

No. 20-5349

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.
FILED

JUN 24 2020

OFFICE OF THE CLERK

My Client(s) "In re [Daryl L. Zimmer],"
Petitioner,

vs.

My Opponent(s) Jack Kowalski, Warden,
Respondent.

On Petition for Writ of Habeas Corpus to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF HABEAS CORPUS

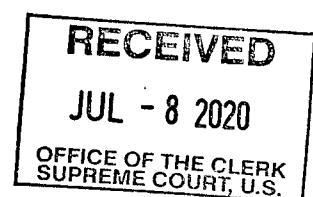
June 24, 2020

Daryl L. Zimmer
Mr. Daryl L. Zimmer Pro Se
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QUESTION(S) PRESENTED

- I. THE TRIAL COURT DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW RIGHTS WHEN THE TRIAL COURT HAVING FULL KNOWLEDGE THAT PETITIONER PLED GUILTY AS A RESULT OF A PLEA BARGAIN AGREEMENT WHICH AS PART OF THE PLEA BARGAIN THAT THERE WOULD BE NO MANDATORY MINIMUM IN SENTENCING PETITIONER AS PETITIONER'S SENTENCE WOULD BE CONSTRUCTED FROM THE SENTENCING GUIDELINES WHEN THE TRIAL COURT ELECTED TO DISREGARD THE PLEA AGREEMENT AND SENTENCE THE PETITIONER TO A MANDATORY MINIMUM TERM OF TWENTY-FIVE (25) YEARS INCARCERATION, THEREBY IN BREACH OF THE PLEA AGREEMENT.
- II. TRIAL COUNSEL FAILED TO OBJECT TO THE TRIAL COURT BREACHING THE PLEA AGREEMENT DURING THE SENTENCING OF PETITIONER WHICH DENIED PETITIONER THE EFFECTIVE ASSISTANCE OF COUNSEL.
- III. APPELLATE COUNSEL FAILED TO RAISE THE ABOVE TWO (2) APPEAL, THEREBY DENYING THE PETITIONER THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

[A]



LIST OF PARTIES

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

RELATED CASES

Zimmer v. Kowalski No. 1:19-cv-12462 United States District Court for Eastern District of Michigan judgment entered October 25, 2019.

Zimmer v. Kowalski No. 19-2265 United States Court of Appeal for the Sixth Circuit judgment entered April 01, 2020.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

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 In re Zimmer Case No. 19-2265;

The Opinion of the United States District Court appears
at Appendix B to the Petition and is

[] Reported at In re Zimmer Case No. 01:19-cv-12462

JURISDICTION

for cases from Federal Courts

The date on which the United States Court of Appeals decided my case was April 01, 2020.

No Petition for Rehearing was timely filed in Petitioner's case.

A timely Petition for Rehearing was denied by the United States Court of Appeals 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 Habeas Corpus was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 2254(b).

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 _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 2241

JURISDICTION

Petitioner case was transferred to the United States Court of Appeals for the Sixth Circuit, from the Eastern District Court of Michigan.

That order of transferred was October 25, 2019, as the habeas was a successive petition that is index to Appendix C, which the Court of Appeals denied authorization to send Petitioner habeas corpus back to the district court which left petitioner only one option and that was to file a Writ of Habeas Corpus into this United States Supreme Court under Title 28 Sec. 2241 for possible relief.

STATEMENT OF THE CASE

A. Statement of the Proceedings:

In June of 2011, Petitioner, Daryl Lavern Zimmer, fifty-five (55) years of age (first contact in Mr. Zimmer's life with police), was arrested in the early morning at his home located at 7422 Imlay City Road, Ruby, Michigan, in St. Clair County, Port Huron, Michigan, by the Port Huron City Police, along with Mr. Stephen Scharmaker who resided with Mr. Zimmer for some time.

Mr. Scharmaker was later released, but Mr. Zimmer was charged with twenty plus counts of Criminal Sexual Conduct. On Thursday August 18, 2011, Mr. Zimmer went before Judge, James P. Adair (at present he's retired), in the Circuit Court for St. Clair County, 31st. Judicial Circuit Court, in the City of Port Huron, Michigan, for a plea hearing.

At the plea hearing, Petitioner Zimmer was represented by court appointed counsel, Edward G. Marshall (P44752). The Prosecutor, Mona S. Armstrong (P51885), was also present.

The hearing started off with Judge Adair inquiring from Mr. Marshall whether a plea agreement had been made between Prosecutor Mona S. Armstrong and the Petitioner, Daryl L. Zimmer? However, Mr. Marshall informed the Court that Petitioner Zimmer had informed him that he was innocent of all charges and that he wanted a trial by jury. Mr. Zimmer expressed the same to the Court. (See pg. 3 ¶ 24-25; pg. 4, ¶ 1-24, Plea Transcript).

Even though Mr. Zimmer expressed his choice to have a jury determine his innocence or guilt at a trial, the plea court continued along the path of plea agreement. (Let it be plainly stated what the above abbreviation refer to. (Pg. means page, para ¶ means paragraph, plea trans. means Plea Transcript). (See pg. 5, ¶ 5-25; pg. 6, ¶ 1-25; pg. 7, ¶ 1-22; pg. 8, ¶ 1-25; pg. 9, ¶ 1-22, Plea Transcript).

CERTIFICATE OF COMPLIANCE

No. _____

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vs.

My Opponent(s) Jack Kowalski, Warden,
Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Habeas Corpus contains _____ words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24, 2020.

Daryl L. Zimmer
Petitioner ^{In} Pro Se

[v]

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Appendix G	District Court Order Granting Petition to Proceed In Forma Pauperis
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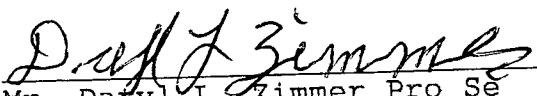
However, Mona S. Armstrong, the Prosecutor, offered Mr. Zimmer a plea agreement through his court appointed attorney, Mr. Edward Marshall, who advised Mr. Zimmer to accept the plea which consisted of: (1) no mandatory minimum, (2) his sentence would be constructed by the statutory sentencing guidelines, see pg. 12, ¶ 7-16, and (3) there was no mention concerning any possibility of the sentence being an upward departure regarding the sentence Mr. Zimmer would be given.

On September 19, 2011, Mr. Zimmer accompanied by court appointed attorney, Mr. Marshall, did appear before Judge Adair for his sentencing. Judge Adair sentenced Mr. Zimmer to a twenty-five (25) year mandatory minimum sentence, in violation of the guidelines, which was supposed to be used in constructing a sentence for Mr. Zimmer, which was a key part of Mr. Zimmer's plea agreement, part of which gave him a safe haven from being given a mandatory minimum sentence. Thus, the sentencing court breached the plea agreement entered into by Mr. Zimmer and the Prosecutor, where the 25 year minimum term it imposed was the very factor as to why he agreed to plea guilty, to avoid it.

With no objections from his court appointed attorney, Mr. Marshall, such failure constituted ineffective assistance of counsel. Mr. Zimmer had a Sixth Amendment right to effective counsel here, given the sentencing stage was a crucial stage of the judicial process. Adequate relief cannot be obtained in any other forum or from any other court.

There is no other appeal on this case pending in any court, State or Federal.

Respectfully submitted,



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[x]

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals used unlawful procedure in adjudicate Petitioner's second habeas petition which also contained two motions. (1) Motion for Appointment of Counsel; (2) Motion for Release on Personal Recognizance or set a fair appeal bond.

Those two (2) motions were not adjudicated by the United States Court of Appeals.

Both issues must be adjudicated or it violate Petitioner's "Due Process."

This case must be remanded back to the United States Court of Appeals to adjudicate the above two (2) motions.

No. _____

IN THE
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"In re [Daryl L. Zimmer],"

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BRIEF IN SUPPORT

1. THE TRIAL COURT DENIED PETITIONER "DUE PROCESS" AND EQUAL PROTECTION OF THE LAW RIGHTS WHEN THE TRIAL COURT HAVING FULL KNOWLEDGE THAT PETITIONER PLEAD GUILTY AS A RESULT OF A PLEA BARGAIN WHICH AS PART OF THE PLEA BARGAIN THAT THERE WOULD BE NO MANDATORY MINIMUM IN SENTENCING PETITIONER AS PETITIONER SENTENCE WOULD BE CONSTRUCTED FROM THE SENTENCING GUIDELINES WHEN THE TRIAL COURT SELECTED TO DISREGARD THE PLEA AGREEMENT AND SENTENCED PETITIONER TO A MANDATORY MINIMUM OF TWENTY-FIVE (25) YEARS INCARCERATION. THE COURT BREACHED THE PLEA AGREEMENT AND VIOLATED THE Ex Post Facto CLAUSE OF THE UNITED STATES CONSTITUTION

Petitioner Answer's "Yes"

1.

When Petitioner received a twenty-five (25) years minimum sentence on September 19, 2011 by the Circuit Court for the County of St. Clair 31st Judicial Circuit Court in the present of court-appointed counsel Mr. Edward G. Marshall (P44752). Judge James P. Adair after Judge Adair was given in detail the contents of the plea agreement by Ms. Mona S. Armstrong assistant prosecutor. (Pg. 12, para 25, pg. 13, para 1-7, plea transcript) Also Mr. Marshall, defense counsel, explained to Judge Adair, his understanding of the plea agreement which Mr. Marshall fully explained which coordinates with prosecutor Armstrong, the plea eliminated the mandatory minimum. Petitioner sentence would be constructed by the sentencing guidelines. (Pg. 13, para 7-16, plea transcript). However, when Judge Adair sentenced Petition on Monday the 19, 2011, to a 25 years mandatory minimum which most definitely violated the plea agreement thereby breaching the plea bargain. In Santobello v. New York, 404 U.S. 257 at HN6; when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Under summary of page 4, Santobello, supra on certiorari, the United States Supreme Court vacated the judgment and remanded the case. In an opinion by Burger, ch. J., was held (1) in expressing the unanimous view of the court, that the disposition of criminal charges by agreement between the prosecutor and the accused - which was an essential component of the administration of justice, to be encouraged when properly administered - must be attended by safeguards, that when a guilty plea rested in significant degree on a promise of the prosecutor, so that it could be said to be part of the inducement, such promise must be fulfilled, ... The trial court breached the plea agreement when it sentenced Petitioner to a twenty-five (25) years minimum, it denied Petitioner "Due Process" right. (See People v. Nixten, 183 Mich. App. 95 HN !) as well as it violated the ex post facto law of the United States Constitution. (See Peugh v. United States.,

556 U.S. 129, HN 1. Plea bargains are the same as a contract which operate the same way HN7, Puckett supra. When the prosecution breaches its promise with respect to an executed plea agreement the defense pleads guilty on a false premise, and his conviction cannot stand. HN9; L. E. HN8, 9. Puckett supra.

Petitioner Zimmer is entitled to be sentence by the guidelines with no upper departure. Kernan v. Cuero, 138 S.Ct. 4 HN2.

2. TRIAL COUNSEL FAILED TO OBJECT TO THE TRIAL COURT BREACHING THE PLEA AGREEMENT DURING THE SENTENCING OF PETITIONER WHICH DENIED PETITIONER THE EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner answers "Yes."

When Judge Adair sentence Petitioner Zimmer to a twenty-five (25) minimum, he gave Petitioner a mandatory minimum sentence which violated the plea agreement as well as violated the ex post factor of the (U.S. Const. 1, § 9 cl. 3; U.S. Const. Art. 1, Sec. 10) United States Const. Peugh v. United States, 569 U.S. 530, at no time did defense counsel form a objection to the trial court breaching the plea agreement in order to preserve the issues. If he fails to do so in a timely manner, his claim for relief from the error is forfeited. HN2; HN3, Puckett, supra. The most said and unjust thing pertaining to Petitioner Zimmer is the fact that Mr. Zimmer was born with a learning disability. He only has a third to forth grade education, his comprehension abilities concerning the judgment system is almost, (on a scale from one to ten) 3 which is why he had to continue to talk to court-appointed counsel Mr. Marshall because he was unable to understand the procedure of the judicial. This was Mr. Zimmer first time ever having any problem with the law. Mr. Zimmer was fifty-five (55) year of age at the date of his arrest June of 2011, by the Port Huron City Police. Petitioner was and still is ignorance of the law which is no reason for Mr. Marshall to

misrepresent Petition and not protect Petitioner's rights. In Zinermon v. Burch, 110 S. Ct. 975 HN6. Did understand how people such as Petitioner Zimmer who is ignorance of the law (which is the average American) is treated: What is unconstitutional is the deprivation of such an interest without due process of law. (Life, Liberty or Property).

The reason why Mr. Marshall was appointed as defense counsel for Petitioner was to protect Petitioner legal and constitutional rights. Petitioner plead not guilty and informed the plea court he wanted a trial as well as he also informed defense counsel. (Pg. 4, ¶ 18-24, plea transcript). However, the court and prosecutor continued to speaking on a plea. (Pg. 5, ¶ 5-25, pg. 6, ¶ 1-25, pg. 7, ¶ 1-25, plea transcript) In McCoy v. Louisiana, 138 S.Ct. 1500, this Court holds that a defendant has the right to insist that counsel refrain from admitting guilty, even when counsel's experience - based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. HN 1.

This Petitioner plead guilty to avoid the mandatory minimum, which was part of the plea agreement, "no mandatory minimum." In People v. Nixten, 183 Mich. App. 95. HN1 Breach of Plea Agreement. A trial court is not bound by any sentencing agreement negotiated between a defendant and the prosecutor. However, once a trial court accepts a plea which was induced by such an agreement, the terms of that agreement must be fulfilled.

Never-the-less Petitioner defense counsel failed to adhere to Petitioner's decision to stand trial by jury. Once Petitioner Zimmer expressed his decision to stand trial which was his right (SEE HN2, HN3, HN5, McCoy, supra) all other activities should have ceased and a date set to select a jury. That did not happen, the plea subject dominated the atmosphere.

Guaranteeing a defendant the right to have the assistance of counsel for his/her defense, the Sixth Amendment so demands. To demonstrate Mr. Marshall, defense counsel ineffective assistance, the counsel standard for an ineffective assistance of counsel

claim is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668; 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); Lema v. United States, 987 F.2d 48 (1st Cir. to succeed in a claim of ineffective assistance of counsel, Petitioner must show both incompetence and prejudice.

1. Defense counsel failed to conduct an investigation into Petitioner's case and there is no way he was prepared to conduct a jury trial, which most definitely prejudice Petitioner as Petitioner at that point was denied any possible chance of having effective and ready defense counsel.

2. By defense counsel not objecting at sentencing of the court breaching the plea agreement and the mandatory minimum sentence of twenty-five (25) years, violated the ex post factor of the U.S. Const. without any proper objections from defense counsel.

Mr. Marshall defense counsel most definitely rendered Petitioner ineffective assistance of counsel. Mr. Zimmer sentence cannot stand and Mr. Zimmer must be resentenced, for there is no reasonable explanation as to why defense counsel did not make proper objections to reserve the issues for appellate review. It is a reasonable probability that, but for counsel's unprofessional errors, the result of the sentencing of Petitioner would have been different. Argencourt v. United States, 78 F.3d 14 (1st Cir. 1996); Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464; 91 L.Ed.2d 144 (1986); Lockhart v. Fertwell, 506 U.S. 364, 113 S. Ct. 838, 122 L.Ed.2d 180 (1993).

3. Appellate Counsel Failed To Raise The above Two (2) Issues on Appeal, Thereby Denied Petitioner Effective Assistance of Appellate Counsel.

Petitioner Answers "Yes"

The purpose to have effective assistance of counsel on appeal, is the appellate counsel must raise all meritorious issues and in order to claim any meritorious claim appellate counsel must read the trial transcript as well as sentencing record to know what occurred in the process at the trial level. Petitioner was granted an appellate counsel on Petitioner's first appeal. However, Petitioner court appointed appellate counsel Susan Welch was appointed to represent Petitioner Zimmer on his first appeal of right. However, attorney Welch failed to raise the issues of breaching the plea agreement and violating the ex post facto law. Mapes v. Tate, 388 F.3d 187 HN2: A defendant is entitled to the effective assistance of counsel in his first appeal of right. Appellate counsel's performance is judged under the same standard for evaluating trial counsel's performance found in Strickland. To establish ineffective assistance of counsel, it must be shown that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the trial unfair and the result unreliable.

The scrutiny of counsel's performance is highly deferential and counsel is strongly presumed to have rendered adequate assistance and make all significant decisions in the exercise of reasonable professional judgment which is untrue in the instant case and there is no way counsel can claim that by appellate counsel failing to claim the errors of trial counsel failing to object at Petitioner sentencing of the sentencing court breaching the plea agreement by sentencing Petitioner to a mandatory minimum which is twenty-five (25) years; and violating the ex post facto law, is appellate strategy. It also can't be denied that appellate counsel negligence most definitely did prejudice Petitioner Zimmer. With respect to prejudice in the context of ineffective assistance of appellate counsel, a defendant must show a reasonable probability that, but for his counsel's defective performance, he would have prevailed. Mapes, *supra*, HN1, 111.

Mapes argues that he did not receive the effective assistance of appellate counsel because his appellate counsel failed to raise the following three issues on appeal: (1) the Eddings claim; (2) the acquittal-first claim and (3) the unanimity (1) that these issues were significant and obvious and (2) that appellate counsel did not have a strategy in omitting these issues from his direct appeal.

Petitioner Zimmer did not receive the effective assistance of appellate counsel because Petitioner appellate counsel failed to raise the following three issues on appeal: (1) The sentencing court breached the plea agreement and violated the Ex Post Facto law of the United States Constitution (2) Court-appointed counsel fail to make proper objections to preserve the issues, which constitute ineffective assistance of counsel at the sentencing stage of the judicial process, and (3) Court-appointed Appellate counsel failed to raise the above meritorious issues on appeal. Such conduct constituted ineffective assistance of appellate counsel.

Petitioner case should be remanded back to the United States Court of Appeals for proper adjudication. As the appeals court failed to adjudicate motion for appointment of counsel and motion for appeal bond. In Gonzalez v. United States, 722 F.3d 118, 130 (2d Cir. 2013) (with regards to the claim of ineffective assistance of counsel at sentencing. The defendant must show a reasonable probability that, but for counsel's substandard performance, he would have received a less severe sentence). (See Strickland v. Washington, 466 U.S. 668, 695, 80 L.Ed. 2d 674 (1984)).

To aid the court appellate jurisdiction it can be constitutionally exercised only insofar as writs re in aid of its appellate jurisdiction. (Ex parte Republic of Peru, 318 U.S. 578); Marbury v. Madison, 1 Cranch 137, 163 (1803).

Petitioner Zimmer did file a writ of habeas corpus into the federal district court in Detroit, Michigan, along with a motion for appointment of counsel and a motion for a appeal bond

incorporated in the writ petition.

Because the habeas was ruled a successive habeas petition. (Even though the Petition contained two (2) new issues) on October 25, 2019, the district court transferred Petitioner's complete case to the United States Court of Appeals for the Sixth Circuit. On April 01, 2020, the Court of Appeals denied Petitioner authorization to allow the district court to adjudicate Petitioner's second habeas petition, but the appeal court failed to rule on Petitioner's motion for appointment of appellate counsel and motion for appeal bond, which constitute unlawful procedure as well as it prejudiced Petitioner.

In Garza v. Idaho, 139 S.Ct. 738, see *id.*, at 96, 108 ("I understand that my plea agreement is a binding plea agreement. This means that if the district court does not impose the specific sentence as recommended by both parties, I will be allowed to withdraw my plea of guilty pursuant to Rule 11(d)(4) of the Idaho criminal rules and proceed to a jury trial"); See also *id.*, at 128, at page 29 of 30(3).

No. : _____

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vs.

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Respondent.

To Provide The Following Required Information:

1. The petition does not show how the writ will be in aid of the Court's Appellate jurisdiction.

A). What aid the court appellate jurisdiction can be constitutionally exercised only insofar as writs are in aid of its appellate jurisdiction. (Ex parte Republic of Peru, 318 U.S. 578); and Marbury v. Madison, 1 Cranch 137, 163 (1803); FTC v. Dean Foods Co., 384 U.S. 597 (1966).

All Writs Act, 28 U.S.C.S. sec. 1651(a), empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. What exceptional circumstances warrant the exercise of the Court's discretionary powers;

A.) Petitioner filed a second petition or successive petition with three (3) new issues into the U.S. District Court - Eastern District of Michigan, which had to be transferred to the sixth circuit court of appeals to obtain leave to file a second or successive petition. 28 U.S.C. § 2244(q)(3)(A). In re Cline, 531 F.3d 1249, 1251 (10th Cir. 2008)(per Curiam)(district courts lack jurisdiction to decide second or successive 28 U.S.C. sec. § 2255 claims without authorization from the Court of Appeals).

If authorization is denied the successive petition is dismissed and the only option petitioner has is to file write of habeas corpus into this Supreme Court. (Extraordinary writ 28 U.S.C. § 2241).

3. Why adequate relief cannot be obtained in any other form or any other court. Rule 20.1

The court must understand that every accused is not as fortunate as Michael Flynn, who plead guilty not once but twice to lying to federal officers during and investigation, because he was allegedly afraid. petitioner was afraid when he pled guilty to a plea bargain (which was breached by the trial court at sentencing Mr. Zimmer); however, Petitioner is being held to the plea of guilty because Petitioner and thousand of other poor accused must stand before the law, because they don't have rich and powerful friends as Michael Flynn.

Therefore, the only remedy available to Mr. Zimmer, is the writ of habeas corpus he has caused to be filed in this Court.

The United States Court of Appeals had denied authorization to allow the district court to adjudicate petitioner's, second or successive habeas petition, basically because Mr. Zimmer don't appear to be innocent.

What do guilt or innocence have to do with his constitutional rights being violated?

Adequate relief cannot be obtained in any other form or from any other court, Rule 20.1 of the United States Supreme Court.

Daryl L. Zimmer
Mr. Daryl L. Zimmer, Pro Se

CONCLUSION

The Petition for a Writ of Habeas Corpus should be granted.

Respectfully submitted,

June 24, 2020

Daryl L. Zimmer
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