "inadequate or ineffective" should be unduly restricted to mean only when there exists an "intervening change in substantive law".

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: August 2, 2019