No._____

In the

Supreme Court of the United States

Gary E. Peel,

Petitioner

vs.

United States of America,

Respondent

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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QUESTIONS PRESENTED FOR REVIEW

1. Whether, contrary to Supreme Court precedent [*Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002)], the government can criminalize the possession of non-obscene photographic materials that depict only an adult at the time of production, and which, therefore, are not intrinsically related to the sexual abuse and/or exploitation of children, a subject matter jurisdictional question on which multi-circuit conflict now exists.
2. Whether consistent with the Takings Clause, the government can criminalize the legally acquired possession of materials that previously enjoyed the protection of the First Amendment in violation of Supreme Court precedent.
3. Whether consistent with the *Ex Post Facto* Clause, the government can retrospectively re-define an *adult* (at the time of production) to a *minor* (at the time of production) in order to secure a federal conviction for possession of child pornography.
4. Whether, in violation of Supreme Court precedent [*McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013) and others], a Defendant, with *unimpeachable* exculpatory newly discovered evidence, confirming that false evidence was used to secure his bankruptcy fraud conviction, can have the *merits* of his "actual innocence" claims denied on procedural grounds, without any evidentiary hearing.
5. Whether consistent with the due process clause, a Defendant can be denied the right to even one evidentiary hearing to prove the ineffective assistance of his appointed counsel, including, counsel's failure to raise the statute's exculpating affirmative defense and submit its corresponding exculpating jury instruction.

TABLE OF CONTENTS

Appendix J - Transcript of Bankruptcy Court Hearing of 1-6-06
Appendix K –Partial Transcript (Testimony of Attorney Donald Urban)
Appendix L – Fax/Letter of Attorney Stanton dated 1-11-06 to Attorney Urban

TABLE OF AUTHORITIES

Cases

LIST OF PROCEEDINGS

Bankruptcy: Peel files a Ch. 7 Bankruptcy in the So. Dist. of Illinois in July 2005. (Bk. Case no. 05-33238). Appeals to the Seventh Circuit pertaining to the bankruptcy include 725 F.3d 696 (7th Cir. 2013), and the unreported cases with Case No. 13-1547 (7th Cir. 2013) and 14-3459 (7th Cir. 2015) 14-3459 (7th Cir. 2015). The bankruptcy remained pending through the following referenced criminal matter. The bankruptcy proceeding closed in December 2015.

Criminal Trial and Direct Appeals: In March 2006, Peel is indicted in the U.S. Dist. Court for the Southern District of Illinois (Case No. 06-CR-30049) with federal jurisdiction asserted under 18 USC §152(6), 18 USC§1512(c)(2), and 18 USC §2252A(a)(5)(B). A jury verdict of "guilty" is returned on all four (4) counts in March 2007. Judgment and conviction are entered in November 2007 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 USC §16901 et. seq. (2006)].

Peel's first direct appeal [595 F.3d 763 (7th Cir. 2010)] affirmed, in part, and reversed, in part, the judgment. Cert. Den. 131 S.Ct. 994. On remand, Count 2 is dismissed as duplicitous of Count 1. The Amended Judgment imposes the same sentence. A second appeal is taken. The Seventh Circuit affirms Peel's revised sentence [668 F.3d 506 (7th Cir. 2012)].

Post-Conviction Proceedings: Since Peel's 2007 conviction, he has initiated multiple post-conviction proceedings, including habeas petitions, that were all denied without any evidentiary hearings.

In 2011, four years *after trial,* the Bankruptcy Court enters an Order, affirmed on appeal (subject to a minor financial adjustment), disclosing unimpeachable and exculpatory "**newly discovered evidence.**" See the 12-19-11 Bankruptcy Court decision (So. Dist. of Illinois, Bky. Case #05-33238, Doc.#264). The District Court affirmed (2013 U.S. Dist. LEXIS 19478) and the Seventh Circuit slightly modified those two decisions on 8-2-13 in *In re [The Debtor] Gary E. Peel,* 725 F.3d 696 (CA7, 2013).

Pertinent to this proceeding, Peel thereafter pursues an aggressive series of actions for §2255 relief, but he is continually denied relief, **without an evidentiary hearing,** on at least four (4) occasions, i.e.,(2013 U.S. Dist. LEXIS 60865), (CA-7 Case No. 15-3269); (CA-7 Case No. 16-1665); and (CA-7 Case No. 16-3297).

Present Matter: Unable to secure a §2255 evidentiary hearing, Peel files, on 11-1-21, his COMBINED PETITION for WRIT OF ERROR *AUDITA QUERELA* (as to Count 1 of the Indictment), WRIT OF ERROR *CORAM NOBIS* (as to Counts 3 & 4 of the Indictment), and/or, alternatively, RELIEF FROM "AMENDED JUDGMENT IN A CRIMINAL CASE" pursuant to a WRIT OF ERROR UNDER THE ALL-WRITS ACT (28 USC §1651) (as to Counts 1, 3 & 4 of the Indictment) in *United States v Peel,* 06-CR-30049. Same is denied on 6-13-22 (Appx. B), without a discussion of the

merits,[1] and *again* **without an evidentiary hearing.** Peel's "Motion to Reconsider" is denied on 9-7-22 (Appx. D), again without discussing the merits. On 9-14-22, Peel files his "Notice of Appeal."

On 3-23-23, the Seventh Circuit – without addressing the merits – affirms the District Court, Case No. 22-2616. (Appx. A). Peel files a Petition for Rehearing *En Banc* on 4-10-23. Same is denied on May 2, 2023, (Appx. C), again without discussing the merits.

DECISIONS BELOW

Each of the following decisions below is unreported. The opinion of the Seventh Circuit, (*U.S. v Peel,* No. 22-2616) (Appx. A), affirming the District Court and denying Peel's appeal. The opinion of the Seventh Circuit, (*U.S. v Peel,* No. 22-2616) (Appx. C), denying Peel's Petition for Rehearing *en banc.*

The opinion of the U.S. District Court for the Southern District of Illinois (*U.S. v Peel,* No. 06-CR-30049) (Appx. B). The second District Court opinion (Appx. D), denying Peel's Petition for Rehearing.

JURISDICTION
(Including Circuit Conflicts)

The Seventh Circuit issued its decision on March 23, 2023. On May 2, 2023, the Seventh Circuit denied Peel's timely filed Petition for Rehearing *en banc.* The jurisdiction of this Court is properly invoked pursuant to 28 USC §1254(1)

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[1] Except for erroneously "borrowing" Illinois State law, which is ***not*** authorized by the Assimilative Crimes Act and is prohibited by Supreme Court precedent [W*illiams v U.S.* (1946) and *Moor v. County of Alameda* 411 U.S. 693, 701-702, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973)], discussed *infra*].

With regard to the four-count Indictment (Appx. E), 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 (as to Counts 3 & 4) *allegedly* 18 U.S.C. §2252A(a)(5)(B).

Subject Matter Jurisdiction - Circuit Conflict. Counts 3 & 4 of the Indictment, (Appx. E) charge Peel with possession of child pornography in violation of 18 U.S.C. §2252A(a)(5)(B). However, the Indictment, on its face, as confirmed by 100% of all trial evidence, affirmatively alleges the child pornography "victim" to have been an ***adult*** when the subject photos were *produced* in 1974, a non-criminal offense.

Ex Parte Bain, 121 U.S. 1 (1887), held that a court has no jurisdiction over an offense not properly presented by an indictment. Then, in *United States v. Cotton,* 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), where a drug quantity necessary for sentencing purposes was omitted from the Indictment, this Court declared that "Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled." The *Cotton* decision resulted in ***circuit conflicts*** by leaving unresolved the subject matter jurisdictional question presented where, as here, the Indictment (Counts 3 & 4) is not merely *defective* but *charges no criminal offense at all.*

The Eleventh Circuit, in *United States v. McIntosh,* 704 F.3d 894, 902 (11th Cir. 2013), recognized its conflict with the Fifth, [*United States v. Meacham,* 626 F.2d 503 (5th Cir.1980)] and Tenth Circuits, [*United States v. DeVaughn,* 694 F.3d 1141, 1148 (10th Cir. 2012)], and notes, as here, that there is still no subject matter jurisdiction when the Indictment fails to charge any criminal offense whatsoever.

In *United States v. Muresanu,* 951 F.3d 833, 838 (7th Cir. 2020), the Seventh Circuit aligned itself with the Fifth and Tenth Circuits.

The District Court and the Seventh Circuit each turned a blind eye to this subject matter jurisdictional issue when it was raised here by Peel.

Federal courts have an affirmative duty to address subject matter jurisdiction *sua sponte.* (*Gonzalez v Thaler* 565 U.S. 134, 141, 132 S.Ct. 641, 648, 181 L.Ed.2d 619 (2012). As stated in *Henderson v Shinseki* 562 U.S. 428, 434-435, 131 S.Ct. 1197, 1202, 179 L.Ed.2d 159 (2011);

> "Federal courts have an independent obligation to ensure that they do not exceed the scope of their subject matter jurisdiction, and thus must raise and decide jurisdictional questions that the parties either overlook or elect not to press."

In light of this subject matter jurisdictional obligation, the Federal courts desperately need Supreme Court guidance, because the Seventh Circuit here has. turned a blind eye to that jurisdictional issue in order to uphold Peel's conviction.

CONSTITUTIONAL PROVISIONS, STATUTES, AND JURY INSTRUCTIONS INVOLVED

Constitutional Provisions – Relevant Portions:

Art. I, Sec. 9, Clause 3 of the United States Constitution provides:

> "No ... *ex post facto* Law shall be passed.

U.S. Constitution, First Amendment (Free Speech) provides:

> "Congress shall make no law...abridging the freedom of speech."

U.S. Constitution, Fifth Amendment (Due Process- "Fair Notice," "Fair Trial," & "Takings" Clause) provides:

> "No person shall ...be deprived of life, liberty, or property without due process of law."

Statutory Provisions – Relevant Portions:

18 USC §2252A (Possession of Child Pornography)

> "(a) Any person who – (5) either – (B) knowingly possess... 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), (3A) (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 actual minor or minors.

20 Cong. Rec. 997

> [Congress first established 16 as the age of consent for sexual activity in 1889.]

Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204

> [Congress raised the age of consent from 16 to 18.]

Jury Instructions:

The Seventh Circuit's pattern criminal jury instruction, [18 U.S.C. § 2252A(c) Affirmative Defense To Charges Under 18 U.S.C. §§ 2252A(a)(1), (a)(2), (a)(3)(A), (a)(4) or (a)(5)]- though not tendered to Peel's jury-[2] provides:

> "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."

At trial, the presiding Judge, via judicial notice, instructed the jury:

> "And this Court does take judicial notice of the fact that in 1973 and 1974, the age of consent for sexual activity was 16. This is not an issue in this case." (Appx. F.)

STATEMENT OF THE CASE

With regard to Counts 3 & 4 of the Indictment, charging possession of child pornography in violation of 18 USC §2252A(a)((5)(B), the Indictment alleges (on its

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[2] A *Strickland* violation.

face) and all trial evidence confirms, that "In 1974, **Gary Peel**, took sexually explicit photographs of his then-wife's 16 year old sister, D.R." [Bolding in original.] In 1974, a 16-year-old was an "adult." Any criminal prosecution for the possession of said materials, which had been legally acquired and legally possessed, violates the First Amendment, the *ex post facto* clause and/or the takings clause.

With regard to Count I of the Indictment, charging bankruptcy fraud, *unimpeachable* newly discovered evidence - (decisions from three courts) - now confirms that *false* evidence was used to convict, and absent that false evidence, Peel is a*ctually innocent,* factually and legally, of the charged offense. Despite the discovery of this new evidence (four years post-trial), Peel has been repeatedly denied even one evidentiary hearing to prove his *actual innocence.*

PETITION FOR A WRIT OF CERTIORARI

Gary E. Peel respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

REASONS FOR GRANTING THE WRIT:

1. Under Count 1, *unimpeachable,* newly discovered, exculpatory evidence (decisions from three separate courts[3]) has now proven that the *sole* basis for Peel's Bankruptcy Fraud conviction was false evidence introduced at trial by the Government (a due process violation). The failure of the

[3] A 12-19-11 Bankruptcy Court decision (So. Dist. of Illinois, Bky. Case #05-33238, Doc.#264); a District Court affirmance on 2-13-13 (2013 U.S. Dist. LEXIS 19478); and the Seventh Circuit's 8-2-13 modified decision in *In re [The Debtor] Gary E. Peel,* 725 F.3d 696 (CA7, 2013).

District Court and the Seventh Circuit to address this issue and compel at least one evidentiary hearing, conflicts with this Court's decisions in *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013); *House v. Bell*, 547 U.S. 518 (2006); and others.

2. Under Counts 3 & 4 of the Indictment (Possession of Child Pornography), Peel was charged and convicted of non-criminal conduct, i.e., the Indictment *on its face* affirmatively alleged, and all trial evidence confirmed, that the *child pornography* "victim" was an *adult* at the time the subject nude photographs were *produced, i.e. when the camera shutter snapped.*. The refusal of both the District Court and the Seventh Circuit to address this issue of non-criminal conduct, either as a subject matter jurisdictional defect under *Ex Parte Bain,* 121 U.S. 1 (1887) or as a due process violation under *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), does not resolve the constitutional issues presented.

Additionally, the failure of the District Court and the Seventh Circuit to address this issue, leaves Peel's conviction as one procured in violation of Supreme Court precedents established in *Ashcroft v Free Speech Coalition,* 535 U.S. 234 (2002); *Andrus v Allard* 444 U.S. 51, 62 L.Ed.2d 210 (1979); *Williams v United States*, 327 U.S. 711, 90 L.Ed. 962 (1946); and *Moor v. County of Alameda* 411 U.S. 693, 701-702, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

3. Unless certiorari is granted, there will be wide-ranging adverse effects in that Circuit courts will be incentivized, by this Court's silence, to

   a. prosecute future possession of child pornography cases under 18 USC §2252A when the "victim" is an *adult* at the time of *production,*

   b. render inapplicable the *ex post facto* defense (a/k/a the affirmative defense/grandfather[4] clause) for that statute, and

   c. bar future Defendants' use of the Seventh Circuit's own18 USC §2252A pattern criminal affirmative defense jury instruction for that offense.

SUMMARY OF THE ARGUMENTS

Peel's post-conviction petition for *coram nobis* and *audita querela* relief is premised upon "actual innocence" coupled with constitutional implications.

As to Count 1 (Bankruptcy Fraud), Supreme Court precedent eliminates procedural impediments and guarantees at least one evidentiary hearing when credible newly discovered evidence is sufficient to exonerate the defendant. Here, the exculpatory evidence is *unimpeachable,* i.e., court decisions from three separate courts, and

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[4] In denying Peel's first direct appeal, the Seventh Circuit (595 F.3d 763, 771), failed to recognize that Peel's "grandfather clause" defense, was supported by Supreme Court precedent [*Andrus v Allred* 444 U.S. 51, 62 L.Ed.2d 210 (1979)] and was, in fact, embodied in the charging statute's affirmative defense language and the Seventh Circuit's own pattern jury instruction for the charge.

proves that the conviction was procured solely via *false* evidence. However, contrary to Supreme Court and Seventh Circuit precedent, Peel has been denied any evidentiary hearing despite multiple attempts to secure one.

As to Counts 3 & 4 (Possession of Child Pornography), the Indictment, confirmed by 100% of all trial testimony, charges *non-criminal activity* (i.e., possessing nude photographs of a "victim" who was an ***adult*** when the subject photographs were *produced*). Multiple Supreme Court decisions, cited *infra*, (and totally ignored by the District and Appellate Courts) mandate that said conviction be vacated.

ARGUMENTS

No Procedural Bar to Requested Relief

Writs of error *audita querela* and *coram nobis* are remedies of last resort available only to petitioners who are no longer "in custody" pursuant to a criminal conviction and, therefore, cannot pursue direct review or collateral relief by means of a writ of *habeas corpus*. *Chaidez v. U.S.*, 568 U.S. 342, n.1, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013) and others. Peel is still burdened under Count 1 of the Indictment by the denial of his request for a discharge in bankruptcy, and he is still burdened under Counts 3 & 4 of the Indictment by the conditions imposed on him as a registered sex offender.

The District Court and the Seventh Circuit erroneously utilized procedural impediments to circumvent any merit-based analyses of Peel's "actual innocence" claims (with constitutional impediments). In so doing, they violated, *inter alia,* the precedent established in *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013) and others,

which held that a 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 a procedural bar to relief would otherwise apply, and 5) even if a statute of limitations might arguably preclude the claim Even the Seventh Circuit, in *In Re Davenport* 147 F.3d 605, 611 (CA7, 1998), has noted, as here, with regard to Counts 3 & 4. that

> "[a] procedure for postconviction relief can fairly be 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 "

In accord, see *United States v. Denedo*, 556 U.S. 904, 911 (2009) which also held, at pp. 915-916, that procedural finality of a judgment is not a bar to consideration of *coram nobis* relief.

Counts 3 & 4 (Possession of Child Pornography):

Factual and Legal Predicates

1. In 1889, Congress established 16 as the federally defined age of consent for sexual activity. See 20 Cong. Rec. 997, as confirmed in *Williams v United States* 327 U.S. 711, 724-25, 90 L.Ed. 962 (1946).
2. The Indictment (Appx. E, ¶1), on its face, alleges:

> "1. In 1974, **PEEL**, took explicit photographs of his then-wife's 16 year old sister, D.R., **PEEL** retained these pictures until 2006." [Emphasis in original]

3. Donna Rodgers ("D.R." in the Indictment), the alleged child pornography "victim," testified that she was born on 7-17-57, making her at least 16, if not

17 years of age in 1974 when the subject photographs were *produced.* (Appx. G)

4. At trial, via judicial notice, (Appx. F) the presiding Judge instructed the jury:

> "And this Court does take judicial notice of the fact that in 1973 and 1974, the age of consent for sexual activity was 16. *This is not an issue in this case.*" [Emphasis, by italics, supplied.]

5. In 1974 - the year of ***production*** of the subject photographs - there was no federal child pornography statute regarding either *production* or *possession.*

6. In 1984, Congress passed the Child Protection Act of 1984, Pub. L. 98-292, 98 Stat. 204, raising the age of minority from "under 16" to "under 18," and criminalizing, for the first time, the *possession* of child pornography. If the "victim's adult/majority status in 1974 or at any other time, is altered to child/minority status, as here, to facilitate a criminal prosecution, then the *ex post facto* clause is violated. See *Metrish v Lancaster,* 569 U.S. 351 (2013) and others.

> [In Peel's case, the alleged "victim" was a 16-year-old *adult* in 1974 and a 26-year-old *adult* in 1984. Just as a photograph of a frog taken in 1974 still depicts a frog, not a tadpole, when viewed at any later time (e.g., in 1984), so too does a photograph of a 16-year-old *adult* taken in 1974 still depict a 16-year-old a*dult* when viewed at any later time (e.g. in 1984)].

7. The Assimilative Crimes Act, 18 USC §§7(3) & 13(a) permits borrowing, redefining, or enlarging state law ***only*** when 1) the alleged criminal offense

occurs on federal enclaves or federal admiralty/maritime property, ***and*** 2) the act or omission is not made punishable by an enactment of Congress.

Since neither condition exists here, borrowing Illinois law is not permitted.

8. In 1946, the Supreme Court in *Williams v United States*, 327 U.S. 711, 724-725, 90 L.Ed. 962 (1946) recognized 16 as the age of consent for sexual activity and declared that state law could not be borrowed, redefined, or enlarged under the Assimilative Crimes Act (to facilitate a federally defined criminal offense.) This principle was reinforced in *Moor v. County of Alameda* 411 U.S. 693, 701-702, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).
9. Despite the above-referenced prohibition on the borrowing, redefining, or enlarging of State law to facilitate a federally defined criminal offense, the District Court and the Seventh Circuit both borrowed Illinois State law to justify upholding Peel's original conviction, (see *United States v Peel*, 668 F.3d 506, 510 (7th Cir. 2010) which the District Court relied upon to deny Peel's *coram nobis* Petition. (See Appx. B, pp.6-7)

Legal Discussion

1. Either federal courts lack subject matter jurisdiction to entertain the prosecution of non-criminal conduct, per *Ex Parte Bain*, 121 U.S. 1 (1887) or convictions for non-criminal conduct violate the "due process" clause, per *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

2. State law cannot be borrowed to facilitate a federal conviction. *Williams v United States*, 327 U.S. 711, 90 L.Ed. 962 (1946) and *Moor v. County of Alameda* 411 U.S. 693, 701-702, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

3. With regard to Counts 3 & 4 (Possession of Child Pornography), the Seventh Circuit's failure to address the "merits" of Peel's *coram nobis* argument leaves both the District Court and the Seventh Circuit in violation of multiple Supreme Court cases, including the following:

a) Ashcroft v Free Speech Coalition, 535 U.S. 234 (2002), which held that child pornography requires <u>both</u> a real-life child at the time of *production* and child sexual abuse at the time of *production.*

Neither condition exists here. In finding 18 USC 2256(8)(B) and 2256(B)(D) of the Child Pornography Prevention Act of 1996 (CPPA) overbroad and unconstitutional, the Supreme Court, in *Free Speech Coalition*, observed, at p.236, that:

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

And at pp. 239-240, that same Court commented that:

> 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.

Here, no crime was committed in 1974 when the then 17-year-old adult (who may or may not have looked like a minor) was photographed, and no child "victim" was created in 1974 by the production of the photographs of a nude adult.

b) *Andrus v Allard,* 444 U.S. 51, 62 L.Ed.2d 210 (1979), which held that it is unconstitutional, in violation of the Fifth Amendment Due Process "Takings" Clause, to criminalize the possession of property that had been legally acquired and legally possessed.

Peel was unconstitutionally prosecuted and convicted for possessing property that he had legally acquired and legally possessed beginning in 1974.

c) *Bousley v United States* 523 U.S. 614 (1998) and *Davis v. United States,* 417 U.S. 333, 346-47 (1974), which held that a conviction, for engaging in conduct that the law does not *make criminal, "inherently results in a complete miscarriage of justice and 'present[s]* exceptional circumstances' that justify collateral relief .... "

Here, the Indictment, on its face (Appx. E), alleged non-criminal conduct, i.e., that the alleged "victim" was a 16-year-old [*adult*] when the subject photographs were *produced* in 1974 and all trial evidence confirmed the alleged "victim's" *adult* status at the time the subject photographs were *produced* in 1974. (See Appxs. F & G.)

d) *Williams v United States,* 327 U.S. 711, 90 L.Ed. 962 (1946) and *Ex Parte Bain,* 121 U.S. 1 (1887)], or *United States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), which confirm that any conviction

for non-criminal conduct is the result of a due process violation and/or the lack of subject matter jurisdiction.[5]

Here, Peel was indicted and convicted for non-criminal conduct, i.e., possessing photographs that depicted an *adult,* not a child, at the time of *production* in 1974.[6]

e) *Metrish v Lancaster,* 569 U.S. 351 (2013), and other cases, held that the *ex post facto* clause is violated when the law is changed to criminalize previously legal conduct.

Here, to facilitate Peel's conviction,[7] the alleged "victim" (an adult in 1974) was retrospectively re-characterized as a "minor" beginning in 1984 [presumably based upon the passage of the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 and contrary to the language of the charging statute (18 USC §2252A[8]), and the Seventh Circuit's own corresponding pattern criminal jury instruction.

Count 1 (Bankruptcy Fraud):

Factual Predicates:

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[5] See *United States v. McIntosh,* 704 F.3d 894, 901-03 (11th Cir. 2013), *supra,* for analytical distinction between *Bain* and *Cotton.*

[6] The time of *production* (here, in 1974) is the critical date for determining majority or minority status as per the charging statute, 18 USC §2252A, and the Seventh Circuit's own applicable jury instruction (and Committee Comments).

[7] This *ex post facto* violation, under facts similar to Peel's, was recognized in two similar lower court decisions. *United States v Meyer,* 602 F. Supp. 1476 (1984) and *United States v. Bateman,* 805 F.Supp. 1053, 1055 (D.N.H.1992)

[8] This is a non-obscenity statute. See *United States v Peel,* 595 F.3d at 770 (7th Cir. 2010)

The Indictment (Appx. E) alleged three (3) theories of bankruptcy fraud (Count 1) criminal culpability. It alleges that:

> "Between on or about January 20, 2006 and on or about January 31, 2006...," [at ¶4]:
>
> "GARY PEEL informed his ex-wife that if she did not
> [1] abandon the bankruptcy challenge,
> [2] cease in her attempt to depose GARY PEEL's current wife, and
> [3] agree to a new financial settlement,
> he would mail the pictures of D.R. to his ex-wife's parents."

The first theory fails ***temporally*** because Bankruptcy Court documents prove that Peel's ex-wife withdrew her objection to discharge [11 USC §727(a)(3) and (a)(4)], and the Bankruptcy Court granted her withdrawal of objection to discharge (both on 1-6-06)- *faits accomplis* two weeks ***prior*** to any alleged wrongful conduct by Peel (1-20-06, at the earliest). Appxs. H, I, & J.

The second theory fails because the attorney for Peel's ex-wife admitted, while testifying, that PEEL's current wife had, in fact, been tendered for her deposition on two (2) different dates, but that he (the ex-wife's lawyer) and his client (Peel's ex-wife) had refused to sign a limited use agreement, that the Bankruptcy Court had required be signed as a pre-condition for the deposition's taking. Appxs. K & L.

The last theory of bankruptcy fraud culpability and the sole theory to ostensibly justify Peel's conviction, has now been proven FALSE by the unimpeachable newly discovered evidence of three separate courts, i.e., a 12-19-11 Bankruptcy Court decision (So. Dist. of Illinois, Bky. Case #05-33238, Doc.#264); a District Court affirmance on 2-13-13 (2013 U.S. Dist. LEXIS 19478); and the Seventh Circuit's 8-2-13 modified decision in *In re [The Debtor] Gary E. Peel,* 725 F.3d 696 (CA7, 2013).

At trial, the jury was informed that Peel's ex-wife's bankruptcy claim was $2,500,000 or $2,800,000. The jury *was* informed that Peel had offered approximately $5-600,000 to his ex-wife to settle their bankruptcy dispute. The jury's verdict of "guilty" was premised solely upon this evidence which suggested pressure, by Peel, to coerce a settlement to the ex-wife's financial detriment (and Peel's financial advantage). The ex-wife's $2,500,000 or $2,800,000 claim has now been proven false and actually worth only $157,455.63 (much less than Peel's offer to her). No jury would have convicted Peel, had it known that his ex-wife's $2,500,000-$2,800,000 claim was false, a felony under 18 USC §152(4), and that Peel's settlement offer to hear greatly exceeded the corrected value of her claim. None of this newly discovered evidence was presented to the jury.

Legal Discussion

Now, with the discovery of unimpeachable newly discovered exonerating evidence - first discovered four (4) months *after* trial - the sole basis for Peel's bankruptcy fraud conviction collapses because it was procured by the Government's use of FALSE evidence. However, the District Court and the Seventh Circuit have repeatedly denied Peel *any* opportunity for an evidentiary hearing to demonstrate his "actual innocence" in light of this false evidence, i.e., a due process "fair trial" clause constitutional violation).

The 12-19-11 Bankruptcy Court decision (So. Dist. of Illinois, Bky. Case #05-33238, Doc.#264); the District Court affirmance on 2-13-13 (2013 U.S. Dist. LEXIS 19478); and the Seventh Circuit's 8-2-13 modified decision in *In re [The Debtor] Gary E. Peel,* 725 F.3d 696 (CA7, 2013) comprise newly discovered evidence that warrant at

least one evidentiary hearing to demonstrate that false evidence was utilized to secure Peel's conviction. This unimpeachable "newly discovered evidence" warrants his exoneration.

With regard to Count I (Bankruptcy Fraud), the failure of both the District Court and the Appellate Court to address the "merits" of Peel's *audita querela* argument and the failure to grant Peel at least one evidentiary hearing violates the Supreme Court precedent of *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013) and others.

And the Seventh Circuit's denial of *any* evidentiary hearing violates even its own precedent, as indicated by *United States v. Coscia,* 4 F.4th 454 (7th Cir. 2021) and others.

Ineffective Assistance of Counsel – ***Strickland*** violations:

Trial Counsel's *Strickland* Errors
(Re: Counts 3 & 4) Warranting Collateral Relief

***Strickland* errors by Peel's trial counsel include the following:**

1. Failure to seek the dismissals of Count 3 & 4 for failure to allege federal criminal offenses;

2. Failure to raise the constitutional defenses of the

a) *Ex Post Facto* Clause (Art. I, Sec. 9, Cl. 3),[9]

b) Free Speech Clause (1st Amendment),[10]

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[9] As articulated in *United States v Meyer,* 602 F. Supp. 1476 (1984) and *United States v. Bateman,* 805 F. Supp. 1053, 1055 (D.N.H.1992)

[10] As addressed in *Free Speech Coalition* and *Stevens, infra.*

c) Due Process "Fair Notice" Clause (5th Amendment),[11] and

d) Due Process "Takings" Clause (5th Amendment).[12]

3. Failure to give statutory notice of the intent to assert the affirmative defenses in 18 USC §2252A(c)(1) & (c)(2) and to tender the corresponding, exculpatory Seventh Circuit pattern criminal jury instruction;

4. Failure to object to the trial court's caveat/instruction to the jury that its judicially noticed fact was "...not an issue in this case" [Appx. F], despite the judicially noticed fact being the *sine qua non* of the charging statute, 18 USC §2252A.

Appellate Counsel's *Strickland* Errors
(Re: Counts 3 & 4) Warranting Collateral Relief

***Strickland* errors, by Peel's appellate counsel, include the failure to brief, or -with regard to the *ex post facto* clause- *timely* brief, the argument that:**

5. The Indictment, on its face, failed to allege a federal criminal offense (because the alleged child pornography "victim" was affirmatively identified, and confirmed at trial, to have been an *adult* at the time the subject photos were *produced*);

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[11]That minority status would be established contrary to the trial evidence (Appxs. F & G) and retrospectively re-defined to exclude the date of "*production*" [as required by 18 USC §2252A and 2256] in favor of the date of "possession" – a statutory construction violation.

[12] See *Andrus v Allard,* 444 U.S. 51, 62 L.Ed.2d 210 (1979) discussed *infra.*

6. Legally acquired and previously legally possessed free speech materials were constitutionally protected from criminal prosecution[13], per *Andrus v. Allard,* 444 U.S. 51, 55, 62 L.Ed.2d 210, 2216 (1979);

7. The *production* of the subject materials, in 1974, involved no child, or child sexual abuse- both prerequisites for child pornography, per *Ashcroft v Free Speech Coalition* 535 U.S. 234 (2002);

8. The *Ex Post Facto* Clause (Art. I, Sec. 9, Cl. 3) had been violated by retrospectively re-defining an "adult" in 1974 to that of a "minor" in 2006 (the date of the alleged criminal conduct)[14]. See *Meyers* and *Bateman, supra;*

9. The Due Process "Takings Cause" was violated by retrospectively criminalizing the possession of legally acquired and previously legally possessed First Amendment materials. [See *Andrus,* which protected even *non* -constitutionally protected materials];

10. The Due Process "Fair Notice" Clause was violated by the failure to give fair notice that the definitional statute (18 USC §2256) and the charging statute [18 USC §2252A(a)(5)(B)] would **not** be construed as statutorily written;

11. The impropriety of the trial court's caveat/instruction to the jury that the age of consent for sexual activity was "...not an issue in this case"[15] [Appx. F]; and

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[13] An issue that the Seventh Circuit deemed *forfeited* by Appellate Counsel's failure to raise it in the first direct appeal. See 668 F3d at 510

[14] Another issue that the Seventh circuit deemed *forfeited.* by Appellate Counsel's failure to raise it in the first direct appeal. See 668 F3d at 510.

[15] Had the "victim" been 40 or 50 years of age, would that not be an issue in this case? Would it not be a complete defense to the charged offense? Age, at the time of *production* is the indispensable element of the alleged "crime."

12. That trial counsel had been ineffective, in violation of the Sixth Amendment, as listed above in ¶¶ 1-4.

Entitlement to an evidentiary hearing
on ineffective assistance of counsel claim

As stated in *Pittman v. Warden, Pontiac Correctional Center*, 960 F.2d 688, 691 (7th Cir. 1992):

> "In order to merit an evidentiary hearing on his claims [of ineffective assistance of counsel] a petitioner must allege facts that, if proven, would be sufficient to entitle him to [*habeas*] relief. See Matta-Ballesteros v. Henman, 896 F.2d 255, 258 (7th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 209, 112 L.Ed.2d 169 (1990).... Therefore the question here is whether [habeas petitioner] has alleged facts that, if true, would prove his counsel's ineffectiveness. **If so, an evidentiary hearing is required.**"
>
> [All emphasis supplied.]

Despite Peel's entitlement to at least one evidentiary hearing on his ineffective assistance of counsel claim, the Seventh Circuit, in affirming the District Court, has utilized prohibited procedural impediments to ignore the "merits" of Peel's prayers for relief.

As recently as 2013, the Supreme Court, in *McQuiggin*, (p 132), citing *Herrera v Collins* 506 U.S. 390, 404, 113 S.Ct. 853 (1993), reaffirmed the principle that the fundamental miscarriage of justice exception to overcome procedural defaults survived AEDPA's passage and is grounded on the equitable principle that federal constitutional errors do not result in the incarceration of innocent persons.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a writ of certiorari.

Respectfully submitted,

Date: May 18, 2023

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APPENDIX

Appendix A – *United States v. Peel*, No. 22-2616 (7th Cir. 3-23-23)

Appendix B – Memorandum and Order. *United States v Peel* No. 0-CR-30049, (S.D. Ill. June 13, 2022)

Appendix C – Order denying Rehearing and Rehearing *en banc. United States v. Peel*, No. 22-2616 (7th Cir., May 2, 2023)

Appendix D – Order denying Motion to Reconsider. *United States v Peel* No. 06-CR-30049, (S.D. Ill. Sept. 7, 2022)

Appendix E – Indictment

Appendix F - Judicial Notice

Appendix G – Testimony of child pornography "victim," Donna Rodgers

Appendix H - Complaint to Determine Discharge of Debts

Appendix I - Bankruptcy Court Minute Record of 1-6-06

Appendix J - Transcript of Bankruptcy Court Hearing of 1-6-06

Appendix K - Partial Transcript (Testimony of Attorney Donald Urban)

Appendix L – Fax/Letter of Attorney Stanton dated 1-11-06 to Attorney Urban