22-7???

No. ________________

IN THE

SUPREME COURT OF THE UNITED STATES

BOBBY RICHARDSON — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIRST CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Bobby Richardson #37784-083
(Your Name)

FCI BERLIN, Po Box 9000
(Address)

Berlin, N.H 03570
(City, State, Zip Code)

____
(Phone Number)

FILED
MAR 21 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

WHETHER OR NOT MR. RICHARDSON'S SPECIAL PLEA TO THE LOWER COURT'S LACK OF FACTUAL PREDICATE JURISDICTION PURSUANT TO HIS UNOPPOSED FED R. CIV. P 12(b)(1) MOTION COULD NOT BE ADJUDICATED BECAUSE THE LOWER COURTS DECIDED THAT RICHARDSON DID NOT MEET THE SAVINGS CLAUSE JURISDICTION PURSUANT TO § 2255(e)

WHETHER THE CIRCUITS SPLIT ON CONGRESS INTENT PURSUANT TO TITLE 28 U.S.C § 2255(e) savings clause TO BE TREATED AS JURISDICTIONAL IN NATURE, THUS, EQUIVALENT TO THAT OF subJECT-MATTER JURISDICTION OR WHETHER THE SAVINGS CLAUSE IS A CLAIM PROCESSING RULE THAT MUST BE DECIDED AFTER AND NOT BEFORE THE COURT ESTABLISHES SUBJECT-MATTER JURISDICTION

WHETHER THE APPELLANT COURT'S AFFIRMATIVE DECISION TO DISMISS MR. RICHARDSON'S HABEAS PETITION PRESUMABLY PURSUANT TO Fed R. CIV. P 12(b)(6) on THE BASIS THAT HE FAILED TO STATE A CAUSE OF ACTION upon WHICH RELIEF COULD BE GRANTED UNDER § 2255(e) SAVINGS CLAUSE, NOTWITHSTANDING, MR. RICHARDSON DEMONSTRATED A CREdible SHOWING OF ACTUAL INNOCENCE OF THE SUBSTANTIVE OFFENSE CHARGED IN COUNT 2 OF HIS INDICTMENT VIOLATED HIS CONSTITUTIONAL AMENDMENT RIGHTS

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______ court appears at Appendix ______ to the petition and is

[ ] reported at ______; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was ________________.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOVEMBER 15, 2022, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including __________ (date) on __________ (date) in Application No. __A____.

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

The record discloses that the lower courts was without subject-matter jurisdiction pursuant to ARTICLE III of the United States Constitution because no case or controversy exist. Therefore, this court should notice the defect. Hence, this court only have jurisdiction to correct the error of the lower courts in entertaining this case under review. See United States v. Correck, 298 US 435, 440 (1936)

[ ] For cases from **state courts:**

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including __________ (date) on __________ (date) in Application No. __A____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

On August 6, 2008 at 1:04:13 P.M, Richardson was arrested and detained at 2020 south sycamore street, Petersburg, Virginia, without probable cause. (ATTACHMENT), Exhibit - E "CAD - REPORT I.D: 2008-042443"

On August 6, 2008 at 1:05:10 P.M, Petersburg Police call Center dispatched a EMS call to Petersburg Fire Department ("P.F.D") in response to the mace sprayed into the face of the Defendant. (ATTACHMENT) Exhibit - C "CAD-Report I.D: 2008-042444"

On August 6, 2008 at 1:11:58 P.M, "P.F.D" arrived at 2020 South sycamore street, Petersburg, Virginia, in response to the EMS call dispatch from Petersburg Police call center (ATTACHMENT) "CAD-Report I.D 2008-042444 and Exhibit-K "P.F.D Incident Report # 08-002852.

On August 6, 2008 at 1:22:01 P.M, "P.F.D" completed their EMT service by flushing the eyes of Richardson and the eyes of Det-ective Evan W. Jones, who inadvertently received a face full of mace. In addition, "P.F.D" checked the blood pressure of the injuried, clean-ed cuts and took pictures of the injuries. see Trial Tr. 5-6, Lieuten ant Edward S. Jones, and Exhibit - K "CAD-Report I.D: 2008-042444 and Exhibit- K, "P.F.D Incident Report No. 08-002852.

On August 6, 2008 at 1:22:01 P.M, Lieutenant Edward S. Jones' duty as a supervisor was complete, thereafter, he turned the sc-ene over to Special Investigation and that's when Detective Jason D. Sharp left the scene to pick up a search warrant. Trial Tr. 7, Lieutenant Edward S. Jones.

On August 6, 2008 at 1:30 P.M, Magistrate Jacquelyn Whigham issued a computerized search warrant to Detective Jason D. Sharp for 2020 South Sycamore Street, Petersburg, Virginia, without first establishing probable cause by way of a sworn affidavit. (ATTACHMENT), Exhibit-L "Search warrant".

On August 6, 2008 at 2:35 P.M, approximately, 1 hour and 5 minutes after the execution of the illegal search warrant, Detective Jason D. Sharp presented a handwritten affidavit to magistrate Jacquelyn Whigham at which time she signed, dated and placed the time on the said affidavit, responsive to the illegal search warrant. (ATTACHMENT), Exhibit-M "Affidavit in support of search warrant"

On August 18, 2008, approximately 12 days after the arrest and illegal search and seizure, Detective Jason D. Sharp filed [his] "Initial Report" with the Petersburg Bureau of Police Headquarters. Within that Report, Richardson received 3 charges as a result of the illegal search and seizure, namely, (1) Felony Drug-Violation (non-Distributive) (2) Weapons violation (3) obstruction of Justice. The said crimes and/or search and seizure was assigned to case NO. 08-013748 by "P.P.D" Data base. (ATTACHMENT), Exhibit-F "Incident Report # 08-013748.

On December 5, 2008, Todd R. Fleming of A.T.F, appeared before United States Magistrate Judge M. Hannah Lauck on a criminal complaint responsive to the illegal search and seizure and/or case NO. 08-013748. See Exhibit-N "Criminal Complaint"

On January 7, 2009, Richardson was indicted by a Federal Grand Jury on NINE COUNTS. Eight of the nine counts derived from the illegal search and seizure and/or case NO. 08-013748.

The counts are as follows: Possession with the intent to distribute heroin, 21 U.S.C 841(a) (count one), Possession of a firearm/ammunition by a convicted felon, 18 U.S.C 922(g)(1)(count three) and make, forge counterfeit obligations, 18 USC 471(counts four through nine). The above reference counts are responsive to Case NO. 08-013748 (search and seizure/criminal complaint) However, count Two, namely, Distribution of Heroin, 21 U.S.C 841(a).(count two) is a unrelated case as to Richardson's arrest and/or the said search and seizure. The Petersburg Bureau of Police Database assigned this unrelated evidence to Case Number 08-013781. see Exhibit – O, "Indictment".

On May 27-28, 2009, Richardson proceeded to trial by jury and was convicted of all counts and received a total of 288 months.

On November 23, 2020, Richardson filed a petition for a writ of habeas corpus pursuant to Title 28 U.S.C § 841(a)(count two); Whereas, Petitioner was arrested on August 6, 2008 at 1:04:13 P.M, responsive to Case NO. 08-013748 and remained in custody during the commission of the crime pursuant to Title 28 U.S.C § 841(a)(count Two) that occurred on August 6, 2008 at 9:59:30 P.M (Case NO. 08-013781) (ATTACHMENT) motion.

On March 31, 2021, Richardson filed a petition pursuant to Fed. R. Civ. P 12(b)(1) for lack of subject-matter jurisdiction, where as, there is no case in controversy pursuant to the standing requirement of Article III § 2 of the constitution and/or Title 28 U.S.C § 841(a) (count Two) [Case NO. 08-013781]. See Fed R.Civ. P 12(b)(1) motion.

On June 24, 2021, the District court ordered the magistrate judge to perform a "fact-finding" responsive to Petitioner's Fed. R. Civ. P 12(b)(1) motion. Within [her] "fact-finding", the magistrate made the factual determination that the evidence the government used to convict Richardson responsive to Title 21 U.S.C § 841(a)(Count Two) was controverted and the uncontroverted facts establish the basis of a crime that occurred 9-10 hours after Richardson was arrested and remained in custody. However, the magistrate Judge made the recommendation to treat Petitioner's Fed. R. Civ. P. 12(b)(1) motion as an addendum to [his] § 2241 motion and dismiss [his] claim for want of 2255(e) savings clause and [his] Fed. R. Civ. P 12(b)(1) motion as moot. See Magistrate Report and Recommendation, Appx B

On August 11, 2021, the District court adopted the report and recommendation of the magistrate Judge. See District Court order, Appx B.

On September 1, 2021, Petitioner filed a timely appeal before the court of appeal and renewed [his] Fed R. Civ. P 12(b)(1) motion, in light of the fact that the District court did not satisfy itself of subject-matter jurisdiction.

On October 1, 2021, the Court of appeals proceeded to follow the rule of law pursuant to Fed. R. Civ. P 12(b)(1), thus, ordering the government to respond no later than October 29, 2021. See Appellate order, Appx A

On October 15, 2021, USAO-New Hampshire responded, via, letter stating that the warden was not served in this matter, thus, the government will not participate in the First Circuit Proceedings. See USAO-New Hampshire "Response Letter", EX - P.

On November 15, 2022, the court of appeals adopted the decision of the District Court. See Appellate order, Appx A

On November 22, 2022, Petitioner filed a rehearing and rehearing en banc petition.

On January 18, 2023, the court of Appeals declined a rehearing and rehearing en banc. See Appellate order, Appx C

REASONS FOR GRANTING THE PETITION

The First Circuit District and Appellate court failed in its special obligation to uphold the judicial articles of the Constitution that gives federal courts limited jurisdiction over cases or controversies to which the united states shall be a party. Petitioner made a special plea to the lower court's lack of subject-matter jurisdiction pursuant to federal rules of civil procedures that have been promulgated and amended by acts of Congress and the supreme court pursuant to Article III of the Constitution. To be specific, Fed. R. Civ. P 12(b)(1) permits a party to assert lack of subject-matter jurisdiction, as a defense by way of a motion to dismiss. This court further emphasized that any "objection to subject-matter jurisdiction, however, may be raised at any time." Arbaugh, 546 U.S at 508, 126 S.Ct 1235, 163 L.Ed 2d 1097. Both the District and Appellate Court failed in their special obligation pursuant to Article III, to address Petitioner's Fed. R. Civ. P 12(b)(1) motion. In the case at bar, the lower courts did not order the government to establish the Court's jurisdiction, VIA, a response to Petitioner's Fed. R. Civ. P. 12(b)(1) motion. On the Contrary, the magistrate Judge did a Fact-Finding responsive to Petitioner's Jurisdictional Facts outlined in [his] 12(b)(1) motion. As a result, the magistrate Concluded there is no case in controversy in Support of Petitioner's 12(b)(1) motion. However, the Lower courts treated Petitioner's Fed R. Civ. P 12(b)(1) motion as an addendum to his § 2241 petition, which is an "error of the Law" in doing so. Subsequently, the District Court dismissed the action for a want of savings clause jurisdiction and the Appellate court adopted the District Court's order.

The supreme court should exercise its extraordinary power and grant certiorari because the lower courts and this court has a special obligation to "Satisfy itself both of its own subject-matter jurisdiction and of subject-matter jurisdiction of the trial court before proceeding further". Bender V. williamsport area Sch Dist., 475 U.S 534, 541, 106 S.Ct 1326, 89 L.Ed 2d 501 (1986) Petitioner urge that the actions taking by the lower courts is not only a "error of the law", more so, such actions constituted an abuse of discretion pursuant to Article III standing requirement, where as, the magistrate Judge acknowledge Petitioner's actual Innocence claim by making the determination that [he] did not commit the said crime (count 2). Consequently, it's the District Court's "want of savings clause Jurisdiction" that enabled the court to ignore the actual innocence claim despite acknowledging Petitioner's innocence on the record.

In the Bender Court, the supreme court restated certain basic principles that limit the power of every federal court, holding, "Federal Courts are not Courts of general Jurisdiction, they have only the power that is authorized by Article III of the Constitution and statues enacted by Congress pursuant thereto." Id. This is a special obligation of this court to correct the defects in the lower court(s) ruling, pursuant to subject-matter Jurisdiction. "[when the lower Federal court] lack[s] Jurisdiction, we have jurisdiction on appeal, not of the merits but merely for correcting the error of the lower court in entertaining the suit."

United States V. Corrick, 298 U.S 435, 440, 80 L.Ed 1263, 56 S.Ct 829 (1936) (footnotes omitted)

Furthermore, the sister circuits are split on the intent of Congress, whether Title 28 U.S.C § 2255(e) Savings clause is Jurisdictional in nature, thus, equavalent to Article III subject-matter Jurisdiction. The primary concern of the circuit split is not to correct the error of any circuit decision. More over, this particular case present issue(s) of importance that go beyond the particular facts of the case at bar. If this court does not exercise its extraordinary power to resolve the circuit split, then the public will be greatly effected by Federal court's Judicial decision to place "claim processing rules" before the Judicial articles of the Constitution, from whence, Federal Courts received its limited Jurisdiction, VIA, Articles of the Constitution. Furthermore, if this court elect not to resolve the split of the sister circuits then federal courts will alter the normal operation of our adversarial system, thus, making the Judicial articles of the constitution obsolete. The accused and the public are one and the same that share a clear interest in the Judicial proceedings that affect all citizens of the United States. Therefore, the accused as well as the public must be appraised of his or her legal process. Specifically, whether or not the 2255(e) Savings clause is Jurisdictional in nature or if it is a claim processing rule that comes after Article III Standing.

Finally, this Court should grant certiorari to bring uniformity to the Courts on the manner in which Federal Courts adjudicate Habeas Petition, namely, actual innocence claim(s), in violation of the Furth and Fifth Amendment of the Constitution. In the case at bar, the District Court acknowledge that Petitioner is innocent, yet dismissed the action for want of savings clause Jurisdiction.

WHETHER OR NOT MR. RICHARDSON'S SPECIAL PLEA TO THE LOWER COURT'S LACK OF FACTUAL PREDICATE JURISDICTION PURSUANT TO HIS UNOPPOSED FED. R. CIV. P. 12(b)(1) MOTION COULD NOT BE ADJUDICATED BECAUSE THE LOWER COURTS DECIDED THAT RICHARDSON DID NOT MEET THE SAVINGS CLAUSE JURISDITION PURSUANT TO § 2255(e)

ARGUMENT

Richardson contends that the lower court(s) have an independent obligation to determine as a threshold matter its subject matter jurisdiction prior to making a determination whether the complaint state a cause of action on which relief could be granted.

On or about March 31, 2021, Petitioner filed a motion before the District Court For The First Circuit pursuant to Fed R. CIV. P 12(b)(1). Within [HIS] motion, Petitioner avers that the government used controverted facts to establish the factual predicate for jurisdiction pursuant to 21 U.S.C § 841(a). The particular predicate for jurisdiction is an essential element of any federal offense. See Standford, 805 F.3d 566. Thus, the elements of 21 U.S.C § 841(a) is as follows: (1) To Manufacture, distribute or dispense, a controlled substance. In Petitioner's case sub judice, the government established the following controverted predicate for jurisdiction:

> "on or about August 6, 2008 between 11A-12NOON in the Eastern District of Virginia and within the jurisdiction of this court . . . Bobby Richardson . . . did knowingly, intentionally and unlawfully distributed a mixture and substance con-

taining a detectable amount of heroin, a schedule I controlled substance". SEE PETITIONER'S Fed R. CIV. P. 12(b)(1) motion.

The uncontroverted facts shows that on August 6, 2008 at 1:04:13 P.M, Richardson was arrested by a state agency, namely, Petersburg Bureau of Police ("P.P.D") at 2020 South Sycamore street, Petersburg, Virginia. Subsequently, at 1:30 P.M a search warrant was executed at the same location from whence Richardson was arrested. On August 6, 2008 at 2:35 P.M I.E, 1 Hour and 5 minutes after the search had been conducted, the same officer(s) filed a search warrant affidavit in support of the illegal search and seizure. As a result, Richardson was charged with the following crimes: (1) Felony Drug-Violation (non-Distributive) (2) Weapons Violation (3) Obstruction of Justice. The Petersburg Bureau of Police assigned the above reference incident to Case No. 08-013748.

On January 7, 2009, U.S.A.O-Richmond adopted case No. 08-013748 from the Petersburg Bureau of Police, responsive to the illegal search and seizure described above. Moreover, U.S.A.O-Richmond returned an additional count unrelated to the above related incident. To be specific, Richardson was indicted for Distribution of Heroin pursuant to 21 U.S.C § 841 (a). The evidence in question was assigned to Case No. 08-013781 by the Petersburg Bureau of Poice. Furthermore, "P.P.D" did not arrest Richardson for Distribution of Heroin nor was he charged with the said crime while in state custody. In addition, "P.P.D" do not have any incident Reports inside Police Database responsive to Distribution of Heroin and/or Case No. 08-013781. (ATTACHMENT), EXHIBIT -H "Decl. Latoya Flower, para 5".

Consequently, the Government, ET. AL, elected to controvert the evidence derived from Case No. 08-013781, by giving the appearance of a controlled buy of heroin, in support of the illegal search and seizure. As a reminder to this court, Richardson was federally indicted for Distribution of Heroin pursuant to 21 U.S.C § 841(a) on January 7, 2009. Some 19 Days after the return of the federal Indictment, on or about January 26, 2009, the Government, ET. AL, Created false incident Reports, giving the appearance that the arresting officer filed his "initial report" pursuant to a controlled buy that occurred on August 6, 2008 between 11A-12 NOON.[1] (ATTACHMENT) ..., EXHIBIT I, pgs 10-19. On the same date in question (January 26, 2009), Virginia Department For Forensic Science Faxed the arresting officer, Namely, Jason D. Sharp ("P.P.D") a certificate of Analysis[2] responsive to Case No. 08-013781. (ATTACHMENT), Exhibit C.

In furtherance of the controverted evidence, the Government, ET. AL, used a black marker and blacked off the case numbers from all of the discovery material issued to Richardson, used against Richardson at Trial and suppression hearings. However, the government, ET. AL, has since conceded to Blacking out the case numbers and/or submitting the false documents inside Richardson's Pre-Trial Discovery material. (ATTACHMENT), Exhibit A (Vaughn Index)

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[1] Both the false incident reports and the certificate of analysis show the exact date the reports was created and the Lab Report was generated

[2] The government did not receive the actual evidence responsive to case NO. 08-013781 until the Arresting officer entered the evidence into Exhibit while testifying at trial, on May 27, 2009. see Trial TR. pg. 56, Exhibit Q

Upon 9 years of FOIA Filings, the uncontroverted facts establishes that the redacted case number pursuant to the Lab Report and the evidence pursuant to 21 U.S.C § 841 (a) IS Case number 08-013781. More importantly, the controverted evidence used to convict Richardson for an allege controlled buy that occurred on August 6, 2008 between 11A - 12p, the uncontroverted facts establishes that the same evidence pertains to a incident unrelated to Richardson that occurred on August 6, 2008 at 9:59:30 P.M, I.E, 9 hours after Richardson was arrested and remained in custody. Over the years, the uncontroverted evidence was gathered from the Petersburg Bureau of Police chief John I Dixon III, Virginia Department of Forensic science, Personel from the Petersburg Police Headquarters, ATF Disclosure Division chief, EOUSA Attorney Advisor and USAO-Richmond's Paralegal Specialist Ann S. Helms. From the government's perspective of this litigation, USAO-Richmond's paralegal specialist Ann S. Helms collected, located and reviewed records and retrieved files from archives pursuant to the Prosecution of Richardson, Via, Federal Court. Thus, a physical Search was conducted and 36 pages of responsive FOIA documents was provided to Richardson (ATTACHMENT) Exhibit -R. Ms. Helms, assured that each step in the handling of the FOIA Documents has been consistent with E.O.U.S.A and USAO's procedures. Furthermore, each party to the suit made a declaration under the penalty of perjury as to the authencity of the FOIA material and FOIA process, which the documents entails Actual Innocence pursuant to 21 U.S.C § 841(a), False Arrest, Illegal search and seizure, planting / Tampering with evidence, etc.

The Standard of Review for a Fed. R. Civ. P 12(b)(1) motion permits a party to assert lack of subject-matter jurisdiction as a defense by way of a motion to dismiss See Fed. R.

Civ. P 12(b)(1). "Objections to subject-matter jurisdiction, however, may be raised at any time. Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction." Arbaugh, 546 U.S., at 508, 126 S.Ct 1235, 163 L.Ed 2d 1097. "Indeed, a party may raise such an objection even if the party had previously acknowledged the trial's court's jurisdiction." Ibid. "The part[y] asserting jurisdiction has the burden of demonstrating the existence of Federal jurisdiction". Acosta-Ramirez v. Banco Popular de Puerto Rico, 712 F.3d. 14, 20 (1st Cir. 2013). The standard of review for a 12(b)(1) motion to dismiss turns on whether the defendant has made a "facial" or "factual" jurisdiction attack on the Plaintiff's Complaint. IN re Dinastia, L.P, 381 BR 512, 518-19 (S.D TEX. 2007). "To decide whether a 12(b)(1) motion is a facial or factual challenge, a court must determine whether the motion disputes the complaint's allegations regarding subject-matter jurisdiction." Torres-Negron v J&N Records, L.L.C, 504 F.3d 151, 162 n.8 (1st Cir 2007). If the 12(b)(1) motion does not dispute subject-matter allegations, then it challenges only the facial sufficiency of the complaint. Id. If the 12(b)(1) motion disputes the subject-matter allegations, then it challenges the factual basis for subject matter jurisdiction. Id. Under a factual challenge, "the allegations have no presumptive truthfulness and ... the court has discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts". Mercado-Arocho, 455 F.Supp 2d at 18 (citations omitted). The analysis changes depending on whether the challenged facts would also decide issues relating to the merits of the case. Torres-Negron, 504 F.3d at 163. If the challenged facts do involve the merits of the case, the court must use a summary judgment standard and dismiss "' only

If the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law" Id. (quoting _Trentacosta v. Frontier Pac. Aircraft Indus., Inc._, 813 F.2d 1553, 1558 (9th Cir. 1987).

In the case at bar, the district judge did not follow the rule of law which require the government to establish the courts subject-matter jurisdiction. Instead, the district judge order the magistrate judge to do a "Fact-Finding" in which is required only when the jurisdictional facts are in dispute. In the present case, Petitioner's jurisdictional facts was not in dispute, however, the magistrate's "Fact-Finding" determined the following uncontroverted facts:

> "Mr. Richardson's new evidence consist of a CAD-Report that establish the existence of a "Drug-Violation" that occurred on _August 6, 2008 at 9:59:30 P.M_ at Richardson's place of business. The case number assigned to the "Drug-Violation" is the same case number that appears on the certificate of analysis identifying the substance at issue in count Two. The uncontroverted fact that Mr. Richardson had been arrested at _noon_ on _August 6, 2008_ and remained in custody at the time of the said "Drug-Violation" and there is no incident report generated by "P.P.D" in support of the governments theory of a morning controlled buy". _See Magistrate R&R_, Appx _B_

Instead of granting Petitioner the relief required as a rule of law, the magistrate branded the 2255(e) savings clause as going to the District courts subject-matter Jurisdiction and essentially made a recommendation to dismiss Richardson's 12(b)(1) motion without addressing the merits for a want of savings clause Jurisdiction. See Magistrate Judge Report and Recommendation, APPX B

On August 11, 2021, the District court adopted the report and recommendation of the magistrate Judge. See District Court order, APPX A

On September 1, 2021, Petitioner filed a timely appeal before the Court of appeal and renewed [his] Fed. R. CIV. P 12(b)(1) motion, in light of the fact that the District court did not satisfy itself of subject-matter jurisdiction.

On October 01, 2021, the Court of Appeals proceeded to follow the rule of law, pursuant to Fed. R. Civ. P 12(b)(1), thus, ordering the government to respond no later October 29, 2021 See Appeals court order, EX S

On October 15, 2021, USAO- New Hampshire responded, via, letter, stating that the warden was not served in this matter, thus, the government will not participate in the proceedings. See Government's reply letter, EX -P

On November 15, 2022, the court of Appeals adopted the decision of the District Court. See Appeals court order, APPX A

On November 22, 2022, Petitioner filed for a rehearing and rehearing en banc before the First Circuit Court of Appeals.

On January 18, 2023, the court of Appeals declined a Rehearing & Rehearing en banc. See Appeals Court order, Appx C

If this court would find the time and compare Petitioner's Fed R. Civ. P 12(b)(1) motion, filed in both the District and Appeals court, this court would determine that the Magistrate Judge does not dispute the uncontroverted Facts of [his] 12(b)(1) motion. As a rule of law, "If the material jurisdictional facts are not in dispute then the moving party is entitled to prevail as a matter of law". Torres-Negron, 504 F.3d at 163 (1st Cir. 2007) Consequently, the magistrate Judge elected not to "Follow the rule of Law" and make her report and recommendation in favor of the moving party, when the material jurisdictional facts are not in dispute. On the contrary the magistrate made the following report and recommendation:

> "Mr. Richardson has not established a gateway claim of actual innocence or otherwise properly invoked this court's savings clause jurisdiction, this court lacks jurisdiction to grant the relief requested in his "motion to dismiss". Accordingly, the district Judge should deny Mr. Richardson's "motion to dismiss" without addressing the merits of his argument". See Magistrate's Report and Recommendation, APPX B

In the case at bar, the "Fact-Finding" performed by the Magistrate Judge establish that Petitioner's "material jurisdictional facts" are not in dispute, thus, as a matter of law, Petitioner is entitled to relief. See Torres-Negron, 504 F.3d at 163 (1st Cir. 2007), For this court has long settle that "the question of federal jurisdiction is separate from the question of whether the underlying claim which supports jurisdiction fails to state a claim upon which relief can be granted, E.g., Bell v. Hood., 327 U.S 678, 681-82, 66 s.ct 773, 90 L.ed 939 (1946). Both the District and Appeals Court did not satisfy itself of federal jurisdiction, thus, such unrefined disposition is described as a "drive-by jurisdictional ruling that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." (quoting steel co. v. citizens for a Better Envt, 523 U.S 83, 91, 118 s.ct. 1003, 140 L.ed 210 (1998)).

For the foregoing reasons, this court should resolve this jurisdictional question and remand this missing jurisdictional claim not as a missing door Key, always required but as a missing welcome mat required in the circumstances, when exercising federal jurisdiction.

WHETHER THE CIRCUITS SPLIT ON CONGRESS INTENT PURSUANT TO TITLE 28 U.S.C § 2255(e) savings clause TO BE TREATED AS JURISDICTIONAL IN NATURE, THUS, EQUIVALENT TO THAT OF SUBJECT-MATTER JURISDICTION OR WHETHER THE SAVINGS CLAUSE IS A CLAIM PROCESSING RULE THAT MUST BE DECIDED AFTER AND NOT BEFORE THE COURT ESTABLISHES SUBJECT-MATTER JURISDICTION

STANDARD OF REVIEW

The primary concern of the Supreme court is not to correct errors in lower court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved.

Important Considerations for accepting a case for review include the existence of a Conflict between the decision of which review is sought and a decision of another Appellate court on the same issue. Thus, an important function of the Supreme Court is to resolve disagreements among lower courts about specific legal question and the importance to the public of the issue.

ARGUMENT

Petitioner Contends that Congress did not intend for TITLE 28 U.S.C § 2255(e) savings clause to be treated as Jurisdictional in nature or equavelent to that of subject-matter jurisdiction. The supreme court should exercise its extraordinary power to resolve the circuit split as to whether the 2255(e) savings clause is a claim processing rule that must be decided after and not before the court establish ARTICLE III subject-matter jurisdiction.

On November 23, 2020, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C § 2241, challenging his actual innocence on a heroin distribution charge in the Eastern District of Virginia in United States v. BOBBY RICHARDSON, NO. 3:09-CR-15-JAG-1 (E.D.VA).

On March 31, 2021, petitioner filed a petition pursuant to FED. R. CIV. P 12(b)(1) for lack of subject-matter jurisdiction, whereas, there was no case in controversy, pursuant to Article III of the Constitution.

On June 24, 2021, Magistrate Judge Andrea K. Johnstone made the following recommendation to the District court:

(1) Mr. Richardson's Fed. R. Civ. P 12(b)(1) motion is an addendum to his § 2241 motion and Mr. Richardson's Fed. R.

Civ. P 12(b)(1) motion should be dismissed without addressing the merits of his arguments.

(2) The District Judge should dismiss Mr. Richardson's § 2241 petition for lack of savings clause jurisdiction

On August 11, 2021, the District Court adopted the report and recommendation of the magistrate judge. see District Court order, APPX B.

On September 1, 2021, Petitioner filed a timely appeal before the court of appeal and renewed [his] Fed. R. Civ. P 12(b)(1) motion, in light of the fact that the District Court did not satisfy itself of subject-matter jurisdiction.

On October 1, 2021, the court of appeals proceeded to follow the rule of law, pursuant to Fed. R. Civ. P 12(b)(1), thus, ordering the government to respond no later than October 29, 2021. see Appeals Court order, Ex+ S.

On October 15, 2021, USAO-New Hampshire responded, via, letter, stating that the warden was not served in this matter, thus, the government will not participate in the proceedings. see Government's reply letter.

On November 15, 2022, the court of appeals adopted the decision of the District Court. See Appeals Court order, APPX A.

On November 22, 2022, Petitioner filed a rehearing and rehearing en banc petition.

On January 18, 2023, the court of Appeals declined a Rehearing & Rehearing En banc. see Appeals Court order, APPX C.

The Seventh Circuit concluded, "Section 2241 and 2255 deals with remedies; neither one is a jurisdictional clause [.] Jurisdiction to resolve claims under § 2255, which technically are motions in the criminal prosecution, comes from 18 U.S.C § 3231 [.]" Harris v. Warden, 425 F.3d 386, 388 (7th Cir. 2005)

Other sister circuits have split on the jurisdictional issue at hand. In contrast, the Eleventh Circuit has held that § 2255(e) "speaks in imperative terms regarding a district court's power to entertain a particular kind of claim" and is therefore jurisdictional in nature. Williams v. Warden, 713 F.3d 1332, 1340 (11th cir. 2013)

Many other circuits have sided with the Eleventh circuit view. For example, in a Fourth circuit case, the Fourth circuit considered the savings clause issue and ultimately held that the district court lacked jurisdiction over § 2241 petition because he failed to satisfy the conditions needed to render his § 2255 motion inadequate or ineffective to test the legality of his detention. Notably, the Fourth circuit treated the savings clause as its special obligation to satisfy itself of jurisdiction, as if, the savings clause jurisdiction is equavalent to ARTicle III. See Rice v. Rivera, 617 F.3d 802, 807-08.

Several other courts of Appeals have taken this position, or implied that the savings clause is jurisdiction in nature. See Wooten v. Cauley, 677 F.3d 303, 306 (6th cir. 2012)(analyzing whether "[t]he use of the savings clause to establish jurisdiction renders the resulting § 2241 petition subject to § 2255's statue of limitation), Harrison v. Ollison, 519 F.3d 952, 961 (9th cir. 2008) ("Because Harrison has not established that his petition is a legitimate § 2241 petition brought pursuant to the escape hatch of § 2255, we do not have jurisdiction under § 2241 to hear his appeal"), Hill v. Morrison, 349 F.3d 1089, 1091 (8th cir. 2003) (the savings clause "provides the Court of incarceration as having subject-matter jurisdiction over a collateral attack on a conviction or sentence"), Cephas v. Nash, 328 F.3d 98, 105 (2d cir. 2003) ([W]here... petitioner invokes § 2241 jurisdiction to raise claims that clearly could have been pursued earlier... then the savings clause of § 2255 is not triggered and dismissal of the § 2241 petition for lack of jurisdiction is warranted"), Garza v. Loppin, ("If Garza can show that his petition fits under this narrow exception, [in the savings clause] than ... the district court had jurisdiction to consider his habeas petition...)

- The Supreme court should resolve the circuit-split, where-as, multiple circuits is designating a rule as jurisdiction which can have important consequences. <u>See Henderson</u>, 562 U.S at 434. To be specific, the supreme court has held, "branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system. Indeed, as we have described, this designation changes the method of review applied to a motion to dismiss. Furthermore, parties may raise the issue of lack of subject-matter jurisdiction at any point during the litigation, and the court is obligated to dismiss a case sua sponte if it detects a jurisdictional defect." <u>Id</u>.

The lower court(s) branded Petitioner's Petition, namely, [his] § 2241 Petition as a second and successive Petition and treated his Rule 12(b)(1) motion as a "claim processing rule". To be specific, the lower courts treated Petitioner's Rule 12(b)(1) motion pursuant to ARTICLE III subject-matter jurisdiction as an addendum to [his] § 2241 Petition. In doing so, the lower court changed the method of review applied to a Fed R. Civ.P 12(b)(1) motion. As a consequence, the lower court(s) treated the "savings clause" as adjudicatory authority both preceding, and exceeding Article III subject-matter jurisdiction.

To this end, this court has held, "a statutory provision is jurisdictional only if congress has clearly stated that it is" <u>Arbaugh V. Y&H Corp.</u>, 546 U.S 500, 516, 126 S.Ct 1235, 163 L.Ed 2d 1097 (2006) More importantly, Congress did not intend for federal courts to interpret "claim processing rules" to have adjudicatory authority exceeding Article III subject-matter jurisdiction. It is Article III of the U.S Const. which give congress its regulative power extended to cases or controversy in which the United States is a party.

Subsequently, the judicial power of the United States is vested in one supreme court over cases or controversy. In legal terms, the "so-called savings clause" should not precede nor exceed the U.S Const. Article III, § 2, not even the regulatory body of Congress shall exceed the restraint of Article III, § 2 of the U.S const.

For the foregoing reasons this court should resolve the circuit split because this case present issues of importance beyond the particular facts and parties involved. The disagreements among the lower courts about subject-matter jurisdiction taking a back seat to a "Claim Processing rule" have a serious consequence to the public, whereas, lower courts are exceeding the Articles of Congress from whence it receive its limited jurisdiction.

WHETHER THE APPELLATE COURT'S AFFIRMATIVE DECISION TO DISMISS MR. RICHARDSON'S HABEAS PETITION PRESUMABLY PURSUANT TO FED. R. CIV. P 12(b)(6) ON THE BASIS THAT HE FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED UNDER § 2255(e) SAVINGS CLAUSE, NOT WITHSTANDING, MR. RICHARDSON DEMONSTRATED A CREDITABLE SHOWING OF ACTUAL INNOCENCE OF THE SUBSTANTIVE OFFENSE CHARGED IN COUNT 2 OF HIS INDICTMENT VIOLATED HIS FOURTH AND FIFTH AMENDMENT RIGHTS

Mr. Richardson contends that pursuant to the legal precedence set forth by the supreme court of the United states and adopted by the lower courts to include the First circuit that it erred in dismissing his Habeas petition, presumptive, to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted, because [he] failed to satisfy the requirements of § 2255(e) savings clause. Mr. Richardson made a plausible showing that he is actually innocent of the substantive offense of conviction pursuant to Count 2 of [his] indictment and therefore, he is entitled to relief.

In Petitioner's case sub Judice, the government established the following controverted predicate for jurisdiction as to count 2 of [his] indictment:

> "On or about August 6, 2008 between 11A - 12p in the Eastern District of Virginia and within the jurisdiction of this Court ... Bobby Richardson ... did knowingly, intentionally and unlawfully distributed a mixture and substance containing a detectable amount of heroin, a schedule I controlled substance." (ATTACHMENT), Exhibit - I, pgs 10-19. In addition, the certificate of analysis identifying the substance at issue in count two was assigned to case No. 08-013781 (ATTACHMENT), Exhibit - C.

More importantly, the uncontroverted facts pursuant to the certificate of analysis identifying the substance at issue in count two and/or case No. 08-013781, pertains to a drug-violation that occurred on August 6, 2008 at 9:59:30 P.M, i.e., approximately, 9 hours after Richardson was arrested on August 6, 2008 at 1:04:13 P.M and remained in custody, during the time the said offense was committed (ATTACHMENT), Exhibit - D, "List of Events - Long Format / Incident RPT No. 2008042540, pg. 4"

In addition, the uncontroverted evidence disclosed the absence of a incident report responsive to the alleged morning controlled buy (ATTACHMENT), Exhibit-H "Declaration of Latoya Flowers, para 5." To conceal this fact, the government, et. al, blacked-out the case number(s) from the certificate of analysis and/or all discovery material issued to Richardson. (ATTACHMENT) Exhibit-B "Pre-trial Discovery". Consequently, the government, et. al, created false incident reports responsive to Case No. 08-013781, namely, on January 26, 2009, that is, 19 Days after Richardson was indicted on Nine counts. (ATTACHMENT), Exhibit-I, pgs 10-19. Essentially, the uncontroverted facts establish the absence of a morning controlled buy and/or incident/Police report in support thereof. Moreover, the government, et. al, controverted the evidence responsive to Case No. 08-013781, thus, utilizing the same evidence to cover-up the false arrest and illegal search & seizure. Thus, the evidence used to convict Richardson pertains to a crime that occurred 9-hours after [his] arrest in which he remained in custody during the time the so-called crime was committed. Petitioner raised constitutional violations pursuant to [his] Fourth and Fifth Amendment rights, responsive to [his] false arrest and actual innocence claim. (count two).

By making the argument of "Actual Innocence", Petitioner seeks to obtain review of his claims by showing that [his] case falls into the "narrow class of cases implicating a fundamental miscarriage of justice." Cornell v. Nix, 119 f.3d 1329, 1333 (8th Cir. 1997).

In Schlup, the supreme court has established a gateway claim of Actual Innocence. In schlup, the court recognized in 1995 that a showing of actual innocence can serve as a "gateway" for pursuing his procedurally defaulted constitutional claims.

see Schlup, 513 U.S at 315. An actual innocence claim that involves constitutional error must be supported with new reliable evidence whether it be exculpatory scientific evidence, trustworthy eye witness accounts, or critical physical evidence — that was not presented at trial. Schlup v. Delo, 513 US 298, 324, 115 S.Ct. 851, 130 L.Ed 2d 808 (1995). In the Schlup gateway innocence claim the supreme court held: "Schlup's constitutional claims were not based on his innocence, but instead on his argument that the ineffectiveness of his counsel under Strickland v. Washington, 466 U.S 668, 80 L.Ed 2d 674, 104 S.Ct 2052 (1984) and the prosecutor's withholding of evidence in violation of Brady v. Maryland, 373 U.S 83, 10 L.Ed 2d 215, 83 S.Ct 1194 (1963), denied him constitutional protections. see Schlup, 513 US at 314. Schlup, however, faced procedural obstacles to these claims. In cases where the petitioner has filed a successive or abusive writ, or where he or she has committed a procedural default, the petitioner cannot establish cause and presudice, he or she can obtain review of his or her constitutional claims only by showing that he or she falls within a narrow class of cases implicating a fundamental miscarriage of justice. Proving "actual innocence" is a way to demonstrate that one's case falls within that narrow class. see id at 314-15. This type of "actual innocence" is not a substantive claim in itself, but is a "gateway" through which a petitioner must pass to obtain review of defaulted substantive claims." In Schlup, the Petitioner's claim of innocence was not a basis for his relief, instead his actual relief would be based on the validity of Strickland and Brady claims. Schlup's innocence claim thus was not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits"'. Id at 315 (quoting Herrera, 506 U.S at 404)".

unlike Schlup, Petitioner's actual innocence is [his] constitutional and substantive claim(s) in itself, in which his actual relief is based upon.

Appellate courts, "review de novo a district court's denial of relief in § 2254 habeas corpus proceedings, e.g, Barbe v. McBride, 521 F.3d 443, 452 (4TH cir. 2008). Furthermore, "we review for abuse of discretion, however, such a court's decision not to conduct an evidentiary hearing. See Conaway v. Polk, 453 F.3d 567, 582 (4TH cir. 2006). Consequently, "a court necessarily abuses its discretion when it makes an error of law" see Id. Finally, in assessing whether a § 2254 claim has been properly dismissed without an evidentiary hearing or discovery, we must evaluate its underlying allegations pursuant to the principles of Federal Rule of Civil Procedure 12(b)(6) Id.

In Petitioner's case sub Judice, the magistrate Judge did a Fact-Finding, per District Court Judge and made the determination that Petitioner is actually innocent as to 21 U.S.C § 841(a) (Count two) and did not make any factual dispute to say otherwise Id. More importantly, the District and Appellate court abused their discretion, thus making an error in law, when both courts adapted the Report and Recommendation of the magistrate Judge. In doing so, the District Court essentially dismissed Petitioner's actual Innocence claim, pursuant to Fed. R. Civ. P 12(b)(6), for a failure to State a cause of action upon which relief could be granted under § 2255(e) savings clause. When the District Court elected to dismiss Petitioner's claim, via, Fed. R. Civ. P 12(b)(6) standards, the Appellate Court thereafter, must assess the underlining claim for Facts in dispute and/or whether Petitioner failed to state a claim upon which relief could be granted. This court has long settled that, "to survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual matter to State a claim to relief that is plausible on its face. see Bell Atl Corp v. Twombly, 550 U.S 544, 570, 127 S. Ct 1955, 167 L.Ed 2d 929 (2007)

In the case at bar, Petitioner made a plausible claim on it's face to survive the Fed R. Civ. P. 12(b)(6) determination by the District Court. To be specific, the magistrate Judge made the Factual determination that Richardson is innocent as to Count two of [his] indictment. When the District Court excepted the Factual determination of the Magistrate Judge as to Richardson's innocence, then when "ruling upon such a motion requires determining if 'all the facts alleged [in the complaint] when viewed in the light most favorable to the plaintiff, render the plaintiffs' entitlement to relief plausible". See Ocasio-Hernandez v. Fortuño-Burset 640 F.3d 1, 14, (1st Cir. 2011). In the present case, Richardson provided the District Court with a plausible claim upon which relief could be granted, support by the magistrate Judge. Thus, to avoid a meritorious review inwhich the Petitioner would prevail, the District Court elected to dismiss [his] action pursuant to Fed R. Civ. P. 12 (b)(6) for failure to state a claim upon which relief could be granted. Such a ruling by the District Court is diametrically opposed to the same Fact-Finding by the District Court. On the one hand, the District Court acknowledge Petitioner's plausible claim on actual innocence. However, on the other hand, the same Court is saying [they] do not acknowledge a plausible claim for the "want of savings clause Jurisdiction".

Petitioner's fourth Amendment was violated at the outset of this case where as, "there was not probable cause to arrest and bring the criminal proceeding against him". See Evans v. Chalmers, 703 Furthermore, Richardson's actual innocence claim and unlawful search and seizure at his place of business, also constitute violation under the Fourth, FIFTH and Fourteenth Amendment under the equal protection of the laws of the United States Constitution. See Fourth, FIFTH and Fourteenth Amendment(s).

For the Foregoing reasons, this court should grant certiorari to address the deprivation of the Fourth, FIFTH and FOURTeenth Amendment, more importantly, the public has a vested interest in how Federal courts address and adjudicate claims involving Constitutional interest, Juxa-posed to Federal Rules of civil / criminal procedures mandated by the Supreme court and Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bobby Richardson

Date: March 21, 2023