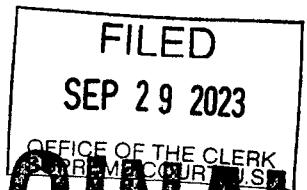


23-5990

No. _____



ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

KIRK A. SIMMONS – PETITIONER

VS.

UNITED STATES OF AMERICA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Kirk Simmons
8728 Plantation Landing Drive
Wilmington, NC 28411
445-456-7314

QUESTION(S) PRESENTED

1. Does fraud, perpetrated by the federal government during a federal criminal proceeding so as to obstruct a defendant from mounting an entrapment defense and proceeding to trial, form the basis for a habeas proceeding under 28 U.S.C. Section 2241 asserting innocence?
2. Does strict adherence to AEDPA (Antiterrorism and Effective Death Penalty Act), which severely increased the burden for filing habeas corpus actions, effectively result in the suspension of the writ of habeas corpus in cases involving fraud by the government during criminal proceedings? Would 28 U.S.C. Section 2241 provide an avenue for judicial review in these circumstances when defendant can assert his innocence after uncovering the previously concealed evidence?

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:

RELATED CASES

United States v Simmons, No. 13-cr-97, U.S. District Court for the District of Delaware. Judgment entered August 15, 2014.

Simmons v United States, No. 15-cv-459, U.S. District Court for the District of Delaware. Judgment entered February 3, 2017 denying motion through procedural default.

United States v Simmons, No. 17-1414, U.S. Court of Appeals for the Third Circuit. Judgment entered April 28, 2017. Rehearing en banc denied June 9, 2017.

Simmons v United States, No. 17-6185, Supreme Court of the United States. Writ declined October 30, 2017. Reconsideration denied January 16, 2018.

Simmons v United States, No. 18-2904, U.S. Court of Appeals for the Third Circuit. Judgment entered September 13, 2018 denying request for 2nd habeas corpus petition.

October 23, 2018 a motion was filed under Rule 60 to reopen 15-cv-459 due to fraud upon the court by the U.S. government through evidence falsification. Judgment entered May 7, 2020 denying motion.

Simmons v United States, No. 20-2072, U.S. Court of Appeals for the Third Circuit. Judgment entered October 13, 2020. Rehearing en banc denied December 23, 2020.

Kirk A. Simmons v United States, No. 21-7494, Supreme Court of the United States. Writ declined April 21, 2021.

Kirk A. Simmons v Thomas Scarantino, No. 21-hc-02136, U.S. District Court for the Eastern District of North Carolina. Judgment entered May 26, 2022 denying motion.

Kirk A. Simmons v Thomas Scarantino, No. 22-6732, U.S. Court of Appeals for the Fourth Circuit. Judgment entered February 23, 2023. Rehearing en banc denied July 14, 2023.

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	20
CONCLUSION	22

INDEX TO APPENDICES

APPENDIX A – ORDER from the United States Court of Appeals, Fourth Circuit denying request for Certificate of Appealability

APPENDIX B – ORDER from the United States District Court, Eastern District of North Carolina denying petitioner's habeas petition filed under 28 U.S.C. 2241.

APPENDIX C – ORDER from the United States Court of Appeals, Fourth Circuit denying request for rehearing en banc

APPENDIX D – Text of 28 U.S.C. Section 2255

APPENDIX E – Text of 28 U.S.C. Section 2244

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>United States v Mayfield</i> , 771 F.3d 417 (7 th Cir 2013)	10
<i>Jacobson v United States</i> , 503 U.S. 540 (1992)	11, 13
<i>In re Jones</i> , 226 F.3d 328 (2000)	11
<i>United States v Surratt</i> , 797 F.3d 251 (4 th Circuit 2015)	13
<i>Abdur’Rahman v Bell</i> , 537 U.S. 88 (2002)	13
<i>Townsend v Sain</i> , 372 U.S. 293 (1963)	14
<i>Amadeo v Zhant</i> , 486 U.S. 214 (1988)	14
<i>Douglas v Workman</i> , 560 F.3d 1156 (10 th Cir. 2009)	14
<i>Kenner v Comm’r</i> , 387 F.2d 689,691 (7 th Cir. 1968)	14
<i>Lester v Flournoy</i> , 909 F.3d 708 (4 th Cir 2018)	15
<i>United States v Barrett</i> , 178 F.3d 34 (1 st Cir 1999)	15
<i>Triestman v United States</i> , 124 F.3d 361 (2 nd Cir 1997)	15
<i>In re Dorsainvil</i> , 119 F.3d 245 (3 rd Cir 1997)	15
<i>In re Davenport</i> , 147 F.3d 605 (7 th Cir 1998)	16
<i>Harrison v Ollison</i> , 519 F.3d 952 (9 th Cir 2008)	16
<i>Prost v Anderson</i> , 636 F.3d 578 (10 th Cir 2011)	16
<i>Jordan v Fisher</i> , 135 S. Ct. 2647 (2015)	17
<i>In re Stevens</i> , 956 F.3d 229 (4 th Cir 2020)	17
<i>Banks v United States</i> , 920 F. Supp. 688 (4 th Cir 1996)	17
<i>Schultz v Butcher</i> , 24 F.3d 626 (4 th Cir 1994)	17
<i>Brady v Maryland</i> , 373 U.S. 83 (1963)	17
<i>Strickler v Greene</i> , 527 U.S. 263 (1999)	17
<i>United States v Caro</i> , 773 F. App’x 651 (4 th Cir. 2018)	17
<i>United States v Williams</i> , 753 Fed. Appx. 176 (4 th Cir. 2019)	17

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Elmore v Ozmint</i> , 661 F.3d 783 (4 th Cir. 2010)	18
<i>United States v Carranza</i> , 640 Fed Appx. 248 (4 th Cir. 2016)	18
<i>United States v Mooney</i> , 497 F.3d 397 (4 th Cir. 2007)	18
<i>Frazer v South Carolina</i> , 430 F.3d 696 (4 th Cir. 2005)	18
<i>United States v Olsen</i> , 737 F.3d 625 (9th Cir. 2013)	20
<i>McClesky v Zant</i> , 499 U.S. 467 (1991)	20
STATUTES AND RULES	
28 U.S.C. Section 2244	7, 14
28 U.S.C. Section 2255	7, 11, 12, 13, 15, 16
OTHER	
U.S. Constitution, Article I, Section 9	19

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 _____; 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 _____; 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 has not yet reported; or,
 is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was February 23, 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: July 6, 2023, 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. Section 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. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's case involves the following statutes:

- 1) 28 U.S.C. Section 2255 – Text in full, located at Appendix D
- 2) 28 U.S.C. Section 2244 – Text in full, located at Appendix E

STATEMENT OF THE CASE

This case involves the situation in which an accused was forced into a plea agreement by the government concealing evidence with the affect the accused could not mount an entrapment defense and proceed to trial. The evidence concealment went undetected by the accused until after he had filed his opening habeas brief under 28 U.S.C. Section 2255 where he asserted prosecutorial misconduct through evidence manipulation and falsification. The government included evidence in its motion in opposition that the accused had never seen, and the Assistant U.S. Attorney invoked procedural default which was honored by the District Court. The evidence intentionally concealed but now made known, along with an earlier admission by the prosecutor that no evidence existed to suggest the accused was predisposed toward the criminal conduct for which he was convicted supports his assertion that he is innocent of the charged criminal conduct. Over the last 10 years, petitioner has sought habeas review for his claim of evidence manipulation and his innocence, yet has never been granted an evidentiary hearing nor had a ruling on the merits of his claims.

- 1) The petitioner's case originated in 2013 in the U.S. District Court in Delaware where petitioner entered into a plea agreement pleading guilty to violation of 28 U.S.C. Section 2422(b) on February 25, 2014.
- 2) On August 12, 2014, the Court sentenced petitioner to 120 months of incarceration. Petitioner did not appeal due to abandonment by counsel.

- 3) On June 4, 2015, petitioner timely filed a motion to vacate under 28 U.S.C. Section 2255 raising four (4) grounds – Miranda violations, Illegal detention, prosecutorial misconduct through evidence falsification and evidence concealment, and ineffective assistance of counsel.
- 4) On December 1, 2015, the government filed its objection to petitioner's motion to vacate, invoked procedural default and included evidence 'Government Exhibit 3' and 'Government. Exhibit 4' – evidence petitioner had never seen during his criminal prosecution.
- 5) A side-by-side comparison of these newly discovered evidence directly refuted the government's statement-of-facts in their proffered plea agreement and were at odds with petitioner's court-appointed public defender's assessment of the evidence, and fully supported a complete affirmative defense of entrapment.
- 6) On December 28, 2015, petitioner filed his reply to the government's objection to his 2255 motion to vacate and attempted to add a fifth ground – violation of due process through entrapment – in light of Government Exhibits 3 and 4, evidence concealed from petitioner by both the government and his public defender.
- 7) Following a thorough comparison of 'Government Exhibit 3' and 'Government Exhibit 4' with a) affidavits in the federal criminal complaint, b) statement-of-facts in the plea agreement and the pre-sentence investigation report, and c) statements asserted by the government in its objection brief filed in the District Court, the petitioner filed, on May 16, 2016, a motion to supplement his opening 2255 motion to show that both the criminal prosecution and habeas proceeding

were based upon knowingly falsified evidence which constituted fraud as well as Fraud upon the Court by officers of the court – federal special agent, assistant U.S. attorney and the court-appointed public defender.

- 8) Furthermore, on September 6, 2016, petitioner filed a Memorandum of Law in support of his 2255 motion outlining how numerous circuits have ruled that Brady violations invalidate pleas of guilt.
- 9) Nearly 16 months after filing his opening 2255 motion, petitioner filed on October 12, 2016 a petition for a Writ of Mandamus – *In re Simmons*, No 16-3884, U.S. Court of Appeals for the Third Circuit.
- 10) On February 3, 2017, the District Court, now fully informed of the evidence falsification and fraud, dismissed petitioner's 2255 motion to vacate without so much as an evidentiary hearing, procedurally defaulted his claims per prosecutor's request, denied any relief, and refused to grant a Certificate of Appealability.
- 11) Petitioner requested a Certificate of Appealability on March 11, 2017 – *United States v Simmons*, No. 17-1414, U.S. Court of Appeals for the Third Circuit – which was denied.
- 12) On August 29, 2018, petitioner filed an application seeking authorization to file a second or successive habeas petition under Section 2255 citing newly discovered evidence – not previously available due to fraud, prosecutorial misconduct through Brady violations, evidence manipulation by police, and prosecutor's introduction of knowingly false evidence arising to Fraud on the

Court, ineffective assistance of counsel for failure to alert petitioner of a complete affirmative defense, failure to investigate and failure to call out fraud on the court, and petitioner's actual innocence. *In re Simmons*, No 18-2904, U.S. Court of Appeals for the Third Circuit. This request was summarily rejected "for failure to meet the requirements of 28 U.S.C. 2244(b)(2)".

13) On October 26, 2018, petitioner timely filed a motion with the U.S. District Court in Delaware seeking to reopen his earlier dismissed, procedurally defaulted habeas corpus proceeding under Fed. R. Civ. Proc. 60 raising claims under 60(b)(2) – new evidence supporting earlier dismissed claim of prosecutorial misconduct, 60(b)(3) – fraud and misrepresentation through evidence manipulation and concealment – a violation of Brady, 60(d)(3) – Fraud upon the Court based on prosecutor's intentional introduction of knowingly falsified evidence in the habeas proceedings, and 60(b)(6) – claim of actual innocence based upon newly discovered evidence previously concealed by the Government.

14) After 15 months of complete inaction by the U.S. District Court in Delaware, petitioner filed a motion for Writ of Mandamus *In re Simmons*, No 20-1050, U.S. Court of Appeals for the Third Circuit.

15) On May 7, 2020 – after 20 months of complete inaction – the U.S. District Court dismissed petitioner's Rule 60 motion "for lack of jurisdiction" after recharacterizing it as an unauthorized second or successive 2255 motion stating it "failed to meet the standards of 2255(h)". The Court refused to grant a

Certificate of Appealability and the Third Circuit rejected petitioner's request.

United States v Simmons, No. 20-2072, U.S. Court of Appeals for the Third Circuit.

- 16) On June 24, 2021, Kirk A. Simmons ("petitioner"), then an inmate at F.M.C. Butner, filed pro se a petition for Writ of Habeas Corpus under 28 U.S.C. Section 2241. *Simmons v Scarantino*, No. 21-HC-02136-M, U.S. District Court in North Carolina, Eastern Division.
- 17) On April 21, 2022, the District Court directed petitioner to show cause why the petition was not rendered moot by his intervening release from federal custody.
- 18) On May 16, 2022, the District Court docketed petitioner's motion purporting to show good cause why the petition was not mooted by his intervening release from federal custody and, on May 19, 2022, the Court found good cause show.
- 19) On May 26, 2022, the District Court completed its initial review of the habeas petition under 28 U.S.C. Section 2243 and dismissed the action without prejudice for lack of jurisdiction. The District Court refused to grant a COA stating "because none of the issues are adequate to deserve encouragement to proceed further."
- 20) On July 18, 2022, petitioner timely filed an appeal in the 4th Circuit Court of Appeals. *Simmons vs. Scarantino*, No. 22-6732, U.S. Court of Appeals for the Fourth Circuit. The court denied this motion on February 23, 2023.
- 21) On March 8, 2023, petitioner timely filed a motion for rehearing en banc to the 4th Circuit Court of Appeals. On July 6, 2023 the court denied the motion for

rehearing.

Statement of the Facts

The following facts, entirely undisputed by the U.S. Attorney, are part of the Court record in this case primarily having been developed in petitioner's motion for authorization for a second 2255 petition and his petition under Fed. R. Civ. Proc 60(b) and 60(d).

- 1) During his online reverse police sting, Delaware State Detective Kevin McKay engaged in actions and behaviors that jurists of reason would conclude induced petitioner to engage in the proffered criminal conduct.
- 2) All suggestions of criminal conduct originated solely from Detective McKay.
- 3) The case was dropped by the State of Delaware and picked up by the U.S. Attorney's Office in Wilmington, DE.
- 4) Special Agent Patrick McCall deleted 75% of the State's evidence – interactive messages collected during McKay's sting – to prepare and present his affidavit to charge and arrest petitioner for alleged violation of 18 U.S.C. 2422(b).
- 5) The evidence Agent McCall deleted consisted exclusively of McKay's actions to induce and petitioner's reluctance to engage in criminal conduct.
- 6) McCall's fraudulent affidavit misrepresented the government's evidence and was presented under oath to the U.S. District Court in Delaware to complain of and secure the federal arrest warrant for petitioner.
- 7) McCall's fraudulent affidavit was used by the government as the sole course of "facts" presented to petitioner, defense counsel and the District Court

throughout the criminal prosecution.

- 8) The “Statement of Facts” in the plea agreement and pre-sentence report were derived exclusively from McCall’s fraudulent affidavit. Petitioner, in his Rule 60 motion, mapped each paragraph in those court documents to the corresponding paragraph in McCall’s fraudulent affidavit.
- 9) The state’s evidence – collected by McKay during his online reverse policy sting – was NEVER presented to petitioner throughout his criminal prosecution.
- 10) The state’s evidence, ‘Government Exhibit 4’, first surfaced on December 1, 2015 – nearly two years after petitioner’s plea of guilt – as an attachment to the government’s opposition brief to petitioner’s 2255 motion to vacate.
- 11) During the original 2255 proceedings, the Assistant U.S. Attorney asserted procedural default to block the District Court from reaching the merits of petitioner’s claims, one of which was prosecutorial misconduct.
- 12) Furthermore, the Court record shows that the Assistant U.S. Attorney affirmed that the government has no evidence that petitioner is predisposed toward any of the criminal conduct charge in his indictment.
- 13) ‘Government Exhibit 4’ – discovered nearly two years after petitioner’s plea of guilt – presents substantial evidence of inducement by Detective McKay that fits the inducement framework adopted in *United States v Mayfield*, 771 F.3d 417 (7th Cir 2013) (enbanc).
- 14) Facts 2, 12 and 13 form a complete affirmative defense of entrapment and, consistent with the federal entrapment jury instruction, would have led jurors to

the decision to acquit.

15) In *Jacobson v United States*, 503 U.S. 540 (1992) the U.S. Supreme Court held that if the government induces a defendant to commit crime, but also fails to prove predisposition, the government has failed to carry its burden for a conviction, as a matter of law.

Arguments

I. **Did the Appellate Court err when it rejected petitioner's claim that his inability to raise his claim of actual innocence on a second or successive 2255 motion made that remedy inadequate or ineffective to test the legality of his conviction?**

The Fourth Circuit has granted that under narrow circumstances a petitioner's inability to raise a claim in a second or successive 2255 petition due to AEDPA's limitations on that process can render the 2255 process inadequate or ineffective.

In re Jones, 226 F.3d 328 (2000) ("Prisoner's inability to file a second or successive motion to vacate made that remedy inadequate or ineffective to test the legality of his detention, entitling prisoner to file petition for Writ of Habeas Corpus"). In the present circumstance, petitioner, like Jones, asserts that he is innocent of the conduct for which he stands convicted. The factual basis for this claim was, in fact, concealed from petitioner through evidence manipulation and concealment on the part of the government, aided and abetted by the incompetence of his court-appointed public defender. In Jones' case, he benefitted from later judicial rulings

that removed his original criminal conduct from the reach of the law under which he was convicted, while petitioner was already outside the reach of the law due to a complete affirmative defense of entrapment. Both the petitioner and Jones are in the same predicament – innocent yet convicted. Both parties requested permission to file a second or successive 2255 petition when they could assert their innocence, and both were denied due to the statutory restrictions imposed by AEDPA upon the 2255 process. These statutory restrictions impose hurdles to a second or successive 2255 that can be overcome only if the claim to be presented contains (2255(h)):

- 1) Newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or
- 2) A new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

While petitioner presents newly discovered evidence that would, in conjunction with the government's admission of no evidence of his predisposition, afford a complete affirmative defense of entrapment his circuit court rejected authorization, stating "for failure to meet the requirements of 28 U.S.C. 2244(b)(2)". Jones, likewise, petitioned for authorization on two occasions and was denied authorization. On his third attempt, however, the Circuit Court declared that Jones' inability to file a second or successive 2255 due to the restrictions imposed by the AEDPA amendments makes the 2255 process inadequate or ineffective to test the legality of his detention and granted him leave to utilize 28 U.S.C. 2241 to raise his claim of innocence. Jones' obstacle was 2255(h)(2) while petitioner's obstacle is

2255(h)(1). The Fourth Circuit Court of Appeals stated in – *United States v Surratt*, 797 F.3d 251 (4th Circuit 2015) – “a chance to argue a claim is the relevant criteria for adequacy and effectiveness.” To date, petitioner has been afforded no opportunity to present his claim of innocence nor to have multiple claims of constitutional violations addressed by any court.

Petitioner asserts that earlier judicial proceedings in the U.S. District Court in Delaware were fundamentally defective due to 1) evidence falsification and concealment by the Government during his criminal prosecution, 2) appointment of incompetent counsel by the Court as petitioner’s public defender, 3) citation and use of these knowingly falsified evidences by the Government in petitioner’s 2255 proceedings which were dismissed as procedurally defaulted at the request of the Assistant U.S. Attorney, 4) the complete lack of any evidentiary hearings in the face of previously concealed evidence, and 5) the refusal by that Court to reopen the dismissed, procedurally defaulted 2255 proceedings under Fed. R. Civ. Proc. 60(b) and 60(d) in light of misrepresentation and fraud on the part of the Government. Thus the U.S. Government obtained a conviction through fraud that they could not have obtained as a matter of law. *Jacobson v United States*, 503 U.S. 540 (1992) (“if the government induces a defendant to commit a crime, but also fails to prove predisposition, the government has failed to carry its burden for a conviction, as a matter of law”).

The U.S. Supreme Court in *Abdur’Rahman v Bell*, 537 U.S. 88 (2002) has stated “A claim of prosecutorial fraud does not rely on ‘a new rule of constitutional

law' and may not 'establish by clear and convincing evidence that... no reasonable fact finder would have found the applicant guilty of the underlying offense.' 28 U.S.C. Section 2244(b)(2). It is a claim that, none the less, must be recognized." And yet, to date, such claim has been totally ignored and blocked from being addressed by the impediments of the AEDPA. And further in *Townsend v Sain*, 372 U.S. 293 (1963) that "evidentiary hearings are required in habeas proceedings where there is a substantial allegation of newly discovered evidence" and SCOTUS further articulated that "a too-limited use of such hearings would allow many grave constitutional errors to forever go uncorrected". And yet, this ruling has been completely ignored in the present case. The U.S. Supreme Court has not been silent on issues faced by the accused in this country, *Amadeo v Zhant*, 486 U.S. 214 (1988) ("concealment of evidence on the part of the government is ample 'cause' to overcome procedural default"). And yet, procedural default was gifted to the prosecutor who had, in fact, concealed evidence. The Tenth Circuit in *Douglas v Workman*, 560 F.3d 1156 (10th Cir. 2009) stated "requiring petitioner's Brady claim to be treated as a second or successive 2255, would have allowed the government to profit from its own egregious misconduct; where a petitioner can show that the state purposefully withheld exculpatory evidence, the prisoner should not be forced to bear the burden of 28 U.S.C. 2244(b)(2)(B) ... , Fraud upon the Court calls into question the very legitimacy of a judgment". And the Seventh Circuit stated "a decision produced by Fraud on the Court is not in essence a decision at all, and never becomes final". *Kenner v Comm'r*, 387 F.2d 689,691 (7th Cir. 1968).

The petitioner, therefore, asserts that given the fraud by the prosecutor in his case, that the circumstance should be addressed by granting, pursuant to the savings clause (2255(e)), permission to seek habeas relief under 28 U.S.C. Section 2241. *Lester v Flournoy*, 909 F.3d 708 (4th Cir 2018) (Court held that earlier judicial proceeding error was so grave to be deemed a fundamental defect, thus permitting petitioner to seek habeas relief under the savings clause 2255(e)). To deny petitioner an opportunity to have his conviction tested for its legality given the history and facts of this case raises serious Constitutional questions. Several Circuits have addressed this rare and unusual predicament by allowing petitioner to petition for a writ of habeas corpus vis the savings clause (2255(e)). *United States v Barrett*, 178 F.3d 34 (1st Cir 1999) (“Section 2241 relief is available in the unusual circumstance in which application of the ‘second or successive’ limitations (2255(h)) would result in a complete miscarriage of justice. A prisoner can seek 2241 habeas corpus in the set of cases in which petitioner cannot, for whatever reason, utilize 2255, and in which failure to allow collateral review would raise serious constitutional questions”). *Triestman v United States*, 124 F.3d 361 (2nd Cir 1997) (“Serious constitutional questions would arise if a person can prove his actual innocence on the existing record – and who could not have effectively raised his claim of innocence at an earlier time – had no access to judicial review. Accordingly, where relief under 2255 is no longer available, a prisoner is entitled to seek a writ of habeas corpus – 2241”). *In re Dorsainvil*, 119 F.3d 245 (3rd Cir 1997) (“Were no other avenue of judicial review available for a party who claims he/she is factually

or legally innocent, as a result of a previously unavailable statutory interpretation, we would be faced with a thorny Constitutional issue. We conclude that under narrow circumstances, a petitioner . . . may resort to the writ of habeas corpus 2241”). *In re Davenport*, 147 F.3d 605 (7th Cir 1998) (“A procedure for post-conviction relief can be fairly termed inadequate when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect as having been imprisoned for a non-existent offense”). *Harrison v Ollison*, 519 F.3d 952 (9th Cir 2008) (“A motion meets the escape hatch of 28 U.S.C. 2255 (2255(e)) when a petitioner (1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim”). *Prost v Anderson*, 636 F.3d 578 (10th Cir 2011) (“If and when the narrowness of 2255(h) poses a difficulty of constitutional dimension a court may step in to permit the petition to proceed via 2241”). Petitioner asserts that his case with the specific facts and circumstances presents such a Constitutional issue and should be allowed to proceed under 2241 and the decision of the 4th Circuit Court of Appeals is at odds with the decisions in a number of sister circuits who allow use of 2241 in such situations.

II. Did the District/Appellate Court abuse its discretion by denying petitioner a Certificate of Appealability?

In 2015 the U.S. Supreme Court in *Jordan v Fisher*, 135 S. Ct. 2647 (2015) stated “In cases where a habeas petitioner makes a threshold showing his Constitutional rights were violated, a COA should issue.”

Petitioner’s motion under 28 U.S.C. Section 2241 made prima facie cases that the Fourth Circuit acknowledges are constitutional rights violations. The Fourth Circuit in *In re Stevens*, 956 F.3d 229 (4th Cir 2020) stated “The Supreme Court has held ‘knowingly using false evidence, including false testimony, to obtain a tainted conviction’ is a due process violation. *Napue v Illinois*, 360 U.S. 264 (1959); *United States v Basham*, 789 F.3d 358 (4th Cir 2015) (“The Due Process Clause obliges the government not [to] use false evidence, including false testimony.”) The 4th Circuit recognizes that nondisclosure or delayed disclosure of material exculpatory evidence invalidates a plea of guilt. *Banks v United States*, 920 F. Supp. 688 (4th Cir 1996). The 4th Circuit stated in *Schultz v Butcher*, 24 F.3d 626 (4th Cir 1994) that “wrongful withholding of material exculpatory evidence makes it inequitable for the withholder to retain the benefit of the judgement”. *Brady v Maryland*, 373 U.S. 83 (1963) (“Suppression of evidence by prosecution denied accused due process of law”). *Strickler v Greene*, 527 U.S. 263 (1999) (“Suppression of evidence favorable to the accused violates due process”). In *United States v Caro*, 773 F. App’x 651 (4th Cir. 2018) the Court stated, “The Fourth Circuit has never held that a Brady claim raised for the first time in collateral challenge under 2255 is procedurally defaulted”. The Court in *United States v Williams*, 753 Fed. Appx. 176 (4th Cir. 2019) stated “a 60(b)(3) claim of prosecutorial misconduct is proper under 60(b) and

is not a second or successive 2255". The petitioner's various claims of ineffective assistance of counsel resonate with rulings in the Fourth Circuit. *Elmore v Ozmint*, 661 F.3d 783 (4th Cir. 2010) (Counsel ineffective because "he failed to investigate despite professional obligations to do so"). *United States v Carranza*, 640 Fed Appx. 248 (4th Cir. 2016) ("Courts have recognized a constructive denial of the right to counsel when, for instance, ... an attorney completely failed to "subject the prosecutor's case to meaningful adversarial testing"). *United States v Mooney*, 497 F.3d 397 (4th Cir. 2007) (Counsel was ineffective because he failed to investigate both the facts and law to determine if defense could be developed). *Frazer v South Carolina*, 430 F.3d 696 (4th Cir. 2005) ("Counsel had a duty to consult with inmate regarding an appeal. The U.S. Supreme Court has applied Strickland to hold that counsel's duty to consult with defendant generally **requires** counsel to discuss with defendant whether to pursue an appeal. Defendant has the ultimate authority to make the fundamental decision as to whether to appeal, and counsel's obligation to assist defendant includes a duty to consult with defendant on important decisions. When defendant has not specifically requested to appeal, counsel is under professional obligation to 'consult' with defendant regarding that fundamental decision. That duty applies even if defendant has pleaded guilty"). Petitioner asserted in his habeas petition under Section 2241 that counsel provided ineffective assistance 1) by his failure to investigate 'Government Exhibit 3' and assert Miranda violations and file motions to suppress, 2) by failing to investigate the affirmative defense of entrapment, 3) by failing to read and review with his client

the government's sentencing memorandum which essentially provided 'Government Exhibit 4', as an attachment, containing clear evidence of inducement of his client by law enforcement running the online reverse police sting, and 4) by his failure to advise his client regarding an appeal by abandoning his client post-sentencing.

All of these issues were clearly articulated in petitioner's 2241 petition, yet the District Court concluded "because none of the issues are adequate to deserve encouragement to proceed further, the Court also denies a Certificate of Appealability." A decision later upheld by the 4th Circuit Court of Appeals, which petitioner asserts is a flawed decision. Their denial of a hearing, effectively denies petitioner the writ of habeas corpus, given that his first 2255 was procedurally defaulted, and no hearing has ever been granted to address his claim of innocence on the merit. U.S. Constitution, Article I, Section 9 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it").

REASONS FOR GRANTING THE PETITION

The petitioner asserts that this Court should grant the petition in order to reverse a miscarriage of justice brought about by dishonest government behavior and ineffective assistance of counsel and more importantly to address the negative impact of AEDPA on an individual's ability to address fraud when that fraud is effectively concealed by the government throughout the criminal proceedings. The severe restrictions imposed upon the habeas process by the AEDPA makes it impossible to achieve justice if the fraud is discovered after the filing of an opening habeas brief. It is widely acknowledged that the federal government cheats during criminal prosecutions by hiding evidence that they are required to disclose. *United States v Olsen*, 737 F.3d 625 (9th Cir. 2013) (dissenting opinion: "Brady violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend...Only judges can put a stop to it."). The Supreme Court, in *McClesky v Zant*, 499 U.S. 467 (1991), defined miscarriage of justice as "an extraordinary instance when a Constitutional violation probably has caused the conviction of one innocent of the crime".

Numerous circuits have ruled that section 2241 may be used as a remedy to address those situations in which failure to allow collateral review would raise serious constitutional questions, yet the Fourth Circuit rejects this position in situations of new evidence demonstrating innocence. This Court needs to clarify the circumstances under which a petitioner may secure a habeas hearing via 2241,

when he is blocked by the severe restrictions of AEDPA.

CONCLUSION

The petitioner respectfully prays this Court will grant his request for a writ of certiorari and reverse the decision of the Fourth Circuit Court of Appeals

A handwritten signature in black ink, appearing to read "Kirk A. Johnson". The signature is fluid and cursive, with "Kirk" and "A." on the first line and "Johnson" on the second line.