21-5129

No._____

ORIGINAL

In the

Supreme Court of the United States

In Re: GARY E. PEEL

On Petition for a Writ of Certiorari to the

United States Court of Appeals

for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a stand-alone (a/k/a free-standing) claim of "actual innocence" is cognizable in a *federal non-capital* criminal case.

PARTIES TO THE PROCEEDING

The parties below were (1) Gary E. Peel and (2) BARBRA ZARRICK, (substituted for JOHN M. KOECHNER), Chief United States Probation Officer for the Southern District of Illinois.

LIST OF PROCEEDINGS

1. Petition for Writ of Habeas Corpus filed in the U.S. District Court for the Southern District of Illinois, "Gary E. Peel v John M. Koechner," Case No. 17-CV—1045. Judgment entered 11-16-17. Memorandum and Order (on Motion to Reconsider) entered 7-18-18. Notice of Appeal filed 8-9-19.
2. During the lengthy pendency of the appeal, an Original Petition for Writ of Mandamus was filed in the United States Supreme Court 3-23-21 and docketed 3-29-21, Case No. 29-7597. Original Petition denied on 4-26-21
3. Notice of Appeal filed 8-9-19 in the United States Court of Appeals for the Seventh Circuit, "Gary E. Peel v Barbra Zarrick [Successor to John M. Koechner, as Chief Probation Officer for the Southern District of Illinois]." Appellate Case No. 18-2732. The pertinent orders and opinions of the District Court are reproduced at Appendices. A, B, and C.

   Judgment/decision entered 6-4-21 and Order denying Motion for Panel and/or En Banc Rehearing entered on 6-30-21 [Appendices D & E, respectively].

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Peel v Zarrick, Case No. 18-2732, (CA-7, 2021) – Not yet reported.

JURISDICTION

(With Partial Subject Matter Jurisdictional Challenge)

The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §1254(1). With regard to the four-count Indictment [Appendix-J], federal jurisdiction, in the court of first instance, was invoked pursuant to 18 U.S.C. §152(6), 18 U.S.C. §1512(c)(2), and *allegedly* 18 U.S.C. §2252A(a)(5)(B).

Subject matter jurisdictional challenge. Petitioner argues that, with regard to Counts 3 & 4 of the Indictment, charging possession of child pornography under 18 U.S.C. §2252A(a)(5)(B), there is no federal subject matter jurisdiction, because the Indictment – on its face – fails to allege a federal criminal offense, i.e. the "victim" is alleged to be an adult when the subject materials were *produced*.

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3. Fifth Amendment (Due Process - "Fair Notice", "Fair Trial",

and "Takings" Clause) 29, 31, 36, 37

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due process of law;..."

4. Fourteenth Amendment (Equal Protection Clause) 28

"No State shall ... deny to any person within its jurisdiction the equal

protection of the laws."

5. Eighth Amendment (Cruel and Unusual Punishment) 32, 33

" Excessive bail shall not be required, nor excessive fines imposed, nor

cruel and unusual punishments inflicted."

(Statutory Provisions)
(Relevant Portions)

18 U.S.C. §2252A (Possession of Child Pornography)

"(a) Any person who – (5) either –(B) knowingly possesses ...any other material that contains an image of child pornography...shall be punished....
(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a)that -

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any alleged minor or minors. 6, 13, 18,20,22-24,26-28,31

STATEMENT OF THE CASE

Petitioner was indicted in the U.S. District Court for the Southern District of Illinois (06-CR-30049) on March 22, 2006. The jurisdictional bases for the court of first instance is 18 U.S.C. §152(6), 18 U.S.C.§1512(c)(2), and 18 U.S.C. §2252A(a)(5)(B). [See APPENDIX-J]. A jury verdict of "guilty" was returned on all counts on 3-23-07. Judgment and conviction were entered on 11-19-07 with a sentence of 144 months imposed, [including conditions imposed by the Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 590, 42 U.S.C. §16901 et. seq. (2006)].

Petitioner's first direct appeal [*United States v Peel*, 595 F.3d 763 (7th Cir. 2010)] affirmed, in part, and reversed, in part, the judgment. Count 2 was dismissed as duplicitous of Count 1. Certiorari was denied. 131 S.Ct. 994. On re-sentencing, the same sentence was imposed. A second appeal was taken. On 2-6-12, the Seventh Circuit affirmed Petitioner's revised sentence. *United States v Peel*, 668 F.3d 506 (7th Cir. 2012).

On 3-29-12 Petitioner filed a §2255 Motion. (*Peel v United States*, Case No. 12-CV-275). It and a Certificate of Appealability were denied on 4-29-13. (2013 U.S. Dist. LEXIS 60865). Petitioner appealed and sought consolidation and recall of prior mandates. This was denied on 10-18-13. (Appellate Case No. 13-2124). Rehearing *en banc* was denied on 12-3-13. Certiorari was denied on 2-24-14, (188 L.Ed.2d 354). On 5-11-14 Petitioner filed a Petition for Writ of Habeas Corpus [without any constitutional challenges] in the U.S. Dist. Court for the Eastern Dist.

of Kentucky (*Peel v Sepanek*, Case No. 14-CV-77). It was procedurally denied. 2014 U.S. Dist. LEXIS 98552. The Sixth Circuit affirmed the procedural denial on 2-26-15 (Appellate Case No. 14-6005). On 4-14-15, Petitioner's Motion for rehearing *en banc* was denied. On 11-16-15, certiorari was denied (193 L.Ed.2d 411). On 10-6-15 Petitioner filed, in the Seventh Circuit, an "Emergency Motion for Immediate Release from Custody or in the Alternative for Permission to File a Second or Successive Motion for Relief Under 28 U.S.C. §2255 Based Upon Newly Discovered Evidence." On 10-16-15, this was procedurally denied because no constitutional issue was raised. A Motion to Reconsider was filed on 10-26-15 and denied on 11-2-15 (Appellate Case No. 15-3269).

On 12-4-15 Petitioner filed a "Motion to Reform Judgment and Sentence Under Rule 60(b)" with the U. S. District Court for the Southern District of Illinois (Case No. 06-CR-30049). It was procedurally denied on 5-12-16 as not filed within one year of the entry of the Amended Judgment in A Criminal Case. Petitioner filed a "Motion for Leave to File a Second or Successive Collateral Attack to Recall Mandate" with the Seventh Circuit on 3-25-16. It was denied on 4-11-16. A Petition for panel rehearing, or for rehearing *en banc*, was denied on 5-2-16 (Appellate Case No. 16-1665).

On 7-25-16 Petitioner filed a "Motion to Set Aside Amended Judgment in A Criminal Case for Fraud Upon the Court Pursuant To F.R.Civ.P. 60(d)(3)," with the U. S. District Court for the Southern District of Illinois (Case No. 06-CR-30049). This was denied on 8-15-16. An appeal was filed on 8-29-16. On 12-17-16, the

Seventh Circuit ordered the District Court Order of 8-15-16 vacated with instructions to dismiss for lack of jurisdiction and denied the "implicit request for permission to bring a successive §2255 motion..." (Appellate Case No. 16-3297). On 1-18-17, a "Petition for Original Writ of Habeas Corpus" was filed with the Supreme Court. On 4-24-17, it was summarily denied without a decision on the merits. (*In Re Gary Peel*, Supreme Court Case No., 16-8577).

On 9-28-17, Petitioner filed a Petition for Writ of Habeas Corpus in the U. S. District Court for the Southern District of Illinois. [District Court No. 17-cv-1045]. On 11-16-17, it was procedurally denied. On 12-8-17 Petitioner filed a Motion to Alter or Amend a Judgment in a Civil Case [pursuant to F.R.Civ.P. 59(e)] a/k/a Motion to Reconsider Memorandum and Order and Judgment in a Civil Case. This was denied on 7-18-18.

On 8-9-18 Petitioner filed his Notice of Appeal. [Appellate Court No. 18-2732] This habeas appeal was denied on June 4, 2021. [Appendix-D] On June 15, 2021, Petitioner filed a "Motion for Re-hearing or Re-hearing *En Banc*." Same was denied on June 30, 2021. [Appendix-E]

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gary E. Peel, *pro se,* respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered and filed on June 4, 2021 (with a Motion for Panel Rehearing and/or *En Banc* Rehearing denied on June 30, 2021). [Appendices D & E]

REASONS FOR GRANTING THE WRIT

The Supreme Court, recognizing that there is injustice in convicting an innocent person [*Schlup v Delo* 513 U.S. 298, 325 (1995)], has never resolved whether a *federally* convicted petitioner is entitled to habeas relief based on a free-standing claim of "actual innocence" in a *non-capital* case. See *McQuiggin v Perkins*, 569 U.S. 383, 392, 133 S.Ct. 1924, 1931, 185 L.Ed.2d 1019, 81 USLW 4327 (2013) and *Herrera v. Collins,* 506 U.S. 390, 404–405, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993)[1].

The "right" to overturn a verdict based on proof of actual innocence, i.e. the free-standing "actual innocence doctrine," has not been openly embraced by the U.S. Supreme Court, in either capital or non-capital cases. It has only been assumed for the sake of argument. In *DA's Office v. Osborne,* 129 S. Ct. 2308, 557 U.S. 52, 71 (2009), this Court observed that

> "As a fallback, Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of 'actual innocence.' Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, arguendo, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet. [Citations omitted.]"

Although the Supreme Court has not articulated the high standard for a free-standing actual innocence claim, assuming one exists, it has suggested that the

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[1] In dismissing *Herrera*'s claim this Court "assume[d], for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Here, in a federal prosecution, there is no state avenue available. The *Herrera* Court, at n. 126, recognized that due process requires that a defendant be afforded a full system of meaningful remedies and that if a habeas petitioner is not afforded a hearing on his claim, then due process is violated. See also Blackmun's dissent in *Herrera* (joined by Justices Stevens and Souter) in *Herrera*, at 430-431.

standard would require more convincing proof of innocence than the *gateway* standard articulated in *Schlup* which requires a movant to demonstrate that, "in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v Bell*, 547 U.S. 518, 536–37, 555, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)).

The federal appellate courts are split on this free-standing "actual innocence" debate. See APPENDIX-R [(Chart of Appellate) Court Decisions in Conflict]. Granting this writ will aid this Court's appellate jurisdiction, by establishing hierarchical *stare decisis* on this issue so as to eliminate future challenges. Some appellate court's limit relief to only those cases qualifying under §2255(e), thereby rejecting otherwise valid claims of exoneration based on "newly discovered evidence," such as DNA evidence and official misconduct.

Exceptional circumstances, here, warrant the exercise of this Court's discretionary powers because a factually and legally innocent Petitioner has been procedurally denied any opportunity for an evidentiary hearing to demonstrate his "actual innocence," and adequate relief cannot be obtained in any other form or from any other court.

This is an issue of enormous public interest, especially as to persons wrongfully convicted of federal non-capital criminal offenses. Courts, lawyers, and litigants would greatly benefit from this Court's directive and clarification. The expenditure of judicial resources would be substantially curtailed by eliminating this ongoing

debate.

Ignoring *Strickland* violations, that include the failure

i) to seek a dismissal of Counts 3 & 4 for failure to allege a federal criminal offense,

ii) to raise an *ex post facto* challenge to the charges (because the 1974 adult had been converted to a minor in 2006 to facilitate the federal criminal prosecution)

iii) to raise and give notice of the intent to assert the charging statute's affirmative defenses at 18 USC §2252A(c)(1) and (c)(2),

iv) to seek a directed verdict at the close of the government's case in chief and/or at the close of all the evidence, and

v) to tender the applicable Seventh Circuit affirmative defense jury instruction,

there remain ***four separate types*** **of "actual innocence"** ***unique*** **to this petition,** i.e.

First, under Counts 3 & 4 (charging possession of child pornography), the Indictment fails, on its face, to allege a federal criminal offense (thereby leaving the federal courts without subject matter jurisdiction).

Second, under Counts 3 & 4 (charging possession of child pornography), 100% of all evidence confirms the alleged "victim" to have been an adult

Third, under Count 1 (charging bankruptcy fraud), reliable newly discovered

evidence *available* at the time of trial *but NOT presented to the jury,*[2] confirms actual innocence, [Appendices J, M, & N] and

Fourth, as to Count 1 (charging bankruptcy fraud), reliable newly discovered evidence[3] - confirmed four (4) years *after* trial – proves that the prosecution knowingly or unwittingly utilized FALSE evidence to procure the conviction.

Because the "newly discovered evidence" consists of persuasive and binding court decisions, it would appear that the *Schlup* gateway standard of proof is exceeded.

Further, this Court should grant this Petition for Writ of Certiorari to protect the integrity and function of hierarchical (vertical) *stare decisis* (with regard to Counts 3 & 4 of the Indictment)[Appendix-J]. The Seventh Circuit's outlier refusal to follow *Ashcroft v Free Speech Coalition,* 535 U.S. 234, 239-240, 152 L.Ed.2d 403 (2002), (requiring *both* a real-life minor at the time of *production and* a criminal act of child abuse or exploitation that is integral to the photographic production process.) The refusal of the Seventh Circuit to follow Supreme Court precedent

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[2] This available (but not presented to the jury) evidence would only have disproven one of the government's three theories of criminal culpability. A complete "actual innocence" claim was therefore premature until four (4) years *after* trial when the last of the government's three theories of culpability was disproven. See footnote 2..

[3] On 12-19-11 – more than four (4) years after the trial – the Bankruptcy Court determined the value of the ex-wife's claim was $158,455.63, *not* $2,800,000 as presented to the jury.. The District Court affirmed (2013 U.S. Dist. LEXIS 19478). The Seventh Circuit, in *In re [The Debtor] Gary E. Peel,* 725 F.3d 696 (CA7, 2013) further reduced the ex-wife's claim by $12,400, bringing her total claim value to $144,055.63 not $2,800,000. This appellate decision was rendered on 8-2-13 (approximately 3 months **after the Petitioners first §2255 Motion was denied on 4-29-13,** An appellate, or other court, opinion is a "fact" and may be treated as newly discovered evidence which warrants consideration and may support a claim of collateral relief. See *Johnson v United States* 544 U.S. 295, 302, 306-308, 31, 161 L.Ed.2d 542, 551-552, 554-556, 558 (2005). Note: unlike the case at bar, J*ohnson* only involved a sentencing issue and therefor AEDPA limitation periods applied in that case.

jeopardizes hierarchical *stare decisis.* Without *stare decisis,* there is no restriction on prosecutorial abuse invited by Petitioner's conviction on these two counts.

Personal to the Petitioner is this fact, i.e. he has never enjoyed an unobstructed opportunity for an evidentiary hearing to present his free-standing "actual innocence" claims. These factual and legal "actual innocence" claims are predicated upon the following:

a) Under Counts 3 & 4 of the Indictment, charging possession of child pornography pursuant to 18 U.S.C. §2252A(a)(5)(B),

   i. the Indictment, on its face, fails to allege a federal criminal offense,

   ii. the Indictment plus all testimonial and documentary evidence confirms the "victim's" status as an *adult* at the time the subject photographs were consensually *produced* in 1974; and

   iii. the trial court took "judicial notice of the fact that in 1973 and 1974, the age of consent for sexual activity was 16," [*while simultaneously instructing the jury to disregard that very same judicially noticed fact*[4], which is the *sine qua non* of the charging statute].

b) Under Count 1 of the Indictment, [Appendix-J], charging bankruptcy fraud pursuant to 18 U.S.C §152(6), reliable newly discovered

[4] The record is void of any objection by trial counsel to the trial court's instruction to disregard this judicially noticed fact – another critical *Strickland* violation.

evidence[5] finally confirmed, on 8-2-13, four (4) years *after* trial and three months *after* Petitioner's §2255 Motion had been denied (on 4-29-13), that the conviction was procured exclusively utilizing *false* evidence.

ARGUMENT

Free-standing " actual innocence" claim"
Indictment Counts 3 & 4

The Petitioner is *factually* and *legally* innocent under Counts 3 & 4 of the Indictment - charging possession of child pornography - because 1) the Indictment, on its face, fails to allege a federal criminal offense, 2) no child was depicted, or participatory, in the *production* of the subject photographs, and 3) the *creation* or *production* of the subject photographs was not integral to conduct that itself violated any then-defined federal criminal statute.

There would appear to be no greater justification for authorizing a free-standing "actual innocence" claim than to exonerate a person who has been charged, convicted, and incarcerated for conduct that is not criminal.

Federal courts have the jurisdiction to determine whether or not they have jurisdiction. See, *Lively v. Wild Oats Markets, Inc,* 2006 WL 3425193, n.2. (2006) and *U.S. v. United Mine Workers of America* 330 U.S. 258, 290, 67 S.Ct. 677, 91 L. Ed. 884 (1947). Subject matter jurisdiction cannot be waived. See *Wellness Intern. Network, Ltd. v. Sharif,* 575 U. S. 665,135 S.Ct. 1932, 1956 (2015): *Mitchell v. Maurer,* 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934). The federal courts lack subject matter jurisdiction when the alleged wrongful conduct is insufficient to

[5] A Bankruptcy Court minute record and transcript of the related hearing [Appendices. J & M] as to one theory of culpability and the (3) three separate court decisions (see footnote 2), as to the remaining theory of culpability.

set forth a federal criminal offense. *See Buggs v. U.S.*, 153 F.3d 439, 444 (CA7, 1998); *Corcoran v. Sullivan,* 112 F.3d 836, 838 (7th Cir.1997); and *Johnson v. United States,* 805 F.2d 1284, 1288 (7th Cir.1986).

A challenge to the court's subject matter jurisdiction – including the failure of an Indictment to charge an offense - may be made at any time, including at the appellate and/or post-conviction stages. See *U.S. v. Whaley,* 830 F.2d 1469, 1476 (CA7 1987); *United States v. Mosley,* 786 F.2d 1330, 1334 (7th Cir.), *cert. denied,* —— U.S. ——, 106 S.Ct. 2919, 91 L.Ed.2d 548 (1986); and *United States v. Esposito,* 771 F.2d 283, 288 (7th Cir.1985), *cert. denied,* 475 U.S. 1011, 106 S.Ct. 1187, 89 L.Ed.2d 302 (1986).

A conviction and punishment for an act that the law does not make criminal inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief. See *Welch v United States,* 136 S.Ct. 1257, 1266, 194 L.Ed. 2d 387 (2016); *Chiro v. Summerlin,* 542 U.S. 348, 352 (2004}; *Bousley v. U.S.*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); *United States v. Lanier*, 520 U.S. 259, ····, n. 6, 117 S.Ct. 1219 1226, 137 L.Ed.2d 432 (1997); and *Davis v. United States* 417 U.S. 333, 346-347, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974).

Here, under Counts 3 & 4 of the Indictment [Appendix-J], charging possession of child pornography under 18 U.S.C. §2252A(a)(5)(B), there are two primary bases supporting a free-standing "actual innocence" claim, a jurisdictional pleading defect and evidentiary defects.

Jurisdictional pleading defect:

First, the Indictment [Appendix-J], on its face, at ¶ 1, alleges the following as a violation of 18 USC §2252A(a)(5)(B):

> "In 1974, **GARY PEEL,** took sexually explicit photographs of his then-wife's 16 year old sister, D.R. **GARY PEEL** retained those pictures until 2006."

But, in 1974, the federal age of consent was 16. Accordingly, the Indictment, on its face, alleges the victim to be an *adult* when the subject photographs were *produced* (the *sine qua non* of the charging statute). Congress first established 16 as the age of consent for sexual activity in 1889. See 20 Cong. Rec. 997, as recognized by the Supreme Court in *Williams v United States*, 327 U.S. 711, 90 L.Ed. 962 (1946). Congress' first child pornography statute was enacted in 1978 (4 years *after* the events charged in the Indictment). The Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 97-225, 92 Stat. 7 (1978) criminalized the "production", but not the "possession," of child pornography. In that Act, a minor was still defined as a person *under* the age of 16. The *federal* age of consent was first raised from 16 to 18 in 1984 when Congress enacted the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 - ten (10) years *after* the events alleged in the Indictment. By then, in 1984, the victim, here was at least 26 years of age, i.e. still an adult. Possession of child pornography was not criminalized until 1990 with the passage of the Child Protection Restoration and Penalties Enforcement Act of 1990, Pub. L. No. 101-674, Title III, 104 Stat. 4816. By then, the alleged "victim," here, was at least 30 years of age, i.e. still an adult.[6]

[6] When the Petitioner was indicted, in 2006, (the date of "possession"), the alleged "victim" was at least 46 years of age – still an adult. Never, at any relevant time from 1974 to the present has the alleged "victim," D.R. been a minor by federal definition.

Without allegations in the Indictment asserting that the "victim" was a *minor* at that time of "production," no federal criminal offense is charged. Without the allegation of a federal criminal offense, there simply is no federal subject matter jurisdiction, and the conviction can be vacated pursuant to a motion filed at any time.

Evidentiary defects:

The Indictment's subject matter jurisdictional defect was reaffirmed by the evidenced introduced at trial. Specifically, the court took judicial notice, [Appendix-F] confirming that 16 was the age of consent for sexual activity in 1974.[7]

The charging statute's affirmative defenses [18 U.S.C. §2252A(c) and (c)(2)] – not noticed or raised by trial defense counsel[8] – provide that it is a defense if the person depicted in the photographs "(1)...was an adult at the time the material was *produced*; or (2) the alleged child pornography was not *produced* using any alleged minor or minors."

Donna Rodgers testified at trial that she was born on 7-17-57 (making her at least 16, if not 17, years of age in 1974) and that she was 16 years of age when the subject photos were produced. [Appendix-K]

In *Williams v United States* 327 U.S. 711, 90 L.Ed.962 (1946), the Supreme Court held that the Assimilated Crimes Act (18 U.S.C. §13) cannot be utilized to borrow state (age of minority) statutes when there is a federally defined criminal offense See also *Lewis v United States* 523 U.S. 155, 118 S.Ct. 1135, 140 L.Ed.2d 271 (1998).

[7]Incredulously, and in apparent disregard of a) the charging statute's specific *production* date language, b) the affirmative defense language, c) the definitional language at 18 USC §2256(8), and d) the language of the applicable Seventh Circuit's jury instruction, the trial court added, without explanation to the jury, that "This is not an issue in this case." This declaration lessened the government's burden of proof (an *ex post facto* violation) and eliminated the defendant's affirmative defenses (also an *ex post facto* violation and a due process violation), thereby further tainting the convictions on Counts 3 & 4.

[8] Another *Strickland* violation.

Because there was no child pornography statute in 1974, the consensual sexual affair between two consenting adults (Petitioner and "D.R.") the production of the subject photographs was not integral to any then-defined federal criminal offense as required to support a child pornography conviction[9]. See *Ashcroft v Free Speech Coalition,* 535 U.S. 234, 239-240, 152 L.Ed.2d 403 (2002).

The Court Record is VOID of any evidence suggesting that Donna Rodgers ["D.R." in the Indictment], was a minor, by applicable federal definition, in 1974 (over 47 years ago), when she voluntarily posed in the nude, as an adult, with First Amendment freedom of expression rights.

Legal Argument

1. In *Ashcroft v Free Speech Coalition,* 535 U.S. 234, 239-240, 152 L.Ed.2d 403 (2002), this Court held unconstitutional both §2256(8)(D) [adults who look like minors language] and §2256(8)(B) [computer generated, virtual child pornography] and observed that

> "The CPPA [Child Protection Act of 1996] extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were *produced without using any real children.* The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using *adults who look like minors* or *by using computer imaging.* The new technology, according to Congress, makes it possible to create realistic images of children who do not exist" [Emphasis, by italics, supplied.]

[9] While the consensual affair was morally offensive, it wasn't a crime and therefore should not taint this legal analysis.

2. In finding the challenged statutory language unconstitutional, as overbroad, and as an abridgement of the free speech clause of the First Amendment - for *both* definitions, this *Free Speech Coalition* Court, at 241, observed that:

> "In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production."

The failure of the Seventh Circuit to follow Supreme Court precedent – in *United States v Peel*, [595 F.3d 763 (7th Cir. 2010)] - places that Court in direct conflict with Supreme Court precedent and jeopardizes hierarchical *stare decisis.*

3. On 4-30-03, in response to the Supreme Court's decision in *Ashcroft v Free Speech Coalition,* above, Congress codified and passed the affirmative defenses at 18 U.S.C. §2252A(c)(1) and (c)(2). These affirmative defenses – applicable in Petitioner's trial - provided as follows:

> "(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a)that -
> (1)(A) the alleged child pornography was <u>produced</u> using an actual person or persons engaging in sexually explicit conduct; and
> (B) each such person was an adult <u>at the time the material was produced</u>; or
> (2) the alleged child pornography was <u>not produced</u> using any alleged minor or minors." [All emphasis supplied.][10]

[10] The definitional statute, 18 U.S.C. §2256(8) [Exh. 34], provides, in relevant part, as follows:
"(8) 'child pornography' means any depiction, including any photograph...of sexually explicit conduct, where – (A) the **<u>production</u>** of such visual depiction **involves the use of a minor** engaging in sexually explicit conduct...." [All emphasis supplied.]

4. The FEDERAL JURY INSTRUCTIONS for the Seventh Circuit provide the following jury instruction with regard to the AFFIRMATIVE DEFENSE to charges under 18 U.S.C. § 2252A(a)(5)(B), to wit:

> "If the defendant proves that it is more likely than not that the alleged child pornography was *produced using actual adults at the time the material was produced,* then you should find him not guilty of possessing child pornography." [All emphasis supplied.]

5. In the absence of a real-life minor and contemporaneous criminal activity in 1974 – at the time of *production* - the photographs (their production, initial possession, and continuous possession) remain constitutionally protected free speech.

6. The Seventh Circuit's decisions at [595 F.3d 763 (7th Cir. 2010) and 668 F.3d 506 (7th Cir. 2012) are in direct conflict with this Court's precedent established in *Ashcroft v Free Speech Coalition,* 535 U.S. 234 (2002), and are inconsistent with the First Amendment, i.e. the government cannot ban non-obscene materials that do not depict actual children, (and therefore, are not intrinsically related to the sexual abuse and exploitation of children).

7. In light of the Indictment's language and the uncontroverted evidence that the subject of the photographs was a 16-year-old "adult," when the photos were *produced in 1974,*" the conviction of Petitioner on Counts 3 & 4 runs afoul of the First Amendment "Free Speech" clause, the Supreme Court's decision in *Free Speech Coalition,* and the charging statute with its

affirmative defense language at 18 U.S.C. §2255(c)(1) – eff. 4-30-03.[11] Unlike the images in *New York v Ferber,* 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), Petitioner's photographs never were, "intrinsically related to the sexual abuse or exploitation of children." And, like the images in *Free Speech Coalition*, the forty-year-old Polaroid photos that Petitioner possessed "record[ed] no crime" and "create[d] no victims by [their] production," in 1974. See 535 US. at 250. Accordingly, their continued possession cannot be banned or criminalized consistent with the First Amendment.

The U. S. Const., Fourteenth Amendment (Equal Protection Clause) is violated, with regard to Counts 3 & 4. After *Free Speech Coalition* (2002) and Congress' 2003 addition of affirmative defenses (c)(1) and (c)(2) to 18 USC §2252A, when Petitioner is the only person in the entire United States who has been federally prosecuted and incarcerated for possessing non-obscene pornographic materials depicting only an adult at the time the subject materials were *produced.* See *Adarand Constructors v Pena* 515 U.S. 200, 214, 132 L.Ed.2d 158, 174 (1995); *Bolling v Sharpe* 347 U.S. 497, 500, 98 L.Ed.2d 884, (1954); and *Hurd v Hodge* 334 U.S. 24, 35, 92 L.Ed.2d 1187

[11] In Petitioner's first direct appeal [595 F.3d 763, 769 (7th Cir. 2010)], the Seventh Circuit erroneously relied upon *United States v. Bateman,* 805 F..Supp. 1053, 1055 (D.N.H.1992) and *United States v. Porter,* 709 F.Supp. 770, 774 (E.D.Mich.1989), aff'd, 895 F.2d 1415 (6th Cir.1990). To the extent applicable here, both were impliedly overruled, *sub silencio,* in *Ashcroft v Free Speech Coalition* 535 U.S. 234 (2002)..*Bateman* and *Porter,* and their precedential value, if any, was also effectively eviscerated when Congress on 4-30-03 added the affirmative defenses, at (c)(1) and (c)(2) and simultaneously deleted §2256(8) (D) from the definitions statute, (14 and 17 years, respectively, **after** *Porter* and *Bateman* were decided).

(1948). The Equal Protection Clause, *inter alia,* prohibits the singling out of a person for different treatment, or for no rational reason. *Village of Willowbrook v Olech* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d1060 (2000). Here, the petitioner shows that his conviction for possessing child pornography violates the Equal Protection Clause in two respects. In one, he is a member of a suspect class, and in the other, he qualifies as a class of one.

The Supreme Court has held that in matters involving alleged violations of equal protection under the law, one must show that a fundamental right is at stake. See *Bolling v Sharpe* 347 U.S. 497, 499-500, 98 L.Ed.2d 884 (1954). The fundamental rights at stake here are the freedom from criminal prosecution, the failure of due process (the Fourteenth Amendment), disparate treatment (the Equal Protection Clause), freedom from *ex post facto* application of the law, and freedom of expression under the Bill of Rights.

Additionally, the Fifth Amendment "takings clause" is violated here by the criminalization of the uses and activities associated with the previously legally acquired property. See *Andrus v Allard,* 444 U.S. 51, 62 L.Ed.2d 210 (1979).

Art. I, Sec. 9, Cl. 3, the *Ex Post Facto* Clause was violated, here, by the trial court's judicial notice (Appendix-F) and the government's retroactive or retrospective alteration of the alleged "victim's" *adult* status (in 1974) to that of *minority* status (in 2006) after Congress enacted the Child Protection

Restoration and Penalties Enforcement Act of 1990. See *Calder v Bell* 1 L.Ed. 648, 3 Dall 386, 390 (1798); *Beazell v Ohio* 269 U.S. 167, 169, 70 L.Ed.216, (1925); *Collins v Youngblood* 110 S.Ct. 2715, 2718-19 (1990); and *Metrish v Lancaster* 569 U.S. ____, 133 S.Ct. 1781, 185 L.Ed.2d 988 (2013). The general rule in determining whether an *ex post facto* violation has occurred is to see if there was any crime or punishment when the act took place, and if such act was later made criminal. *Weaver v Graham* 450 U.S. 24, 30, 67 L.Ed.2d 217 (1981). This is on all fours with what happened here. In 1974, when the photographs were first produced and first *possessed*, and continuously thereafter possessed, no crime was committed. The previously legal *possession,* innocent when done in 1974, was later made criminal and served as the basis for Petitioner's prosecution and conviction on Counts 3 & 4. Even a California District Court Judge recognized this as an *ex post facto* violation. In *United States v Meyer,* 602 F. Supp. 1476 (1984) the court rejected the government's "continuing series of criminal activity" argument, found that "Minor #2 was not a minor by the Act's definition when the depictions of him were produced," i.e. it was not a crime to *produce* the subject photos in June 1983, and found that a punishment was being imposed for an act that was not punishable at the time it was committed. This California Court's *ex post facto* clause analysis mirrors the arguments here presented by Petitioner.

The Fifth Amendment "Due Process" Clause is also violated here by the fundamentally unfair utilization of non-criminal conduct and/or false evidence to procure a conviction. See *Lisenba v California* 314 U.S. 219, 2236, 86 L.Ed. 166 (1941). See also *Colorado v Connelly* 479 U.S. 157, 167, 93 L.Ed.2d 473 (1986). In *Apprendi vs New Jersey,* 530 U.S. 466, 477 (2000). this Court held that a jury must find all elements of a crime beyond a reasonable doubt in order to convict a defendant. Here, by taking judicial notice of the fact that in 1973 and 1974 the age of consent for sexual activity was 16, and then instructing the jury that "*This is not an issue in the case,*" [Appendix-F], the trial judge deprived the jury of the opportunity to make any finding as to the critical element of the crime dealing with whether or not the alleged "victim" was a minor when the subject photographs were *produced* – see the language in 18 USC §2252A [including (c)(1) and (c)(2)] and 18 USC §2256(8). It is difficult for the Petitioner to articulate a greater impingement upon his Fifth Amendment due process rights than that of a trial judge eliminating a portion of the government's burden of proof and depriving the defendant of an otherwise available statutory affirmative defense.

The Seventh Circuit's rejection of Petitioner's "grandfather clause" argument (595 F.3d at 770) invites a due process "fair notice" violation, i.e. the statute defines the age of minority as of the date of "production," yet the seventh circuit, in violation of the rules of statutory construction (see *Burgess*

v United States 553 U.S. 124, 170 L.Ed.2d 478 (2008); *Lamie v U.S. Tr.* 540 U.S. 526, 157 L.Ed.2d 1024 (2004) concluded that the statutory words didn't mean what they said, but instead the statutory word "production" really means "date of possession" [in 2006, when the alleged victim was 46 years of age]. Where is the "fair notice" to Petitioner, or the public, that the statutory words don't mean what they say? "Due process protects against judicial infringement of the 'right to fair warning' that certain conduct will give rise to criminal penalties." *Rose v Locke* 423 U.S. 48, 53, 46 L.Ed.2d 185 (1975) and *Rogers v Tennessee* 532 U.S. 451, 457, 149 L.Ed.2d 697, 706 (2001). See also, *United States v Harriss* 347 U.S. 612, 617, 98 L.Ed.2d 989, 996 (1954) and *Bouie v Columbia* 378 U.S. 351, 12 L.Ed.2d 894 (1964).

The "cruel and unusual punishment" clause of the Eighth Amendment to the Constitution would seem to be violated, by default, every time an innocent person is wrongly incarcerated.

Free-standing "actual innocence" claim
Indictment Count 1

The Petitioner is *factually* and *legally* innocent under Count 1 of the Indictment - charging bankruptcy fraud, because the government's :
a) first theory of culpability was disproven by newly discovered evidence , i.e. a bankruptcy court pleading, minute record and a transcript of the related bankruptcy court hearing that were available, but not presented to the jury, at the time of trial,
b) second theory of culpability was disproven at trial by its own witness, and
c) third, and final, theory of culpability was proven FALSE - by three separate courts, four (4) years *after the jury trial conviction* and three (3) months *after* Petitioner's §2255 Motion was denied,.

Here, the Petitioner shows that newly discovered and reliable evidence (a court pleading, a bankruptcy court minute record and a court transcript), not presented to the jury, now confirms his "actual innocence" as to Count 1 of the Indictment [Appendix-J]. Petitioner further demonstrates that constitutional violations led to his conviction on Count 1. Finally, Petitioner exposes that a fundamental miscarriage of justice exception to his previously barred claims warrants at least one full unobstructed opportunity to have his constitutional challenges addressed on their merits in an evidentiary hearing.

Here, as to Count 1, charging bankruptcy fraud, no court has conducted an evidentiary hearing to determine the merits of Petitioner's compelling newly discovered evidence.[12] The Seventh Circuit affirmed the District Court's refusal to examine Petitioner's evidence of "actual innocence" on the basis that he failed to meet the criteria required by §2255(e), the "savings clause." [Appendices D and E] Unless Petitioner is granted an evidentiary hearing, to demonstrate that his bankruptcy fraud conviction was procured *exclusively* via false evidence, his constitutionally protected due process "fair trial" and other constitutionally protected rights (including the Eighth Amendment) will be violated.

Under Count 1 (Bankruptcy Fraud), the Government presented three (3) theories of culpability, (identified in ¶ 4 of the Indictment – Appendix-J). The

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[12] See footnote 2, attorney Stanton's letter of 1-11-06 [Appendix-P], the Bankruptcy Court Minute Record Appendix-G], and the transcript of the related hearing [Appendix-H].

second of these was disproven at trial [See Appendices I & P]. The other two have now been disproven by "newly discovered evidence."

First Theory	Second Theory	Third Theory
Petitioner wrongfully attempted to compel his first wife to abandon her objection to discharge.	Petitioner opposed the taking of his second wife's deposition by his first wife's attorney.	Petitioner's bankruptcy settlement offer to his first wife was to her financial detriment[13].
Now *disproven by "newly discovered evidence."* A Bankruptcy Court minute record, and transcript of related hearing [Appendices.-K & M] – both available at the time of trial, but not introduced as evidence or presented to the jury - now proves that the ex-wife and her attorney withdrew the objection to discharge two (2) weeks ***prior*** to any alleged wrongful conduct by Petitioner.	*Disproven at trial.* The first wife's attorney, Donald Urban, admitted that Petitioner had tendered his second wife for deposition on two occasions, and that her deposition was not taken because the first wife, and her attorney, Donald Urban, refused to sign a bankruptcy court ordered limited use of information agreement as a pre-condition to the deposition's taking. [See Appendices. I & P]	Now *disproven by "newly discovered evidence."* Four years after trial, after two direct appeals and a §2255 Motion, three separate courts [See Footnote 2] finally determined that the ex-wife's $2,800,000, bankruptcy claim [Appendix-Q – presented to the jury in amount only] - was FALSE. Instead ,it was worth $144,055.63, now proving that Petitioner's offer of settlement [$500,000+]-(Appendix-O) - was not to her financial detriment].

With the government's a) first theory of bankruptcy fraud being now disproven by newly discovered evidence, i.e. a bankruptcy court minute record and a transcript of that related hearing (See Appendices J & M)[14], referencing the ex-

[13] There is no crime in offering someone *more* money or property than they are legally entitled to receive.

[14] With regard to Count 1 of the Indictment, the government alleged that the Petitioner's criminal conduct occurred on **1-20-06** [Indictment at ¶ 4] **or between 1-20-06 and 1-31-06** [Indictment at page 4, first sentence.].

wife's Complaint to Determine Dischargeability of Debts (Appendix-I); b) second theory of bankruptcy fraud having been disproven at trial by the testimony of attorney Urban (See Appendix-L) and by the newly discovered evidence of attorney Steve Stanton's letter of 1-11-06 (Appendix-P), and c) the third and final theory of bankruptcy fraud being disproven by newly discovered evidence, i.e. three separate court decisions (See Footnote 2), there remains *no basis,* under any theory of culpability, to support any bankruptcy fraud conviction.

In dismissing Petitioner's habeas petition, the District Court, citing *Kramer v Olson*, 347 F.3d 214, 218 (7th Cir. 2003) posited that an "actual innocence" claim, warranting habeas relief, is established *only*

a) when a petitioner can "admit everything charged in [the] Indictment but the conduct no longer amount[s] to a crime under the statute (as correctly understood)," [Appendix-A, p.10], and
b) when there has been "a new statutory interpretation case rather than a constitutional case," that "could not have been invoked in his first §2255 motion and that case must apply retroactively." [Appendix-A, p. 9].

In other words, the District Court rejected a free-standing "actual innocence" claim. The Seventh Circuit ratified this analysis, [Appendix-E, at p. 3]. This exclusive avenue of habeas relief [§2255(e)] warrants revisitation because it bars exoneration

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However, the **1-6-06** bankruptcy court minute record [Appendix-G], and transcript of that hearing [Appendix-H], now confirm that Petitioner's ex-wife had voluntarily withdrawn her objection to discharge [11 U.S.C. §727(a)(3) and (a)(4) – Appendix-I at ¶ 3] on **1-6-06**, two (2) full weeks ***prior*** to any alleged criminal conduct by the Petitioner.

to persons who can prove post-conviction actual innocence in the absence of an admission to a previously defined crime coupled with a new, retroactively applied, court decision. Examples of persons barred from exoneration because of this §2255(e) "savings clause" exclusive remedy include persons "actually innocent" as later proven by DNA, false confessions (e.g. the New York Central Park Five), mistaken identification, perjury, official/prosecutorial misconduct, false accusation, and other types of evidence that often prove that no crime was committed, or that the defendant was not the culpable party. See "The National Registry of Exonerations", Michigan State University, College of Law, www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-united-states-map.aspx.

Here, the jury's reliance upon the later proven *false* evidence resulted in a fundamental miscarriage of justice and rose to such an arbitrary and/or prejudicial level that it rendered the trial fundamentally unfair (depriving the Petitioner of his Fifth Amendment constitutional right to due process via a "fair trial"). No jury acting reasonably, would have found the Petitioner guilty of bankruptcy fraud had the jury been informed

a) that Petitioner's ex-wife had withdrawn her objection to discharge two full weeks prior to any alleged criminal conduct on Petitioner's part, and

b) that the ex-wife's $2,800,000 bankruptcy claim 2-1 [Appendix-Q], as presented to the jury, in amount only, was blatantly false.[15].

The Fifth Amendment "Due Process" Clause is violated here by the fundamentally unfair utilization of false evidence to procure a conviction on Count 1. See *Lisenba v California* 314 U.S. 219, 2236, 86 L.Ed. 166 (1941) and *Colorado v Connelly* 479 U.S. 157, 167, 93 L.Ed.2d 473 (1986).

The absurdity of the District Court's approach, requiring an admission of guilt, is demonstrated by the hypothetical case of a man, charged, and convicted, of a federal rape or murder (with no body being found), who is later scientifically exonerated by DNA evidence, or the discovery that the "murdered victim" was actually alive and living elsewhere under an assumed name. Under the District Court's analysis, affirmed by the Seventh Circuit, this man could not establish "actual innocence" because he could not truthfully "admit" that he had committed the rape or the murder of the living person.

Contrary to the decisions here by the District and Appellate courts, [Appendices A, B, C, D, and E], *Calderon v Thompson* 523 U.S. 538, 558-559, 118 S.Ct. 1489, 1503, 140 L.Ed.2d 728 (1998) makes clear that, in state cases, the "new rules of constitutional law made retroactive by the Supreme Court" is NOT the exclusive avenue for relief from a wrongful conviction. Instead, *Calderon* [referencing §2244(b)(2)(B)], acknowledges that a habeas petition may also be

[15] The jury was also deprived of the evidence that her filing of a false bankruptcy claim is itself a felony under 18 U.S.C. §152(4). With that additional information, the jury could well have found that the ex-wife, rather than Petitioner, was the person guilty of bankruptcy fraud.

supported, at least in state prosecutions, by [newly discovered] facts underlying the claim that establishes actual innocence by clear and convincing evidence. Denying that same benefit to a similarly prosecuted *federal* prisoner just lacks common sense because the harm and the evidence of innocence are the same. Only the venue is different.

It is this latter avenue that Petitioner pursues under Count I of the Indictment, i.e. his is a free-standing "actual innocence" claim, buttressed with *reliable* "newly discovered evidence" [a Bankruptcy Court Minute Record, a transcript of the related hearing, and the 1-11-06 letter of attorney Stanton (Exhibits J , M and P) plus the decisions of three different courts],[16] concluded four (4) years after trial and buttressed by multiple constitutional violations that have never been addressed in a merits evidentiary hearing.

Unless free-standing "actual innocence" claims are permitted in federal non-capital cases, the restrictions imposed by time, procedure, and/or the rule of retroactively applied new court decisions will continue to result in the lengthy and wrongful incarceration of actually innocent federally convicted persons.

With regard to the bankruptcy court minute record, the District Court, [Appendix-A, p.11] tacitly affirmed by the Appellate Court [Appendix-D. p.3], held that the 1-6-06 Bankruptcy Court minute record is not "newly discovered evidence" because it was "available" at the time of trial [though not utilized or presented to

[16] See footnote 2.

the jury.] This conflicts with settled case law. Even within the Seventh Circuit - that, *for habeas purposes*, all evidence not shown to the jury is "newly discovered evidence," whether or not it was "available" at the time of trial. See the Seventh Circuit's decision, in *Jones v Calloway*, 842 F.3d 454, 461-462 (CA7, 2016):

> " 'New evidence' in this [habeas] context does not mean 'newly discovered evidence'; it means evidence that was not presented at trial."

To the same effect, see the Supreme Court cases of *House v Bell* 547 U.S. 518, 537, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006); *Calderon v Thomson* 523 U.S. 538, 559, 118 S.Ct. 1489, 1503, 140 L.Ed.2d 728 (1998); *Schlup v Delo* 513 U.S. 298, 324, 130 L.Ed.2d 808, 115 S.Ct. 851, 865 (1995); and the Seventh Circuit cases of *Thomas v Williams* 822 F.3d 378, 387 (CA7, 2016); *Gladney v Pollard* 799 F.3d 889, 898-899 (CA7, 2014); and *Gomez v Jaimet* 350 F.3d 673, 679 (CA7, 2003).

Additionally, the District Court –[Appendix-A, p. 12] – affirmed by the Seventh Circuit – [Appendices-D & E] – held that:

> "...all of Peel's claims herein either were, or could have been, brought within the structured framework of §2255 or in a direct appeal and therefore cannot be properly reviewed under §2241."

This statement is belied by the following. The falsity of the ex-wife's claim was not confirmed by the Seventh Circuit until 8-2-13 (725 F.3d 696). That false claim issue could not have been presented on direct appeal, as there existed no evidentiary basis for same in the court record and the direct appeal was already decided three and a half years earlier on 2-12-10 (595 F.3d 763). And Petitioner's §2255 Motion (filed 3-29-12) was already denied on 4-21-13, more than three (3) months *prior* to the falsity of the ex-wife's claim being finally confirmed by Seventh Circuit on 8-2-

13 (725 F.3d 696). Petitioner's second attempt at §2255 relief, (filed 10-6-15) and "implied" third attempt (filed 7-25-16) were both denied. See "Statement of Case," above.

Additionally, the District Court analysis presumes that the public policy factors described in this Court's precedential opinion of *McQuiggin v Perkins* 569 U.S. 383, 185 L.Ed.2d 1019, 1025, 1331-1332 (2013) simply do not apply in federal non-capital cases. *McQuiggin* held that a state petitioner's right to pursue his claim of actual innocence exists 1) despite any conditions or restrictions imposed by AEDPA, 2) even in the absence of showing of cause for procedural default, 3) even if the relief sought is through a second or successive petition, 4) even if there is a procedural bar to the claim[17].

The §2241 "actual innocence" remedy is compelled here because it is the only remaining remedy for a wrongful federal conviction. As stated in *McQuiggin*, at 392 and 1931:

> "In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera,* 506 U.S., at 404, 113 S.Ct. 853.

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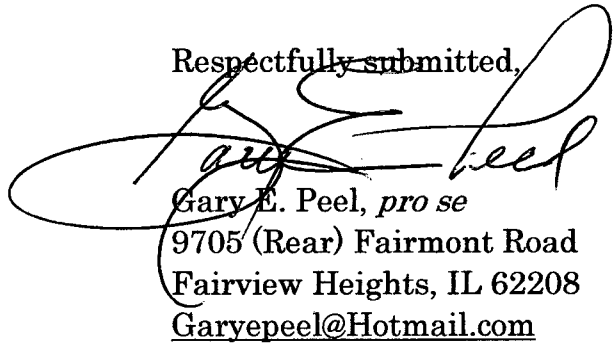
[17] In adopting the District Court's analysis, the Seventh Circuit [Appendix-D, page 3], recognized the precedential significance of *McQuiggin* in holding that procedural impediments are removed in *state* habeas cases. Notwithstanding the Seventh Circuit's recognition that public policy favors the exoneration of state petitioners armed with "compelling proof of factual innocence," that very same Court rejected the very same public policy analysis when confronting the very same compelling proof of factual innocence when presented by a *federal* habeas petitioner. This is a distinction without a valid difference and a violation of the Equal Protection clause. In one case the innocent (state) person is exonerated because he is "actually innocent," while in the other, the innocent (federal) person is **not** exonerated while possessing the exact same proof of "actually innocence."

CONCLUSION

For the foregoing reasons, this Court should 1) grant the Petition for Writ of Certiorari; 2) appoint counsel, admitted to the Supreme Court Bar, to represent the Petitioner's interests; and provide such other relief as this Court deems appropriate.

Respectfully submitted,



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APPENDIX

APPENDIX -A	*Peel v Koechner* Dist. Ct. No. 17-cv-1045-SMY Memorandum and Order (11-16-17)
APPENDIX -B	*Peel v Koechner* Dist. Ct. No. 17-cv-1045-SMY Judgment in a Civil Case (11-16-17)
APPENDIX -C	*Peel v Koechner* Dist. Ct. No. 17-cv-1045-SMY Memorandum and Order (7-18-18)
APPENDIX -D	*Peel v Zarrick* (7th Cir. Case No. 18-2732 decided 6-4-21)
APPENDIX -E	Peel v Zarrick (7th Cir. Case No. 18-2732) (Panel & *en banc* re-hearing denied on 6-30-21)
APPENDIX -F	Transcript of "Judicial Notice" in the criminal trial of *United States v Peel* [So. Dist. of IL Case No. (06-CR-30049)]
APPENDIX -G	Bankruptcy Court Minute Record of 1-6-06
APPENDIX –H	Transcript of Bankruptcy Court Hearing of 1-6-06.
APPENDIX –I	Complaint to Determine Dischargeability of Debts
APPENDIX -J	Indictment in the criminal trial of *United States v Peel* [So. Dist. of IL Case No. (06-CR-30049)]
APPENDIX -K	Partial Transcript of the testimony of Donna Rodgers ("D.R." in the Indictment) in the criminal trial of *United States v Peel* [So. Dist. of IL Case No. (06-CR-30049)]
APPENDIX -L	Partial Transcript of the testimony of Attorney Donald Urban in the criminal trial of *United States v Peel* [So. Dist. of IL Case No. (06-CR-30049)]
APPENDIX -M	Partial Transcript of the testimony of Attorney Laura Grandy in the criminal trial of *United States v Peel* [So. Dist. of IL Case No. (06-CR-30049)]
APPENDIX – N	Partial Transcript of the Closing Argument of Asst. U. S. Attorney Kevin Burke in the criminal trial of *United States v Peel* [So. Dist. of IL Case No. (06-CR-30049)]

APPENDIX - O	Partial Transcript of the testimony of Deborah J. Peel in the criminal trial of *United States v Peel* [So. Dist. of IL [Case No. (06-CR-30049)]
APPENDIX – P	Attorney Steve Stanton's letter of 1-11-06 to Attorneys Donald Urban and Donald Samson
APPENDIX - Q	Deborah J. Peel's (ex-wife's) Bankruptcy Claim 2-1
APPENDIX – R	[Chart of Appellate] Court Decisions in Conflict

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY E. PEEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 17-cv-1045-SMY**
	)	
JOHN M. KOECHNER,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

YANDLE, District Judge:

Petitioner Gary Peel, who is currently serving a 3-year term of supervised release after having served the required period of incarceration pursuant to his 144-month sentence, brings this habeas corpus action pursuant to 28 U.S.C. § 2241, challenging the constitutionality of his conviction and sentence.

This case is now before the Court for a preliminary review of the Petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in United States District Courts. Rule 4 provides that upon preliminary consideration by the district court judge, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." Additionally, under Rule 1(b), the district court is authorized to apply the rules to other habeas corpus cases, such as this action under 28 U.S.C. § 2241. After carefully reviewing the Petition, this Court concludes that this action is subject to dismissal.

APPENDIX - A

Procedural Background

Peel was convicted by a jury in this Court of bankruptcy fraud, obstruction of justice and possession of child pornography. He was sentenced to a term of 144 months incarceration on November 19, 2007. *United States v. Peel*, Case No. 06-cr-30049-WDS. The facts underlying his conviction were summarized by the United States Court of Appeals for the Seventh Circuit as follows:

> The events giving rise to this case go back a long way. In 1967 the defendant married. Seven years later he began an affair with his wife's 16-year-old sister. In the course of the affair, which lasted several months, he took nude photographs of her . . . . In response to her later request for the pictures, he gave her some of them . . . and, without telling her, retained others in a file in his office.
>
> In June 2003 the Peels divorced, and agreed to a marital settlement. The following year Peel filed suit in an Illinois state court to vacate the settlement. The year after that he filed for bankruptcy and asked the bankruptcy court to discharge the financial obligations to his ex-wife that the settlement agreement had imposed. She opposed the discharge and filed a claim for the money that he owed her under the settlement. . . . [H]is debt to her under the settlement probably was not dischargeable in bankruptcy under the Bankruptcy Code as it then read. [citations omitted] (Under the current Code, it almost certainly would not be dischargeable. [citations omitted].) So he had to persuade her to drop the claim.
>
> Negotiations looking to compromise it were predictably acrimonious and in the course of them the defendant told her about the nude photographs of her sister and said that "these would be . . . an item that would likely get out into the public if we didn't stop this escalating battle of putting things in the newspaper." He backed up his threat by placing photocopies of the photographs in her mailbox. She complained to the police and later to federal authorities, and at their direction made recorded phone calls to the defendant. The conversations confirmed that he was blackmailing her with the photographs. He faxed her a draft of a settlement agreement that she had previously rejected, adding a provision requiring him to return certain unidentified photographs to her. They met and he showed her the originals. The meeting was recorded, and included an exchange in which she said: "So you resort to blackmailing me?" He replied: "There's nothing left. I'm down to: no kids; no grand-kids; no money." "And, so," she responded, "blackmailing me with photographs . . . . Okay, but as long as I go ahead and sign these settlement agreements . . . ." He replied: "Right then you have . . . ." And she: ". . . you'll give me the photographs . . . ." And he: "On the spot."

United States v. Peel, 595 F.3d 763, 765-66 (7th Cir. 2010).

On remand after direct appeal, this Court dismissed the conviction for obstruction of justice, recalculated the amount of the intended loss relevant to the bankruptcy fraud, recalculated the applicable guideline sentencing range and resentenced Peel to 144 months (which included consecutive sentences of 24 months for bankruptcy fraud and 102 months for possession of child pornography). That sentence was affirmed on appeal from the Amended Judgment. *United States v. Peel*, 668 F.3d 506 (7th Cir. 2012).

In both the first and second appeals, Peel contested the criminality of his possession of the nude photographs of the then-16-year-old minor. The appellate court rejected his contention that the photos should not be characterized as "child pornography" in 2005-2006, because at the time he took them in 1974, the statute under which he was convicted had not yet been enacted and the photos were not illegal when they were taken. The child pornography statute was amended in 1984 to provide that a minor under age 18 was a "child," thus criminalizing Peel's possession of the photos when he was charged and convicted. Noting that Peel had forfeited this argument because he did not raise it at trial, the Seventh Circuit nonetheless addressed the merits and rejected Peel's argument that his possession of the originally-legal pictures should be "grandfathered" and that he should not be subject to prosecution under the amended version of the statute. *Peel*, 668 F.3d at 509 (citing *Peel*, 595 F.3d at 770).

In that second appeal, Peel also argued that his punishment for illegally possessing child pornography that was legal when he created it violated the First Amendment's free speech clause and the *Ex Post Facto* clause of Article I of the Constitution. *Peel*, 668 F.3d at 510. The Seventh Circuit found both arguments frivolous and noted that Peel forfeited the arguments because he failed to raise them in his first appeal.

Since the dismissal of his second appeal, Peel has brought a series of collateral attacks on his conviction and sentence. On April 29, 2013, this Court denied his request to vacate, set aside or correct his sentence pursuant to a 28 U.S.C.A § 2255 petition, in which Peel claimed that he was denied the effective assistance of counsel. *Peel v. United States*, Case No. 12-cv-275-WDS; (Doc. 4, p. 23; Doc. 4-2, pp. 1-22). The claims of ineffectiveness included Counsel's failure to present his statutory and constitutional challenges to the child pornography statute at trial. This Court found no merit to Peel's claims that his attorneys were ineffective for failing to raise due process, First Amendment, equal protection and *ex post facto* arguments. (Doc. 4-2, pp. 5-9).

On May 11, 2014, Peel filed a habeas petition under 28 U.S.C. § 2241 in the Eastern District of Kentucky. *Peel v. Sepanek*, Case No. 14-cv-77, 2014 WL 3611151 (E.D. Ky.); (Doc. 4-1, pp. 70-75). He raised arguments that the child pornography statute (18 U.S.C. § 2252A(a)(5)(B)) violates the Equal Protection Clause, the Due Process Clause, the *Ex Post Facto* Clause and the Eighth Amendment. He also contended that he should have been sentenced under a lower guideline range based on newly-discovered evidence that establishes a lower value for the photographs he had possessed. *Peel v. Sepanek*, Case No. 14-cv-77, 2014 WL 3611151, at *2 (E.D. Ky. July 21, 2014). The court denied habeas relief, finding that Peel's claims could have been brought on direct appeal or in his initial § 2255 challenge. As such, they did not fall within the narrow scope of the "savings clause" found at 28 U.S.C. § 2255(e) and could not be brought under § 2241. *Peel v. Sepanek*, 2014 WL 3611151, at *3.

Peel next sought permission from the Seventh Circuit to bring a second/successive § 2255 petition to challenge the calculation of his intended loss, which if successful, would reduce his offense level. *Peel v. United States*, No. 15-3269 (7th Cir.); (Doc. 4-1, pp. 63-64). This application was denied because Peel had already challenged the intended loss calculation on

direct appeal and in his first § 2255 petition.

On December 4, 2015, Peel filed a "Motion to Reform Judgment and Sentence under Rule 60(b)" in this Court. It was ultimately denied as untimely (Doc. 4-1, pp. 58-59).

Another attempt by Peel to obtain authorization for a successive collateral attack was rejected by the Seventh Circuit on April 11, 2016. *Peel v. United States*, No. 16-1665 (7th Cir.); (Doc. 4-1, pp. 60-62). Peel attempted to challenge his conviction for possession of child pornography, but the court found that his arguments merely mirrored the arguments that were rejected in his direct appeal, and were therefore not cognizable in a successive § 2255 proceeding. (Doc. 4-1, p. 61). As to the bankruptcy fraud conviction, Peel argued that the "bankruptcy court's rejection of his ex-wife's claim undermines his fraud conviction." *Id.* The court reasoned, however, that "the bankruptcy court's decision does not implicate Peel's innocence as required by § 2255(h)(1).[1] Rather, the conviction is based on Peel's blackmailing of his ex-wife in an attempt to get her to drop the bankruptcy claim before the bankruptcy court's ruling." *Id.*

On July 25, 2016, Peel filed a motion in his criminal case, invoking Rule 60(d)(3) and seeking to set aside the Amended Judgment for fraud upon the Court. (Doc. 4, p. 24). The purported fraud was an allegedly false claim in the amount of $2,800,000 by attorney Donald W. Urban in the bankruptcy court,[2] which was then "perpetuated" in the criminal trial. (Doc. 4-1, p. 55; Doc. 253, p. 1 in criminal case). This Court found Peel's argument to be without merit and denied the motion. (Doc. 4-1, p. 57; Doc. 253, p. 3 in criminal case).

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[1] Section 2255(h)(1) allows an appellate court to authorize a successive § 2255 motion if it presents: "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense[.]"

[2] This claim in the bankruptcy court was for funds that Petitioner owed to his ex-wife under the terms of their divorce settlement. The value of her claim was eventually determined to be substantially less by the bankruptcy court. (*See* Doc. 4-1, pp. 56-67).

Peel filed an appeal and on December 7, 2016, the Seventh Circuit vacated this Court's Judgment and remanded the matter with instructions to dismiss the motion for lack of jurisdiction. *United States v. Peel*, No. 16-3297 (7th Cir.); (Doc. 4-1, pp. 52-54). In his Rule 60 motion, Peel asserted that "newly discovered evidence" regarding the value of the bankruptcy claim required his bankruptcy fraud conviction to be set aside. He requested that the appellate court consider his motion on its merits. *Id.*

The Seventh Circuit found (as argued by Peel on appeal) that this Court should have construed the Rule 60(d)(3) motion as an unauthorized successive § 2255 motion, which was subject to dismissal on jurisdictional grounds. *United States v. Peel*, No. 16-3297 (7th Cir.); (Doc. 4-1, p. 53). (Doc. 4-1, p. 53). It also noted that even if the change in value of the claim could be considered "new evidence," that fact would not be sufficient to establish that no reasonable factfinder would have found him guilty of bankruptcy fraud. *Id.*

On January 18, 2017, Peel sought habeas relief in the United States Supreme Court. His Petition was summarily denied on April 24, 2017. (Doc. 4, p. 24; Doc. 4-2, p. 51).

The Petition

In this action, Peel asserts that he has newly discovered evidence which shows that he is "actually innocent" of bankruptcy fraud. This "new" evidence consists of: (1) A Bankruptcy Court Minute Record (Doc. 4-1, p. 20) that shows his ex-wife "had voluntarily abandoned her objection to a bankruptcy § 702 discharge **two weeks prior** to any alleged misconduct by [Peel]" (Doc. 4, p. 2) (emphasis in original); and (2) Three court orders (one each from the bankruptcy court, the district court and the appellate court) establishing that his ex-wife's claim of

$2,800,000 was false and was only worth $144,055.63.[3] Peel had made settlement offers to his ex-wife in sums exceeding the lesser amount. The jury was not informed of the ex-wife's abandonment of her objection to the discharge or of the falsity of her claim. (Doc. 4, pp. 2, 41-46).

As to the conviction for possession of child pornography, Peel claims actual innocence (on the basis that when the pictures were taken in 1974, the girl in the photographs was not considered a minor) and asserts that his conviction was in violation of the Free Speech Clause, the *Ex Post Facto* Clause, the Due Process Clause (both the "Fair Notice" and the "Takings" portions) and the Equal Protection Clause. (Doc. 4, p. 3).

In summarizing his previous challenges to the convictions, Peel maintains that his earlier § 2241 petition (*Peel v. Sepanek*, Case No. 14-CV-77 (E.D. Ky.)) was "denied on procedural grounds without a decision on the merits." (Doc. 4, p. 23). Likewise, he asserts that his October 2015 application to the Seventh Circuit (No. 15-3269) to bring a successive § 2255 motion based on "newly discovered evidence" was "procedurally denied without a decision on the merits." *Id.* Peel makes the same point – that his previous collateral attacks were rejected on procedural grounds, without ever reaching the merits of his arguments – as to his Rule 60(b) motion of December 4, 2015 and January 18, 2017 Petition for Writ of Habeas Corpus filed with the Supreme Court. (Doc. 4, p. 24). He argues, he has "never enjoyed the unencumbered opportunity to have his habeas constitutional challenges addressed on their merits." (Doc. 4, p. 29).

Peel asserts that a second or successive § 2255 motion is both inadequate and ineffective to address his claims. (Doc. 4, pp. 25-28). Specifically, he states that the one-year time limit in

[3] The Bankruptcy Court order valuing Petitioner's ex-wife's claim at $158,455.63 rather than $2,800,000 is included at Doc. 4-1, pp. 36-42. The District Court affirmed that order. The Seventh Circuit later found the value of her claim to be $144,055.63. *In re Peel*, 725 F.3d 696 (7th Cir. 2013). (Doc. 4, p. 44).

28 U.S.C. § 2255(f) would bar a second or successive § 2255 claim based on "newly discovered evidence"[4] because of the time frame he claims that evidence came to light. (Doc. 4, pp. 26-28). He further argues that no time bar applies because he raises a claim of "actual innocence." (Doc. 4, pp. 34-35).

As to the bankruptcy fraud conviction, Peel argues that the Bankruptcy Court Minute Record (Doc. 4-1, p. 20) qualifies as "newly discovered evidence" because, although it was "available at the time of trial," it was not presented to the jury. (Doc. 4, p. 38). He further argues that the bankruptcy, district court and appellate court decisions which allegedly demonstrate the falsity of the evidence supporting his conviction did not arise until 4 years after his conviction. *Id.* Similarly, he claims that the constitutional arguments he now raises against the child pornography conviction "did not arise until 2-12-10" when the Seventh Circuit issued its decision on his first direct appeal. (Doc. 4, p. 39).

As relief, Peel requests that this Court vacate his convictions for bankruptcy fraud and possession of child pornography. (Doc. 4, p. 78).

Discussion

As a general matter, "28 U.S.C. § 2241 and 28 U.S.C. § 2255 provide federal prisoners with distinct forms of collateral relief. Section 2255 applies to challenges to the validity of convictions and sentences, whereas § 2241 applies to challenges to the fact or duration of confinement." *Hill v. Werlinger*, 695 F.3d 644, 645 (7th Cir. 2012) (citing *Walker v. O'Brien*, 216 F.3d 626, 629 (7th Cir. 2000). *See also Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012); *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998). Here, Peel is attacking his

[4] 28 U.S.C. § 2255(f) sets forth a 1-year period of limitation for filing an initial § 2255 motion, triggered by 4 alternative events, with the limitation period to "run from the latest of – (1) the date on which the judgment of conviction becomes final; . . . or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

conviction and sentence, which implicates § 2255 as the proper avenue for relief.

Under very limited circumstances, a prisoner may employ § 2241 to challenge his federal conviction or sentence. 28 U.S.C. § 2255(e) contains a "savings clause" which authorizes a federal prisoner to file a § 2241 petition where the remedy under § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). *See Hill*, 695 F.3d at 648 ("'Inadequate or ineffective' means that 'a legal theory that could not have been presented under § 2255 establishes the Petitioner's actual innocence.'") (citing *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002)). *See also United States v. Prevatte*, 300 F.3d 792, 798-99 (7th Cir. 2002). The fact that a petitioner may be barred from bringing a second/successive § 2255 petition is not, in itself, sufficient to render it an inadequate remedy. *In re Davenport*, 147 F.3d 605, 609-10 (7th Cir. 1998) (§ 2255 limitation on filing successive motions does not render it an inadequate remedy for a prisoner who had filed a prior § 2255 motion). Instead, under § 2241, a petitioner must establish the inability of a § 2255 motion to cure the defect in the conviction. "A procedure for postconviction relief can be fairly termed inadequate when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense." *Davenport*, 147 F.3d at 611.

Following *Davenport*, in order to trigger the savings clause, a petitioner must meet three conditions. First, he must show that he relies on a new statutory interpretation case rather than a constitutional case. Secondly, he must show that he relies on a decision that he could not have invoked in his first § 2255 motion *and* that case must apply retroactively. Lastly, he must demonstrate that there has been a "fundamental defect" in his conviction or sentence that is grave enough to be deemed a miscarriage of justice. *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013). *See also Brown v. Rios*, 696 F3d 638, 640 (7th Cir. 2012).

The application of the § 2255(e) savings clause was cogently explained to Peel in the Order dismissing his § 2241 petition in the Eastern District of Kentucky. Specifically, a prisoner's claim of "actual innocence" can only be addressed in the context of § 2241 if the Supreme Court "re-interprets the substantive terms of the criminal statute under which he was convicted in a manner that establishes that his conduct did not violate the statute." *Peel v. Sepanek*, Case No. 14-cv-77, 2014 WL 3611151, at *3 (E.D. Ky.) (citing *Hayes v. Holland*, 473 F. App'x 501, 501-02 (6th Cir. 2012)); (Doc. 4-1, pp. 74-75). The Seventh Circuit takes the same approach – "actual innocence" is established when a petitioner can "admit everything charged in [the] indictment, but the conduct no longer amount[s] to a crime under the statutes (as correctly understood)." *Kramer v. Olson*, 347 F.3d 214, 218 (7th Cir. 2003).

Peel does not point to any new statutory interpretation case, unavailable at the time of his initial §2255 motion, that would alter the interpretation of the statutes under which he was convicted in such a way that his conduct can no longer be considered criminal. Thus, he fails to meet either of the first two conditions established in *Brown*, 719 F.3d at 586. As such, even an assertion of a "fundamental defect" in the conviction (the third *Brown* condition) is insufficient to bring Peel's claim within the savings clause of § 2255(e), and therefore within the realm of claims cognizable in a § 2241 habeas action.

For his claim that he is "actually innocent," Peel relies on arguments that he unsuccessfully presented or attempted to bring in one or more of his earlier challenges. But in order for a claim to come within the savings clause for consideration in a § 2241 habeas proceeding, the claim must be one that could not have been brought within the framework of either an original or successive § 2255 motion. *See Hill v. Werlinger*, 695 F.3d 644, 648 (7th Cir. 2012); *United States v. Prevatte*, 300 F.3d 792, 798-99 (7th Cir. 2002); *In re Davenport*, 147

F.3d 605, 609-10 (7th Cir. 1998). Each of Peel's arguments were or could have been brought under § 2255, and some were or could have been raised on direct appeal. As such, the claims cannot now be addressed under § 2241.

Peel's challenge to his bankruptcy fraud conviction is based in part on the Bankruptcy Court minute order dated January 6, 2006 (Doc. 4-1, p. 20), which he admits was available to him at the time of his trial.[5] (Doc. 4-2, pp. 14-15). There is simply no basis for this Court to construe the minute order as "new evidence" that would be cognizable in a § 2241 habeas action.

The other three court orders on which Peel pins his "actual innocence" claim all relate to the valuation of his ex-wife's claim in his bankruptcy proceeding – a claim she continued to pursue throughout Peel's criminal proceedings and beyond. In the original § 2255 proceeding, this Court found that Peel's ex-wife did not withdraw her opposition to the bankruptcy proceedings and concluded that the specific amount of her bankruptcy claim was not relevant to Peel's guilt or innocence as to the criminal charges, because he was seeking a discharge of his obligation to her under the marital settlement agreement regardless of the amount. (Doc. 4-2, pp. 14-15). The Seventh Circuit agreed that the devaluation of the ex-wife's bankruptcy claim was insufficient to raise a question about the validity of Peel's conviction when it denied authorization for a successive § 2255. *Peel v. United States*, No. 16-1665 (7th Cir. April 11, 2016); (Doc. 4-1, pp. 60-62). The Seventh Circuit reached the same conclusion when Peel filed the Rule 60(d)(3) motion claiming that he had "newly discovered evidence" on the value of the bankruptcy claim. *United States v. Peel*, No. 16-3297 (7th Cir. Dec. 7, 2016); (Doc. 4-1, p. 53). Against that background, this Court cannot conclude that a structural problem in § 2255 prevented Peel from raising this claim in a § 2255 motion. Thus, the claim cannot be raised in a § 2241 action.

[5] Peel argued in his § 2255 motion that his attorneys should have introduced the evidence at trial.

Turning to Peel's child pornography conviction, he has previously raised the same statutory and constitutional challenges on appeal and under § 2255. In the first appeal, the Seventh Circuit rejected Peel's argument that the photographs were not illegal when taken in 1974 and therefore should not have been considered child pornography in 2005-06. *United States v. Peel*, 595 F.3d 763, 770 (7th Cir. 2010); *see also United States v. Peel*, 668 F.3d 506, 510 (7th Cir. 2012). In the second appeal (from the amended judgment), the Seventh Circuit rejected Peel's free speech and *ex post facto* challenges as both frivolous and forfeited. *Peel*, 668 F.3d at 510.

Peel again raised the statutory argument as well as due process, First Amendment, equal protection and *ex post facto* arguments for his claims of ineffective assistance of counsel in his original § 2255 motion. This Court considered them and found them to be without merit. His attempt to raise these same arguments in a successive § 2255 motion was rejected because they had already been raised on direct appeal. *Peel v. United States*, No. 16-1665 (7th Cir. April 11, 2016); (Doc. 4-1, pp. 60-62). As was true with his bankruptcy fraud challenge, § 2255 provided a framework for Peel to raise his claims. The fact that his arguments were rejected does not open the savings clause door for him to now bring them in a § 2241 proceeding.

As noted above, all of Peel's claims herein either were, or could have been, brought within the structural framework of § 2255 or in a direct appeal. Therefore, his conviction cannot properly be reviewed under § 2241 and his Petition must be dismissed.

Disposition

Petitioner Gary Peel's 28 U.S.C. § 2241 Petition is summarily **DISMISSED** with prejudice. All pending motions are **DENIED AS MOOT**.

If Petitioner wishes to appeal this dismissal, he may file a notice of appeal with this court within the appropriate time period for his case, as provided in Federal Rule of Appellate Procedure 4(a). A motion for leave to appeal *in forma pauperis* ("IFP") should set forth the issues Peel plans to present on appeal. *See* FED. R. APP. P. 24(a)(1)(C). If Petitioner does choose to appeal and is allowed to proceed IFP, he may be required to pre-pay a portion of the $505.00 appellate filing fee, commensurate with his ability to pay. *See Walker v. O'Brien*, 216 F.3d 626, 638 n.5 (7th Cir. 2000); FED. R. APP. P. 3(e). An appellant who is granted IFP status still incurs the obligation to pay the entire appellate filing fee. *Thomas v. Zatecky*, 712 F.3d 1004, 1004-05 (7th Cir. 2013); *Ammons v. Gerlinger*, 547 F.3d 724, 725-26 (7th Cir. 2008); *Sloan v. Lesza*, 181 F.3d 857, 858-59 (7th Cir. 1999); *Lucien v. Jockisch,* 133 F.3d 464, 467 (7th Cir. 1998).

A proper and timely motion filed pursuant to Federal Rule of Civil Procedure 59(e) may toll the appeal deadline. A Rule 59(e) motion must be filed no more than twenty-eight (28) days after the entry of the judgment, and this 28-day deadline cannot be extended. It is not necessary for Petitioner to obtain a certificate of appealability from this disposition of his § 2241 Petition. *Walker v. O'Brien*, 216 F.3d 626, 638 (7th Cir. 2000).

The Clerk is **DIRECTED** to close this case and enter judgment accordingly.

IT IS SO ORDERED.

DATED: November 16, 2017

s/ STACI M. YANDLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY E. PEEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 17-cv-1045-SMY**
	)	
JOHN M. KOECHNER,	)	
	)	
Respondent.	)	

JUDGMENT IN A CIVIL CASE

This action came before the Court, District Judge Staci M. Yandle, for preliminary consideration of Petitioner's application for writ of habeas corpus. The Court has rendered the following decision:

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus is summarily dismissed on the merits with prejudice. Judgment is entered in favor of Respondent and against Petitioner. Petitioner is to take nothing from this action.

DATED: November 16, 2017

JUSTINE FLANAGAN, ACTING CLERK

By: s/ Tanya Kelley
Deputy Clerk

APPROVED: s/ STACI M. YANDLE
Staci M. Yandle
United States District Judge

APPENDIX - B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY E. PEEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 17-cv-1045-SMY**
	)	
JOHN M. KOECHNER,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

YANDLE, District Judge:

This matter is before the Court for consideration of Petitioner Gary Peel's Motion to Alter or Amend Judgment/Motion to Reconsider (Doc. 13). The Motion challenges this Court's November 16, 2017 Order, which dismissed Peel's Habeas Corpus Petition brought pursuant to 28 U.S.C. § 2241. (Doc. 11). In the Order, the Court noted the arguments advanced in the Petition had either been previously raised on direct appeal or in a motion brought under 28 U.S.C. § 2255, or could have been presented in one of those proceedings. As such, the Court concluded that § 2241 was not a proper vehicle for Peel to raise the arguments anew.

The instant motion invokes Federal Rule of Civil Procedure 59(e), and was filed within the 28-day time limit required by that rule. Rule 59(e) permits a court to amend a judgment only if the movant demonstrates a manifest error of law or fact or presents newly discovered evidence that was not previously available. *See, e.g., Sigsworth v. City of Aurora*, 487 F.3d 506, 511-12 (7th Cir. 2007). "A manifest error [of law or fact] is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (quotation

APPENDIX - C

omitted). As discussed below, Peel's arguments in support of his claim that the Court erred in its legal analysis are unpersuasive. Accordingly, the motion shall be denied.

Peel asserts three claims of legal error: he contends that (1) the Court applied the wrong standard to determine what qualifies as "newly discovered evidence;" (2) the Court erroneously conflated the "value" of his ex-wife's allegedly false bankruptcy claim for sentencing purposes with the "value" of the false claim for purposes of proving "actual innocence" with "newly discovered evidence"; and (3) the Court ignored controlling Supreme Court precedent that removes all procedural bars to his habeas petition. (Doc. 13, p. 1).

In support of his argument that the Court applied the wrong standard for newly discovered evidence, Peel cites *Jones v. Calloway*, 842 F.3d 454, 461-62 (7th Cir. 2016) and several other cases. Each of the cited cases is distinguishable from Peel's because they address what may be considered as new evidence in the specific context of federal habeas review of a *state* conviction under 28 U.S.C. § 2254.

Contrary to Peel's belief, this Court correctly relied on the "newly discovered evidence" standard that applies to a habeas petitioner convicted of a federal offense who seeks to use the "savings clause" of 28 U.S.C. 2255(e) to bring an "actual innocence" claim under § 2241. That standard was discussed and clearly explained in the Eastern District of Kentucky's 2014 decision dismissing Peel's § 2241 Petition filed in that district. *Peel v. Sepanek*, Case No. 14-cv-77, 2014 WL 3611151, at *3 (E.D. Ky. July 21, 2014) (citing *Hayes v. Holland*, 473 F. App'x 501, 501-02 (6th Cir. 2012)); (Doc. 4-1, pp. 74-75). The Seventh Circuit's criteria for bringing an actual innocence claim in a § 2241 habeas action using § 2255(e)'s savings clause tracks those of the Sixth Circuit, and Peel's Petition filed in this action still fails to meet those requirements. His claim does not rest on any new and retroactively applicable statutory interpretation case under

which his conduct would no longer be criminal. *See Kramer v. Olson*, 347 F.3d 214, 218 (7th Cir. 2003). *See also Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013); *Brown v. Rios*, 696 F3d 638, 640 (7th Cir. 2012); *Hill v. Werlinger*, 695 F.3d 644, 648 (7th Cir. 2012); *In re Davenport*, 147 F.3d 605, 609-10 (7th Cir. 1998).

Furthermore, the "new evidence" cited by Peel could have been presented in one of his earlier challenges to his conviction. In particular, the bankruptcy court Minute Order Peel refers to was available during his trial, and thus does not qualify as "newly discovered evidence" for purposes of a § 2241 petition. The three court decisions which, according to Peel, confirm the falsity of his ex-wife's $2,800,000 bankruptcy claim also do not trigger the savings clause. The December 19, 2011 bankruptcy court Order was available at the time Peel filed his original § 2255 motion in 2012.[1] Thus, a challenge based on the information in that document could have been raised in Peel's first § 2255 motion (the order denying relief in the § 2255 proceeding was not issued until April 29, 2013). *Peel v. United States*, Case No. 12-cv-275-WDS (Doc. 36 in that case). Likewise, the district court order (which referenced the Bankruptcy court's December 2011 approval of Peel's ex-wife's claim in the amount of $158,455.63) was also available to Peel during the pendency of his § 2255 proceeding. *See Peel v. Peel*, Case No. 12-cv-573-GPM, 2013 WL 566974 (S.D. Ill. Feb. 13, 2013) (affirming Bankruptcy Court Orders and denying Peel's appeal). Because no structural barrier prevented Peel from raising the bankruptcy court or district court orders in his first § 2255 proceeding, he cannot raise these matters in a § 2241 Petition.

The appellate court order which Peel also claims constitutes new evidence on the value of

[1] This Order reflects that Peel's ex-wife originally filed a bankruptcy claim for $2,800,000 based on the Marital Settlement agreement, and subsequently amended the amount to $434,112.30. She later agreed with the Trustee to value the claim at $260,927.26. The bankruptcy court ultimately found that the value of her claim was $158,455.63. (Doc. 1-1, pp. 36-42).

the bankruptcy claim, was not issued until after Peel's § 2255 proceeding was concluded. *In re Peel*, 725 F.3d 696 (7th Cir. 2013) (Aug. 2, 2013). That order did not alter the valuation of Peel's ex-wife's claim at $158,455.63, which had been reflected in the previously-referenced 2011 bankruptcy court and 2013 district court orders. 725 F.3d at 701. Nevertheless, § 2255 provides an avenue to present newly discovered evidence in a successive motion, if the evidence would be sufficient to establish that no reasonable factfinder would have found the defendant guilty. 28 U.S.C. § 2255(h)(1). Peel attempted to bring successive § 2255 challenges based on these decisions, but the Seventh Circuit found that the "new evidence" did not demonstrate Peel's innocence as required by § 2255(h)(1). Again, because an opportunity existed under § 2255 for Peel to raise claims, he cannot now bring them under § 2241.

Peel's second claim of error, that this Court conflated the value of his ex-wife's bankruptcy claim for sentencing purposes with the value of the claim for the purpose of proving actual innocence, is without merit as well. Again, this information was available to Peel as early as 2011, and he could have raised the issue of the bankruptcy claim's value for any purpose he wished to argue within the context of § 2255. Additionally, because Peel does not invoke any retroactive supreme court statutory-interpretation case or any change in the law that post-dates his § 2255 motion, he fails to meet two of the three requirements for triggering the § 2255(e) savings clause. *See Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013); *Brown v. Rios*, 696 F3d 638, 640 (7th Cir. 2012); *In re Davenport*, 147 F.3d 605, 609-10 (7th Cir. 1998).

Finally, Peel's insistence that the Supreme Court's decision in *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924 (2013) removed all procedural bars to his habeas petition is unavailing. *McQuiggin* does not hold that a claim of actual innocence is a free-standing basis for habeas relief. Rather, such a claim is only a gateway to consideration of defaulted constitutional claims

under § 2254 – the habeas statute for prisoners convicted in state court. *McQuiggin*, 569 U.S. at 392. *See also Gladney v. Pollard*, 799 F.3d 889, 895 (7th Cir. 2015) ("The Supreme Court has not recognized a petitioner's right to habeas relief based on a stand-alone claim of actual innocence."). The Supreme Court expressly noted that different rules apply to second or successive petitions. *McQuiggin*, 569 U.S. at 395-96.

Obviously, Peel is not a state prisoner who will be deprived federal court review of constitutional claims if he is not allowed to proceed on a § 2241 petition. In fact, he is a former federal prisoner who has already availed himself of an opportunity for direct appeal and review of his convictions under § 2255. He has twice unsuccessfully sought permission to bring a successive § 2255 motion advancing the same arguments he made in the Petition in this case. Simply put – § 2241 is not a vehicle for reviving claims the Seventh Circuit has previously considered under 28 U.S.C. § 2255(h)(1) and rejected.[2]

Neither the language nor the reasoning of *McQuiggin* supports the expansive reading Peel suggests. He does not cite any case from any Circuit that shares his interpretation of *McQuiggin*, and this Court's independent research has not revealed such a case. While the Seventh Circuit has not spoken on the issue, the Third, Fifth, Tenth and Eleventh Circuit Courts have refused to apply *McQuiggin* to permit a federal prisoner to bring a § 2241 petition without first showing the remedy available under § 2255 was inadequate or ineffective. *See, e.g.*, *Hale v. Fox*, 829 F.3d 1162, 1171 (10th Cir. 2016), *cert. denied sub nom. Hale v. Julian*, 137 S. Ct. 641 (2017); *Ball v. Boyle*, 659 F. App'x 790, 791-92 (5th Cir. 2016); *Boyce v. Berkebile*, 590 F. App'x 825 (10th Cir. 2015); *Candelario v. Warden*, 592 F. App'x 784 (11th Cir. 2014); *McAdory v. Warden*

[2] Section § 2255(h)(1) allows the authorization of a successive § 2255 motion based on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense[.]"

Lewisburg USP, 545 F. App'x 88 (3rd Cir. 2013). This Court agrees with the reasoning in those cases. *McQuiggin* does not open the door for Peel to assert an "actual innocence" claim as to his bankruptcy fraud conviction, or to challenge his child pornography conviction based on his argument that the nude photographs he took in 1974 were not illegal at the time he produced them.

Upon review and reconsideration of the record in this case, and for the foregoing reasons, the Court remains convinced that its dismissal of the § 2241 Petition was proper.

Disposition

Peel has not shown any mistake of law or fact, or presented any newly discovered evidence that would entitle him to relief under Rule 59(e). Accordingly, the Motion to Alter or Amend Judgment/Motion to Reconsider (Doc. 13) is **DENIED**; the Petition for habeas relief pursuant to 28 U.S.C. § 2241 remains summarily **DISMISSED** with prejudice. In light of this ruling, Petitioner's Third, Fourth, and Fifth Motions for Court Ruling (Docs. 18, 19, & 20) are **DENIED AS MOOT**.

It is not necessary for a petitioner to obtain a certificate of appealability for an appeal based on a Petition brought under §2241. *Walker v. O'Brien*, 216 F.3d 626, 638 (7th Cir. 2000). If Petitioner wishes to appeal the dismissal of this action, his notice of appeal must be filed with this Court within 60 days of the date of this Order. FED. R. APP. P. 4(a)(4). A motion for leave to appeal *in forma pauperis* ("IFP") must set forth the issues Petitioner plans to present on appeal. *See* FED. R. APP. P. 24(a)(1)(C). If Petitioner does choose to appeal and is allowed to proceed IFP, he may be required to pre-pay a portion of the $505.00 appellate filing fee, commensurate with his ability to pay. *See Walker v. O'Brien*, 216 F.3d 626, 638 n.5 (7th Cir. 2000); FED. R. APP. P. 3(e). An appellant who is granted IFP status still incurs the obligation to

pay the entire appellate filing fee. *Thomas v. Zatecky*, 712 F.3d 1004, 1004-05 (7th Cir. 2013); *Ammons v. Gerlinger*, 547 F.3d 724, 725-26 (7th Cir. 2008); *Sloan v. Lesza*, 181 F.3d 857, 858-59 (7th Cir. 1999); *Lucien v. Jockisch*, 133 F.3d 464, 467 (7th Cir. 1998).

IT IS SO ORDERED.

DATED: July 18, 2018

s/ STACI M. YANDLE
United States District Judge