No. 23-6608

In the Supreme Court of the United States

MARY M. MOONEY
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

On Petition For A Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mary Mooney
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QUESTIONS PRESENTED ARE

1. Whether the trial court erred by failing to accept petitioner's 59e motion as timely filed where it had been received by clerk of court within time constraints as set forth in Fed.R.Civ.P. 5(d)(2), thus denying petitioner constitutional guarantees of the 1st, 5th, and 14 amendments of the US constitution?

2. If a pro se litigant submits a timely Rule 59(e) motion, and the presiding judge, upon inadvertently receiving it, consciously decides not to facilitate the filing process, thereby depriving the litigant of the opportunity to potentially rectify errors of law or fact and appeal the court's judgment, is this action by the judge in violation of the litigant's constitutional rights to due process?

3. Whether the district court erred when determining the loss and restitution amounts for Petitioner's sentence when the relative conduct used was not based on criminal conduct, specially when Petitioner's plea agreement only agreed to the use of restitution for victims harm by "criminal activity".

PARTIES TO THE PROCEEDING

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

RELATED CASES

USA v Harding et al 9:14-cr-00054-DCN-2 Decided: November 7, 2016

USA v. Mary Mooney 17-4573 4th Cir. Unpublished; Argued: December 13, 2018 Decided: February 28, 2019

USA v. Mary Mooney 17-4573 (4th Cir.) requested a rehearing en banc, Denied: March 14, 2019

USA v. Mary Mooney 9:19-cv-02952-DCN filed October 17, 2020, Decided April 27, 2022

USA v. Mary Mooney 23-6485 (4th Cir.) Submitted: July 20, 2023 Decided: July 25, 2023

USA v. Mary Mooney 23-6485 (4th Cir.) Motion for rehearing and rehearing en banc dated August 29, 2023

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Mary Mooney, proceeding pro-se, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals, rendered in these proceedings on July 25, 2023.

OPINIONS BELOW

The Fourth Circuit Court of Appeals affirmed Mooney's conviction in Cause no. 23-6485 and it refused to address the merits of her case or issue a Certificate of Appealability. The order denying the C.O.A. is reprinted in the appendix to this petition. The order of the Fourth Circuit Court of Appeals ruled Mooney's notice of appeal and informal brief as an application to file a second or successive 28 U.S.C. 2255. The court denied a hearing en banc September 29, 2023 the rehearing denial is reprinted in the appendix to this petition.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 25, 2023 and appears at Appendix A. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 29, 2023, a copy of the order denying rehearing appears at Appendix B.

An extension of time to file the petition for a writ of certiorari was granted to and including January 26, 2024 on December 15, 2023 in Application No 23A548.

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

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix. Infra,

STATEMENT OF THE CASE

Petitioner pleaded guilty of a one count Felony charge of 42 U.S.C. § 14944(c)[1], which prohibits the making of a false statement to an accrediting entity in order to obtain or maintain accreditation. With the acceptance of the guilty plea to 42 U.S.C. § 14944(c) the government

[1] Felony Information dkt 131

dropped the original charge of 18 U.S.C. § 371. Petitioner subsequently filed a 28 U.S.C. § 2255 habeas petition asserting numerous claims, which were denied by the district court on April 26, 2022. (Appendix-D). In that same order, the court denied Petitioner a Certificate of Appealability. Petitioner then filed a motion to amend or alter the judgment of the district pursuant to Rule 59(e) Of the Federal Rule of Civil Procedure. The clerk of court received the motion May 23, 2022 according to Fed.R.Civ.P. 5(d)(2) yet, did not file the motion. After receiving the motion the clerk gave the motion to the judge who in turn refused to cause the motion to be filed. After realizing the motion would not be filed Petitioner had to re-mail the 59(e) motion to the clerk which caused a duplicate motion to be filed late on June 14, 2022. After a "review of the record", the court denied the motion on April 20, 2023. (Appendix-C).On May 20, 2023 Petitioner filed a notice of appeal. The Fourth Circuit denied the appeal on July 25, 2023 (Appendix-A),The Court found "Because Mooney's motion for reconsideration was filed more than 28 days after entry of the district court's order denying her § 2255 motion, that denial order is not property before us in this appeal." Petitioner filed and was denied a petition for rehearing en banc on September 29, 2023.(Appendix-B).

REASONS FOR GRANTING THE WRIT

I. Certiorari is appropriate to resolve any potential ambiguity in the phrase "filing ... with the court", preserve pro se litigants rights to post conviction relief and to resolve any conflict among circuit courts as to the use of non-criminal behavior used for sentence enhancements.

Petitioner has been unfairly denied her ability to have the merits of her Application for a Certificate of Appealability considered and denied access to the courts from an arbitrary filing

system of the district court. Petitioner filed the 59(e) motion because she fully believes the court made errors in its order, and because he believed that he could properly bring the perceived errors to the court's attention and then file his notice of appeal after receiving a ruling on the motion.

The Rule 59(e) motion did not raise any new claims but instead pointed out errors in the district court's reasons for denying the habeas petition. If Petitioner's 59(e) is considered timely as it should be according to Fed.R.Civ.P. 5(d)(2) then the 59(e) motion should be heard on the merits and not be considered a second or successive habeas petition under 28 U.S.C. § 2255.

This Court held in Banister v. Davis, 140 S. Ct. 1698 - Supreme Court 2020 *Held*: Because a Rule 59(e) motion to alter or amend a habeas court's judgment is not a second or successive habeas petition under 28 U.S.C. § 2244(b), Banister's appeal was timely. Pp. 1704-1711.

If this Court finds that the 59(e) motion was filed timely under Fed.R.Civ.P. 5(d)(2) then this Court should also find the judge in violation of the Petitioner's constitutional rights to due process. The Petitioner also asked the Court to clarify relative conduct sentencing enhancement under USSG 2B1.1. At least six circuits have held that relevant conduct under the Guidelines must be criminal activity or unlawful.

Certiorari is appropriate in this case. Additionally, Certiorari is appropriate so that this Court can decide important questions of Federal Rules of Civil Procedure and Federal habeas law that will bring much needed clarity to Federal jurisprudence.

QUESTION 1

> Whether the trial court erred by failing to accept petitioner's 59e motion as timely filed where it had been received by clerk of court within time constraints as set forth in Fed.R.Civ.P. 5(d)(2), thus denying petitioner constitutional guarantees of the 1st, 5th, and 14 amendments of the US constitution?

The petitioner contends that her 59(e) motion should be considered filed on time since the mail was placed in the Clerk's post off box and signed for on May 23, 2022 (2 days before the deadline) according to the clear language of Fed.R.Civ.P. 5(d)(2). Petitioner had notified the clerk and the Judge's clerk that the mail contained a motion that needed to be filed, yet no action was taken by staff to ensure the motion was filed.

USPS Tracking Number: 9510815404022140119197 (dkt 383-2 pg 2-4 & Appendix I) validates that the mail was collected on Monday, May 23, 2022, at 8:37 am and signed for by A Snipes, as detailed further in the evidence is provided below.

When Petitioner called the Clerk of Court on May 24, 2022 to inquire why the motion had not been filed the Clerk informed Petitioner that the address included the judges name and she gave the mail directly to the judge and therefore the motion had not been filed. Petitioner emailed with the clerk on May 25, 2023 sending the motion to be docketed by email.

Judge's Order (dkt 395) states on pg 7 footnote, "Petitioner mailed her motion directly to "Judge Norton", not to the Clerk of Court, and the documents were not marked as received for filing since that is the incorrect way to file a motion. See ECF No. 384 at 3. As specified in the Local Rules, "non-electronic (paper) filing is authorized in limited circumstances. "And non-electronic documents may be filed with the Court Services section of the office of the clerk of court." Local

Civ. Rule 5.02(B)(D.S.C.). Thus, Petitioner's petition was not correctly filed" Interestingly, the Judge mentions the petitioner's mail directly to him, but the mail was signed for and received by the Clerk of Court.

By the judge failing to cause the motion to be timely filed, Petitioner lost substantial right to be heard and lost the right to file an appeal. Petitioner assumed filing the 59(e) motion would toll the time to appeal. 28 U.S.C. § 2072(b) commands that Local Rules "shall not abridge, enlarge, or modify any substantive rights."

Local Civ. Rule 5.02(B)(D.S.C.) 5.02: Filing With the Clerk

> (B) Non-electronic (paper) filing is authorized only in limited circumstances as explained by the ECF Policies and Procedures Manual. The court is normally open to accept non-electronic filings on all days except Saturdays, Sundays, and federal holidays. Closure on any other days will be as ordered by the court and posted on the court's website. Non-electronic documents may be filed with the Court Services section of the office of the clerk of court at the Matthew J. Perry, Jr. United States Courthouse at 901 Richland Street in Columbia; the United States District Courthouse at 85 Broad Street in Charleston; the Carroll A. Campbell, Jr. United States Courthouse at 250 East North Street in Greenville; and the McMillan Federal Building at 401 West Evans Street in Florence between the hours of 8:30 a.m. and 4:30 p.m. on a day the court is open.

Federal Rule of Civil Procedure Rule 83. Rules by District Courts; Judge's Directives

> (b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Petitioner asserts she directed the mail directly to the Clerk of Court as she had done over the past 9 years to the address given to her by the Court and was never given notice that any of her

mail was incorrectly addressed[2]. These electronically filed envelopes establish a history of how Petitioner's previous motions were mailed and each was successfully filed by the clerk.

Petitioner asserts if the mail was not directed to the Clerk of Court how did the clerk's office sign for and receive the mail in their post office box? Petitioner also asserts that according to Fed.R.Civ.P. 5(d)(2) the motion should be considered "filed" on May 23, 2022 when it was signed for and received by the Clerk.

Fed.R.Civ.P. 5(d)(2) "Nonelectronic Filing. A paper not filed electronically is filed by delivering it: (A) to the clerk". The fact that the clerk received the motion is uncontroverted.

The Judge's Order (dkt 395) takes note of an email dated May 26, 2022 from the Clerk stating she received the mail but gave it to the judge. The fact remains that the motion was delivered to the Clerk as required by Fed.R.Civ.P. 5(d)(2).

Petitioner worked diligently to rectify the problem and naively believed that the issue would be rectified and the motion would be timely filed. Petitioner called and spoke to the Clerk of Court then sent emails to the Clerk of Court, the Judge's Clerk and the AUSA to notify them that the motion needed to be filed and even sent a copy of the motion and exhibits by email on May 25, 2022 (see dkt 384). Petitioner was never notified by the Clerk of Court how to rectify the problem or what action Petitioner could take to have the motion docketed.

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[2] Similar Envelopes filed by the Clerk of Court:
dkt 364-5 Envelope (8-17-20) MOTION,
dkt 362-1 Envelope (8-14-20) MOTION
dkt 376-3 Envelope (8-27-21) RESPONSE in Opposition
dkt 378-2 Envelope (4-7-22) MOTION and MOTION to Appoint Counsel

The envelope that the Judge states was not addressed properly was never docketed so we do not know exactly how the envelope was addressed, but we do have similar envelopes that show how Petitioner was addressing motions to the court. It is the Petitioner's understanding that the Judge chose not to send the motion back to the Clerk to be timely filed. Petitioner was never notified that the motion would not be filed. As a matter of fact the Petitioner had never been notified that any of the previous motions were addressed wrong.

When a District Court Judge inadvertently receives a timely motion from a pro se litigant but does not cause it to be filed after Petitioner has specifically requested it to be filed raises significant concerns about fairness and due process. Petitioner had requested but was denied appointment of counsel two times. (See dkt 333 and again dkt 378).

> "Is it inequitable for a judge to deny a pro se civil litigant assistance of counsel and then refuse to exhibit some sort of leniency toward the pro se litigant in these matters?" Merritt, 697 F.2d at 769 (Posner concurring and dissenting) ("It is unfair to deny a litigant a lawyer and then trip him up on technicalities."). *Merritt v. Faulkner*, 697 F.2d 761, 769 (7th Cir. 1983)

Petitioner's 59(e) motion was not docketed until June 14, 2023 after Petitioner had to resend the document to the Clerk for a second time. Petitioner was assuming the motion would be docketed and even emailed the Clerk again on June 9, 2022[3] asking if there was anything else she needed to do to get the motion on the docket.

[3] See Dkt 384

Petitioner provides the following facts to support that the mail was directed to the Clerk of Court, received timely by the clerk of court and therefore should be considered "filed" according to Fed.R.Civ.P. 5(d)(2).

1. USPS Tracking Number: 9510815404022140119197 ((dkt 383-2 & Appendix A-I pg 96) document shows Petitioner's mail was addressed to P.O. Box 835 Charleston, SC and picked up Monday, May 23, 2022 at 8:37 am and Signed for by A Snipes. ((dkt 383-2 & Appendix A-I pg 96)
2. Email from Courtroom Deputy documenting that the Clerk received the motion yet, gave it to the Judge (dkt 383-2 pg 4 & Appendix A-I pg 98)
3. The motions previously submitted by the petitioner reveal that, although the petitioner had noted the judge's name on the envelope these motions were not sent to the judge; instead, they were filed by the Clerk of Court. See dkt 364-5 (8-17-20), dkt 362-1 (8-14-20), dkt 376-3 (8-27-21), dkt 378-2 (4-7-22)
4. Petitioner's asserts the mail was addressed to the address provided to Petitioner by the Judge's clerk on July 21, 2020[4].
5. Petitioner's J and C, (dkt 300) states the Clerk of Courts address to be P.O. Box 835, Charleson, S.C. the address Petitioner used to file motions.
6. U.S.District Court of South Carolina, Information on Representing Yourself in a Civil Action (non-prisoner)[5] on page 1 states, "filings are accepted at the following locations: U.S. District Court Annex 85 Broad Street Charleston, SC 29401 Post Office Box 835 Charleston, SC 29402"
7. The evidence that Petitioner's documents were received by the Clerk timely is uncontroverted by the Government. The Government's response (dkt 391) states,

a. "Petitioner provides exhibits to a letter, claiming that she mailed her Motion to Reconsider to the Court, and that it was received on May 23, 2022. ECF No. 384. This would be 26 days from the filing of the judgment. Petitioner also provides an email from May 26, 2022, that states that the documents had been received. ECF No. 384."

8. Doc 383-2 pg 3-4 shows the tracking verifying the motion was mailed to the Clerk and AUSA on the same day.(dkt 383-2 & Appendix A-I pg 97) It is uncontroverted that the AUSA received the motion timely.
9. Defendant previously wrote a letter to the Chief U.S. District Judge R. Bryan Harwell. The letter to Judge Harwell (dkt 384 & Appendix A-I pg 95) was promptly docketed, which suggests that any communication to a judge should be docketed. However, Defendant's documents received by Judge Norton on May 23, 2022 have not been docketed to date. This discrepancy between the treatment of the letter to Judge Harwell

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[4] Email of July 21, 2020 from (norton_ecf@scd.uscourts.gov)"Any communication with the court, whether it's filing a motion, making requests for copies, asking questions or writing to the judge, should be done in writing and mailed to the address listed below. Please do not use this email for any further communication.
US District Court
Clerk of Court
PO Box 835
Charleston, SC 29402"

[5] Website link https://www.scd.uscourts.gov/DOCS/PROSE.pdf

and the handling of the documents received by Judge Norton raises questions about the consistency and proper procedure for docketing.

10. June 27, 2022 Judge Nortion by Order (dkt 385) requested the Government to respond to Petitioner's motion for reconsideration dkt 383-1. Petitioner was not notified that the Court would consider the motion untimely causing Petitioner to lose the ability to file other motions due to time issues.
11. Judge's Order (dkt 395) states he received Petitioner's mail, yet these original documents received on May 23, 2022 were never docketed so Petitioner can not address the envelope issue.
12. Petitioner assumes the Judge never sent the motion to the clerk to be docketed as it has never been filed so there is no proof of how the document was specifically labeled except for the USPS tracking that verifies the mailed to PO Box 835 Charleston, SC the address given to Petitioner by the Judge's office as well as pro se guidance documents.
13. The Fed.R.Civ.P. 5 or any local rule does not prohibit the Petitioner from noting the judges name on the envelope as Petitioner had done several times before with no problem.

It would seem due process would require that some minimal inquiry be conducted into the alleged wrongly addressed envelope. Petitioner was not given an opportunity to address the alleged wrongly addressed envelope before the judge made his ruling.

The Fifth Amendment's Due Process Clause requires fundamental procedural fairness for those facing the deprivation of life, liberty, or property. Yet, Petitioner was never given an opportunity to respond to the accusation the motion was addressed incorrectly as provided for by Rule 2.9: Ex Parte Communications - American Bar Association.[6] or by Code of Conduct for United States Judges[7] that the judge should promptly notify the parties and allow them to respond.

[6] Rule 2.9. A(b) ABA "If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond."

[7] (4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge of the subject matter of the communication and allows the parties an opportunity to respond.

Courts have even emphasized that papers "stricken by the district judge" for noncompliance with local rules "should remain filed" for purposes of Civil Rule 5(d)(4) and the Appellate Rules if the right to appeal would be lost otherwise. *NationsBank, N.A. v. Plecas,* 84 F.3d 1453, 1996 WL 244762, at *1 (D.C.Cir.1996) (table); Fed.R.Civ.P. 5(d)(4) ("The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice."). Although this case involves a defective Rule 59 motion and not a defective notice of appeal, there is no good reason to treat them differently. In a case factually indistinguishable from this one, the Ninth Circuit concluded that a "Rule 59(e) motion, despite its technical noncompliance with Local Rule 7.4.1"

In *Halfen v. United States*, 324 F.2d 52, 54 (10th Cir. 1963) a handwritten Notice of Appeal was addressed to the Trial Judge. The Judge was out of his office and out of Oklahoma City on December 28, 1962, and therefore did not see the Notice of Appeal until January 2, 1963, at which time he handed it to the Clerk of the Court. Although the appeal was late….. "The court found and ordered that the Notice of Appeal should be considered as being timely filed." and "The fact that appellant's Notice of Appeal was mailed to and received by the Judge rather than the Clerk makes no difference as the Clerk is merely an arm of the court[8]."

In *Torras Herreria v. M/V TIMUR STAR,* 803 F. 2d 215 - Court of Appeals, 6th Circuit 1986 - the Sixth Circuit addressed the timing aspect of Federal Rule of Civil Procedure 5(e), the predecessor to Rule 5(d)(2), when a document is mailed. In this type of situation, the Sixth Circuit held:

[8] Boykin v. Huff, 73 App.D.C. 378, 121 F.2d 865.

'Filing with the court' is defined as filing with the clerk of the court, or, if the judge permits, with the judge. Fed.R.Civ.P. 5(e). If mailed, the filing is accomplished only when actually received by the clerk or when placed in the clerk's post office box. Filings reaching the clerk's office after a deadline are untimely, even if mailed before the deadline. *Blake v. Traster (In re Traster)*, Case No. 12-34042, 11 (*Bankr. N.D. Ohio* Sep. 30, 2013)

and

Faust v. Anderson, 52 F. Supp. 2d 930 - Dist. Court, ND Indiana 1999

"Where a filing deadline is specified by the court, papers to be filed must reach the clerk's office by the deadline date. When a party mails papers to the clerk's office, filing is complete when the papers are received by the clerk or placed in the clerk's post office box. Papers arriving after a deadline are untimely even if mailed before the deadline."

and

Clifford v. Bundy, 747 NW 2d 363 - Minn: Court of Appeals 2008

"Generally, a document is filed with the district court when it is delivered to or received by the office where it is required to be filed, even though the document may not be stamped "filed" until sometime later." *Cederberg v. City of Inver Grove Heights,* 686 N.W.2d 366. Cederberg v. City of Inver Grove Heights, 686 NW 2d 853 - Minn: Court of Appeals 2004. *Cederberg* cites the *Black's Law Dictionary* definition that a document is "filed" when it is delivered to the court clerk or record custodian for placement into the official record. *Id.* at 856 (citing *Black's Law Dictionary* 642 (7th ed. 1999)).

and

Wallace v. Wallace, 708 So.2d 1190, 1191 (La. App.1998)

"(stating that pleading is filed when it is delivered to clerk of court for that purpose and that clerk's failure to endorse and file pleading is not imputable to litigant). These jurisdictions further hold that the "critical date is the date the document is received; and, once the document is delivered, the person filing the document is not responsible for the disposition of the document by the clerk's office." *ee also NCD, Inc. v. Kemel,* 308 Ill.App.3d 814, 242 Ill.Dec. 419, 721 N.E.2d 698, 701 (1999) (disagreeing with argument that litigant has duty to ensure that clerk file-stamps pleading and places it in court file)."

This Court Court *Bowles v. Russell*, 551 US 205 2007 in dissenting: "The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually

been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent." Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

Federal Rule of Civil Procedure 5(e) resolves any potential ambiguity in the phrase "filing ... with the court". Rule 5(d)(2) teaches us, "How Filing Is Made—In General. A paper is filed by delivering it: (A) to the clerk;" and Rule 5(d)(4) "Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice."

This situation raises concerns about transparency, accountability, and the ability to effectively manage and track court communications for pro se litigants. It is crucial for the court to establish clear processes and procedures to ensure the needs of self-represented litigants are met and they are able to rely on accurate and timely communication from the court.

The Judge's Order (dkt 395) intentionally ignored the case law, yielding an error in law, and revealing intentional bias and partiality to ensure Petitioner would not have access to the courts.

The Petitioner undertook to file the motion according to the method described in Rule 5(d)(2)(A) — by delivery to the clerk. The determination that the mail was labeled wrong is without merit as the USPS tracking and the email from the clerk that show the mail was received and signed

for on May 23, 2022 as required for filing according to Federal Rule of Civil Procedure Rule 5(d)(2). This Court should reverse because the plain language of the Federal Rule states that Petitioner 59(e) motion was filed the date the Clerk of Court received it.

This lack of notice from the court, and lack of guidance from the applicable rules creates extremely detrimental problems for the majority of habeas petitioners, who are mostly unsophisticated and proceeding without the aid of counsel. This case provides a perfect opportunity for this Court to provide habeas petitioners with protection from arbitrary and capricious local court actions. This Court should grant Petitioner's Petition for Writ of Certiorari.

QUESTION 2

> If a pro se litigant submits a timely Rule 59(e) motion, and the presiding judge, upon inadvertently receiving it, consciously decides not to facilitate the filing process, thereby depriving the litigant of the opportunity to potentially rectify errors of law or fact and appeal the court's judgment, is this action by the judge in violation of the litigant's constitutional rights to due process?

Petitioner filed a Rule 59(e) within the 28 days required yet the court personnel failed to file the motion timely which inturn allowed the court to dismiss Petitioners 59(e) as untimely. Under the circumstances this self-serving action by the court harmed Petitioner.

The Fourth Circuit incorrectly agreed with the District Court and held that petitioner's timely Rule 59(e) motion was a "second or successive habeas corpus application" and that, as a result, she could not rely on the timing rule, which made the appeal of the underlying habeas judgment untimely. Penalizing Defendant for the district court's unreliable and seemingly arbitrary filing

and docketing system by reviewing the motion as a 60(b) motion. This foreclosed Petitioner's ability to appeal.

Petitioner asserts above that the motion was a timely filed 59(e) motion and should be considered as such as evidence above.

Banister v. Davis, 140 S. Ct. 1698 - Supreme Court 2020 *Held*: Because a Rule 59(e) motion to alter or amend a habeas court's judgment is not a second or successive habeas petition under 28 U.S.C. § 2244(b), Banister's appeal was timely. Pp. 1704-1711.

The District Court's ruling Order dkt 395 that "Petitioner's motion to reconsider the court's denial of her motion to vacate, set aside, or correct her federal sentence pursuant to 28 U.S. C. 2255 as an unauthorized successive 2255 petition" is in direct conflict with *Banister.*

Petitioner's Rule 59(e) motions was seeking to rectify an error in a just-issued trial court decision just as the rule states yet the court refused to review the laws and regulations that Petitioner states the court failed to take into consideration when sentencing Petitioner by ruling the motion was late, therefore the Court did not have to address the issues of it's misinterpretation of relevant laws and regulations.

The Order dkt 395 page 8, states, "Even if the court were to consider Petitioner's motion to reconsider to be timely filed -which it does not-her arguments do noreach the threshold necessary for reconsideration under the high bar of Rule 59(e)." The court states the claims are new claims

Petitioner failed to raise in her original 2255 yet, the claims are clearly spelled out throughout the 2255 dkt 336-1. On page 43 Petitioner covers this issue under #7...."Restitution and relevant conduct are inextricably joined. The adoptions from Kazakhstan were lawful." Throughout the 2255 motion under ineffective assistance of counsel (counsel's failure to appeal the enhancement based on it was not based on "criminal activity") and under prosecutorial misconduct (AUSA giving false information to the court to secure the enhancement). The court then fails again to address the laws and regulations Petitioner provides that were ignored by the court at sentencing.

Because the Petitioner is proceeding pro se, the court should construe pleading liberally. Petitioner claims of the court using the wrong laws and applying an enhancement based on non-criminal activity are well covered in her 2255 motion. The District court even in its order denying the 59(e) motion stated: "Federal district courts are charged with liberally construing petitions filed by pro *se* litigants to allow the development of a potentially meritorious case. *See Hughes v. Rowe,*449 U.S. 5, 9-10 (1980). *Pro se* petitions are therefore held to a less stringent standard than those drafted by attorneys. *See Gordon v. Leeke,*574 F.2d 1147, 1151 (4th Cir. 1978)."*United States v. Petitioner*, 9:14-cr-00054-DCN-2, 6 (D.S.C. Apr. 26, 2022)

For all the reasons above, the court's understanding of Petitioner's Rule 59(e) motion is wrong. The district court's action violated Petitioner's constitutional rights. The Court should reverse the judgment of the Court of Appeals and remand the case for further proceedings.

QUESTION 3

> Whether the district court erred when determining the loss and restitution amounts for Petitioner's sentence when the relative conduct used was not based on criminal conduct,

specially when Petitioner's plea agreement only agreed to the use of restitution for victims harm by "criminal activity".

The district court erred in determining Petitioner's guideline range by including non-criminal conduct to assess relative conduct, calculate loss, and determine restitution amounts. According to established legal principles most circuits agree that relative conduct should be limited to criminal conduct. In this case, the court considered legally obtained adoptions as relative conduct, leading to an increase in the Petitioner's sentence based on gain without identifying loss, followed by the addition of restitution in breach of the plea agreement[9]. The plea agreement specifically allowed the use of restitution for victims harmed by "criminal activity," highlighting a discrepancy with the court's approach.

The AUSA twisted the dates that the laws and regulations applied, leading the court to believe that the Kazakhstan adoptions were flawed in some way without providing any evidence from the U.S. Citizenship and Immigration Services (USCIS), The Dept of State or any other Government agency who investigated and approved the adoptions. The relevant conduct sentencing enhancement under USSG 2B1.1 added 12 points to Petitioner's guideline range for conduct that was not criminal conduct[10] contrary to well established 4th and other circuit law.

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[9] Petitioner's plea agreement dated Jan. 14, 2015. (dkt 132) & Petitioner's affidavit dkt 142 dated March 12, 2015

[10] "This system also imposes strict procedural obligations on prosecutors who wish to charge a defendant with a particular crime, but then provides them with a shortcut alternative means of having a defendant punished for an additional offense that they might not have been able to prove beyond a reasonable doubt, so long as the defendant has been convicted of a related offense." US v. St. Hill, 768 F. 3d 33 - Court of Appeals, 1st Circuit 2014 AND "trial by sentencing enhancements" was not what Congress had in mind when it blessed the federal Sentencing Guidelines regime!" US v. James, Dist. Court, Dist. of Columbia 2019 AND United States v. Montgomery, 262 F.3d 233, 249-50 (4th Cir. 2001) (stating that "[p]roof by a preponderance of evidence is sufficient as long as the enhancement is not a tail that wags the dog of the substantive offense"; not deciding whether the district court was required to apply a heightened standard, as it had made the relevant finding by clear and convincing evidence "[i]n an abundance of caution" (internal quotation marks omitted));

Court Order dkt 249 at 2 states. "...Ethiopia not a party to the Hague Convention.....The court finds that the Ethiopian adoptions are not relevant conduct to Petitioner's offense of conviction, so receipts from Ethiopian adoptions should be excluded from loss calculations under § 2B1.1(b).....However, the Kazakhstan adoptions after 2008 qualify as relevant conduct because they were part of the same course of conduct as the offense of conviction."

This ruling was contrary to laws and regulations that applied at the time of the Kazakhstan adoptions because like Ethiopia, Kazakhstan was not a party to the Hague Convention during adoptions in question[11].

Defendant is actually innocent of the relevant conduct sentencing enhancement under USSG 2B1.1 because the enhancement was based on the Judge's belief that the Convention was in effect in Kazakhstan as of 2008, therefore he believed that the adoptions should have been conducted under the Convention regulations. The adoptions in question all occurred prior to 2011 well before the Universal Accreditation Act of 2012 (UAA) was implemented on July 14, 2014[12] (Note: 6 months after Petitioners arrest) and Kazakhstan enacted the Convention[13].

[11] U.S. State Dept. Notices: April 4, 2012: Kazakhstan Approval of New Hague Convention Adoption Process https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/AdoptionsNoticesPDFs2019/2012AdoptionArchive/Kazakhstan_Approval%20of%20New%20Hague%20Convention%20Adoption%20Process_April%204%2C%202012.pdf

[12] The Universal Accreditation Act of 2012, U.S. State Dept Website https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/universal-accreditation-act-of-2012-2.html

[13] US State Dept Kazakhstan Announcements showing implementation of the Hague https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/AdoptionsNoticesPDFs2019/2012AdoptionArchive/Kazakhstan_Approval%20of%20New%20Hague%20Convention%20Adoption%20Process_April%204%2C%202012.pdf

The Court Orders, Doc 249 and Order Doc 395 completely misunderstood the complexity of the laws of international adoption and how they applied at the time of the Kazakhstan adoptions completed before the implementation of the Convention by Kazakhstan in May 2012[14]. Causing the Court to illegally enhance Petitioner's sentence.

Judge's Order Doc 249 incorrectly States,
"Kazakhstan is a party to the Hague Convention, therefore COA[15] accreditation is required to facilitate adoptions from Kazakhstan."

Judge's Order Doc 395 incorrectly States,
"the fact that a treaty required some countries to obtain COA accreditation for adoption agency does not mean that other countries are prohibited from requiring the accreditation on their own initiative."

The above statement implies that Kazahstan could on its own change the Convention by adding a "reservation" to the Convention. A "reservation" is specifically addressed by the Convention and it specifically states that NO "reservations" can be made unlike the District Court stated. The fact is that Kazakhstan coud NOT require accreditation on its own nor require adoptions be processed under the I800 US Immigration Treaty process.

In the context of international law, a "reservation" refers to a unilateral statement made by a state when signing, ratifying, or acceding to a treaty. It allows a state to modify or exclude the legal effect of certain provisions of the treaty as they apply to that state. Reservations are intended to enable states to accept a treaty while expressing their objections or limitations to specific provisions. This is often done to ensure uniform and consistent application of the treaty among the participating states.

[14] .id
[15] COA - Council on Accreditation

Article 40 of The HCCH 1993 Adoption Convention (Convention) specifically DOES NOT allow "reservations". The Convention states Countries CAN NOT on their own apply the Treaty before they have implemented the Convention[16]. The Court failed to apply the law as written when enhancing Petitioner's sentence by stating Kazakhstan could own its own alter the Convention adding a "reservation" and require COA accreditation to process Non-Hague adoptions from Kazakhstan before they implemented the Convention.

> "In the context of international law, a "reservation" refers to a unilateral statement made by a state when signing, ratifying, or acceding to a treaty. It allows a state to modify or exclude the legal effect of certain provisions of the treaty as they apply to that state"[17]. *Vienna Convention on the Law of Treaties 1969*

Procedure when other nations attach new conditions:

> "Unless prohibited by the agreement itself, a state may attach conditions to an agreement only at signature or ratification. If such expressions are attached to the treaty as formal statements which limit or modify its substance, they are known as ``reservations." \44\ A reservation is a formal declaration by a state that excludes or modifies the legal effect of certain treaty provisions as between that state and other parties.\45\ If a foreign state, or in the case of the United States, a President, adds a reservation to a bilateral treaty after the Senate has given advice and consent, the President must submit the new reservation to the Senate for its advice and consent prior to his ratification of the treaty[18]" *Treaties and Other International Agreements:* The Role of the U.S. Senate 2001, A Study by Congressional Research Service

The Government acknowledged to the Court they had no evidence to support that the adoptions from Kazakhstan were illegally processed[19].

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[16] Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Article 40, states, "No reservation to the Convention shall be permitted".)
https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf

[17] Vienna Convention on the Law of Treaties
https://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm

[18] Treaties and Other International Agreements: The Role of the U.S. Senate 2001, A Study by Congressional Research Service
www.govinfo.gov/content/pkg/CPRT-106SPRT66922/html/CPRT-106SPRT66922.htm

[19] (Transcript of August 4, 2015, pg 30)"MR. BORCHERT: Your Honor, if the Court is asking about the legitimacy of adoptions conducted by the defendant and her company, regrettably, I am not in a position to be able to answer that. As I mentioned earlier, that would be a decision to be made by USCIS or the Department of State."

The court stated it speculated that families relying on the agency's accreditation for adoption processing could be considered victims, despite no statements from Kazakhstan families. The court nor the government did not note any violation of any statute or criminal activity to support the relative conduct sentencing enhancement.

Despite starting this investigation in 2012 and sentencing was in 2017 the Government stated it had no statements from any Kazakhstan families[20] and no family completed a victim statement or requested restitution. The investigating FBI agent's emails, which might have included contacts with alleged victims, were lost by the AUSA, leaving the content unknown. The AUSA presented a letter from the U.S. State Department dated July 31, 2017, stating "...due to a systematic change in the way in which all Department of State emails are archived, we are unable to recover any of S.A./ Perez' emails...."adding another layer of unprofessionalism by the Government. It seems highly impossible for AUSA professionals to lose discovery and for the DOS not to have a back up system in place for FBI agent's emails[21].

The Department of State provided clear guidance to families about Convention and Non-Convention adoptions on its website and by requiring 20 hours of education to families adopting. Also, by completing the USCIS i600a non-Convention adoption form before starting

[20] (1) Ms. SCHOEN:..... "while we don't have a statement on that from victims of Kazakhstan". (Transcript August 10, 2017 Pg 40) (2) Letter to Probation, Kelli Frye, from Derek J. Ettinger Feb. 8, 2017 "That figure represents the application fees, dossier fees, agency fees, and foreign fees charged to families who adopted children from Kazakhstan. These families are also victims, although none of them have returned the government's questionnaires or requested restitution." Exhibit dkt 336-15.

[21] U.S. State Department dkt 336-4 dated July 31, 2017

their adoption each family acknowledged they were completing a non-Hague adoption[22]. Therefore, no family could rely on any accreditation because it was not needed or material to process the adoption from Kazakhstan. Petitioner repeatedly requested the Government turn over the I-600 forms submitted by the Kazakhstan families yet the Government after repeated requests refused to turn over these documents.[23]

The Government's opposition dkt 354 page 8, states: "At the sentencing hearing, the Court acknowledged that the basis for the loss was not that Kazakhstan was a party to the Hague Convention, but rather that Kazakhstan on its own was requiring international adoptions agencies to have COA accreditation to adopt children from Kazakhstan. (JA 246, 243, 257-58);" Yet, the Government did not address the laws or provide any information that supported this assumption. These laws, regulations and treaties are all available online yet, the court failed to even refer to the laws before making its decisions. The U.S. The State Department website specifically outlining how to adopt internationally and has detailed instructions on how to process adoptions from Kazakhstan specifically states to process the adoptions under the I600 USCIS non-Convention process contrary to what the Judge stated in his order.

Article 40 of the HCCH states, "No reservation to the Convention shall be permitted[24]." Therefore, Kazakhstan could NOT change the Convention and require U.S. agencies to be accredited before it implemented the Treaty as stated by the Court.

[22] Understanding the Hague Convention U.S. Dept. of State https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/understanding-the-hague-convention.html

[23] See dkt 336-3 is multiple emails and letters between Petitioner's attorney and the AUSA specifically requesting the I-600a forms.

[24] US State Dept Website https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/hague-convention-text.html

In addition Congress did not give permission to the U.S. State Department to require accreditation of agencies to process non-Convention cases. See Doc 372-8 is a page from the Federal Register Vol 71, No. 31, February 15, 2006 / Rules and Regulations 8077, that states, "the IAA does not give the Department the authority to require accreditation or approval for non-Convention cases"[25]

With the adoptions being carried out according to U.S. Department of State and USCIS guidelines rules and code of federal regulations[26] the court could not find that the adoptions were criminal conduct. Using these adoptions as relative conduct to enhance Petitioner's sentence was in conflict with the 4th circuit as well as other circuits.

At least six circuits have held that relevant conduct under the Guidelines must be "criminal" or "unlawful." *See, e.g.,*

> *"United States v. Chube*, 538 F.3d 693, 702 (7th Cir.2008) (explaining that relevant conduct must be unlawful); *United States v. Maken*, 510 F.3d 654, 657-59 (6th Cir.2007) (reciting 6th Circuit precedent to the effect that relevant conduct must "amount[] to an offense for which a criminal defendant could potentially be incarcerated"); *United States v. Culverhouse*, 507 F.3d 888, 895 (5th Cir.2007) ("An offense need not have resulted in a conviction to constitute relevant conduct under the guidelines, but the conduct must be criminal."); *United States v. Dove*, 247 F.3d 152, 155 (4th Cir.2001) (concluding that "relevant conduct under the Guidelines must be criminal conduct"); *United States v. Dickler*, 64 F.3d 818, 830-31 (3d Cir.1995) (same); *United States v. Sheahan*, 31 F.3d 595, 600 (8th Cir.1994) (same). Like this court, *see Altamirano-Quintero*, 511 F.3d at 1095, the First, Second, and Ninth Circuits have held that uncharged and even acquitted conduct may constitute "relevant conduct" under the Guidelines, but have not explicitly held that such conduct must be "criminal" or "unlawful," *see, e.g., United States v. Juwa*, 508 F.3d 694, 700 (2d Cir.2007); *United States v. Reyes-Echevarría*, 345 F.3d 1, 7 (1st Cir.2003); *United States v. Peyton*, 353 F.3d 1080, 1089 (9th Cir.2003).- US v. Griffith, 584 F. 3d 1004 - Court of Appeals, 10th Circuit 2009"

[25] Federal Register Vol 71, No. 31, February 15, 2006
https://www.govinfo.gov/content/pkg/FR-2006-02-15/pdf/FR-2006-02-15.pdf

[26] Office of the Federal Register, National Archives: Immigration and Nationality Act (INA) sections 101(b)(1)(F) and 101(b)(1)(G),8 CFR 204.3, 8 CFR 204.301, 8 CFR 204.311, 8 CFR 204.309 and 22 CFR Part 96, found at: https://www.archives.gov/ also refer to the U.S. State Department guidelines on international adoptions.

Specifically the 4th, 10th and 5th circuits stated:

U.S. v. Dove 247 F.3d 152, 155 - Court of Appeals, (4th Cir. 2001)

> ...".if conduct which is not illegal may be relevant conduct because it is "not benign," this approach would involve sentencing courts in the impossibly subjective task of determining the relative "benignness" of various legally permissible acts, and "would allow individuals to be punished by having their guideline range increased for activity which is not prohibited by law but merely morally distasteful or viewed as simply wrong by the sentencing court."

US v. Griffith, 584 F. 3d 1004 - Court of Appeals, (10th Cir. 2009)

> Agreeing with the reasoning of our sister circuits, and making explicit what has been implicit in our own precedent, we hold that for a district court to consider a defendant's conduct as "relevant" under the Sentencing Guidelines, the Government must prove by a preponderance of the evidence that the defendant (1) engaged in conduct (2) related to the offense of conviction pursuant to U.S.S.G. § 1B1.3 and (3) constituting a criminal offense under either a federal or a state statute.

United States v. Peterson, 101 F.3d 375, 385 (5th Cir.1996)

> To hold otherwise would allow individuals to be punished by having their guideline range increased for activity which is not prohibited by law but merely morally distasteful or viewed as simply wrong by the sentencing court."); *Dove*, 247 F.3d at 155 (explaining that if relevant conduct need not be criminal, sentencing courts would become mired "in the impossibly subjective task of determining the relative `benignness' of various legally permissible acts").

The Court's sentencing enhancement increased Petitioner's guideline range from 8 points and added 12 points (2 points for victims and 10 points for loss) totaling 20 guideline points for activity which is not prohibited by law. The enhancement added loss and restitution to Petitioner's sentence when there were not any victims, therefore violating the plea agreement.

> "an order of restitution that exceeds the victim's actual losses or damages is an illegal sentence." *United States v. Wolf*, 90 F.3d 191, 194 n. 2 (7th Cir.1996); *cf. Hughey*, 495 U.S. at 413, 110 S.Ct. 1979.

Before his appointment to this Court, Justice Kavanaugh authored opinions disapproving of uncharged conduct at sentencing. See, *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J., for the Court): Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the right to due process and to a jury trial.

The error in applying the wrong evidentiary standard was harmful, because it meant the difference between a range of 0 to 6 months that is usually considered a probationary range i.e. zone A (8 points) to Zone D (20 points). As is well known, Zone D does not allow for a sentence of probation, as was agreed upon in 2014. The district court varied downward makes no difference, because it never indicated it would've imposed the same sentence regardless of the guidelines calculation adding loss.

As "a matter of administration and to secure nationwide consistency," all sentencing proceedings should begin "by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007).

The Certiorari should be granted because an enhanced Sentence Under § 1B1.3 Relevant Conduct Provision Of the United States Sentencing Guidelines Violates The Sixth And Fifth Amendments if it uses non-criminal conduct as a sentencing enhancement.

Petitioner is requesting this Court send this case back to the district Court for resentencing removing the illegally enhanced sentencing that included loss and restitution based conduct that was not prohibited by State or Federal law.

REASONS FOR GRANTING THE PETITION

1. Certiorari Should Be Granted To Determine the Plain Language of Rule 5(d)(2) and to resolve any potential ambiguity in the phrase "filing ... with the court."

2. Certiorari Should Be Granted to Determine if a Judge violates a Litigant's Constitutional Right to Due process if the judge causes a motion not to be filed that causes a litigant to lose substantial rights.

3. Certiorari Should Be Granted To Determine Whether Judicially Enhanced Sentences Under § 1B1.3 Relevant Conduct Provision Of the United States Sentencing Guidelines Violates The Sixth And Fifth Amendments by using non-criminal conduct for sentencing enhancements.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Mary M. Mooney

January 24, 2023