

ORIGINAL

No.
23-6470

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IN THE

SUPREME COURT OF THE UNITED STATES

Richard Gathercole — PETITIONER
(Your Name)

vs.
United States of America &
Federal Bureau of Prisons — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard Gathercole
(Your Name)

P.O. Box 1000
(Address)

Petersburg, VA 23804-1000
(City, State, Zip Code)

(Phone Number)

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Questions presented.

(1) IS 28 U.S.C. Section 2255 Unconstitutional if the petitioner was subjected to any substantial procedural hurdles that made his remedy under Section 2255 less swift and imperative than a federal habeas Corpus?

(2) Does the fourth Circuit Court of Appeals and the District Court for the eastern District of Virginia have jurisdiction to hear and decide the petitioner's Habeas Corpus petition, where a federal Sentencing Court's decision, from another circuit, was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, and where it will be futile for him to bring his valid Constitutional violation claims back to life with the District Court for the District of Nebraska and the Eight Circuit Court of Appeals, where the petitioner did not receive a full and fair hearing, thereby rendering 28 U.S.C. Section 2255 inadequate or ineffective to test the legality of his conviction?

(3) Does 2255(e) inadequate or ineffective mean that it is a set of cases in which the petitioner cannot utilize 2255, and in which the failure to allow for collateral review would raise serious Constitutional questions?

Statement of the Case

Petitioner Gathercole, acting pro-se, had requested that the Federal Courts look into his criminal conviction because there were substantial constitutional violations throughout his criminal procedure. The petitioner's constitutional claims are:

- (1) Ineffective assistance of Counsel; and
- (2) Does a collateral attack waiver waive the appellant's right to appeal based on the alleged partiality of a judge, who deprived the appellant of a substantive or procedural right to which the law entitles him?

Petitioner had filed a 28 U.S.C. Sect. 2241 with the Eastern District of Virginia, pursuant to 28 U.S.C. Sect. 2254(b)(1)(B)(ii), 2254(b)(3), and Rule 1(b) Rules governing 28 U.S.C. Sect. 2254, stating that the Eighth Circuit Court of Appeals and the District Court for the District of Nebraska did not permit him a full and fair hearing, regarding the District Court for the District of Nebraska ruling that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court - see 28 USC Sect 2254(d); see also *Harrington v. Richter*, 526 U.S. at 102.

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Appendix A : Per Curiam: Richard L. bathercote, a federal prisoner, appeals the district court's orders dismissing without prejudice his 28 USC Sect. 2241 petition in which he sought to challenge his conviction by way of the Savings Clause in 28 U.S.C. Sect. 2255 and denying his motion to reconsider.

Pursuant to sect. 2255(e), a prisoner may challenge his conviction in a Traditional writ of habeas Corpus pursuant to sect. 2241 if a sect 2255 motion would be inadequate or ineffective to test the legality of his detention. Section 2255 is inadequate and ineffective to test the legality of a conviction when :

- (1) at the time of conviction, settled law of this Circuit Court or the Supreme Court established the legality of the conviction;
- (2) Subsequent to the prisoner's direct appeal and his first 2255 motion, substantive LAW changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and
- (3) the prisoner cannot satisfy the gatekeeping provisions of Sect. 2255 because the new Law is not one of Constitutional LAW.

(i)

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In re Jones, 226 F.3d 328, 333-34 (4th cir 2000).

We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's orders. Gathercole v. United States, No. 3:22-cv-00384-mHL-MRC (E.D. VA Sept 19 & Dec 13, 2022). We deny Gathercole's motion for appointment of Counsel and for bail/release pending appeal and dispense with oral arguments because the facts and legal contents are adequately presented in the materials before this Court and argument would not aid the decisional process. Affirmed - 4th circuit court - 22-7433 - 06-06-2023.. (unpublished)

Appendix B : In his present Sect 2241 Petition, Gathercole contends that 28 U.S.C. Sect. 2255 is unconstitutional and that the sentencing Court and the Eighth Circuit unfairly denied his Sect. 2255 motion and appeal of that motion. As discussed below, this Court lacks jurisdiction to entertain these claims.

Law governing 2241 petitions :

A motion pursuant to 28 U.S.C. Section 2255 "provides the primary means of collateral attack" on the imposition of a federal conviction and sentence, and such motion must be filed with the sentencing Court. See Pack v. Yusuff, 218 F.3d 448, 451 (5th cir 2000) (quoting Cox v. Warden, Fed Det Ctr., 911 F.2d 1111, 1113 (5th cir 1990). A federal inmate may not proceed under 28 USC Sect. 2241 unless he or she demonstrates that the remedy afforded by 28 USC Sect 2255 "is inadequate or ineffective to test the legality of his detention." 28 USC Sect. 2255(e), "for example, attacks on the execution of a sentence are properly raised in a Sect. 2241." In re Vial, 115 F.3d 1192, 1194 n.5 (4th cir 1997) (citing Bradshaw v. Story, 86 F.3d 164, 166 (10th cir 1996).

(ii)

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Nevertheless, the United States Court of Appeals for the Fourth Circuit has emphasized that "the remedy afforded by Sect 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provisions or because an individual is procedurally barred from filing a Section 2255." *Id.*

The fourth circuit has stressed that an inmate may proceed under section 2241 to challenge his or her conviction "in only very limited circumstances" *United States v. Poole*, 531 F.3d 263, 269 (4th cir 2008). The fourth circuit has explained:

Section 2255 is inadequate or ineffective to test the legality of a conviction when: (1) at the time of conviction; (2) subsequent to the prisoner's direct appeal and first sect. 2255 motion, the substantive LAW changed that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of Sect 2255 because the new rule is not one of Constitutional LAW. - *In re Jones*, 226 F.3d 328, 333-34 (4th cir 2000).

B. This Court lacks jurisdiction over Gathercole's Claim.

Gathercole Challenges the legality of his 28 USC Sect. 2255 and the Sentencing Court's and Eighth Circuit's dismissal of his Sect. 2255 motion and subsequent appeal. These claims make little sense in the context of his sect. 2241 because clearly sect. 2241 is an inappropriate procedural vehicle for bringing these claims. Gathercole fails to show that, subsequent to his direct appeal, the substantive LAW has changed so his various convictions are no longer a crime, as he must bring his claims under sect. 2241. *In re Jones*, 226 F.3d at 333-34. Accordingly, Gathercole cannot proceed under 28 USC Sect. 2241. This action will

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be Dismissed without prejudice for lack of jurisdiction.

Conclusion

Gathercole's request to proceed in forma pauperis will be granted.

Gathercole's Sect 2241 will be Dismissed without prejudice for lack of Jurisdiction, Gathercole's motion for bail during his pendency of his Sect. 2241 will be denied. Gathercole's motion to leave to Amend will be Granted to the extent that the Federal Bureau of Prisons is added as A respondent. An appropriate final order shall accompany this memorandum Opinion, U.S Dist Court for the E.D of Virginia 3:22-cv-00384- 09-19-2022 (Richard Gathercole v. United States of America & Federal Bureau of Prisons) (unpublished)

Appendix C: Richard L. Gathercole, a federal inmate proceeding pro se, submitted a 28 USC Sect. 2241 petition. By memorandum order entered on Sept. 19, 2022, the Court dismissed the Section 2241 petition without prejudice because the Court lacked jurisdiction to entertain such petition. The matter is now before the Court on Gathercole's motion filed on September 29, 2022, that will be construed as a motion under Fed. R. Civ. P. 59(e) ("Rule 59(e) motion"). See *MLC Auto, LLC v. Town of S. Pine*, 532 F.3d 269, 277-78 (4th Cir 2008) (stating that filings made within twenty-eight days later after entry of judgment are construed as Rule 59(e) motions (citing *Dove v. Codesco*, 569 F.2d 807, 809 (4th Cir 1978))).

"[R]econsidering of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pac. Ins. Co. v. Am Nat'l Fire Ins Co.*, 148 F.3d 396, 403 (4th Cir 1998). The United States Court of Appeals for the Eighth Circuit recognizes three grounds for relief under Rule 59(e): "(1) to accommodate an intervening change in controlling law; (2) to account for new

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evidence not available at trial; or (3) to correct a clear error of Law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir 1993) (citing *Weyerhaeuser Corp. v. Koppers Co.*, 771 F.Supp. 1406, 1419 (D.Md 1991); *Atkins v. Marathon. Letourneau Co.*, 130 F.R.D 625, 626 (S.D. Miss 1990).

Bathercole does not explicitly address any of the above recognized grounds for relief in his Rule 59(e) motion. However, Bathercole argues that Court's dismissal of his Sect. 2241 petition was a "mistake," and presumably, that the Court had jurisdiction to review his petition. Thus, the Court construes Bathercole's Rule 59(e) motion to argue that the Court should grant his Rule 59(e) motion "to correct a clear error of law or prevent manifest injustice."

Hutchinson, 994 F.2d at 1081. Nevertheless, Bathercole's Rule 59(e) motion fails to put forth any persuasive reason why this Court had jurisdiction to review his 2241 petition. Instead, the Rule 59(e) motion simply recites Law that has little to no bearing on the Court's Conclusion that it lacked jurisdiction to entertain Bathercole's Sect. 2241 petition.

Bathercole fails to demonstrate any clear errors of Law in the Conclusions of the Court or that the dismissal of this action resulted in manifested injustice. Therefore, Bathercole fails to demonstrate any of the three grounds for Rule 59(e) relief. Accordingly, the Rule 59(e) motion will be denied.

Bathercole has also filed several other motions. First, Bathercole filed a Motion for Bail. Bathercole fails to identify any persuasive reason why this Court could, or should, release him on bail. Thus, the motion for bail will be denied. Second, Bathercole filed a motion for the appointment of Counsel. (ECF No 24). No Constitutional right to have appointed Counsel in post-Conviction proceedings exist. - *Mackall v. Angelone*, 131 F.3d 442, 445 (4th Cir 1997)

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The Court, however, may appoint counsel to a financially eligible person if justice so requires. See 18 USC sect 3006A(a)(2)(B). Gathercole fails to demonstrate that the interests of justice warrant the appointment of Counsel at this juncture. Accordingly, Petitioner's motion for Appointment of Counsel will be denied. (ecf No 24.)

Finally, Gathercole filed a request for an ex parte Communications with the undersigned to discuss "adjudicating his Rule 59(e) motion within a reasonable time". (ecf No 26). As the Court has now addressed Gathercole's pending motion and Gathercole offers no persuasive reason why the Court should discuss this matter ex parte with him, (A request this Court does not undertake with any party), Gathercole's request will be denied. (ecf No 26). - An appropriate final order shall issue.

U.S. Dist Court for the E. D of Virginia Date: 12-13-2022 (Gathercole v. United States of America & Federal Bureau of Prisons) request for reconsidering of a judgement. (published: 3:22-cv-384)

Appendix D: The petition for rehearing en banc was circulated to the full Court. No Judge requested a poll under Fed. R. App. p. 35. This Court denies the petition for rehearing en banc- Fourth Circuit Court. 22-7433 09-18-2023 (unpublished 22-7433).

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 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 June, 6th 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: September 18, 2023, and a copy of the order denying rehearing appears at Appendix D.

☐ 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

Eighth Circuit local Rule 40(a)(c) pg-21

Art. I Section 9, Cl 2 pg-22

Federal Rules of Civil procedure 60(b)(1) pg-27, 28

Federal Rules of Civil Procedure 83(a) pg-21

28 U.S.C. Section 2243 pg-28

28 U.S.C. Section 2253(c)(2) pg-19

28 U.S.C. Section 2254(d) pg-24

28 U.S.C. Section 2254(b)(1)(B)(ii) pg-22, 23

28 U.S.C. Section 2254(b)(3) pg-22, 23

Rule 1(b) Rules governing 2254 pg-22, 23, 26

28 USC Section 2255 pg-20, 21, 28

28 USC Section 2255(e) pg-29

Aguayo v. Harvey, 476 F.3d 971, 976 (D.C. Cir 2007). pg-27

Arizona v. Fulminante, 499 U.S. at 310-311 pg-17, 18

Avery v. Alabama, 308 U.S. 444, 446 (1940) pg-15

Baldayague v. U.S., 338 F.3d 145, 152 (2nd Cir 2003) pg-15

Brady v. Maryland, 373 U.S. 83, 87 (1963) pg-13

Brady v. United States, 397 U.S. 742 (1970) pg-13

Brech v. Abrahamsom, 507 U.S. 619, 123 (1993) pg-18

Boydin v. Alabama, 395 U.S. 238 (1969) pg-17

Buck v. Davis, 137 S.Ct 759 (2017) pg-19

Byrnes v. Vose, 929 F.2d 1306, 1308 (1st Cir 1992) pg-23

Carter v. Buesgen, 10 F.4th 715 (7th Cir 2021) pg-25, 26

Colgrove v. Battin, 413 U.S. 149 (1973). pg-21

Constitutional and Statutory Provisions Involved

- County Court v. Allen, 442 U.S. at 165 (1979) Pg-17
- Davis v. Adult parole Authority, 610 F.2d 410 (6th Cir 1979) Pg-27
- David v. Heckler, 591 F.Supp 1033 (E.D.N.Y 1984) Pg-10
- Doleman v. muncy, 579 F.2d 1258, 1265 (4th Cir 1978) Pg-10
- Dowd v. United States, 310 at 210 Pg-28
- Fay v. Noia, 372 U.S. 391, 83 Pg-20
- Gates v. Henderson, 568 F.2d 830 (2nd Cir 1977) Pg-10
- Hawk v. Olson, 326 U.S. 274-275 Pg-21
- Henderson v Morgan, 426 U.S. 637, 644 (1976) Pg-15
- Herrington v. Richter, 562 U.S. 86, 103 (2011) Pg-8, 24
- Hill v. Lockhart, 474 U.S. 52, 59 (1985) Pg-11
- Hill v. United States, 368 U.S. 424, 427 Pg-26
- Hoffman v. Arave, 455 F.3d 926 (9th Cir 2006) Pg-13
- In re Agent orange prod. Liab. Litig. 100 FRD 1158 (E.D.N.Y 1984) Pg-21
- in re Jones, 226 F.3d 328, 333, 334 (4th Cir 2000). Pg-28
- In re Murchison, 395 U.S. 133, 136-139 (1955) Pg-17
- Kemp v. United States, 142 S.Ct. 1856 (2022) Pg-27
- Kimmelman v. Morrison, 477 U.S. 365 (1986). Pg-13, 16
- Lee v. United States, 137 S.Ct 1958 (2017) Pg-16
- Lindstadt v. Keane, 239 F.3d 191, 199 (2nd Cir 2001) Pg-13
- Lonchar v. Thomas, 517 U.S. 314, 116 (1996) Pg-18.
- Mackey v. United States, 401 U.S. 667, 692, 694 (1979) Pg-18
- Magwood v. Smith, 791 F.2d 1438 (11th Cir 1986) Pg-24
- Martel v. Clair, 569 U.S. 648, 663 (2012) Pg-12, 17
- McCoy v. Louisiana, 138 S.Ct 1500, 1508 (2018) Pg-15.

Constitutional and Statutory Provisions involved

- McMann v. Richardson, 397 U.S. 759, 771 (1970) pg-16
- Miller-EL v. Cockrell, 537 U.S. at 327 pg-19, 20
- Nadar v. United States, 572 U.S. 1-8, 9 (1999). pg-18
- Plumlee v. Del Papa, 469 F.3d 910, 922 (9th cir 2006) pg-17
- Richman v. Bell, 131 F.3d, 1150, 1156-1160 (6th cir 1977). pg-14
- Rimmer v. Fayetteville Police Dept. 567, F.2d 273 (4th cir 1977) pg-24
- Roe v. Flores Ortega, 528 U.S. 484 pg-14
- Rose v. Lundy, 455 U.S. 509 at 544 pg-18
- Sanders v. United States, 373 U.S. 1.83 pg-20, 26
- Slack v. McDaniel, 529 U.S. 473, 484 (2000) pg-19
- Stone v. Powell, 426 U.S. 465, 49 (1976) pg-18
- Strickland v. Washington, 466 U.S. at 688 (1984). pg-14, 15, 16, 19
- Teague v. Lane 489 U.S. 288, 311-314 (1989) pg-18
- Tollett v. Henderson, 411 U.S. 258, 266-267 (1973) pg-17
- Townsend v. Sain, 372 U.S., 293 pg-20
- Tristman v. United States, 124 F.3d 361 (2nd cir 1997) pg-29
- United States v. Andis, 333 F.3d 886, 891 (8th cir 2003) pg-17
- U.S. ex rel Conroy v. Bombard, 426 F. Supp 97, 109 (S.D.N.Y 1976) pg-10
- U.S. v. Chipps, 410 F.3d 438, 447 (8th cir 2005) pg-14
- United States v. Hayman, 342 U.S. 205, 223 (1953). pg-26, 29
- United States v. Hernandez, 281 F.3d 746, 749 (8th cir 2002) pg-15
- Visciotti v. Woodford, 288 F.3d 1097, 1110-1115 (9th cir 2002 pg-13
- Weatherford v. Bursey, 429 U.S. 545, 559 (1977) pg-13
- Wheat v. United States, 468 U.S. 153, 159 (1988) pg-17
- White v. Woodall, 572 U.S. 415 (2014) pg-24

Constitutional and Statutory Provisions involved

Williams v. Taylor, 529 U.S. 362 S.Ct (2000) Pg. 24

Williams v. United States, 285 Fed Appx 595 (11th Cir 2008) Pg 10

U.S District Court for the District of Nebraska did not permit the petitioner a full and fair hearing on his 28 U.S.C Section 2255.

In denying the petitioner's Constitutional Violation claims, the U.S District Court for the District of Nebraska noted as follows :

"when one weeds through the prolix and frivolous filings in this Court and the Eighth Circuit Court of Appeals, bathercole, Sometimes known infamously and nationally as the "AK-47 bandit, mainly asserts that his Counsel was ineffective and a "global" Settlement that Called for a dismissal of a California case was not Complied with by the government. Nonsense.

first, any fair reading of the record shows that his Counsel was effective and did a terrific job for him particularly understanding that the case was indefensible. Second, the government represented that the California Case has been dismissed and has Submitted evidence to prove it. Any other Claims are of the make weight variety and are barred by the collateral attack waiver in the plea agreement. . . . It is ordered that the motion for Sect. 2255 relief (filing 106) and any Supplements (e.g, filing 107) are dismissed with prejudice. A Separate judgement will be issued, NO Certificate of appealability has been or will be issued." - See 4:17-cr-3096.

The judge's memorandum order in the petitioner's 2255 denial were vague and contained "insufficient" information regarding the
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petitioner's Constitutional Violation Claims. Federal Courts are required to resolve all Constitutional Claims presented in a Habeas Corpus petitions without regard to whether relief is ultimately is granted or denied. - see *Williams v U.S.*, 285 Fed Appx 597 (11th Cir 2008).

A U.S. District Court Judge Jack Weinstein, one of the federal judiciary's more distinguished federal judges, had ruled that bad writing in government documents violates the due process clause of the Federal Constitution. An order must be of such nature as to reasonably convey the required information. It is essential to due process for if the district court's order is inadequate, other procedural protections become an illusion. - see *David v. Heckler*, 591 F. Supp 1033 (E.D.N.Y. 1984).

Circuit Courts generally agree that a full and fair hearing opportunity was not afforded if:

(1) The Courts provided no corrective procedures to redress the claims that the petitioner had raised. - see *Gates v. Henderson*, 568 F.2d 830 (2nd Cir 1977).

(2) The Courts had no reasonable inquiry into the relevant questions of facts and law - see *U.S. ex rel Conroy v. Bombard*, 426 F Supp 97, 109 (S.D.N.Y 1976).

(3) The process provided by the Courts to fully and fairly litigate those Constitutional claims were applied in such a way as to prevent the actual litigation of such claims on their merits - *Doleman v muncy*, 579, F2d, 1258

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1265 (4th Cir 1978).

The district Court for the district of Nebraska had abused it's discretion in determining that:

(1) Counsel's performance did not fall below an objective standard of reasonableness;

(2) Counsel's performance did not prejudice the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceedings ;

(3) In the context of a guilty plea, the defendant did not satisfy the prejudice prongs by failing to demonstrate that, but for Counsel's deficient performance, a reasonable probability exist that the defendant would not have plead guilty and would have insisted on a trial. - See Hill v. Lockhart, 474 U.S. 52, 59 (1985).

(4) The District Court for the District of Nebraska had unreasonably determined that the defendant's Counsel "was effective and did a terrific job for him."

Prior to the petitioner signing the plea agreement, the petitioner had filed multiple timely motions with the District Court for the District of Nebraska, that the petitioner was having severe issues with his Counsel, the petitioner's Counsel was coercing him to sign the plea agreement, even though the petitioner insisted on going to trial, and that the extent of the conflict was irreparable. The district Court denied the motion for removal of Counsel without adequately

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reasonable professional judgement in which Competent Lawyers might disagree - see *Lindstadt v. Keane*, 239 F.3d 191, 199 (2nd Cir 2001). Although appellants have no general Constitutional right to discovery in a Criminal proceeding (*Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)), Counsel's failure to investigate, present ready available mitigation evidence, and his inability to obtain prosecution aggravating evidence constituted deficient performance, because such conduct could not be justified as strategic decisions - see *Visciotti v. Woodford*, 288 F.3d 1097, 1110-15 (9th Cir 2002).

In *Kimmelman v. Morrison*, the Supreme Court had held that Counsel's failure to conduct pretrial discovery fell below the level of reasonable professional assistance, - see *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

Counsel's failure to obtain certain types of evidence to safeguard his client's "due process" rights amounted to unreasonable strategy or deficient performance, - see *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The 9th Circuit Court of Appeals first determined that Counsel's failure to investigate potential mitigating evidence was unreasonable, then held such failure prejudicial - see *Hoffman v. Arave*, 455 F.3d 926 (9th Cir 2006).

Counsel neglected to adequately communicate effectively with his client during critical confrontations with his expert adversary, the government. Effective communications essentially allows the defendant's Counsel to ensure that any decisions the defendant makes, regarding his criminal trial, represents an intelligent choice among the alternatives available to the defendant, - see *Brady v. U.S.* 397 U.S. 742 (1970). "Access to Counsel's skills and knowledge is necessary to accord defendant the ample

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Opportunity to meet the case of the prosecution to which they are entitled to. - Strickland v. Washington, 466 U.S. at 688.

Counsel failure to notify the Court about errors with the indictments, which would have affected the Sentence or Sentencing range. Under an effective standard of reasonableness, a Competent attorney would have challenged the Carjacking indictment as being both multiplicitious and improper venue, 2 Counts of indictments for carjacking; one in the District of Nebraska and one in the District of Kansas from a single incident, because it would force the defendant to serve erroneous sentence imposed under multiplicitious indictment. - See U.S. v. Chippis, 410 F.3d 438, 447 (8th Cir 2005).

Counsel clandestinely change the appellant's trial date to a change of plea without the appellant's consent and Counsel had coerced the appellant to sign the plea agreement, even though the appellant insisted on going to trial.

Counsel had abandoned his client and completely failed to participate in defense, constituted a denial of assistance of Counsel. - See Rickman v. Bell, 131 F.3d 1150, 1156-1160 (6th Cir 1997). Counsel is effectively acting as a second prosecutor and it constitutes a denial of assistance of Counsel such as that the court need not establish actual prejudice. - Rickman v. Bell, 131 F.3d 1150, 1156-1160 (6th Cir 1997).

Counsel refusal to file a notice of appeal, when the appellant reasonably demonstrated to Counsel that he was interested in appealing. - Roe v. Flores-Ortega, 528 U.S. at 484. Counsel's failure to file a post-conviction motion to vacate, despite being directed to do so by the appellant, was a "violation."

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of basic duty of an attorney," - See *Baldyague v. U.S.*, 338 F.3d 145, 152 (2nd cir 2003). If the appellant did not file a direct appeal with the District Court, the appellant would have missed the deadline to file a direct appeal and would have deprived the appellant his right to appeal.

Counsel neglected to inform the appellant that ineffective assistance of Counsel is not cognizable on direct appeal. - See *United States v. Hernandez*, 281 F.3d 746, 749 (8th cir 2002). The Supreme Court has stressed that defence Counsel's role is to assist the defendant, but that assistance does not mean that Counsel can wrestle Complete Control from the person who is subject of the prosecution. - *McCoy v. Louisiana*, 138, sct 1500, 1508 (2018).

District Court stated, "First, any fair reading of the record shows that his Counsel was effective and did a terrific job for him, particularly understanding that the case was indefensible."

Even with overwhelming evidence of guilt, a Plea Cannot Support a judgement of guilt unless it was Voluntary. - *Henderson v. Morgan*, 426 U.S. 637, 644 (1976). The Constitutional guarantee of Counsel "cannot be Satisfied by mere formal appointment - *Avery v. Alabama*, 308 U.S. 444 446 (1940). "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair," - *Strickland v. Washington*, 466 U.S. at 685. The Constitutional rights of Criminal defendants are granted to the innocent and the guilty alike. Consequently, the Supreme Court declined to hold either

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that the guarantee of effective assistance of Counsel belongs to the innocent or that it attaches only to matters affecting the determination of actual guilt. - *Kimmelman v. Morrison*, 377 U.S. at 380.

Ineffective assistance of Counsel

The Sixth Amendment of the Federal Constitution guarantees the petitioner the right to effective assistance of Counsel in criminal prosecutions. - *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The Supreme Court had established a two prong test to evaluate ineffective assistance claims:

(1) Counsel's performance fell below an objective standard of reasonableness. - *Strickland v. Washington*, 466 U.S. at 687-688.

(2) Counsel's deficient performance prejudice the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceedings. - *Strickland v. Washington*, 466 U.S. at 687.

If the deficient performance might have caused the defendant to waive a proceeding he was otherwise entitled to, then a reasonable probability that the deficient performance caused the waiver fulfills the prejudice requirement. The focus is on the defendant's decision making. - see *Lee v. United States*, 137 S.Ct. 1958 (2017).

Does a collateral attack waiver waive the appellant's right to appeal based on the alleged partiality of a judge, who deprived the appellant of a substantive or procedure right to which the law entitles him?

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If a rational, Commonsense Connection exist, (County Court v. Allen, 442 U.S. at 165 (1979)) that it is more than likely that a judge, who had an apparant bias, deprived the appellant of a fair trial should not be barred to appeal by the collateral attack waiver in the plea agreement because:

(1) A violation to the right to an impartial judge is a plain error (Arizona v. Fulminante, 499 U.S. at 316-11) that is "clear" or "Obvious" (U.S. v. Feliciano, 223 F.3d, 102-115 (and Cir 2000).

(2) It effected the appellant's "Substantial rights." (Arizona v. Fulminante, 499 U.S. at 310-11).

(3) It Seriously effects the fairness, integrity, or public reputation of Judicial proceedings (U.S. v. Olano, 507 U.S. at 732 (1993)) as it suggest that the Court do not have to follow the established Circuit Court factors when deciding a motion to Substitute Counsel. (Martel v. Clair, 565 U.S. 648 (663 (2012)). Thus, Violates the appellant's right to effective Counsel (see Wheat v. U.S., 468 U.S. 153, 159 (1988)) and his due process, - (in re Murchison, 349 U.S. 133, 136-139 (1955); Boykin v. Alabama, 395 U.S. 238 (1969)).

(4) It prejudiced the appellant. (Plumlee v. Del papa, 465 F.3d 910, 922 (9th Cir 2006)).

(5) The appellant did not Voluntarily waive his right to appeal a Sentence in a plea agreement because Waiver not Voluntary due to ineffective assistance of Counsel. (Tollett v. Henderson, 411 U.S. 258, 266-267 (1973)). However, a Court Can refuse to enforce an otherwise valid waiver of right to appeal if doing so prevents miscarriage of justice, (U.S. v. Andis, 333 F.3d 886, 891 (8th Cir 2003)).

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(b) It constitute "structural error". The Court in *Fulminante* describes structural error as "defects in the Constitution of the trial mechanism." (*Arizona v. Fulminante*, 499 U.S. at 309).

Such errors "affect the framework within which the trial proceeds, rather than simply being an error in the basic process itself."

"Structural errors," the Court subsequently added, "deprived defendants of basic protections without which criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence... and no criminal punishment may be regarded as fundamentally fair." (*Nader v. United States*, 572 U.S. 1-8, 9 (1999)).

The Supreme Court stated that "dismissal of a first federal habeas Corpus petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great writ, risking injury to an important interest in human liberty." (see *Lonchar v. Thomas*, 517 U.S. 314, 116 at 1299 (1996)). Furthermore, it is well settled that the facts that Constitutional error occurred in the proceedings that led to a Court conviction may not alone be sufficient reason for concluding that a prisoner is entitled to the remedy of habeas. (see *Stone v. Powell*, 426 U.S. 465, 49 (1976); see also *Brecht v. Abrahamson*, 507 U.S. 619, 123 (1993)).

On the other hand, errors that undermine confidence in the fundamental fairness of the Court adjudication certainly justify the issuance of the federal writ. (*Teague v. Lane*, 489 U.S. 288, 311-314 (1989); see also *Mackey v. United States*, 401 U.S. 667, 692, 694 (1979); *Rose v. Lundy*, 455 U.S. 509 at 544)). The deprivation of the right to

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effective counsel recognized in *Strickland* is also such an error. (*Strickland v. Washington*, 466 U.S. at 687, 697-698 (1984)).

The petitioner demonstrated that both the dispositive procedural ruling is debatable and that his motion stated a debatable claim of the denial of a Constitutional right.

Petitioner filed a Certificate of appealability with the Eighth Circuit Court of appeals asserting that the petitioner has shown that "a jurist of reason could disagree with the District Court's resolution of his constitutional claims or that a jurist could conclude the issues presented are adequate to deserve encouragement to proceed further. - (*Miller-El v. Cockrell*, 537 U.S. at 327).

A Certificate of Appealability may be issued only if the petitioner has made a substantial showing of a denial of a Constitutional right. - See 28 U.S.C. Sect. 2253(c)(2). When the District Court denies relief, the petitioner satisfies 28 U.S.C. Sect. 2253 by demonstrating that a reasonable jurist could find the District Court's assessment of the Constitutional Claims debatable or wrong. - *Buck v. Davis*, 137 S. Ct 759 (2017). When the district Court denies relief on procedural grounds, the petitioner must demonstrate both that the dispositive procedural ruling is debatable and that the motion stated a debatable claim of the denial of a Constitutional right. - *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A claim can be debatable even though every jurist of reason might agree, after the C.O.A. has been granted and the case has received full

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Consideration, that the petitioner will not prevail. - *Miller-El v. Cockrell*, 537 U.S. at 338.

Even if the same grounds was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the grounds.

The Eighth Circuit Court of Appeals denied the petitioner's Certificate of appealability request, even though the inquiries cannot "conclusively show," as the statute requires, that there is no merit in his present claim. - *Machibroda v. United States*, 368 U.S. at 495; See also *Sanders v. United States*, 373 at 19.

The petitioner refiled a rehearing on a previously denied rehearing by panel and by en banc, pursuant to the principles of *Sanders v. United States*, 373 U.S. 1-83, 1063, read in light of companion cases of *Townsend v. Sain*, 372 U.S. 293 and *Fay v. Noia*, 372 U.S. 391, 83. If the hearing on Petitioner's prior motion under Section 2255 was not a full and fair hearing resulting in a reliable findings, successive applications for relief under Section 2255 may be filed by the petitioner in the committing Court and a ruling thereon appealed until a full and fair hearing and a lawful decision has been rendered, and until the ends of justice would not be served by reaching the merits of a subsequent application. This is explicitly provided in the guidelines laid down in *Sanders v. United States*, *supra* wherein it stated:

"(3) Even if the same grounds was rejected on the merits on the prior application,

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it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the grounds. If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not a full and fair..."

28 U.S.C. Section 2255 states "Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the U.S. attorney, grant a prompt hearing thereon, determine the issues and make finding of facts and conclusions of law with respect thereto."

Federal Courts of the U.S., upon an application for a writ of habeas Corpus may look beyond forms, and inquire into the very truth and substance of the causes of his detention, although this may necessitate an inquiry into the judicial facts outside of the records of his conviction, - *Frank v. Mangum*, U.S. 309, 331 (1915); *Hawk v. Olson*, 326 U.S. at 274-275.

The Eighth Circuit Court of Appeals rejected the petitioner's rehearing request, without a hearing, pursuant to the Eighth Circuit local rule 40A(c) that prohibits a request for a rehearing on a previously denied rehearing.

28 U.S.C. Section 2072(b) and Fed. R. Civ. P. 83(a) authorizes federal courts to prescribe local rules that are consistent with acts of Congress, but such rules shall not abridge, enlarge, or modify any substantive rights. - *in re "Agent Orange Prod. Liab. Litig."* 100 F.R.D. 1158 (E.D.N.Y. 1984); *Colgrove v. Battin*, 413 U.S. 149 (1973).

The Eighth circuit local rule 40A(c) modified, or abridged, the petitioner's habeas Corpus rights and therefore is not consistent with acts of Congress

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and constituted a prohibited suspension of writ. - See Art. I, sect. 9, cl. 2.

The Doctrine of Supremacy of Laws implies that all agencies of the government must act upon established principles; even the highest bodies and officials are not permitted to act upon arbitrary will or caprice. The Supremacy of law means that all acts of government agencies are subjected to examination in the Courts, which are compelled in their turn to follow established procedures, "due process", and to reach decisions guided not by whim but by generally accepted principles and sound reasons." - see origins of the Common Law by Arthur R. Hogue.

Petitioner shows that the Federal Sentencing Courts decision "was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court.

The petitioner had filed a 28 U.S.C Section 1651 Petition with the eastern District of Virginia Alexandria, pursuant to the five judicially created guidelines for issuance of writ under section 1651 and pursuant to 28 U.S.C Sect. 2254 (b)(1)(B)(ii), 2254(b)(3), and Rule 1(b) rules governing 2254.

The five judicially created guide lines that exist for issuance of writ under 28 U.S.C Sect. 1651 are:

- (1) The party seeking writ has no other adequate means, such as direct appeal, to attain desired relief.
- (2) The petitioner will be prejudiced or damaged in a way not correctable on appeal.

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(3) The District Court's order is clearly erroneous as a matter of law.

(4) The District Court's error is a kind of - repeated, or manifests disregard of federal rules.

(5) The District Court's order raises new and important problems or issues of law of first impressions. *Bauman v. U.S.*, 557 F.2d 650, 990 (9th Cir 1977).

The District Court for the District of eastern Virginia and the Fourth Circuit Court of Appeals can waive the exhaustion requirements - see 28 USC Section 2254(b)(3). The Courts may also dispense with the exhaustion requirements if further litigation in the District Court for the District of Nebraska, or with the Eighth Circuit Court of Appeals, would be futile - see 28 U.S.C. Section 2254(b)(1)(B)(ii); see also *Byrnes v. Vose*, 929 F.2d 1306 1308 (1st Cir 1992).

Rule 1(b) Other Situations

In applications for habeas Corpus in Cases Not Covered by Subdivision Rule 1(a) Rules governing 2254, These rules may be applied at the discretion of the United States District Court. - See Rule 1(b) Rules governing 2254.

28 U.S.C Section 2254(d)

A prisoner who challenges matters "adjudicated on the merits" in state court can obtain relief in federal court if he shows that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court" or "was based on an unreasonable determination of the facts in light of the evidence presented in state court proceeding." - 28 USC Sect. 2254(d).

When reviewing a state court's application of federal law, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that the application must also be unreasonable." (Williams v. Taylor, 529 U.S. 362 S.Ct (2000)). The state court's application is unreasonable if it is "objectively unreasonable, not merely wrong." - (White v. Woodall, 572 U.S. 413, 56 L.Ed.2d 132 (2014)). Meaning, the state court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." - see Harrington v. Richter, 562 U.S. 86, 103 S.Ct (2011).

Pursuant to 28 USC Section 2254(d), a federal court must:

(1) Determine what arguments or theories supported or could have supported the state court's decision and then ask

(2) whether it is possible that a fairminded jurist could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. - Harrington v. Richter, 562 U.S. at 102

Federal courts have no appellate jurisdiction over state criminal case and hence has no authority to remand case to state courts. Federal habeas provides mechanism for collateral, not appellate review - *Magwood v. Smith*, 791 F.2d 1438 (11th Cir 1986), Therefore the court judgement is either reversed nor vacated, but prisoner is released and court judgement is authoritative declared void. - *Rimmer v. Fayetteville Police Dept.* 567 F.2d 273 (4th Cir 1977).

Petitioner's finality in the futility and the Constitutionality of 28 U.S.C Sect. 2255

Applying the futility standard to the present case, Gathercole see's "finality in the futility" of his plight in the District Court for the District of Nebraska and the Eighth Circuit Court of Appeals. Gathercole recounted the unreasonable actions from the courts, that he experienced for years and concludes that it would be futile for him "to continue to bring his appeal to life back into the Eighth Circuit Courts."

Gathercole has no more remedies to exhaust and asking him to try one final time is "a feat guaranteed to fail". The Seventh Circuit Court explained that the situation that Gathercole finds himself trapped in, is the precise type of scenario Congress envisioned when it provided for an exception to the habeas Corpus. - See Carter v. Buessen, 10 F.4th 715 (7th Cir 2021).

The District Court in Alexandria, Virginia had sent the petitioner's 1651 petition to the District Court in Richmond, where the 1651 petition was construed as a 28 U.S.C Sect. 2241 petition. The memorandum order by Richmond District Court stated, "That the petition is conditionally filed pending payment of any assessed filing fee". Dated 6-08-2022. The Court also noted that "To the extent that the petitioner wishes this Court to review the U.S. District Court for the District of Nebraska and the U.S. Court of Appeals for the Eighth Circuit's denial of his 28 U.S.C Section 2255 motion and appeal of that motion, this Court may not do so. Any challenge to the denial of his 28 U.S.C Section 2255 or his

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appeal must be filed in the District Court for the District of Nebraska or the Eight Circuit Court of Appeals."

The petitioner proceeded with the filing 2241, paid the habeas Corpus fee, and submitted a memorandum explaining the petitioners finality of the futility situation with the District Court for the District of Nebraska and the Eighth Circuit Court of Appeals. (see Carter v. Buessen, 10 F.4 715 (7th cir 2021)) and the unconstitutionality of 28 U.S.C. Sect. 2255. - see United States v. Hayman, 342 U.S. 205, 223 (1952).

As the U.S. Supreme Court stated, "It conclusively appears from the historic context in which section 2255 was enacted that legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined," - Hill v. U.S., 368 U.S. 424, 427.

It was not the intention of Congress to subject petitioners with any substantial procedural hurdles that would make his remedy under section 2255 less swift and imperative than a federal habeas corpus. Otherwise, constitutional doubts would be engendered. - see United States v. Hayman, 342 U.S. 205, 223 (1952); see also Sanders v. United States, 373, U.S. 1, 83.

The District Court in Richmond had filed a memorandum order stating that the petition had been filed and "Rule 1(b) of the rules governing section 2254 cases to petitions under 28 U.S.C. Sect. 2241. -

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See rule 1(b) rules governing Section 2254 cases; see also *Aguayo v. Harvey*, 476 F.3d 971, 976 (D.C. Cir 2007).

The very nature of the writ demands that it be administered with the initiative and flexibility to ensure that miscarriage of justice within its reach are surfaced and corrected.

On September 19, 2022, the District Court in Richmond issued a memorandum order (after the writ of mandamus was filed with the Fourth Circuit Court of Appeals, because of the District Court in Richmond was unduly delaying the petitioner's habeas corpus. - see 22-1911) denying the habeas corpus petition, stating that 28 U.S.C. Sect. 2241 was the improper procedure vehicle for bringing these claims and therefore the Court lacked subject matter jurisdiction.

On September, 22, 2022, Petitioner had filed a rule 60(b)(1), stating that the District Court for the eastern District of Virginia has jurisdiction to hear and decide the petitioner's habeas corpus. - See *Kemp v. United States*, 142 S.Ct 1856 (2022). A rule that would permit a Court to dismiss an action for habeas corpus relief without consideration of equities presented would render habeas corpus process inadequate to test the legality of conviction and would constitute a prohibited suspension of writ. - *Davis v. Adult Parole Authority*, 610 F.2d 410 (6th Cir 1979).

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On December, 13, 2022, The United States District Court for the Eastern District of Virginia had denied the petitioner's rule 60(b)(1) motion (Construed as a Rule 59(e) motion) stating, "Reconsideration of a judgement after its entry is an extraordinary remedy which should use sparingly." - *Pac. Ins. Co v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir 1998). The Court further added that the Fourth Circuit Court of Appeals recognizes three grounds for relief (see *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir 1993)), and Gathercole does not explicitly address any of the above grounds for relief in his Construed rule 59(e) motion. The Court concluded that Gathercole's rule 59(e) motion fails to put forth any persuasive reason why this Court had jurisdiction to review his Sect. 2241 petition - see 3:22-cv-384.

On January 9th 2023, petitioner Gathercole had filed an appeal with the Fourth Circuit Court of Appeals, (see 22-7433) stating the same Constitutional grounds with the emphasis that any New or put of the ordinary or when procedural obstacles to an apparently just outcome arises, the Federal Courts retain the statutory power and duty to "dispose of the matter as Law and Justice require" - see 28 U.S.C Section 2243; see also *Dowd v. United States*, 340 at 210.

On June 6, 2023, The Fourth Circuit Court of Appeals denied the Petitioner's appeal, citing the three criteria's when Section 2255 is inadequate and ineffective to test the legality of a conviction - see *In re Jones*, 226 F.3d 328, 333-334 (4th Cir 2000).

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On June, 8, 2023, filed a petition for rehearing En Banc with the Fourth Circuit Court of Appeals. The reason for petitioning the Court for a rehearing En Banc was that the Fourth Circuit Court of Appeals had overlooked the unconstitutionality of 28 USC Sect. 2255^(c) ground in the petitioner's habeas Corpus appeal. The petitioner asserts that he was subjected to substantial procedural hurdles that made his remedy under 2255 less swift and imperative than a federal habeas Corpus, thereby rendering 2255 unconstitutional and therefore would grant both the Fourth Circuit Court of Appeals and the District Court in Richmond jurisdiction to hear and decide his habeas Corpus petition. - United States v. Hayman, 342 U.S. 205 (1952). As of now, no decisions have been made on his petition for a rehearing.

Why the Supreme Court should grant the petitioners writ.

Petitioner Gathercole is serving an unlawful imprisonment upon arbitrary will or caprice. The federal Courts have denied his habeas Corpus petitions multiple times without deciding his Constitutional claims based on its merits, law, and sound reasons.

Furthermore, there is no general agreement on what Congress meant for "inadequate or ineffective" (see *Tripatti v. Henman*, 843 F.2d 1160, 1163 (9th Cir 1988); *Echavarría-Olarte v. Bardin*, 1997 U.S. Dist. (N.D. Cal 1997)).

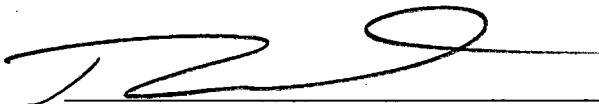
Why the Supreme Court should grant the petitioner's writ.

With the Supreme Court approving the petitioner's writ and defining what 28 U.S.C. Sect 2255(e) "inadequate or ineffective" means, this honorable Court will set a general guidelines for the lower Courts to follow. Thereby, reducing the chance that a Court will deny a habeas Corpus petition because of a lack of understanding on what inadequate or ineffective means.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a horizontal line.

Date: 9-29-2023