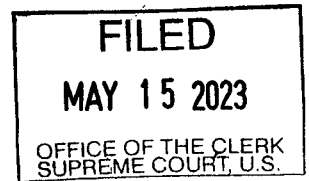


22 - 7682  
No. \_\_\_\_\_



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IN THE  
Supreme Court of the United States

\_\_\_\_\_  
TYRIN GAYLE  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

\_\_\_\_\_  
On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit  
\_\_\_\_\_

Tyrin Gayle,  
Pro Se  
USP CANAAN  
P.O. Box 300  
Waymart, PA 18472

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## QUESTION(S) PRESENTED

18 U.S.C. §924(c) criminalizes using or carrying a firearm during and in relation to a crime of violence or drug-trafficking crime. When a court issues a General verdict sheet failing to specify the proper predicate for a §924(c) count, disjunctive theories of culpability manifest, which may require the dismissal of the §924(c).

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This petition presents the following questions:

- I. Whether the Second Circuit conflicted with its own precedent in *Capers* when it denied Gayle relief?
- II. Whether the Second Circuit Court of Appeals' decision in *Gayle* manifested a Circuit conflict with the Fifth Circuit's decision in "*Perry*" and "*Jones*", and the Eleventh Circuit's decision in "*Gomez*"?
- III. Whether a Judge's "Confidence" is an appropriate standard when determining the predicate offense for a 18 U.S.C. §924(c) count, when there are disjunctive theories of culpability?

## LIST OF PARTIES

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

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

Petitioner, Tyrin Gayle, was the movant in the district

court and the appellant in the court of appeals. Respondent,

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the United States of America, was the respondent in the

district court and the appellee in the court of appeals.

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No. \_\_\_\_\_

\_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_

TYRIN GAYLE — PETITIONER  
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE 2ND CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

TYRIN GAYLE  
(Your Name)

USP CANAAN P.O. BOX 300  
(Address)

WAYMART, PA 18472  
(City, State, Zip Code)

(570)488-8443  
(Phone Number)

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 A1 to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix A2 to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

☐ For cases from **state courts**:

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

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

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

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.



## JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 31, 2023.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 17, 2023, and a copy of the order denying rehearing appears at Appendix A3.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

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

☐ For cases from state courts:

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

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

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

### Constitutional and Statutory Provisions Involved

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

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

The 6th and 14th amendment of the U.S. Constitution provides in pertinent part:

Fundamental Right to a Trial by Jury, essential to impartiality and fairness.

18 U.S.C §924(c) provides in pertinent part:

~~-----~~(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime(including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The RICO Statute, Section 1962(c) of Title 18 of the United States Code, provides in pertinent part:

any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...

Drug Statute Section 812, 841(a)(1), 841(b)(1)(A), and 846 of Title 21 of the United States Code provides in pertinent part:

Section 846 of Title 21 of the United States Code makes it a crime for an individual to conspire with others to violate the narcotics laws of the United States.

Section 841 of Title 21, it is unlawful for any person knowingly or intentionally "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance." Crack cocaine and heroin are "controlled

substances" under the federal statute.

### Statement of Fact

Ignorance of the law is not an excuse, but ignorance of the fact(s) is. Court's are required to liberally construe the filings of Pro Se litigants such as Gayle. Gayle contends that had the court done so, it is unequivocal that he would have prevailed in the initial proceeding.

The truth is Gayle has a bona-fide Yates-error, that requires that his §924(c) conviction be set aside in light of United States v. Capers, 20 F.4th 105, 118-20(2d.Cir2021), because he has shown "a reasonable probability that the jury may not have convicted him" on the §924(c) count absent the district court's error. The instant case is clearly analogous to "Capers", and justice requires the same outcome, in order to maintain uniformity in the Circuit. The court's decision also conflicts with the 5th Cir. decisions in (U.S. v. Perry, \_\_\_F.4th\_\_\_(5th2022)), and (U.S. v. Jones 935 F.3d 266 C.O.A. 2019). Also, the appellate court decision conflicts with the 11th Circuits decision in (U.S. v. Gomez, 830 F.3d 1225, 1227)(11th 2016).

The lower court, in denying Gayle relief, opted to assume facts A priori, erroneous facts that the 2nd Cir. believed and considered when it denied Gayle relief. Mr. Gayle will show below how the panel decision conflicts with its own precedent and with other circuits.

### Reasons for Granting the Writ

I. THE 2ND CIRCUIT'S DECISION IN GAYLE CONFLICTS WITH IT'S DECISION IN CAPERS.

When charging the §924(c) count at Gayle's trial, the lower court had instructed the jury that either the racketeering conspiracy(as a crime of violence), or the narcotics conspiracy (as a drug trafficking offense), or both, could serve as a valid predicate offense. Since then, however, that racketeering conspiracy is no longer a valid predicate crime of violence after the Supreme Court's decision in United States v. Davis, 139 S.Ct. 2319(2019). See United States v. Capers, 20 F.4th 105(2d.Cir.2021).

Gayle filed a 28 U.S.C. §2255 motion to vacate his [924(c)] conviction and sentence, in light of Davis, among other things. Gayle argued that the jury charge on the §924(c) count amounted to an error under Yates v. United States, 354 U.S. 298(1957). Such an error occurs when both valid and invalid theories of culpability are submitted to a jury that returns a general verdict of guilty, and it is "impossible to tell" whether the jury selected the valid or invalid ground. United States v. Agrawal, 726 F.3d 235, 250(2d Cir. 2013)(Quoting Yates, 354 U.S. at 312). Gayle also argued that his counsel was ineffective for failing to raise this jury-instruction issue on direct appeal. In response, the government argued that the underlying Yates claim was procedurally defaulted and otherwise without merit.

In denying relief, the district court concluded that the jury would have rendered the same verdict if properly instructed, because both the RICO conspiracy and the narcotics conspiracy were found to be "inextricably intertwined" based on the evidence

at trial. The lower court was clearly mistaken, as will be explained below, but was able to sway the 2nd Cir. C.O.A. to affirm the judgement.

The court also held that Gayle's claim was procedurally defaulted because he did not raise it on direct appeal and his ineffective assistance of counsel claim did not excuse the default because there is no prejudice. But because "the court had not found a case in which a narcotics conspiracy and racketeering conspiracy were found to be inextricably intertwined based on the record at trial", the court granted a certificate of appealability. Gayle v. United States, Nos,16-cr-361-1, 20-cv-10086, 2021 WL 5234762, at \*4-7(S.D.N.Y. Nov 8,2021). The petitioner assumes the court's familiarity with the underlying facts and the procedural history of the case.

A. In light of the 2nd Cir.'s decision in Capers, Gayle was entitled to the relief being sought on Appeal.

In Capers, like Gayle, the government argued that Capers cannot demonstrate that any error affected his conviction because the invalid racketeering conspiracy predicate "was inextricably intertwined" with the charged narcotics conspiracy. That argument failed then for the same reasons it should fail now in the instant case.

First, the lower court misapplied the "inextricably intertwined" standard it used to justify denying Gayle relief. For an ideal example, Gayle points to United States v. Viera, U.S. App. Lexis

12538(2022)("where the goal of the Robbery Conspiracy is to obtain narcotics to distribute, the robbery itself is an integral part of the narcotics conspiracy "such that the two would be 'inextricably intertwined'").

In relation to the case cited above, Gayle's RICO conspiracy and narcotics conspiracy are in no way "inextricably intertwined", as the lower court infers. The lower court was clearly mistaken because the instant case does not present such an issue. In fact, Gayle has co-defendants who were solely convicted under the narcotics conspiracy, who were not convicted under the RICO conspiracy, therefore the two conspiracies cannot be construed to be "essentially co-extensive."

The court continuously asserts that the "evidence" at trial supports it's narrative, that the Firearm conduct charged in count six was based on the Narcotics conspiracy. But, in all actuality, there is nothing definitive in the record that unequivocally supports that claim. The court is clearly reaching.

The Firearm conduct in question pertains to a retaliatory shooting that took place after Gayle and a friend("Stacks") got shot. The reason Gayle was shot in the first place is unknown. (See att. B, B1, B2, B3). Like Gayle, Caper's §924(c) & (j) conduct was a result of retaliatory shootings that took place after his friend was killed in a shooting by a rival gang. The reason Caper's friend was killed is unclear. There was no evidence



presented that the shootings, in either case, was in furtherance of a narcotics conspiracy.

In the trial testimony, the government asked Germaine to "Let's break that down" and Germaine SEPERATED the gun from the drugs, when he was asked "Why would somebody be carrying a firearm while selling drugs?" and Germaine answered the question with "Because at the time we had an ongoing feud with Southside, so at any moment, you know, rival gang members could come through." (See attachment B2 lines 8-13).

Both Gayle's and Capers' cases are analogous. Both men were accused of selling drugs and the juries in both cases chose drug trafficking as a predicate act of the RICO conspiracy. The government, in both cases, highlighted that fact asserting that the jury must have intended to connect the §924(c) charge to a drug trafficking predicate. In the government's view, the section 924(c) conviction undoubtedly rested on a valid drug trafficking predicate "because there is a drug trafficking component to both predicate counts."

But that conclusion does not necessarily follow. It is true that the jury made two findings of guilt that, in theory, could be predicates for a 924(c) convict: the narcotics conspiracy charged in count four and the narcotics conspiracy charged as a predicate racketeering act in count one, both of which are drug trafficking crimes. The jury also found that Gayle used a gun in furtherance of at least one of either the RICO conspiracy or

narcotics conspiracy. But none of the jury's instructions required it to make a specific finding that either the narcotics conspiracy predicate to the RICO conspiracy offense or the narcotics conspiracy was the basis for its §924(c) verdict, which constitutes a bona-fide Yates error. (See Attachments 1 and 2.)

The jury's general verdict thus does not definitely say whether the shooting that Gayle is accused of was in furtherance of either the narcotics conspiracy charged in count four, as opposed to the general RICO conspiracy charged in count one. Of course, if it were clear that the jury found that Gayle used a gun in furtherance of the narcotics conspiracy charged as a predicate of count one, that would be enough to affirm Gayle's conviction, because it would mean that the jury necessarily rested its verdict on a drug trafficking crime. (See Capers).

But, the court cannot assume that the jury made that finding. As the Capers court stated, "The Appellate court cannot uphold a conviction where there is a reasonable likelihood that the jury may have returned a guilty verdict based on a theory that it was erroneously told would justify a conviction for violating the Statute under which the defendant was charged." (See Capers.)

Given the disjunctive nature of the verdict sheet's count six prompt, the conviction can be valid only if "BOTH" count one and count four remain qualifying predicates --a drug trafficking offense or a categorical crime of violence --for the firearms offense. (See Heyward).

In a criminal case a conviction may not be upheld on the basis of speculation or inference, however strong. It is the jury that must convict, not an appellate court. If the instructions leave open the logical possibility that the verdict is based on a legally insufficient predicate, the conviction cannot stand. (See U.S. v. Kragness 830 F.2d 842) March 9, 1987 8th Cir. C.O.A.)

II. THE APPELLATE COURTS DECISION IS IN CONFLICT WITH  
THE 5TH CIR. DECISION IN PERRY AND JONES. ALSO  
THE DECISION IS IN CONFLICT WITH THE 11TH CIR.  
DECISION IN GOMEZ.

"Stare Decisis" exist for this very reason. It is the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation. Gayle clearly has a bona-fide Yates error/Davis claim, and this court's precedent set in Capers warrants the granting of the relief being sought. Other Circuits are also in line with Capers. See United States v. Perry, \_\_\_F.4th\_\_\_(5thCir.2022)(Where the Fifth Circuit held that the 924(c) conviction must be vacated despite the alternative drug trafficking predicate, because "[a] reasonable probability remains that the jury relied upon RICO conduct separate from the drug conspiracy... to convict appellants of the challenged 924(c) offenses.") See United States v. Jones 935 F.3d 266 C.O.A. 5th Cir.2019(Where Jones met plain error standard due to the Davis error, being plain, his substantial

rights being affected, because no one knows what the jury chose, and the error seriously affected the judicial proceedings, because Jones's sentence was increased). See Gomez (Where a general verdict of guilty does not reveal any unanimous finding by the jury that the defendant was guilty). Keeping Gayles §924(c) conviction and sentence in tact not only violates the 2nd circuits precedent in Capers, it also conflicts with the holdings of other Courts of Appeals that considered the issue, like Perry, Jones, and Gomez.

Courts that have considered §924(c) convictions predicated on both a crime of violence and a drug trafficking crime have reached disparate conclusions as to whether the jury could have convicted based only on the drug trafficking predicate.(See Jones). For example: The 11th Cir. concluded that an indictment charging a 924(c) offense based on multiple predicate offenses was infirm because "a general verdict of guilty does not reveal any unanimous finding by the jury that the defendant was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of the predicate offenses, or guilty of conspiring during some and not others." In re Gomez, 830 F.3d 1225, 1227 (11th Cir.2016); See also In re Cannon, 931 F.3d 1236, 2019 WL 3334766, at \*5(11th Cir. July 25,2019) (holding that appellant made a prima facie showing that his Davis claim satisfied the statutory criteria of 28 U.S.C. §2255(h)(2) where his §924(c) conviction referenced multiple predicates, including one that may no longer qualify (2019 U.S. App. LEXIS 11) as a crime of violence, and it was

"Somewhat unclear which crime or crimes served as the predicate offense").

III. THE DISTRICT COURT'S CONFIDENCE IS INAPPLICABLE  
AND UNCONSTITUTIONAL.

In the Appellate Court's Summary Order, the Court stated:  
"In the context of a Yates jury instruction error, the third and fourth requirements are not met [under plain error] if the Court is 'confident' that the jury would have rendered a guilty verdict 'in the absence of the error.' Quoting *United States v. Laurent*, 33 F.4th 63, 87(2dCir.2022),

The issue with that assessment is that a Court's 'confidence' is not an appropriate standard. See *Capers* (Where the appellate court stated: "An erroneous jury instruction makes it impossible to be confident that the jury convicted him on an appropriate set of findings")) See *U.S. v. Wolfname* 835 F.3d 1214, 1222 (10thCir.C.O.A.2016) (Where the court stated: "A reasonable probability is a probability sufficient to undermine" confidence" in the outcome"). Unlike *Laurent*, *Gayle* is not arguing that the jury would not have found him guilty, rather, *Gayle* is arguing that a reasonable probability remains that the jury relied on the RICO conduct separate from the drug conspiracy... to convict [Gayle] of the challenged 924(c) offense. See *Perry*. As the Fifth Circuit held, as long as a reasonable probability exist that the jury relied on the RICO conspiracy as the predicate for the 924(c) offense, then there is a likelihood that *Gayle* is [actually innocent] of the 924(c) charged in count six.

That reasonable probability is enough to meet the third and fourth prongs of the plain error standard because the error [clearly] affected Gayle's substantial rights and the error affects the fairness, integrity, or public reputation of judicial proceedings.

The Fifth and Sixth Amendments afforded Gayle the right to have the jury determine, unanimously, and beyond a reasonable doubt, his guilt as to every element of the crime(s) with which he was charged.

The opening sentence of 18 U.S.C. §924(c) shows that the intention of legislature was for the government to prove that a criminal defendant committed either or both separate forms of offenses to be held under it's provision by providing: "Any person who, during and in relation to any crime of violence or drug trafficking crime..." the Government did not prove that Gayle's alleged discharge of a firearm was "during and in relation to a ... drug trafficking crime." The jury was not required to find [specifically] that Gayle's firearm conduct was "during and in relation to a drug trafficking crime." For the lower Court to hold otherwise is troubling, and clearly beyond its purview.

Even the case the Court used as the foundation of its "confidence", "Laurent", was misplaced. Laurent dealt with two crimes of violence, namely one substantive RICO and a RICO conspiracy. Because "that" trial court understandably believed that both counts could qualify as crimes of violence, it did not instruct the jury to specify, upon finding guilt on count three (the 924(c) count), whether the finding was based on the substantive RICO in count one, or the RICO conspiracy in count two. Thus the reason

that the court was "confident" is because the jury clearly intended to predicate Laurent's 924(c) on a crime of violence.

In contrast, Gayle's case has entirely different circumstances, namely, the two predicates in his case are not both crimes of violence like the appellant in Laurent. Rather, Gayle's predicates are one crime of violence, and one drug trafficking crime which constitutes a "distinct factual separation." See *United States v. Heyward*, 3F.4th 75(2d.Cir.2022).

The sentencing Court's confidence is clearly misplaced and may very well violate *Alleyne v. United States*, 570 U.S. 99(2013), because any fact that raises the mandatory minimum in which a defendant is subject to is an element that has to be presented to the jury beyond a reasonable doubt. Without the 924(c) count of conviction, Gayle's mandatory minimum is ten years, and with it, the 924(c) conviction bumps it up to twenty years. Thus, the Court's "confidence" in upholding Gayle's 924(c) conviction is unconstitutional. Rather than Laurent, the Courts confidence should be placed in Capers and Grant Gayle's petition.

The relevant question is, if Gayle and Capers cases are essentially the same, how did the Appellate Court come to a different outcome? The answer is at the trial stage, two predicates existed that could sustain a 924(c) conviction, and because of the trial court's error in delivering a General verdict [form] the jury was never presented with a meaningful opportunity to specify which predicate act the 924(c) count relied on. But rather

than accept the error and correct it, the lower Court opted to assume facts A Priori in order to save a now-void conviction.

At every phase of a Criminal Prosecution, Mr. Gayle has a fundamental Right to a Trial by Jury, essential to impartiality and fairness, expressly stated in the U.S. Constitution's 6th and 14th Amendments (Equal Protection Rights).

The violation of Gayle's Constitutional Rights above is seen through the argument that since his RICO Racketeering Count is now a non-valid predicate to support his 924(c) conviction. Gayle still remains convicted of a consecutive 10 years due to the Judge sentencing him to a 924(c) "in furtherance of a Narcotics Conspiracy, even though there was [NO] specific "Nexus" to link his 924(c) to his Narcotic Conspiracy. [NO] witness testified that the guns that were found by police were used to protect the drugs instead of their persons due to "beefs" (relatiatory shootings). In United States v. Chavez, 549 F.3d. 119, 130 (2nd Cir. 2008), because "a gun may, of course, be possessed for any number of purposes, some lawful, others unlawful"; In United States v. Snow, 462 F.3d 55, 62 (2nd Cir. 2006), Section 924(c)'s "in furtherance of" element cannot be satisfied "by relying on the generalization that any time a drug dealer possesses a gun, that possession is in furtherance of, because drug dealers generally use guns to protect themselves and their drugs"; In Chavez, 549 F. 3d at 130, instead, the "in furtherance" element requires a specific Nexus between the charged firearm and the federal drug traffic crime.



Consequently, the District Court "should" have anticipated that the disjunctive or changed to and was egregious to the Petitioner's sentence. Had she known that the Supreme Court decision in Davis would invalidate Gayle's RICO as a predicate, she would no doubt in the interest of fairness, charge and insruct the jury in the alternative, or, to decide whether Gayle's 924(c) was "in furtherance of" the Racketeering Conspiracy [or] Narcotic Conspiracy.

The prejudicial effect of what the Government and Judge deem harmless, is now notably unconstitutional because Fed. Rule for Criminal Procedures is silent on Special Verdict Forms it only addresses General Verdicts, which shows the deficiency of Gayle's Trial Attorney, Sam Braverman's performance, because a reasonable Counsel would have known to object to the Jury instruction of Count Six; pursuant to Rules of Civil Procedure 49(2); and Rules of Criminal Procedure 30(d).

It is evident that Mr. Gayle has been making the right claim since day one, namely that the unclear predicate for his guilty plea constitutes a Yates error. But because it was not argued absolutely perfect, resistance was met at every level.

"In a Pro Se case, the court must view submissions by a more lenient standard than that afforded to formal pleadings drafted by lawyers." Govan v. Campbell, 289 F.Supp.2d.289, 295(N.D.N.Y. 2003) (quoting Haynes v. Kerner, 404 U.S. 519, 520(1972)). The Second Circuit has opined that the Court is obligated to "make reasonable allowances to protect Pro Se litigants "from inadvertantly

forfeiting rights merely because they lack legal education." See *Traguth v. Zuck*, 710 F.2d.90, 93(2d.Cir.1983).

Gayle unequivocally qualifies for relief under each of the various standards relevant to this appeal-Brecht's substantial-and-injurious-effect standard, ineffective assistance of counsel's prejudice standard, and procedural default. But, the 2nd Cir. claimed that "we need not determine the precise interplay between these various standards...if Gayle cannot prevail under plain error review, which is least stringent. Had the Court, construed the initial motion liberally, in light of *Haynes v. Kerner*, the Court would have realized that Mr. Gayle met all the criteria.

As to the plain error standard, Gayle satisfies all the prongs in full. Under plain error review, relief is not warranted unless "(1) There is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings."

As far as the first two prongs, both the Appellate Court and the lower Court has acknowledged that prongs one and two are satisfied, namely that there is an error (Yates-Jury instruction) and the error is clear and obvious. As to prong 3, the error did indeed affect Gayle's substantial rights because a reasonable probability remains that the jury relied upon the RICO conduct, charged in count one, separate from the drug conspiracy to convict Gayle of the [challenged] 924(c) offense, (See *Jones*). Lastly, the error

seriously affects the fairness, integrity or public reputations of judicial proceedings, because the 2nd Circuit conflicted with its Capers decision when it denied Mr. Gayle the relief being sought. Also, prong four of plain error review, the Davis error here increased Gayle's sentence. Declining to correct this "particularly egregious error" would therefore "cast significant doubt on the fairness of the criminal justice system". See U.S. v. Young 470 U.S. 1, 15, 105 S.Ct. 1038 84 L. Ed.2d 1 (1985) (quoting U.S. v. Frady 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d. 816 (1982)). The 2nd Circuit also conflicted with the Fifth Circuit's decision in Perry and Jones, the decision also conflicted with the 11th Circuit's decision in Gomez, which is tantamount to a potential Circuit split. Mr. Gayle clearly satisfies plain-error.

Appellate counsel was clearly ineffective for failing to raise the Yates issue on appeal, a fact in which even the lower Court acknowledged. In light of Strickland v. Washington, 466 U.S. 668, 687-88, 694(1984), Gayle has also shown that counsel's deficient performance, failing to raise the Yate's claim, led to prejudice. A reasonable attorney would have done so, and had counsel done so, Gayle's void 924(c) count would have likely been vacated years ago.

As far as the Brecht standard, because Gayle qualifies under Strickland, it is unnecessary. See Hall v. Vasbinder, 563 F.3d. 222, 236 (6thCir.2009)(observing that satisfying Strickland "necessarily" satisfies Brecht).

Gayle has clearly shown that he is entitled to the relief being sought, namely the vacatur and remand for resentencing without the void 924(c) count of conviction in light of the Second Circuit's decision in Capers.

Conclusion

For the reasons stated above, Gayle prays this Honorable Court GRANTS this petition for Writ of Certiorari.

May 15th, 2023  
Date

Respectfully Submitted,  
/s/ Tyrin Gayle  
Tyrin Gayle, #77732-054