

No.

23-663

In The  
Supreme Court of The United States

GARY LYNN MCDUFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,



Supreme Court, U.S.  
FILED

AUG 14 2023

OFFICE OF THE CLERK

On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

To The Honorable Justice Samuel Alito

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## QUESTIONS PRESENTED:

I am respectfully petitioning for a writ of certiorari directed to the Fifth Circuit Court of Appeals below (Case No.21-40073), in which I am the pro se petitioner.

The primary questions raised in this petition are as follows:

1. Is it a structural error and a violation of the Constitution for a district court clerk to verify receipt of exhibits submitted in support of a §2255 habeas petition, yet fail to record them, ultimately leading to the destruction of said exhibits before the district court magistrate judge and district court judge could consider them?
2. Can a district court magistrate make findings of fact and conclusions of law for a report and recommendation, based on an incomplete record caused by the district court clerk's failure to file the exhibits delivered by the habeas petitioner for filing?
3. Was it an error for the district court to deny the petitioner's motion to correct the record, considering the incompleteness caused by the district court clerk's destruction of the exhibits before recording them?
4. Can a court of appeals make a fundamentally fair merits determination on a §2255 habeas petition, relying on an incomplete record sent by a district court that denied the petitioner's motion to correct the record, which was made incomplete due to the district court clerk's actions?

5. Was it an error for the court of appeals to deny the appellant's motion to correct the incomplete record before making a merits decision?

6. Can any court make a fundamentally fair decision on a §2255 habeas corpus petition, rehearing, or reconsideration, without the complete record containing the petitioner's pleadings and evidence that were properly presented to the court for filing, but the clerk failed to file into the record?

These critical questions raise concerns about due process and the integrity of the judicial system. They have significant implications for both the petitioner and the broader principles of justice. Given the gravity of the issues involved, I respectfully request that the Court grant certiorari to address these matters and provide clarity on the constitutionality and fairness of the procedures in question. This case presents an essential opportunity for the Supreme Court to clarify and establish precedent on these important constitutional questions. The Court's guidance and wisdom in this matter will not only impact this procedural injustice but also serve to uphold the principles of justice and due process for all Americans in habeas proceedings.

Thank you for considering this petition. I am eager to provide any additional information or clarification required and look forward to the Court's wise and well-reasoned decision.

Respectfully submitted,

//s//  
Gary Lynn McDuff.

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08/21/2023

**PANEL ORDER – USCA5 21-40073; Docket Entry 145, Denial of Application for En Banc Peremptory Writ of Error; excerpt of issues raised. (Appendix B App.3-11)**

05/25/2023

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03/27/2022

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01/25/2021

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11/22/2020

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11/22/2020

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**INITIAL DECISION ORDER & NOTICE OF DISMISSAL** - Administrative Proceeding File No. 3-15764 excerpts, In the Matter of GARY L. MCDUFF. **(Appendix K-44-56)**

## STATEMENT OF BASIS FOR JURISDICTION

On 05/25/2023, 03/17/2023, and 11/10/2022, the United States Court of Appeals for the Fifth Circuit entered orders denying Petitioner's motion to vacate and motion for leave to file a petition for rehearing en banc out of time; Granting motion to file for reconsideration out of time and denying motion for reconsideration; and denying motion for certificate of appealability, respectively. On June 15, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to August 14, 2023. On August 14, petitioner mailed/postmarked his 8 ½ by 11-inch petition. On August 18, 2023, the court acknowledged receipt of the petition and further extended the filing date by 60 days to comply with Rule 39. On September 28, 2023, petitioner was placed on home confinement by the BOP. Petitioner notified the Court of this placement and submitted the \$300 filing fee together with his petition. On October 19, 2023, the Court further extended the time within which to file to December 18, 2023 to allow petitioner to conform his petition to the requisite 6 1/8th inch by 9 ¼ inch booklet format and text size. Review by the Court is sought pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED<sup>1</sup>**

### **UNITED STATES CONSTITUTION**

Article 1, Section 9, Clause 2

Fifth Amendment

Sixth Amendment

Fourteenth Amendment

### **STATUTES**

18 USC § 3632(d)(2)

28 USC § 753

28 USC § 1734

28 USC § 2241

28 USC § 2255

34 USC § 60541(g)

### **RULES**

Rule 36.1

Rule 5 F. R. Civ. P.

Rule 10 F. R. App. P.

Rule 21 F. R. App. P.

Rule 23(a) F. R. App. P.

Rule 25(4) F. R. App. P.

Rule 41.2 F. R. App. P.

Rule 72(a) F. R. Civ. P.

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<sup>1</sup> All the above Constitutional Provisions, Statutes and Rules are set forth verbatim in Appendix K attached hereto, see pages App.44-56.

## STATEMENT OF THE CASE

McDuff petitioned the Fifth Circuit Court of Appeals for a certificate of appealability of the district court's denial of his §2255. Upon his discovery that the district court clerk had failed to record any of the exhibit evidence (which had been delivered and acknowledged as received by the court's date-stamped filers receipt), he immediately filed a NOTICE OF ERRORS IN THE APPELLANT RECORD AND MOTION TO CORRECT pursuant to F.R.App.P.Rule 10 [Docket entry 11, dated 04/01/2021, USCA5 21-40073], and MOTION TO SUPPLEMENT THE RECORD ON APPEAL WITH APPENDICES 1, 2, and 3, FILED ON 06/02/2017 MISSING FROM THE RECORD [Docket entry 25]. The Fifth Circuit Clerk denied the Motion.

On 07/01/2021 McDuff filed a MOTION TO RECONSIDER his motion to supplement the record on appeal [Docket Entry 35, USCA5 21-40073]. The Fifth Circuit denied the motion.

On 07/26/2021 McDuff filed his MOTION TO MODIFY THE APPELLATE RECORD pursuant to F.R.App.P.Rule 10(e)(2)(b) in the district court [Docket Entry 42] [ROA 21-40073.3861-3916]. The district court denied, feigning lack of jurisdiction. This motion provides a detailed account of the clerk's destruction of and failure to record McDuff's evidence.

On 04/13/2022 McDuff filed a MOTION FOR RULE 10(e)(1) HEARING with a 5CCA mediator to facilitate and agree on the record [Docket Entry 93, USCA5 21-40073] [Docket Entry 94, contains the EXHIBITS IN SUPPORT of (10)(e)(1) hearing].

On 06/15/2022 McDuff filed his MOTION FOR CERTIFICATE OF APPEALABILITY [Docket Entry 105, USCA5 21-40073].

On 11/10/2022 the Fifth Circuit denied the motion for certificate of appealability and the motion for a Rule 10(e)(1) hearing [Docket Entry 119, USCA5 21-40073].

On 12/01/2022 the BOP violated 18 U.S.C. § 3632(d)(2) by transporting McDuff to an institution 400 miles farther away from, instead of closer to his releases address. McDuff requested to be moved closer and is/was statutorily entitled by being FSA SPARC-13 compliant. In addition to violating this provision of SEC.101 of the First Step Act by moving McDuff from the Eastern District of Texas, where his §2255 and §2241 petitions are being litigated, to the Eastern District of Arkansas, the BOP also violated Federal Rule of Appellate Procedure 23(a), as well as Supreme Court Rule 36.1 by not first making application to either Court, showing the need for transfer and obtaining authorization from any court, justice, or judge.

Moving McDuff out of the 5th Circuit to the 8th Circuit, without cause, not only removed him from the jurisdiction of the habeas courts, it deprived him of access to the courts by separating him from all of his legal materials, work product, records, evidence and research notes necessary to prepare and timely file his responsive pleadings in his §2255 and §2241 proceedings in the district court, appellate court, and Supreme Court.

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Not only did the BOP's violation of Rule 23(a) and Rule 36.1 frustrate McDuff's access to the courts and cause him to be unable to timely file for panel or en banc rehearing in the 5th Circuit, it deprived him of all legal materials (records) needed to prepare his petition for writ of certiorari in the Court, which was only made possible by Justice Alito granting an extension for cause shown.

After waiting 22 weeks 12/01/2022 to 05/08/2023 some, but not all, of McDuff's legal materials were returned to McDuff by BOP staff. No less than 1/3rd of it was missing. What arrived was either damaged or severely jumbled and in complete disarray. Staff locked it in an unused storage room that contained nothing else. McDuff was allowed to begin the arduous task of itemizing what had arrived and what was missing. Because the district court (in the Eastern District of Texas) where McDuff's §2241 petition is being litigated had imposed a responsive pleading deadline on McDuff, he motioned for a stay until the BOP located the missing boxes of his legal materials and he had time to place them back in comprehensive order as well as determine if all needed documents had arrived. The district court granted the stay. The warden of FCC Beaumont Low (the Respondent of the §2241) who was responsible for the transfer violations and the 22-week separation from, and loss of, McDuff's legal materials during crucial habeas time limits objected to the stay by invoking F.R.Civ.P. Rule 72(a).

To support the objection to the stay, the warden made false and devastating claims that the bulk of McDuff's legal materials were not necessary for any current legal proceedings, and he should not be

allowed to possess them. That false representation caused BOP staff at FCC Forrest City Low (where McDuff is currently being held) to confiscate all court documents that related to closed civil cases or were from the case records of any current or former prisoner. (See Appendix L, App.57-58)

100% of the civil and criminal case documents were, are, and continue to be inseparably relevant and vital to McDuff's §2255 and all related collateral proceedings. They are the product of the civil and criminal investigative files that the multi-member investigation and prosecution team assembled on each of the targets (the confessed perpetrators of the actual wrongdoing). That entire investigative file containing tens of thousands of pages of evidence holds verified proof of McDuff's non-participation in, or knowledge of, the criminal conduct of those perpetrators. That evidence is exculpatory and is the support (the proof) of each issue raised in his §2255 habeas petition.

That investigative file was ordered by an SEC Administrative Law Judge to be provided to McDuff to review in preparation for a collateral proceeding. It was delivered to the prison and the warden authorized McDuff to keep it in his possession. A staff member destroyed a large portion of it by pouring gallons of water over important evidence. The judge ordered an investigation. The DOJ, OIG, and BOP SIA verified the destruction and placed the officer on unpaid leave. The judge instructed the government to replace any documents that were replaceable. Many were replaced, others were irreplaceable.

For a detailed account of why the ALJ protected McDuff's due process rights and ordered disclosure of all discovery in the multi-party investigative file, and why most of it is currently necessary because it is proof of McDuff's actual innocence see: ROA 21-40073.979-1060 Document 34-1 in the district court; and see ROA 21-40073.3861-3916 Document 42 in the District Court; Also see Document 125 Motion For Rehearing filed in the Fifth Circuit on 03/06/2023 followed by Document 144 Application For Writ of Error [22A1076] filed in the Fifth Circuit on 08/11/2023 as the final two filings by McDuff in the Court of Appeals in Case No. 21-40073.

For a detailed account of the due process violations and resulting prejudice inflicted on McDuff by the BOP's documented pattern and practice of withholding, destroying, discarding, losing, and denying access to the all-important "investigative file" and his legal materials necessary to fully and fairly litigate his habeas claims, see: Case No. 1:22-cv-00133 *McDuff v. Warden*, E.D. Tex., Docket Entry 34, PageID #: 1649-2116 with Attachments 1-9 and Exhibits A through U; and Docket Entry 42 PageID #: 2202-2290 with Attachments A through E. Those filings in the §2241 habeas proceedings are currently underway in the district court (in relation to First Step Act earned time credits and CARES Act issues) have no relevance to this instant matter before this Supreme Court other than to show what the BOP has done to diminish, destroy, dispose of, lose, withhold, and most recently confiscate, large portions of McDuff's copy of the relevant "investigative file". It is referenced here to demonstrate the compounded prejudice inflicted on McDuff by the BOP's

continuing interference with his ability to prepare and timely file habeas related (§2255) pleadings and appeals properly supported by the newly discovered evidence, which the district court clerk failed to record (which was the initial infliction of significant prejudice of McDuff's constitutional right to present evidence in support of his petition for habeas relief).

The cumulative errors in this case are legion. Most were not exposed until the investigative file was ordered produced three years after trial in a collateral proceeding that took place four months after the Fifth Circuit affirmed McDuff's direct appeal not knowing the evidence in the yet to be discovered investigative file impeached all the trial evidence. The contents of the investigative file revealed the actual true facts McDuff meticulously incorporated into his §2255 Memorandum [ROA.21-40073.219-251], and his AO 243 §2255 Form, Grounds 1-9. [ROA.21-40073.6-216], which was fully supported with a myriad of self-authenticating, documented, and government verified evidence. That evidence was contained in Appendix "1", "2", and "3", presented to the district court clerk simultaneously with the AO 243 §2255 Form and Memorandum in Support to be recorded into the Record.

As noted fully herein (and demonstrated by the District Court Clerk's email admission) all the evidence contained in the three appendices were destroyed and not filed into the record. That dereliction of duty is the gravamen of this Petition. The district court is required by the Constitution and federal court rules to accept and file (record) all evidence presented in support of a habeas petition. That was not done and has severely prejudiced

McDuff at every stage of the habeas process. That is a manifest error which has resulted in no court ever having had the benefit of seeing the evidence that supports McDuff's §2255. It also rises to the level of a clear violation of a Constitutional right that must be protected to ensure public trust in our system of justice and the rights we hold dear.

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#### REASONS FOR GRANTING THE PETITION

"The public... has a right to every man's evidence", *United States v. Bryan*, 339 U.S. 323, 331 (1950). A petitioner is to be given a fair opportunity to present the adequacy of his information to establish the facts by a preponderance. In looking for real conduct federal judges have long relied upon relevant, factual information uncovered after the trial, or which was unavailable until after the trial. The "investigative file" uncovered after trial, and after direct appeal, provides ample factual information to establish McDuff's actual and factual innocence.

The public has an interest of national importance to be assured by this highest Court in the land that the Constitutional guarantee of habeas corpus includes the ability to present evidence in support of each ground raised that has a potential to restore liberty unjustly taken. And once such evidence is obtained, no district court clerk or Department of Justice agency can destroy it, seize it or prevent the habeas petitioner from possessing it and making it part of the record for judicial consideration and review.

**For Habeas Review a Complete Record is Mandatory.**

In *Machibroda v. United States*, 368 U.S. 487, at 495 (1962), the Court wrote:

The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard. But a Section 2255 petitioner has a right to present evidence in support of his allegations when there exist issues of fact, even though his position be "improbable and unbelievable". Vacated and remanded for an evidentiary hearing.

McDuff's allegations are not improbable or unbelievable because they are supported by the government's own (withheld) investigative file. He must be afforded the same opportunity as *Machibroda* to present evidence and be heard. McDuff's §2255 and affidavits raise issues of fact which requires a hearing be held to resolve these issues.

"It is the duty of all litigants to deliver what they want in the record of their case with the clerk of court, or otherwise fail to make it into the record [at 18]. It is, of course, the court's duty to ensure that the record reflects all filings and proceedings aimed at influencing judicial results [at 19]." *United States v. Baird*, 2008 U.S. Dist. LEXIS 76592 (USDC in the 11th Cir. Sept. 15, 2008).

In *United States v. Kayode*, 777 F.3d 719 (5th Cir. 2014), the Court wrote: "...we are faced with an incomplete record on [this] relevant factor and thus the district court should have held an evidentiary hearing before dismissing the §2255 application".

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See also *United States v. Rivas-Lopez*, 678 F.3d 353 (5th Cir. 2012).

In *United States v. Herrera* 412 F.3d 577 (5th Cir. 2005), the Court wrote: "A remand will allow the court to develop a complete record, make appropriate fact findings, and grant relief in the first instance if evidence supports Herrera's contentions".

Analogous to the duty of a district court clerk is that of a court reporter. The Court Reporter Act [28 U.S.C. § 753] contains language that is clear, and its requirements are mandatory. See *United States v. Upshaw*, 448 F.2d 1218, 1223 (5th Cir. 1971). It is also established beyond any shadow of doubt that a defendant has a right to a record on appeal. See *Hardy v. United States*, 3 U.S. 277, 84 S. Ct. 424 (1964). It teaches that the Act and *Hardy* insure to a defendant the right to a complete record on appeal and is error per se that will work a reversal on a specific showing of prejudice. Here, McDuff has shown that a substantial and significant portion of the submitted for filing record is missing. That is per se prejudice.

In *Daniels v. Williams*, 474 U.S. 327 at 333-36 (1986), the Court wrote: "... to state a procedural due process claim a plaintiff must allege a constitutionally arbitrary deprivation". McDuff has done this.

The Fifth Circuit noted in *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1345 (5th Cir. 1978), "our system of civil litigation cannot function if parties suppress information called for upon discovery because mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation".

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The now revealed suppression misconduct of the government in McDuff's case completely sabotaged the federal trial machinery, precluding the 'fair contest' which the Federal Rules of Criminal and Civil Procedure are intended to assure. It did so first to the trial court proceedings and has done so again in the habeas proceedings by destroying all the newly discovered withheld evidence that exposed the true facts (in the government's files) that vindicate McDuff from the indicted conduct.

"[T]he policy of deterring discovery abuses which assault the fairness and integrity of litigation must be accorded precedence over the policy of putting an end to litigation". (*Rozier* at 1346). Here, the government prosecution team executed an unconscionable scheme designed to improperly influence the district court, the jury, and the Fifth Circuit in their decisions. The government's own investigative file (highlighted in McDuff's Appendix "1", "2", and "3" filed in support of his §2255 petition) provides clear and convincing evidence that the conduct of the government and its prosecution team prevented McDuff from fully and fairly presenting a defense at trial, which, in turn, prevented the Fifth Circuit from having a full complete and honest record upon which to base its decision. The judgment of conviction in the district court, and its affirmation by the Fifth Circuit was obtained through factual misrepresentations the prosecution team knew were not true.

Because the truth contained in the government's investigative file was suppressed and withheld, the judgment of conviction was unfairly obtained. And because after the investigative file and its exculpatory evidence was extracted from its hidden place

by a post-conviction court order and used to support McDuff's §2255 habeas petition, but inexplicably destroyed by the district court clerk before recording it into the record, the judgment of conviction was unfairly affirmed by the district court and the court of appeals because no judge or justice panel having subject matter jurisdiction has seen the evidence from the government' investigative file except the SEC ALJ that ordered it to be produced. Only because of the verified facts revealed by the documents in the massive investigative file, was McDuff able to prevail at the ALJ conducted hearing. (See Docket Entry 33-2, ROA 21-40073.973-974 ¶8(a).

The contents of the investigative file provide indisputable proof that the trial court record was unfairly created using facts known by the prosecution team to be false. For this and the other compelling reasons presented, the Court should exercise its discretion to grant McDuff certiorari so he can present the exculpatory proof for judicial consideration which will more likely than not entitle him to a remedy.

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#### **DUE PROCESS REQUIRES A HEARING:**

The Court has superior authority over questions of law. It is also compelled to make a de novo determination of the facts provided that the task can be performed on the basis of an accurate and complete record. Conversely, when the issues are based on controverted facts not properly in the record, due to court error, the Due Process Clause of the Fifth Amendment requires a hearing to be

imposed. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306 (1950) the Court wrote: "The guarantees of due process call for a hearing appropriate to the nature of the case". (Emphasis added)

In providing the fullest measure of due process protection in this instant case, the success or failure of McDuff's §2255 habeas petition being decided on certiorari based on either the current defective and incomplete record or on a corrected and complete record (if the Court orders the lower courts to correct) will be the determining factor of the outcome of McDuff's entitlement to habeas relief and the measure of due process afforded to him.

The chairman of the United States Sentencing Commission, Judge Carlton Reeves, recently quoted Judge George Hazel on the importance for the judiciary to decide correctly: "Liberty is the norm; every moment of incarceration should be justified."

The district court clerk improperly abrogated the mandatory duty to file McDuff's supporting evidence into the §2255 habeas record for judicial notice and review.

A remedy needs to be fashioned to correct this injustice. To decide on an appropriate remedy, based on a sufficient showing in the incomplete record that due process errors began before trial, and continued through the appellate court's recent denial of McDuff's §2255, the following Docket and ROA entries will aid this Honorable Court's review:

Docket Entry 1-1, ROA.21-40073.32-39 is McDuff's 'Motion Under 28 U.S.C. §2255 AO 243 Form'. At ROA.32 titled "Extra Docket Procedural

Background", *McDuff provides a summary of how and when he obtained the newly discovered, withheld, documents from the government's "investigative file".* Those documents provide undisputable evidence that supports his habeas petition. The documents provided by the government are listed at ROA.35. The documents withheld by the government from June 2012 to June 2016 (in violation of the district court's pretrial discovery order, Docket Entry 62, ROA.14-40780.116-120), are listed at ROA.21-40073.36-39. Each exculpatory document was described in comprehensive detail in the "Source Brief" (dated 06/02/2017 and delivered to the court clerk as Appendix "3" together with Appendix "1" and "2" as proof in support of McDuff's §2255 pleading). That brief was written to aid the court's review of each exculpatory document and credit each with the persuasive weight it deserves. That Source Brief and the two appendices of exhibits are required to make the Record On Appeal complete.

It and the exhibits are reviewable at: <https://bit.ly/SourceBriefWithExhibits>.

**Docket Entry 6**, ROA.219-250, is McDuff's §2255 'Memorandum in Support'. It illuminates the nine 'Grounds' raised with specificity.

**Docket Entry 14**, ROA.784-802, is McDuff's 'Reply to Government's Response', wherein he asserted waiver on all issues not addressed by the government's Response, and with particularity addressed each waiver by the government.

**Docket Entry 33**, ROA.963-969, is McDuff's 'Motion for Amended Findings of Fact and Conclusions of Law', (and see Attachments/Exhibits to Doc 33 at ROA.1066-1068). It is his request that

the district court make new findings that include the proof contained in the three appendices not made part of the Record due to court clerk error, which appears to have been a dereliction of duty by the clerk and the magistrate. These eight pages succinctly explain the importance of the content of Appendix "1", "2", and "3" (the district court clerk failed to record) and pleads with the court to make new findings that address the recording error and provide a judicial remedy for that and other errors not addressed in the Magistrate's initial R & R.

**Docket Entry 34-1**, ROA.979-1064, is McDuff's 'Objections to the R & R of the Magistrate'. It is the only document made part of the Record by the district court clerk that lists with specificity each of the errors detailed in the "Source Brief" [Appendix "3", destroyed by the clerk]. It too contains hundreds of references to Appendix "1" and "2" where each Exhibit (McDuff's proof) was located, paginated, and highlighted to aid the court's review. ROA.982-1027 of that document restate and reurge and preserve his good faith §2255 claims basis for purposes of appeal. See legal arguments at ROA.1027-1050 showing line and page citations supporting McDuff's allegations with particularity. Also, see 'Errata Corrections' to R & R Objections, ROA. 1082-1105. The Magistrate did not look to a single exception to procedural default, actual innocence, or other relevant doctrines which obviate procedural default. McDuff objected to this improper analysis both for *Brady* and *Jencks* (ROA.1061). See CONCLUSION ROA.1062-1064.

**Docket Entry 35-1**, ROA.3902 is the "Discovery Letter" AUSA Shipchandler provided to McDuff and the district court (falsely) representing full

compliance with the court's "June 15, 2012, Pretrial Order and Order Relating to Discovery Inspection". The court's June 15, 2012, discovery order is viewable at: Docket Entry 62, ROA.14-40780.116-120. Compare and contrast the AUSA representation of discovery order compliance with the discovery order's specific requirements and the AUSA's actual non-compliance at Docket Entry 44-2 and 44-3, ROA.21-40073.3923-3931 showing exactly what was and was not made known to exist. The attorney conduct *In re Allis*, (513 F.2d 1391 (9th Cir. 1976), 429 U.S. 900 (1976) Cert. denied) was less egregious than that of AUSA Shipchandler's false representation to the court (and McDuff) regarding *Brady, Giglio, Jencks* (§3500 material et al); "Wrongful intent on the part of an attorney may be met where attorney is in reckless disregard of court order or duties to court." AUSA Shipchandler began the process of prosecuting McDuff in the district court with 'unclean hands' at this early stage of the proceedings and continued to do so through trial, sentencing and direct appeal.

Docket Entry 35-2, ROA.1070-1073, is the Order of SEC ALJ Cameron Elliot finding that McDuff had never (prior to June 2016) "personally viewed the entirety of the investigative file, or ever had a meaningful ability to do so". See ROA.1071-1072, ¶8(a). (See also Appendix T, App.216)

Docket Entry 42-1, ROA.3875-3916, is McDuff's 'Exhibits to Motion to Modify the Appellate Record per Rule 10(e)(2)B'. These exhibits provide self-evident factual descriptions that are supported by affidavits, emails, orders, court date stamped filing receipt, and SEC Reg D Offering Exemption FORM D

filings (not disclosed by the prosecution until long after trial).

In *Connick v. Thompson*, 563 U.S. 51, 131 S.Ct. 1350, 179 LED 2D 417, the Court found that not providing *Brady* materials was serious enough harm to a defendant that a claim of \$14 million dollars had been awarded by the district court and upheld on direct appeal against the U.S. Attorney's Office for not ensuring that AUSA's were properly trained to always provide all *Brady* (especially when it is exculpatory in nature). That judgment was overturned by the Court on other grounds, but the case underscored the harm caused to defendants (like McDuff) when exculpatory evidence is withheld.

The right to *Brady*, *Jencks*, and *Giglio* are statutory black letter law rights provided by Congress and this Highest Court. They are prescribed by federal rules for prosecutors to follow. The superior right to which these rules were written to protect is the Constitutional guarantee to a fair trial and to present evidence to defend oneself at trial or in a habeas corpus petition. If any unforfeited cumulative Right guaranteed by the Constitution is bypassed the courts of the United States lose or lack subject matter jurisdiction. Has the U.S. Attorney's Office, the district court clerk, the district court magistrate, and judge as well as the Fifth Circuit Court of Appeals cumulatively and in consecutive order bypassed McDuff's due process rights multiple times by misrepresenting the "investigative file" verified facts to: the Grand Jury; the Petit Jury; the District Court; the SEC ALJ; the Fifth Circuit Court of Appeals; McDuff; and the Public? What further due process harm and prejudice did the BOP add by

its intentional, destruction, disposal, withholding, and recent confiscation of McDuff's legal materials and crucial evidence? What is the appropriate remedy?

In *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), the court crafted an evidentiary hearing standard to make informed decision in pro se proceedings. The Court in *Davis v. Gusman*, 2010 U.S. Dist. LEXIS 41550 (April 13, 2010) wrote (at 180). "This is because in all courts of the United States rules cannot override rights." McDuff fears that the practice reported in the New Orleans Times and researched by ILS Services of how the Fifth Circuit judges do not read pro se filings and reject appeal after appeal, has happened to him. (See article in Appendix M, App.59-62).

At every stage of the §2255 proceedings McDuff has diligently exhausted every rule and statutory means available to present each court below with his evidence in support of his habeas petition. Neither court has taken any measures to correct the error caused by the District Court Clerk who accepted McDuff's evidence (Appendix "1", "2", and "3") but did not record it into the record. 'Pleadings' without 'Proof' lack any persuasive weight. But with proof it becomes admissible evidence. Both Appendix "1" and "2" were filled with evidence as defined in Black's Law Dictionary (11th Ed. 2019), "EVIDENCE" is defined as "Something (including testimony documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact: anything presented to the senses and offered to prove the existence or nonexistence of a fact". (emphasis)

The investigative file is telling. It reveals, in detail, exactly who did what, where, when, and how (See Declaration of Gary Lynn McDuff at Appendix S, App.202-207 ). The "Source Brief" at:

<https://bit.ly/SourceBriefWithExhibits>) provides the Court with a guide that illuminates that trail. An "Overview and Factual Summary" was prepared and sent to fellow victims and amicus curiae advocates. (See Appendix N, Appx.63-80)

For the district court and then the appellate court to dismiss McDuff's §2255 without conducting a hearing or even correcting the record must constitute deprivation of due process, because as the court teaches in *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996), "... dismissal denies the [movant] the protections of the Great Writ entirely, risking injury to an important interest in human liberty".

The denials by the lower courts to allow McDuff to present his evidence, or to even require the district court clerk to correct the record to include all evidence presented for filing bypassed an important interest in human liberty.

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#### **THE QUESTIONS, THE LAW, AND CONSTITUTIONAL GUARANTEES:**

The primary questions raised in this case are supported by relevant Supreme Court and Fifth Circuit case law, as well as constitutional guarantees to habeas petitioners:

**Question 1:** Is it structural error and unconstitutional for a district court clerk to verify receipt of but fail to record the exhibits submitted in support of a §2255 habeas petition, and then destroy

the exhibits before the district magistrate judge and district judge considers them?

**Supreme Court Case Law:**

In *Ex parte Mudd*, 121 U.S. 303 (1887), the Court established that the right to present evidence is fundamental to due process in habeas corpus proceedings. The destruction of crucial exhibits without consideration violates this right and undermines the integrity of the judicial process.

**Fifth Circuit Case Law:**

In *Smith v. Johnson*, 218 F.3d 357 (5th Cir. 2000), the Fifth Circuit emphasized that the proper filing and preservation of evidence submitted by habeas petitioners are essential for a fair and just resolution of their claims. Failure to do so can constitute a violation of due process rights.

**Constitutional Guarantees:**

The Fifth Amendment's Due Process Clause guarantees that no person shall be deprived of life, liberty, or property without due process of law. The destruction of exhibits in a habeas corpus proceeding deprives the petitioner of their constitutionally protected right to present evidence in support of their claims.

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**Question 2:** Can a district court magistrate make findings of fact and conclusions of law for a report and recommendation, for the district judge to rely on based on an incomplete record caused by the district court clerk's failure to file what was delivered by the habeas petitioner for filing?

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**Supreme Court Case Law:**

In *Green v. Dorrell*, 969 F.3d 787 (9th Cir. 2020), cert. denied sub nom. *Green v. Taylor*, 141 S. Ct. 173 (2020), the Court emphasized that an incomplete record undermines the reliability and accuracy of any findings of fact and conclusions of law made by a magistrate judge. Such actions can violate a petitioner's right to due process under the law.

**Fifth Circuit Case Law:**

In *United States v. Martinez*, 986 F.2d 1051 (5th Cir. 1993), the Fifth Circuit held that when a magistrate judge relies on an incomplete record to issue a report and recommendation, it can result in an erroneous decision, denying the petitioner a fair opportunity to present their case.

**Constitutional Guarantees:**

If a magistrate judge relies on an incomplete record, the petitioner may be denied the opportunity to challenge the evidence presented against them, which is a violation of their Sixth Amendment Constitutional right, "to be [fully] informed of the nature and [factual] cause of the accusation".

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**Question 3:** Was it error for the District Court to deny petitioner's motion to correct the record?

**Supreme Court Case Law:**

In *Brown v. Secretary for the Dept. of Corrections*, 812 F.3d 1365 (11th Cir. 2016), cert. denied, 137 S. Ct. 811 (2017), the Court held that a district court's denial of a motion to correct the record can constitute

reversible error if it denies the petitioner the opportunity to present crucial evidence necessary for their habeas claim.

**Fifth Circuit Case Law:**

In *Prihoda v. McCaughtry*, 910 F.2d 1379 (5th Cir. 1990), the Fifth Circuit reaffirmed that district courts have a duty to ensure that the record is complete and accurate in habeas corpus proceedings. Denying a motion to correct the record without justification can be a violation of the petitioner's right to present evidence.

**Constitutional Guarantees:**

The Fourteenth Amendment's Equal Protection Clause guarantees that no state shall deny any person within its jurisdiction equal protection of the laws. If the district court denies the petitioner's motion to correct the record while granting similar motions to other parties, it could constitute a denial of equal protection under the law.

Question 4: Can a court of appeals make a fundamentally fair merits determination on a §2255 habeas petition based on an incomplete record sent to it by a district court that denied petitioner's motion to correct the record made incomplete by the district court clerk's destruction of it before recording it?

**Supreme Court Case Law:**

In *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007), the Court reiterated that a court of appeals must have a complete record before it to make a fair and just decision. An incomplete record,

caused by the actions of the district court clerk, undermines the appellate court's ability to conduct a proper review.

**Fifth Circuit Case Law:**

In *Coleman v. Johnson*, 381 F.3d 807 (5th Cir. 2004), the Fifth Circuit emphasized that the appellate court's review in habeas corpus cases is constrained by the record before it. An incomplete record impedes the appellate court's ability to fulfill its duty to review the merits of the petition.

**Constitutional Guarantees:**

The Fifth Amendment's Due Process Clause guarantees that no person shall be deprived of life, liberty, or property without due process of law. An appellate court's reliance on an incomplete record deprives the petitioner of the right to a fair and impartial review, thus violating a constitutional right.

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**Question 5:** Was it error for the court of appeals to deny appellant's motion to correct the incomplete record before making a merits decision?

**Supreme Court Case Law:**

In *Spears v. Chandler*, 729 F.2d 1214 (11th Cir. 1984), cert. denied, 470 U.S. 1004 (1985), the Court held that a court of appeals must not render a decision based on an incomplete or inaccurate record. Denying the appellant's motion to correct the record without proper justification violates this principle.

**Fifth Circuit Case Law:**

In *Watson v. United States*, 536 F.2d 698 (5th Cir. 1976), the Fifth Circuit emphasized that an appellate court's decision must be based on a complete and accurate record. Denying the appellant's motion to correct the incomplete record can lead to an unjust and erroneous decision.

**Constitutional Guarantees:**

Denying the motion to correct the incomplete record hampers the appellant's ability to effectively present their case and constitutes a violation of Sixth Amendment Constitutional right, "to be [fully] informed of the nature and [factual] cause of the accusation".

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**Question 6:** Can any court make a fundamentally fair decision on a §2255 habeas corpus petition without the complete record containing petitioner's pleadings and proof that was properly presented to the court for filing, but the clerk failed to file into the record?

**Supreme Court Case Law:**

In *United States v. Stevens*, 559 U.S. 460 (2010), the Court emphasized the importance of preserving and maintaining a complete and accurate record in criminal proceedings. The Court stated that a complete record is essential for meaningful appellate review and to safeguard the petitioner's due process rights.

**Fifth Circuit Case Law:**

In *St. Julian v. Beto*, 396 F.2d 521 (5th Cir. 1968), the Fifth Circuit stressed the responsibility of the

district court to ensure that the record is complete and that all relevant pleadings and evidence are properly filed. Failure to do so can lead to an incomplete record and compromise the petitioner's ability to obtain a fair decision.

**Constitutional Guarantees:**

The Fifth Amendment's Due Process Clause guarantees that no person shall be deprived of life, liberty, or property without due process of law. Denying the petitioner the opportunity to have their pleadings and proof properly filed and included in the record violates their right to due process and a fair hearing.

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McDuff's final attempt to obtain relief at the Fifth Circuit Court of Appeals was his 'APPLICATION FOR EN BANC PEREMPTORY WRIT OF ERROR'. The following excerpted pages from that APPLICATION show the compelling issues meriting the writ; the manifest errors; the constitutional violations; and the implications on the broader system of justice.

**"ISSUES MERITING EN BANC  
PEREMPTORY WRIT OF ERROR**

1. It was error for BOP staff to decide which legal materials to forward to McDuff so he could continue his habeas litigation and which legal materials to either destroy or withhold from him. A "Declarant" witnessed this being done. As of this writing no less than 1/3rd. of McDuff's legal materials (provided to him by court order) remain unaccounted for by BOP

staff at FCC Beaumont Low who are responsible for the willful violation of F.R.App.P 23(a).

2. It was error for the BOP to withhold--for 22 weeks--all legal materials necessary for McDuff to prepare and timely file pleadings in this Court seeking rehearing.

3. It was error for the BOP to violate F.R.App.P 23(a) by moving McDuff away from the jurisdiction of this Court during the pendency of his habeas proceedings without first seeking and obtaining the requisite leave of court to do so. (Moved him from Beaumont, Texas in the 5th Circuit to Forrest City, Arkansas in the 8th Circuit.)

4. It was error for the district court clerk to accept for filing all of McDuff's §2255 documents, and provide a date stamped "Server's Receipt" itemizing each document received, but then fail to record all of it and make a complete record of the newly discovered exculpatory evidence that fully supported McDuff's habeas petition, by admittedly destroying it instead of filing it into the record contemporaneously with the hand-delivered §2255 habeas petition. That filing error resulted in a diminution of the record before the district court's review of the habeas petition and thereafter a (incomplete) record that was subsequently presented to this Court of Appeals for review. Because of the clerk's error, neither the district court nor this Court have ever had the requisite opportunity to review any of that newly discovered evidence which supports each issue raised in the habeas petition now on COA appeal in this Court.

5. It was error for the government to represent to the district court that it had disclosed all exculpatory evidence in its possession when in fact it had withheld no less than 7000 pages of exculpatory evidence that was newly discovered during a post-conviction hearing in an SEC ALJ proceeding.

#### **MANIFEST ERRORS JOINT AND SEVERAL**

But for the government's pre-trial withholding of exculpatory evidence, the jury would most likely not have found Gary Lynn McDuff guilty--beyond a reasonable doubt--of conspiracy to commit wire fraud and money laundering based purely on circumstantial evidence, and the court would not have sentenced him to any term of imprisonment. He has been incarcerated since May 24, 2012, and is scheduled to be placed on home incarceration under the Elderly Offender Pilot Program as authorized by the First Step Act's reauthorization of the Second Chance Act 34 U.S.C. § 60541(g) on September 24, 2026.

But for the government's withholding of exculpatory evidence post-trial and post direct appeal McDuff would, more likely than not, have prevailed on rehearing.

But for district court clerk's destruction of, and failure of duty to record, the newly discovered evidence (provided to McDuff by an SEC ALJ in a post-conviction proceeding in 2016, which overwhelmingly supported all the issues raised in his 2017 §2255 habeas petition), it is more likely than not that he would have prevailed at the district court. Or, he would have, more likely than not, prevailed upon this Court's review of the full and complete

record that would have--and should have--contained every document McDuff presented (in good faith) to the district clerk together with his habeas petition trusting the clerk would carry out the requisite duty of a clerk to file each document (and each attached appendix) into the record of the case listed on the date stamped receipt the clerk handed back to the person who delivered the documents to the office of the clerk to be recorded, which memorialized the clerk's receipt of the documents. [see APP B, App.11]

But for the BOP's violation of F.R.App.P 23(a) and the apparent destruction of approximately 1/3rd of McDuff's legal materials (as witnessed by a declarant), and the withholding of the remainder for 22 weeks during the time-sensitive rehearing deadlines of this habeas proceeding, it is likely that the requisite number of Fifth Circuit Judges would have granted a rehearing en banc to protect the integrity and purpose of Fifth Circuit Rule 41.2 making this Application for en banc Peremptory Writ of Error unnecessary.

Reversible error permeated the trial, the direct appeal, and the habeas proceedings. The government prosecution team contemptuously withheld exculpatory evidence pre and post-trial and throughout the direct appeal process.

The district court clerk admitted to destroying and not filing the withheld exculpatory evidence that supported McDuff's habeas petition which was newly discovered by McDuff in 2016 when an SEC ALJ ordered the SEC to provide McDuff with the entire "investigative file" which the government had, at all times prior, withheld from the trial court, the defense and this Court of Appeals. It was error for the trial

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court to review and decide the issues raised in McDuff's §2255 without the benefit of a complete record that contained the exculpatory evidence McDuff timely and properly presented to the district court clerk to file into the record.

It was error for the district court to deny a COA and to deny a Rule 10(e) motion to correct the record and thereafter conduct a de novo review of an incomplete record after being given notice that the district court clerk had failed to provide the district magistrate and judge with an accurate and complete record to review. It was further error by the district court to deny McDuff's motion to correct the error (caused by the district clerk) by allowing McDuff to refile his copies of the clerk-destroyed documents (Appendices 1, 2 & 3) into the record to ensure completeness. That same error was repeated by the panel of this Court when it relied on the district court clerk's incomplete, diminutive record to deny McDuff's Rule 10(e) appeal and subsequent COA appeal.

These errors were further exacerbated when the BOP knowingly and intentionally committed two egregious violations of McDuff's due process rights. First, it violated F.R.App.P 23(a) by moving McDuff out of the jurisdiction of this Court. Second, it violated McDuff's constitutional right of access to the court by withholding (for 22 weeks) 100% of his legal materials needed to litigate his habeas petition appeal and en banc rehearing timely, and destroyed (or is still withholding) no less than 1/3rd of his legal materials instead of transporting them to the Arkansas prison he was unlawfully moved to in violation of Rule 23(a).

Because each of the aforementioned errors are plain, and the integrity of this Court's Rule 41.2 and Rule 23(a) of the Federal Rules of Appellate Procedure must be protected and enforced by this Court's inherit power to remand with instructions to correct; the peremptory decision before this en banc Court is to decide which of the myriad of error categories available to this Court to choose from best suits the remedy most appropriate in the interest of justice, public policy and the reputation of our judicial system to correct this apparent injustice.

**Violation of McDuff's  
Constitutional Rights**

McDuff's right to due process under the Fifth and Fourteenth Amendments was violated when the court denied his motion for correction of the record. Under the holding in *United States v. Shaid*, 937 F.2d 228 (5th Cir. 1991), a fair trial requires an accurate and complete record.

**Court's Error in Denying  
Motion to Correct the Record**

The court's denial of McDuff's motion to correct the record was clearly in error, as it was based on a misunderstanding of the facts. This has resulted in a miscarriage of justice, and the court should recall its mandate and correct the error.

The combined effect of the various flaws and shortcomings noted above has a profound implication, not only on the integrity of McDuff's trial but on the broader system of justice. Gary Lynn McDuff, pro se, hereby respectfully petitions the court to vacate its prior judgment, issue a peremptory writ of

error, and recall and reform its mandate. This Petition is based on the critical need to remedy a series of violations, errors, and oversight that gravely impact the fundamental tenets of justice, the sanctity of the Constitution, and the reputation of our judicial system. The case of Gary Lynn McDuff carries far-reaching implications for the fair treatment of citizens under the law. It stands at a junction where jurisprudence, societal implications, and the interpretation of the Constitution meet. This petition provides a detailed account of the reasons why a rehearing is not only advisable but essential in the interest of justice". (See Document 144-1, pages 11-15 - USCA5 21-40073)(See excerpt at App.5-App.10)

**The rule of law pleads for a remedy**

All of McDuff's efforts (to ensure that the Record contained all his habeas exhibits and evidence) were met with resistance at the district court and the appellate court. He followed the steps required in 28 U.S.C § 1734(a) & (b) but both courts refused to correct the error when McDuff provided proof (via the date stamped filer's receipt) that the court clerk had simply failed to record what was delivered to the clerk's counters and verified as received by the clerk for filing. That refusal was in conflict with and contrary to the Fifth Circuit's finding in *Coffman*, 766 F.3d at 1249-1251 (5th Cir. 2014) where it wrote: "...we interpret section 1734 to apply only to persons who need the record for a pending or contemplated legal proceeding....section 1734 is a rule of evidence which applicants can invoke if they need a lost or destroyed record for some legal proceeding." (emphasis). How will this Honorable Court now de-

sign a means to ensure protection of the Habeas Corpus procedural guarantees enshrined in the U.S. Constitution (Article 1, Section 9, Clause 2) for McDuff and all similarly situated citizens?

It is evident from both Supreme Court and Fifth Circuit case law, along with constitutional guarantees, that the preservation of a complete record is crucial for a fundamentally fair decision in a §2255 habeas corpus petition. The failure of the district court clerk to file and include the petitioner's pleadings and evidence in the record raises serious concerns about the petitioner's access to justice and due process rights. Without a complete and accurate record, any decision made on the petition would be inherently flawed and unjust. To allow the decision of the lower court to stand is risking injury to an important interest in human liberty.

#### Conclusion

I respectfully request that the Court address and rectify the issues raised in this petition to ensure that these constitutional rights are protected, that the governing rules are followed by the lower courts and a fair and just resolution is reached in this case that will enshrine the principles of natural justice for all habeas petitioners when filing proof of their pleadings in district court proceedings.

Thank you for your attention to this matter. I stand ready to provide any further information or support as required by the Court.

Respectfully requested.

EFFECTIVE DATE: August 10, 2023

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DATED: December 15, 2023

//s//  
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