No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

DUSTIN NGUYEN — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s): UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT; UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA (WESTERN); AND THE SUPREME COURT OF THE UNITED STATES.

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.
PRO SE PETITIONER

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

DATE: Jan 4, 2024

(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, DUSTIN NGUYEN, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$0.00	$N/A	$0.00	$N/A
Self-employment	$0.00	$N/A	$ 0.00	$N/A
Income from real property (such as rental income)	$0.00	$N/A	$ 0.00	$N/A
Interest and dividends	$0.00	$N/A	$ 0.00	$N/A
Gifts	$200.00	$N/A	$ 200.00	$N/A
Alimony	$0.00	$N/A	$ 0.00	$N/A
Child Support	$0.00	$N/A	$ 0.00	$N/A
Retirement (such as social security, pensions, annuities, insurance)	$0.00	$N/A	$ 0.00	$N/A
Disability (such as social security, insurance payments)	$0.00	$N/A	$ 0.00	$N/A
Unemployment payments	$0.00	$N/A	$ 0.00	$N/A
Public-assistance (such as welfare)	$0.00	$N/A	$ 0.00	$N/A
Other (specify): _____	$0.00	$N/A	$ 0.00	$N/A
Total monthly income:	$200.00	$N/A	$ 200.00	$N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$0.00
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$0.00
			$
			$

4. How much cash do you and your spouse have? $ NONE 0.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
N/A NONE	$ N/A	$ N/A
	$	$
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home N/A NONE
Value $0.00

☐ Other real estate N/A NONE
Value $0.00

☐ Motor Vehicle #1 N/A NONE
Year, make & model
Value $0.00

☐ Motor Vehicle #2 N/A NONE
Year, make & model
Value $0.00

☐ Other assets N/A NONE
Description
Value $0.00

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$0.00	$0.00 N/A
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☒ Yes ☐ No N/A Is property insurance included? ☐ Yes ☐ No N/A	$0.00 N/A	$N/A
Utilities (electricity, heating fuel, water, sewer, and telephone) N/A	$0.00	$N/A
Home maintenance (repairs and upkeep)	$0.00	$N/A
Food N/A	$N/A $0.00	$N/A
Clothing N/A	$N/A $0.00	$N/A
Laundry and dry-cleaning N/A	$N/A $0.00	$N/A
Medical and dental expenses N/A	$N/A $0.00	$N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$N/A $0.00	$N/A
Recreation, entertainment, newspapers, magazines, etc.	$0.00	$N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$0.00	$N/A
Life	$0.00	$N/A
Health	$0.00	$N/A
Motor Vehicle	$0.00	$N/A
Other: N/A	$0.00	$N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): N/A	$0.00	$N/A
Installment payments		
Motor Vehicle	$0.00	$N/A
Credit card(s)	$0.00	$N/A
Department store(s)	$0.00	$N/A
Other: F.R.P. (FEDERAL REPAYMENT PLAN)	$60.00	$N/A
Alimony, maintenance, and support paid to others	$0.00	$N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$0.00	$N/A
Other (specify): COURT JUDGMENT	$9,000.00	$N/A
Total monthly expenses:	$60.00	$N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? N/A

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I AM AND HAVE BEEN INCARCERATED. I AM INDIGENT. I AM WITHOUT ANY ASSETS, AND I HAVE NO INCOME OTHER THAN GIFTS FROM FAMILY.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Jan 4, 2024

(Signature)

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

DUSTIN NGUYEN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
ORIGIN:
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

PRO PER PETITIONER:

DUSTIN NGUYEN, REG. NO. 19389-030 - K3
(Your Name)

P. O. BOX 1000 (FCI SANDSTONE)
(Address)

SANDSTONE, MN 55072
(City, State, Zip Code)

N/A NO PHONE
(Phone Number)

QUESTION(S) PRESENTED

Nguyen's 2255 Motion was allegedly reviewed under Federal Rules Governing 2255 Proceedings, Rule 4 by the lower court. Though the court focused on the motion's disorganized format, there were at least four colorable claims raised and repeated throughout all the court fillings; which the lower court never specifically addressed any of Nguyen's allegations in its summary dismissal, prompting Nguyen to ask this Court:

> I. Did the lower court abuse its discretion when it summarily dismissed Nguyen's 2255 Motion based on the language under Federal Rules Governing 2255 Preceedings Rule 4(b)?

Two of Nguyen's colorable claims involved ineffective assistance of counsel allegations against one of his retained attorney's violating the Sixth Amendment Confrontation Clause and Title 28 U.S.C. §1827 Interpreter Act. Nguyen asks:

> II. Was Nguyen's counsel both Constitutionally (and Statutorily) ineffective with Nguyen's trial fights when he (a) forged Nguyen's signature on a critical stipulation waiver without informing Nguyen or receiving his consent to do so; and (b) waived Nguyen's right to a court appointed interpreter without his presence, knowledge, or consent?

The language in 18 U.S.C. §1827 requires Nguyen's personal waiver to dismiss on appointed interpreter from his criminal proceedings. The interpreter was dismissed at a phone conference, that Nguyen was not present for. Preventing Nguyen from being fully informed and participating in his legal proceedings, raising the following question:

> III. Does the denial of the fundamental right to be present and to participate in a defendant's own trial by the failure to provide an essential interpreter require a showing of prejudice, before a defendant may have post conviction relief granted?

LIST OF PARTIES

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

REALTED CASES

UNITED STATES v. NGUYEN, Case No.: 1:19-cr-061-JAJ (SD IA, 2019)

UNITED STATES v. NGUYEN, Case No.: 4:22-cv-00222-SMR (SD IA, 2022)

UNITED STATES v. NGUYEN, Appeal No.: 22-1360 (CA8, 2023)

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Rules

Petition for a Writ of Certiorari

This proceeding arises from a pro se amended post conviction motion (Nguyen v. United States, Case No.: 4:22-CV-00222-SMR, "Doc."; Amended Motion under 28 U.S.C. §2255 "Pet.", Doc. 7) raising, inter allia, specific allegations supporting Constitutional violations in Nguyen's criminal case. At all stages of Nguyen's criminal case, his legal counsel(s) continually made it near on impossible for Nguyen to not only be informed of the charges and case against him, but to participate in his legal proceedings. Pet. at 5, 7, 11-14. The district court summarily dismissed them as "rambling" (Doc. 9, Initial Review Order, "Order". at 2) in a Federal Rules Governing §2255 Proceedings "2255 Rule 4(b)" Denial. The record as summarized here and detailed infra clearly established otherwise.

A. Factual Summary

The sentencing court's Rule 4(b)'s summary dismissal was inappropriate when viewed against the Federal Rules Governing §2255 Proceedings. The presiding judge alleged the Petition's claims were frivolous and rambling (Order at 2) when in fact Nguyen made specific claims, such as: refusing a 3 month probation plea deal because he did not understand his court appointed interpreter (Pet. at 6) and having his due process violated when his second retained counsel did not inform him of his Constitutional rights, including his right to directly appeal the jury verdict (Pet. at 13).

Nguyen was not informed of (nor did counsel challenge) Nguyen's right to confront his accusers, particularly the authors of the

two Reports core to the Government's case. Counsel's forgery of Nguyen's signature stipulated to the veracity and accuracy of the National Center of Missing and Exploited Children (NCMEC) Reports allowing the evidence to be admitted unchanged. (Pet. at 5,7, 12-14, 19-20; Nguyen v. United States, Case No.:23-1451, "CA8 Doc."; CA8 Doc. 5266725, Certificate of Appealability Application, "COA", at 3, 5, 8; Cr. Doc. 69, Stipulation Waiver "Waiver").

Counsel Hrvol also violated Nguyen's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor when he hired an expert witness (Mr. Meinke) to address the NCMEC Reports, which were pivotal to the indictment and used (without challenge) to convict him (Pet. at 7, 12, 14, 18; Pet. Attachment 2, Affidavit "Aff.") then fired him without informing Nguyen, who found out the day of the trial that there was no expert witness. /Id.

Nguyen had his statutory right to an interpreter violated (28 U.S.C. §1827) when his attorneys failed to not only request the Court assign an interpreter who spoke the correct dialect of Vietnamese; But the attorney waived his right -- via a telephone conference call -- (See Cr. Doc. 54; See Also Cr. Doc. 55 Text Order) on the client's behalf, without Nguyen's presence, knowledge, or consent. Pet. at 5-6, 11-14; COA at 5, 8. Hrvol then dismissed the interpreter assigned to the case despite the Court originally finding one was necessary due to Nguyen's lack of understanding of the English language. See /Id.; See Also Cr. Doc. Text dated November 22, 2019.

B. Summary of Argument

Nguyen is a layman in the law and thus the district court was to construe his pro se motion liberally. Neither of the lower courts afforded Nguyen that review standard. Haynes v. Kerner, 404 U.S. 579 (1972).

Despite the pleadings before the Court making colorable allegations, that if proven true would support post-conviction relief, the district court made no specific findings of where or how Nguyen's claims were plainly frivolous when making its dismissal. The district court's failure to articulate the basis for its judgment denies Nguyen "meaningful appellate review" and is subject to G.V.R. which Nguyen respectfully requests this Court issue. See Denton v. Hernandez, 504 U.S. 25, 34 (1992); quoting Boag v. Macdougall, 454 US. 364, 365, n* (1982)(per curiam) (When summary dismissal occurs, district courts are encouraged to "provide a statement explaining the dismissal that facilitates intelligent appellant review" ... Failure to explain dismissal may warrant reversal).

Nguyen's Confrontation Clause claims ring soundly in Sixth Amendment violation when he alleged Counsel Hrvol, during trial preparation, waived Nguyen's statutory right to an interpreter preventing him from participating in his defense in any meaningful way; and Hrvol fraudulently forged Nguyen's signature on a critical stipulation documentation. This prevented Nguyen's from: 1) having an interpreter present who spoke the same Vietnamese dialect to facilitate Nguyen's full understanding and participation in his criminal proceedings; and 2) waiving the Government's burden (without Nguyen's express knowledge and consent) to establish foundation for the evidence's admissibility which used in the Government's

case-in-chief to indict and convict Nguyen. Counsel Hrvol continued his deficient behavior when he retained a computer expert, then without Nguyen's knowledge or consent, terminated the witness before the trial started.

The federal interpreter statute (28 U.S.C. §1827) and current Circuit and Supreme Court case law does not allow for unconsented interpreter dismissals (like Nguyen's) to happen. This did not happen here. It is well acknowledged that a defendant has a fundamental right to be present and participate in his criminal proceedings despite English not being their native language. See Holmes v. Carolina, 547 U.S. 319 (2006); Citing Crane v. Kentucky, 476 U.S. 683 (1986). Because this is a novel concept requiring a record to be developed below to allow for meaningful review of the matter, Nguyen requests this Petition be GRANTED, the decisions be VACATED and the matter be REMANDED (G.V.R.) on the prevailing practice barring access to court proceedings to those who do not speak the English language but whom the Government wants to prosecute. This will also protect the interest of the public by demonstrating fair process, the practice of proper prosecution, and the reputation of the court to be an arbiter of justice.

In The
Supreme Court of the United States
Petition for Writ of Certiorari

Petitioner respectfully requests that a writ of certiorari issue to review the judgements below.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the petition and is unpublished.

Jurisdiction

The date on which the United States Court of Appeals for the Eighth circuit decided my case was July 28, 2023.

A timely petition for rehearing was denied by the United States Court of Appeals for the Eighth Circuit on October 5, 2023 and a copy of the order denying en banc rehearing appears at Appendix B.

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

Constitutional and Statutory Provisions Involved

Amendment 5 in relevant part -

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

Amendment 6 in relevant part -

> In all Criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of Counsel for his defense.

Title 18 U.S.C. § 2252 in relevant part -

(a)(2) Any person who knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in affecting interstate or foreign commerce by any means including by computer or through the mails.

...

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter [18 U.S.C.S. §2251 et. seq.], section 1591 [18 U.S.C.S. §1591], Chapter 71, Chapter 109A, or Chapter 117 [18 U.S.C.S. §1460 et. seq., 2241 et. seq., or 2421 et. seq.], or under section 920 of Title 10 (Article 120 of the Uniform Code of Military Justice) [10 U.S.C.S. §920], or under the law of any state relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such a person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

Title 28 U.S.C. §1827 in relevant part -

(d)(1) The presiding judicial officer, with the assistance of the Director of the Administrative Office of the United States Courts, shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness may present testimony in such judicial proceedings -

(A) Speaks only or primarily a language other than the English language; or

...

so as to inhibit such a party;s comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.

...

(e)(1) If any interpreter is unable to communicate effectively with the presiding judicial officer, the United States attorney, a party (including a defendant in a criminal case), or a witness, the presiding judicial officer shall dismiss such interpreter and obtain the services of another interpreter in accordance with this section.

...

(f)(1) Any individual other than a witness who is entitled to interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer and made expressly by such an individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such an individual, utilizing the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, the nature and effect of the waiver.

Title 28 U.S.C. §2255 in relevant part -

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgement vulnerable to collateral attack, the court shall vacate and set the judgement aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate

...

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of

...

(f)(1) the date on which the judgement of conviction becomes final;

Fed. R. Governing 2255 Proceedings, Rule 4 in relevant part -

(b) **Initial Consideration by the Judge.** The Judge who receives the motion must promptly examine it. If it plainly appears from the motion; any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion or other response within a fixed time, or to take other action the judge may order.

Statement of the Case

A. Underlying Criminal Case Background

On February 19, 2021, a jury convicted Nguyen of Receipt of Child Pornography (18 U.S.C. §2252(a)(2); (b)(1)). He was sentenced to 120 months of imprisonment and five years of supervised release. United States v. Nguyen, Case No.: 1:19-CR-00061-JAJ-HCA-1(SD IA 2021), "Cr. Doc."; Judgment and Commitment Order, Cr. Doc. 106 on June 30, 2021.

Nguyen is a laymen in the law and thus his pro se motion must be construed liberally. Haynes v. Kerner, 404 U.S. 579 (1972). The lower court did not do this, instead focusing on the motion's disorganization, overlooking colorable claims, that if proven true, would warrant relief.

B. Plea Trial and Plea Stage

Attorney Brian S. Munnelly was assigned as Nguyen's counsel on November 22, 2019. That same day, it was decided by, then presiding, Chief Judge John Jarvey that due to Nguyen's lack of understanding of the English language, an interpreter would be needed to guarantee Nguyen's full comprehension of decisions that would be made during his proceedings. See Cr. Doc. Text dated 11/22/2019. Myhanh Che was designated as Nguyen's interpreter. Though she spoke Vietnamese, it was a completely different dialect than what Nguyen spoke, making communication between the two next to impossible. See Pet. at 11. Munnelly was informed of this conundrum on multiple occasions by Nguyen but no attempt was made to have the Court find a replacement interpreter who spoke Nguyen's dialect. Instead, Munnelly focused on convincing Nguyen to take the plea deal being proffered by the Government. Pet. at 11-12; COA at 9, 11. Nguyen refused profusely, asking Munnelly to investigate regarding the charges being brought against him, mainly the veracity of the search warrant, which: was not produced for Nguyen to see during the time his residence was searched; was issued from a different jurisdiction; and did not list the magistrate judge's name granting the warrant. See Exhibit B attached to the Petition.

At no point was Munnelly willing to discuss any other strategem besides a plea bargain. Simultaneously, Nguyen was stuck with an interpreter he could not understand. Nguyen's next retained counsel (Joseph Hrvol, Cr. Doc. 33) continued to use an interpreter who was unable to communicate with his client until, in the middle of trial preparation, Hrvol waived the interpreter, and dismissed Ms. Che from the case, without Nguyen's knowledge or consent.

See Pet. at 5, 13-14; See Also Doc. 55, January 5, 2021; COA at 5. The unconsented dismissal placed Nguyen the precarious situation of have no clue, or ability to learn (communicate) the detailed mechanics (and their effects) involved his case as it went to (and in) trial. Pet. at 11, 13-14.

C. Trial Stage

Nguyen dismissed Counsel Munnelly because all he would consider were plea bargains and hired Counsel Hrvol because Hrvol was more willing to taking Nguyen's case to trial. Due to the complex comprehension required to present the Government's highly technical evidence to a jury, Hrvol determined that retaining a computer forensic expert in the field of computer networking was essential.

Hrvol requested $5,000 from Nguyen's family to retain such an expert for trial preparation and testimony which Hrvol received April 16, 2020. See Exhibit B attached to the Petition. Additional evidence would show that this money was used to retain Daniel Meinke of Computer Forensic Resources. Discovery was sent to Meinke by the sentencing court to be analyzed (Pet. at 12, 16; Cr. Doc. 49) which resulted in a Motion of Limine. See Cr. Doc. 65. Meinke was promptly struck from the defenses' witness list. Meinke was listed by the Government shortly thereafter. COA at 14; Cr. Doc. 60, Government Witness List. None of this was disclosed to Nguyen by Hrvol until the first day of trial. COA at 4, 14.

Discontent with his representation on two accounts now, Nguyen fired Hrvol mid-trial and retained his third counsel, Aaron Hamrock. Cr. Doc. 91. Nguyen informed Hamrock of all of the issues he had with his previous counsels, and requested Hamrock to look into specific laws or facts regarding his case, specifically the lack

of an expert witness in his defense when hired. Pet. at 11, 13-14; COA at 5, 9. All of Nguyen's requests and concerns went unheard. After Nguyen's sentencing (June 30, 2021), Hamrock did not inform Nguyen he had a right to appeal his guilty verdict and sentence. Pet. at 13; COA at 5, 9.

D. 2255 Proceedings

Nguyen proceeded, based on his understanding that his §2255 Petition had to be filed on or before July 14, 2022 (28 U.S.C. §2255(f)(1)), and filed his §2255 Motion on July 6, 2022. Doc. 1.

After being ordered to do so (Doc. 5, Order to Amend), Nguyen filed an amended motion with the sentencing court on October 8, 2022, which was docketed November 7, where he raised six grounds. Though not all Grounds raised are significant to this Writ, relevant facts were pot-shotted throughout the motion alleging colorable claims and allegations which established the basis of viable claims that there were violations against Nguyen's Fourth, Fifth, and Sixth Amendment Rights during his criminal proceedings and trial; that if corrected would change the outcome of his trial and proceeding. Pet. at 5-6, 11-15, 17-18.

After three months, Nguyen filed a Motion for Compliance with Rule 4(b), dictating Judge Rose promptly examine the §2255 Motion under the Rules Governing Section 2255. Doc. 8. Four days later, Judge Rose filed her Initial Review Order dismissing Nguyen's 2255 outright (Doc. 9, "Rule 4(b) Denial", Appendix D), claiming : it was done after careful review (/Id at 1); that many of Nguyen's claims appeared frivolous (/Id at 2); that the motion was not

fully legible and full of rambling making it difficult to discern (/Id); and never once specifically addressing any of the six grounds Nguyen submitted, she concluded that the files and records of the case conclusively show Nguyen is entitled to no relief because he has not made a showing that his sentence was imposed in violation of the Constitution or laws of the United States," (/Id). The record belies that bald assertion. Judge Rose also denied a Certificate of Appealability. Doc. 10. Following a timely Notice of Appeal (Doc. 11), Nguyen filed an Application for Certificate of Appealability with the Eighth Circuit.

E. Application for Certificate of Appeal

In his COA, Nguyen established how the lower court's failure to create a record, of why and how his 2255 was denied, preventing any appellate review. Nguyen, in manner of pro se pleaders, sprinkled the allegations and six grounds he raised throughout his 2255 Motion. Even though in-artfully pled, the COA preserved the claims and allegations presented below. Germane here are Nguyen's Ineffective Assistance of Counsel, "IAC", claims against all three prior counsel, with examples establishing (by at least a preponderance) that: Hrvol denied Nguyen's right to confront witnesses against him when Hrvol forged Nguyen's signature on the waiver of foundation for the critical NCMEC Reports (COA at 3-4, 7-12); Hrvol dismissed Nguyen's interpreter without Nguyen's consent. By doing so, Hrvol denied Nguyen meaningful participation in his defense (COA at 5, 8-9, 11); and Hamrock failed to inform Nguyen of his right to appeal his conviction and sentence or have an appeal filed on his behalf after Nguyen took the charges against him to trial. COA at 9.

On July 28, 2023, in a four sentence decision, the Appellate Court entered judgment stating "This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. Appellant's motion for default judgment is denied. The appeal is dismissed." See COA Denial, Appendix A. Nguyen filed a timely petition for en banc rehearing, claiming the Panel's decision was in conflict with other Circuit and Supreme Court case law (See Petition for en banc), which the Circuit Court denied (See En banc denial, Appendix B) on October 5, 2023. This timely Petition of Certiorari follows.

Reasons to Grant the Petition

Nguyen ran afoul of three primary issues during his habeas proceeding. The first two are well established with significant support in this Court's (and lower courts) precedence. Yet the lower court and some Circuits continue to abused their discretion by ignoring or misapplying the law. Specifically, Nguyen raises here: (1) Summary 2255 Rule Four dismissals lacking adequate explanation of the claims to facilitate intelligent appellate review; and (2) Violation of a Sixth Amendment right allowing a defendant to confront the witnesses against him. And a question that the Rushen[1] Court left open in 1983: Whether the denial of a defendant's statutory right (§1827) to an interpreter is structural or requires a prejudice inquiry. Nguyen's case is the perfect vehicle to reaffirm the first two issues with a more updated opinion, and to allow

1 - Rushen v. Spain, 464 U.S. 144 (1983) (per curiam).

for a record to be built (via G.V.R.) on the third or to take the issue up to answer the Rushen Court's open question.

I. The district court erred when it summarily dismissed Nguyen's §2255 (under 2255 Rule 4) as the record contained colorable allegations that if true rise to Constitutional violations warranting a new trial.

The lower court -- despite having a habeas record that alleged (albeit in a jumble manner) four distinct colorable allegations (discussed infra at) that would prove Nguyen's proceedings were fundamentally unfair -- claimed (without supporting the decision) that many of the grounds were frivolous, all because the motion was "rambling". Rule 4(b) Denial at 2.

The controlling rule (Four(b)) at the preliminary review stage, the statute (28 U.S.C. §2255(b)), and this Court's precedence require a court to allow a pro se prisoner's 2255 petition to proceed unless the motion, records, and files of the case "conclusively show that the prisoner is entitle to no relief." 28 U.S.C. §2255(b).

Nguyen's amended motion, and files and, records of the case," (/Id), before his district court contained numerous non-conclusory, specific allegations, which if given a chance to be proven, would have warranted relief. See Procunier v. Atchley, 400 U.S. 446 (1971) ("An evidentiary hearing on a section 2255 must be granted when the facts alleged would justify relief, if true, or when a factual dispute arises as to whether or not a Constitutional right is being denied.")

Yet, the district court, without any specificity, or citation to the record before it, claimed the motion was "rambling" (Rule 4(b) Denial at 2) and that "many of the claims were frivolous," /Id. The record belies that presumption. Further, as demonstrated in the following subsections, there was at least four claims (and

numerous allegations) that meet the very low threshold required by the law to allow the parties to, at minimum, brief them if not hold an evidentiary hearing on the colorable allegations.

A. The lower court's summary dismissal left no record for Nguyen to receive a meaningful appellate review.

Given the district court's disposition of Nguyen's case, it cannot be addressed whether the claims are plainly frivolous and should be summarily dismissed or are worthy of further review. The district court's failure to articulate the basis for its judgment denies Nguyen meaningful appellate review. Its this reason that other circuits, and this Court, require district courts to render decisions that are at least sufficiently informative to permit such a review.

> The preferred practice in summarily dismissing a §2255 motion is to enumerate the issues raised by the prisoner, and explain the reasons for that action. Such a disposition provides a basis for appellate review at the dismissal of the motion that, standing alone, might arguable have some merit. This requirement of a reasoned decision, even though the district court denies a hearing, is consistent with the requirements of the other circuits.

United States v. Underwood, U.S. App. LEXIS 32247 at n. 3 (10th Cir. 1997); See Also United States v. Edwards, 711 F.2d 633 (5th Cir. 1983); United States v. Counts, 691 F.2d 348 (7th Cir. 1982); Newfield v. United States, 565 F.2d 203 (2nd Cir. 1977).

One of the reasons given by Nguyen's court for dismissal was the "rambling" format, making the motion hard to discern. Nguyen's 2255 is not the first, and most certainly will not be the last, pro se motion to be submitted that could be considered rambling, poorly written, or full of grammar and spelling mistakes. That does not excuse the lack of review, as other courts seem

to handle such motions just fine. Like when the Distirct of Nebraska stated:

> Even though Judge Kopf found the petition "rambling" (see fn. 3) the petition was still properly examined and claims discussed.

United States v. Smith, 2006 U.S. Dist. LEXIS 29664 (D NE). The other reason Nguyen's court gave was it declared "many of [the claims] appeared frivolous" and when compared to the record "conclusively show[s] Nguyen is entitled to no relief." Rule 4(b) Denial at 2. It is worth noting that the lower court did not say "all claims" but "many claims." If this were true, there should have been an explanation on the record specifically claim which one of the six claims were not frivolous but still did not constitute relief and for what reasons. Instead, none were given. It is this reason that most Circuit's follow the Eleventh Circuit Clisby standard:

> The havoc a district court's failure to address all claims in a habeas petition may wreck in a federal and state court systems compels us to require all district courts to address all such claims.

Clisby v. Jones, 960 F.2d 925, 938 (1992) and n. 17. This Court has also adhered to the Blackledge standard on summary dismissal as it:

> does not permit summary dismissal because the claims in the petition are somewhat vague or conclusory. The question is if it is 'palpably incredible' or "patently frivolous or false' when viewed against the record.

Blackledge v. Allison, 431 U.S. 63 at 75-76 (1977). Neither of which is applicable to all of Nguyen's claims. The lower court's language choice shows it failed to align its reasoning with controlling precedence.

> Petition ought not to be summarily dismissed unless it appears without a doubt that the petitioner can prove no set of facts which would entitle him to relief.

O'Blasney v. Solem, 774 F.2d 925, 926 (8th Cir. 1985); See Also Murchu v. United States, 926 F.2d 50 (1st Cir. 1991). However, the O'Blasney Court also understood:

> Pro se petitions for habeas corpus deserve indulgence.

O'Blasney at 926. Nguyen received no such indulgence for his habeas corpus proceeding or the valid claims he raised within his petition. Specifically, there are four claims made by Nguyen that were supported by the record before reviewing court but never allowed to bear fruit.

Because of the district court's failures to render any record of its actual reasoning for denial (a reversible error on its own) all Petitioner can do at this point is show where in "the motion, and record, and files" (§2255(b)) he presented, and the criminal record contained, that he made at least four colorable claims and allegations that, if proven true, would warrant the relief he is requesting.

B. Nguyen's four colorable claims and (supporting allegations) that were raised in his petition(s) warranted at minimum further development, if not relief.

1. Defense Counsel failed to file a direct appeal despite Nguyen's clear intention to challenge every aspect of the Government's case.

Nguyen has never claimed to be well versed in the law. Though defense lawyers and judges do their best to alleviate the burden of the in depth knowledge required to navigate legal waters, some defendants still slip through the cracks. Especially when a non-enlgish speaker is not able to properly utilize an interpreter.

Nguyen made the post conviction claim that Hamrock did not inform him of his right to appeal at multiple points in his habeas pleading: "Counsel Hamrock ... made no attempt to advise Mr. Nguyen of his right to file an appeal or advise him of his rights." (Pet. at 13); "Aaron Hamrock's failure to advocate procedurally barred me from appealing numerous issues which should have been raised on appeal." (COA at 5); and "Mr. Hamrock ... did not advise me I had a right to appeal or make any effort to find appealable issues or appeal." COA at 9. This ineffective assistance of counsel claim should have immediately warranted an evidentiary hearing, or at least further briefing. Despite well established case law, this did not happen here. Attorneys failure to file an appeal in spite of being instructed to do so is per se ineffective assistance; in addition, an attorney's failure to advise a defendant about an appeal constitutes ineffective assistance when there is a reason to think either:

> 1) that a rational defendant would want to appeal or 2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Roe v. Flores-Ortega, 528 U.S. 470, 145 LED 2d 985, 991 (2000). Nguyen had fought taking a plea bargain since his first CJA appointed counsel (Munnelly) as he truly believed, and still does, that he was/is innocent of the charges being brought against him. Through his behavior, it was quite evident during the pre-sentence process that Nguyen would want to file an appeal, if he know he could.

The lower court's focus on Nguyen's poorly formatted, rambling pro se motion, while simultaneously failing to provide any specific reasons for its denial of his 2255 Motion constitutes a grave procedural error when faced with the sundry, but colorable, claims

alleging a violation of Nguyen's Fourth, Fifth, and Sixth Amendment Rights. This claim alone was enough, at this level of review, to warrant a G.V.R. due to the lack of complete record. Because if Nguyen had been told about his options, he would have requested an appeal making his unlitigated claim, warrant relief.

2. Counsel Hrvol committed both fraud (forging client's signature on stipulation document) and; waived (without consent) his client's statutory right to an interpreter violating both Nguyen's Fifth and Sixth Amendment Rights to a fundamentally fair trial.

One thing defendant's are not always aware of, or told of, by legal counsel are what things they can (and cannot) waive and if the client chooses to waive a right, what they must sign themselves or what the client can (knowingly and consentually) permit their counsel to sign on their behalf. The waiver of a Constitutional or significant statutory right must be knowing and voluntary. Requiring the district court to explicitly question the defendant about their understanding of the waiver, unless it is clear from the record that the defendant fully understands and waive the right. That is not the case here.

In his Petition, Nguyen claimed Hrvol violated his Sixth Amendment Right in two major ways: 1) Forging Nguyen's signature stipulating to the admissibility and veracity of the NCMEC Reports (the very basis of the Government's case-in-chief) consigning him to the "functional equivalent of a guilty plea" (Pet. at 5, 7, 10, 12-12, 19-20; COA at 3, 5, 8); and 2) deprived Nguyen of "hav[ing] compulsory process for obtaining [a] witness in his favor/to be confronted with the witnesses against him," (Pet. at 5-7, 12-14, 16-18; COA at 3-4, 7-13. All of which was done without Nguyen's knowledge or consent.

There was also an instance where Hrvol knew (or reasonably should have known) Nguyen's knowledge and consent were required to waive certain procedural matters. Instead of getting that consent Hrvol just verbally waived the court's appointed interpreter to Nguyen's case (Pet. at 5-6, 11-14; COA at 5).

(a) Hrvol verbally waived Nguyen's statutory right to an interpreter without Nguyen's presence, knowledge, or consent.

Hrvol waived Nguyen's right to an interpreter despite Judge Jarvey determining that an interpreter was needed for Nguyen to understand (and participate) in what was to come in his case. Whether Hrvol was aware or not, he reasonably should have known there is a federal statute in place to protect foreign speaking citizens ability to participate fully in their court proceedings. The sentencing court failed in its duty to uphold Nguyen's protection to be present and participate in his trial through an appropriate intepreter when it allowed Hrvol to verbally waive Nguyen's interpreter, despite the statute requiingr a "personal waiver" (§1827) by the defendant. Nguyen was stripped of his fundamental right to participate in his trial by three separate individuals (the prosecutor, Hrvol, and the Chief Magistrate Judge) whose positions require them to ensure that Nguyen's rights are upheld during all stages of his criminal case which rests on his ability to understand what is happening. This was not the only instance, nor biggest way, Counsel Hrvol violated Nguyen's rights to a fair trial.

(b) Instead of challenging the Governments core evidence (as the defense expert advised) Counsel Hrvol forged Nguyen's signature on a stipulation document allowing critical evidence against Nguyen to be admitted unchallenged.

Hrvol failed in his sworn dutyto be loyal, competent, and zealously guard Nguyen's rights when he forged Nguyen's signature on the Government's stipulation (Doc. 69) essentially waiving of foundation and elements of the NCMEC Reports. Because the NCMEC Reports are programatically created, they cannot be self authenticating evidence like video. Without supporting testimony, the reports are nothing more than hearsay statements that require the Government to prove foundation because they are not established by direct evidence. The forged waiver allowed Nguyen's entire criminal case to be determined on circumstantial evidence violating Nguyen's Sixth Amendment right to confront his accusers, the NCMEC report authors, under the Confrontation Clause. Signing away the Government's required burden of proof, especially the sole proof used to indict, is not something that should be taken lightly and DEFINITELY not something that should be stripped from a defendant without their knowledge or consent. The Eighth Circuit relies on two cases to determine how district courts address counsel signing away a client's interpreter rights without consent. Neither of which the 2255 court addressed in its denial. Specifically:

> The argument that the district court should have accepted trial counsel's offer to stipulate, without any evidence of [defendant's] consent, fails to pass Constitutional muster. This Court has long held that a stipulation is the "functional equivalent of a guilty plea," requiring the district court "to determine whether [the defendant] knowingly and voluntarily agreed to the stipulation." To admit into evidence a stipulation without first inquiring into a defendant's knowledge and consent would violate his Constitutional rights.

United States v. Riley, 236 F.3d 982, 985 (8th Cir. 2000).

> Appellant was charged [more severely] because counsel stipulated ... without defendant's consent. Appellant [through] a writ of habeas corpus claimed IAC which the lower court denied. Appellant challenged the ruling where the court held that appellant's counsel's admissions without his consent was the functional equivalent of a guilty plea and could not be accepted unless appellant understood the consequences of the admission. The court also determined that the error was prejudicial.

Cox v. Hutto, etc, no.: 78-1482 U.S. App. LEXIS 7983 (8th Cir. 1978) (per curiam). It was, and had been, clear Nguyen strongly believed he was innocent, thus he refused any and all plea deals and insisted on going to trial. It is highly unlikely Nguyen would have fired his first attorney (Munnelly), if he would have accepted a plea deal to stipulate to something 'equivalent to a guilty plea.' Further, Nguyen's forgery claim was supported in the record by comparing Nguyen's signatures on the above referenced document to every other document on record that Nguyen has submitted to show they are not the same. See Cr. Doc. 69; See Also Pet. at 23; COA at 13. A review of the plethora of documents Nguyen did sign, comparing signatures, would establish the stipulation was signed by a different person. A simple step that if the lower court had allowed the 2255 to proceed would have been done. This straight forward review would have shown the stipulation was signed without Nguyen's knowledge or consent, as Nguyen has claimed:

> The Due Process Clause, U.S. Const. Amend. V, the same Constitutional values that impose procedural safeguards on the acceptance of a guilty plea also dictate that a defendant may not be treated as admitting to an element of an offense when he clearly and firmly expressed the desire to hold the Government to its burden of proof.

Riley, 236 F.3d at 985. Hrvol's actions were in clear violation of Nguyen's Constitutional rights and prevented Nguyen from truly fighting his case, as he wished, with the assistance of adequate counsel failing squarely within the ambit of a valid Ineffective Assistance of Counsel claim, yet somehow missed by the lower court. The lower court had claimed in it's Initial Review Order (Rule 4(b) Denial) that many of Nguyen's claims appeared frivolous. Rule 4(b) Denial at 2. Nguyen's forged stipulation claim, in particular, was not frivolous and yet was still completely unaddressed being lumped in with Nguyen's other claims that did "not entitle[him] to any relief." /Id. This is incorrect and this claim, alone, should have been further developed, warranting at minimum G.V.R.

3. Nguyen raised an interference with his statutory right to an interpreter, a potentially structural error echoing in the realm of ensuring fundamental fairness of criminal trials.

Nguyen's statutory interpreter claim sounds in Fifth Amendment waters as a protection of fundamental fairness. The question of whether or not improper denial of an interpreter is a structural error is a matter specifically left open by the Rushen Court:

> We thus need not reach the question ... whether the failure to provide an interpreter is structural error as opposed to the more common type that is subject to harmless error review. We note, however, that harmless error analysis generally applies even to the "fundamental right" to be present at trial, which [defendant] identifies as the source of the interpreter right.

Rushen, 464 U.S. at 117-18. According to the language in statute 28 U.S.C. §1827 "[To dismiss an interpreter from their appointed position, [it] require[s] a **personal waiver** from the defendant once the Court determines or the defendant points out, that English

is not his primary language." /Id (d)(1) and (f)(1) (emphasis added).

Such a finding, that English was not Nguyen's primary (or secondary) language was made. See Cr. Doc. 55 Text. When a waiver is signed it must be by the defendant under judge supervision to ensure knowledge and consent. Otherwise there is no Constitutional protection, rendering a flaw in the fundamental fairness fabric of the trial and raising a significant structural error claim. The right to understand the charges, and case, against a criminal defendant is bedrock to our criminal justice system. If the defendant cannot even understand the words being said, how can they participate fully? This protection deadzone results in cases like Nguyen's to fall through the cracks, allowing for a built in unavoidable prejudiced conclusion. Such a claim requires a full record to allow for the appellate and high court to grapple with the question with fleshed out arguments and positions. This was not done here due to the lower court's opaque Rule 4 dismissal, giving this Court the opportunity (via G.V.R.) to answer the question left open by the Rushen Court.

4. Nguyen presented a colorable Confrontation Clause claim which was overlooked by both the lower and appellate courts allowing the violation of his Sixth Amendment Right to stand without a post conviction challenge.

Nguyen made numerous claims in his amended 2255 motion revolving around Confrontation Clause violations. Pet. at 5-7. 10, 12-14, 17-20. There are mountains of Supreme and Circuit case law that disallowed the lower and appellate court from making a vaguely encompassing dismissal of Nguyen's petition. The peppering of such an allegations, in the Petition, at least, warranted proceeding further to an evidentiary hearing to test the validity of what

was, essentially, the Government's sole evidence used in Nguyen's guilty verdict. With an evidentiary hearing, Nguyen would have presented the numerous documents he gathered to prove Hrvol had forged his signature without his knowledge and consent, denying Nguyen his Sixth Amendment Right to confront the authors of the NCMEC reports as well as show the flaws in the documents foundation, veracity and how they actually exonerate him. The details and ramifications of Hrvol's unconstitutional decision to commit fraud and the lower and appellate courts inappropriate ruling are further discussed in the next section.

II. Nguyen's counsel was Constitutionally ineffective injecting a structural error into the trial by: forging Nguyen's signature stipulating to elements of the crime charged; and by waiving, without consulting Nguyen, the court appointed attorney.

Counsel Hrvol forged Nguyen's signature on the NCMEC stipulation in effect waiving foundation for Government's crucial Exhibits (Doc. 69). Specifically Hrvol agreed not to "object to the foundation and/or chain of custody" (/Id) of the evidence being submitted by the Government against Nguyen.

A few weeks before the trial, Meinke (Nguyen's paid expert) received a signed subpoena from the United States Attorney's Office, commanding he appear to testify at Nguyen's trial on the Government's behalf. The Government knew Meinke was retained for Nguyen's defense. At best the subpoena was improper and subject to quash; at worst, it constituted witness tampering. Pet. at 14.

The subpoena was relayed to Hrvol when Meinke informed him of receiving the order. Five days before Nguyen's trial was to begin, Meinke's colleague spoke with Hrvol once more on the phone to discuss the status of the subpoena, where Hrvol reassured the

gentlemen it would be quashed or resolved by way of Motion of Limine. The decision to fire, and not use, Meinke was not done in good faith, or with Nguyen's best interest in mind. As the record shows the basis ultimately used to convict Nguyen of the charges against him was the stipulated to Reports.

> The right to offer the testimony of witnesses, and to compel their attendance if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). Hrvol deprived Nguyen of both of these fundamental Due Process Rights.

> It is the accused, **not counsel** ... who must be confronted with the witnesses against him and who must be accorded compulsory process for obtaining witnesses in his favor.

Faretta v. State of California, 422 U.S. 806, 819 (1975) (cleaned up).

A. The Government was allowed, through fraudulent actions by counsel, to rely and present to the jury circumstantial evidence, without a challenge to the flimsy foundation which is rested on.

The linchpin to the Government's evidence was two testimonial Tumblr CyberTipline Reports which were forwarded to NCMEC by an algorithm in Tumblr's system. NCMEC wrote their own reports from those tips before in (the NCMEC Reports) was sent to Special Agent Larsen of the Iowa Division of Criminal Investigation. This would have been presented, but for the lower court's Rule 4(b) error. See Issue I, supra.

The First Circuit in Cameron v. United States, 699, F.3d 621 (2012) has found:

> [Both] NCMEC employee [and CyberTipsite] employee who created the CP Reports; they both analyzed the underlying information in the Image Upload Data and then used that information to create a separate, independent statement. The new statement made by NCMEC can be characterized along these lines: 'based on the [website] data, we have determined that the IP Address used by the suspect to upload the most recent image of child pornography is X, and the date and time of this upload is Y and Z.' Having determined that the CyberTipline Reports were indeed new statements by NCMEC, the question now is whether they were testimonial. The answer must be yes, for it is clear that the 'primary purpose' of a CyberTipline Report is to 'establish [] or prov[e] past events potentially relevant to later criminal prosecution.'

Cameron, 699 F.3d at 651; Citing Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705, 2714 (2011).

In other words, NCMEC does not always send exactly what it receives. New statements were made by NCMEC that constituted testimonial hearsay statements, which were admitted into evidence in violation of Nguyen's Confrontation Clause Rights. The records did not exists before criminal activity was discovered, the records stated conclusions about the meaning of the underlying data provided by Tumblr, and the records were created for the express purpose of reporting criminal activity.

Here, without the forged stipulation, the evidence would have not been admitted just because it was central to the prosecution's case. A case that was entirely circumstantial, with no foundation (sans the stipulation) being laid by direct evidence, as is required by the rules of evidence.

This is important to Nguyen's Confrontation Clause claim when it is taken in tandem with the fact that there was no child pornography found on Nguyen's other confiscated device(s). See Doc. 111, Trial Transcripts "TT", page 60 lines 8-13. With no child pornography found, and the NCMEC Reports discredited there

would be no evidence for the Government to base their charges on. Under prevailing norms, no competent counsel would have waived (stipulated to) the questionable foundation on which the Government's pivotal evidence (NCMEC Reports) rested when Hrvol prejudiced Nguyen and failed in his duty to zealously advocate on his client's behalf impermissibly preventing Nguyen from receiving a full and fair trial.

This breach of Sixth Amendment protection of the admittance of circumstantial evidence is almost a carbon copy of the Cameron case:

> "Our analysis [] supports the conclusion that these [NCMEC CyberTipline] reports were new statements made by NCMEC [and] constituted testimonial hearsay statements which were admitted into evidence in violation of [defendant's] Confrontation Clause rights. -- First, the Cybertipline Reports were introduced into evidence to prove the truth of the matters asserted in them. ... In fact, without the CyberTipline Reports the prosecution would not have been able to prove guilt as to [the multiple c]ounts of the indictment, which exclusively charge [defendant] with uploading digital images of child pornography on [an] specific account[] on specific dates. The only piece of evidence the government could have relied on to establish specific dates ... was the Tipline Reports, which reflected the date and time on which the most recent image of child pornography had been uploaded, as well as the IP address from which that upload had originated.
> Therefore, the CyberTipline Reports were introduced -- and admitted -- into evidence to prove the truth of the assertions contained therein, most importantly: that child pornography images were uploaded onto a particular [] account, and that the most recent one of those images was uploaded from a specific IP address on a specific date and time. The reasoning above the defeats the government's argument that the CyberTipline Reports are not really "statements" of NCMEC because all they do is simply convey information sent to NCMEC by [other] companies to [] law enforcement. The Government relies on testimony from [] the NCMEC witness to the effect that NCMEC does not add anything to the reports it receives via the CyberTipline, aside from a "report ID number and an

> entry date" for report. However this does not explain the fact that the CyberTipline Reports reflect the date and time of the most recent child pornography upload, while the receipts of the [] CP Reports do not.
> This, the admission of the CyberTipline Reports in these circumstances violated the Confrontation Clause.

Cameron, 699 F.3d at 649-53.

Proper foundation requires that the party produce evidence sufficient to support a finding that the preferred item is what the party claims it is. The law requires an open, visible connection between the principle of the evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. This is exactly what an expert witness is for and why it is necessary for them to be present to explain to a jury the importance to the components being presented and how they validate the presumption being made upon their reliance. Nguyen made a colorable post conviction claim that the stipulation/waiver to allow for the admittance of the reports was unconsented to by Nguyen. This would have led (if briefing was not stifled) to a showing of prejudice that without the stipulation, the Government would be burdened with establishing foundation (and probably could not) to the evidence being proposed. Or the evidence could become exculpatory. This should have been flagged the habeas court to hold an evidentiary hearing.

B. Nguyen requests a stay on this issue until the Court finishes grappling with two Confrontation Clause claims in Smith v. Arizona and Diaz v. United States.

There is still confusion throughout the country when it comes to who constitutes an expert witness; when and why they are needed as well; when, why, and how testimonial statements can be submitted by a non-testifying party. Which is (presumably) why this Court

has granted two certiorari petitions addressing some of the identified issues. See Smith v. Arizona, No.: 22-899 (set to be argued January 10, 2024) and Diaz v. United States, No.: 23-14 (granted certiorari November 13, 2023). Nguyen believes these cases will solidify the boundaries between hearsay and direct evidence, when it comes to specialists reports going to guilt or innocence; Outline Guidelines for what what is needed; delineate who must provide foundation for admittance under Federal Rules of Evidence; and what limitations must be in place for the process to be considered fair.

Here, there were reports compiled by algorithms based on parameters set by an analyst who created the program. Which were used to establish guilt, but never challenge because of counsel ineffectiveness.

To allow for Confrontation Clause guidance, Nguyen requests a stay on his Confrontation Clause claim until this Court has resolved the issues set forth in Smith and Diaz.

III. Nguyen requests a record on his Interpreter claim to be built for further review and discussions on its protection dimensions.

Nguyen's Interpreter allegations, supra, stem from a lack of enforcement of the protections provided by the Interpreter Act (28 U.S.C. §1827) that allowed for his counsel to sign away Nguyen's right to understand and be heard, preventing him from participating in his own trial. Whether violations of the Act's safeguards rise to a Constitutional dimension is an open question that can be answered on the record before this Court now. This would ensure that not only a defendant's counsel but any arbiter she makes her claim in front of, is accountable to ensuring her fundamental rights are protected.

Nguyen's trial record is silent in regards to whether or not he knowingly and willingly waived his right to an interpreter. Without a developed post conviction record to review: prejudice is difficult to determine. Even though the right to an interpreter is a statutory right, does failures in properly applying it rise to a Due Process error as a defendant has a fundamental right to be cognizant and participate in his own trial?

Nguyen's case is an attractive vehicle, if a record can be built, for resolving the following: Does the denial of a defendant's right to be present and participate in his own trial occur when there is no functioning interpreter? and In a habeas context can this be considered structural error? or Does a petitioner need to meet a Strickland-like two prong requirement of: 1) Specifically showing, on the record, where and when the defendant voiced concern of lack of understanding due to not having an interpreter; and 2) How the lack of an interpreter prejudiced the defendant and changed the outcome of their trial?

Being able to answer this conundrum would be essential in Nguyen's case as his concern with lack of interpreter and how it affected his whole trial process was the first "Statement of Mitigatory Facts" in Nguyen's 2255 Petition. See Pet. at 5. Nguyen respectfully requests this particular question be G.V.R.'d to allow him to build a record and have this question readdressed for later appellate and High Court review -- OR -- if the Court so chooses, rewrite he question and grant certiorari.

Conclusion

The Court should grant the petition and decide the case on the merits -OR- in the alternate, vacate and remand to the habeas court to address, in detail, the original claims of the petition on whether or not to grant original relief requested or allow for a record to be built for appellate review.

RESPECTFULLY SUBMITTED THIS 4 DAY OF JANUARY, 2024

Dustin Nguyen
19389-030 Unit K-3
FCI Sandstone
P.O. Box 1000
Sandstone, MN 55072

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

DUSTIN NGUYEN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

Appendices

Appendix A - Eighth Circuit Denial for COA

Appendix B - Denial of en banc

Appendix C - Constitutional, Statutes, and Rule provision text

Appendix D - District Court Denial of §2255

Appendix A

Eighth Circuit Denial for COA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1451

Dustin Nguyen

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:22-cv-00222-SMR)

JUDGMENT

Before LOKEN, COLLOTON, and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. Appellant's motion for default judgment is denied. The appeal is dismissed.

July 28, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix B

Denial of en banc

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1451

Dustin Nguyen

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:22-cv-00222-SMR)

ORDER

The petition for rehearing en banc and also for rehearing by panel is denied as overlength.

October 05, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix C

Constitutional, Statutues, and Rule provision text

CONSTITUTION OF THE UNITED STATES

Table of Contents

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

Part I. CRIMES

CHAPTER 110. SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the

Government of the United States, or in the Indian country as defined in section 1151 of this title [18 USCS § 1151], knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title [18 USCS § 1151], knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter [18 USCS §§ 2251 et

seq.], section 1591 [18 USCS § 1591], chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice) [10 USCS § 920], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice) [10 USCS § 920], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) Affirmative defense. It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

Part V. PROCEDURE

CHAPTER 119. EVIDENCE; WITNESSES

§ 1827. Interpreters in courts of the United States

(a) The Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States.

(b) (1) The Director shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters, when the Director considers certification of interpreters to be merited, for the hearing impaired (whether or not also speech impaired) and persons who speak only or primarily a language other than the English language, in judicial proceedings instituted by the United States. The Director may certify interpreters for any language if the Director determines that there is a need for certified interpreters in that language. Upon the request of the Judicial Conference of the United States for certified interpreters in a language, the Director shall certify interpreters in that language. Upon such a request from the judicial council of a circuit and the approval of the Judicial Conference, the Director shall certify interpreters for that circuit in the language requested. The judicial council of a circuit shall identify and evaluate the needs of the districts within a circuit. The Director shall certify interpreters based on the results of criterion-referenced performance examinations. The Director shall issue regulations to carry out this paragraph within 1 year after the date of the enactment of the Judicial Improvements and Access to Justice Act [enacted Nov. 19, 1988].

(2) Only in a case in which no certified interpreter is reasonably available as provided in subsection (d) of this section, including a case in which certification of interpreters is not provided under paragraph (1) in a particular language, may the services of otherwise qualified interpreters be used. The Director shall provide guidelines to the courts for the selection of otherwise qualified interpreters, in order to ensure that the highest standards of accuracy are maintained in all judicial proceedings subject to the provisions of this chapter [28 USCS §§ 1821 et seq.].

(3) The Director shall maintain a current master list of all certified interpreters and otherwise qualified interpreters and shall report periodically on the use and performance of both certified and otherwise qualified interpreters in judicial proceedings instituted by the United States and on the languages for which interpreters have been certified. The Director shall prescribe, subject to periodic review, a schedule of reasonable fees for services rendered by interpreters, certified or otherwise, used in proceedings instituted by the United States, and in doing so shall consider the prevailing rate of compensation for comparable service in other governmental entities.

(c) (1) Each United States district court shall maintain on file in the office of the clerk, and each United States attorney shall maintain on file, a list of all persons who have been certified as interpreters by the Director in accordance with subsection (b) of this section. The clerk shall make the list of certified interpreters for judicial proceeding available upon request.

(2) The clerk of the court, or other court employee designated by the chief judge, shall be responsible for securing the services of certified interpreters and otherwise qualified interpreters required for proceedings initiated by the United States, except that the United States attorney is responsible for securing the services of such interpreters for governmental witnesses.

(d) (1) The presiding judicial officer, with the assistance of the Director of the Administrative Office of the United States Courts, shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings—

(A) speaks only or primarily a language other than the English language; or

(B) suffers from a hearing impairment (whether or not suffering also from a speech impairment)

so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.

(2) Upon the motion of a party, the presiding judicial officer shall determine whether to require the electronic sound recording of a judicial proceeding in which an interpreter is used under this section. In making this determination, the presiding judicial officer shall consider, among other things, the qualifications of the interpreter and prior experience in interpretation of court proceedings; whether the language to be interpreted is not one of the languages for which the Director has certified interpreters, and the complexity or length of the proceeding. In a grand jury proceeding, upon the motion of the accused, the presiding judicial officer shall require the electronic sound recording of the portion of the proceeding in which an interpreter is used.

(e) (1) If any interpreter is unable to communicate effectively with the presiding judicial officer, the United States attorney, a party (including a defendant in a criminal case), or a witness, the presiding judicial officer shall dismiss such interpreter and obtain the services of another interpreter in accordance with this section.

(2) In any judicial proceedings instituted by the United States, if the presiding judicial officer does not appoint an interpreter under subsection (d) of this section, an individual requiring the services of an interpreter may seek assistance of the clerk of court or the Director of the Administrative Office of the United States Courts in obtaining the assistance of a certified interpreter.

(f) (1) Any individual other than a witness who is entitled to interpretation under subsection (d) of this section may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer and made expressly by such individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such individual, utilizing the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise competent interpreter, the nature and effect of the waiver.

(2) An individual who waives under paragraph (1) of this subsection the right to an interpreter may utilize the services of a noncertified interpreter of such individual's choice whose fees, expenses, and costs shall be paid in the manner provided for the payment of such fees, expenses, and costs of an interpreter appointed under subsection (d) of this section.

(g) (1) There are authorized to be appropriated to the Federal judiciary, and to be paid by the Director of the Administrative Office of the United States Courts, such sums as may be necessary to establish a program to facilitate the use of certified and otherwise qualified interpreters, and otherwise fulfill the provisions of this section and the Judicial Improvements and Access to Justice Act, except as provided in paragraph (3).

(2) Implementation of the provisions of this section is contingent upon the availability of appropriated funds to carry out the purposes of this section.

(3) Such salaries, fees, expenses, and costs that are incurred with respect to Government witnesses (including for grand jury proceedings) shall, unless direction is made under paragraph (4), be paid by the Attorney General from sums appropriated to the Department of Justice.

(4) Upon the request of any person in any action for which interpreting services established pursuant to subsection (d) are not otherwise provided, the clerk of the court, or other court employee designated by the chief judge, upon the request of the presiding judicial officer, shall, where possible, make such services available to that person on a cost-reimbursable basis, but the judicial officer may also require the prepayment of the estimated expenses of providing such services.

(5) If the Director of the Administrative Office of the United States Courts finds it necessary to develop and administer criterion-referenced performance examinations for purposes of certification, or other examinations for the selection of otherwise qualified interpreters, the Director may prescribe for each examination a uniform fee for applicants to take such examination. In determining the rate of the fee for each examination, the Director shall consider the fees charged by other organizations for examinations that are similar in scope or nature. Notwithstanding section 3302(b) of title 31, the Director is authorized to provide in any contract or agreement for the development or administration of examinations and the collection of fees that the contractor may retain all or a portion of the fees in payment for the services. Notwithstanding paragraph (6) of this subsection, all fees collected after the effective date of this paragraph [Oct. 19, 1996] and not retained by a contractor shall be deposited in the fund established under section 1931 of this title [28 USCS § 1931] and shall remain available until expended.

(6) Any moneys collected under this subsection may be used to reimburse the appropriations obligated and disbursed in payment for such services.

(h) The presiding judicial officer shall approve the compensation and expenses payable to interpreters, pursuant to the schedule of fees prescribed by the Director under subsection (b)(3).

(i) The term "presiding judicial officer" as used in this section refers to any judge of a United States district court, including a bankruptcy judge, a United States magistrate [United States magistrate judge], and in the case of grand jury proceedings conducted under the auspices of the United States attorney, a United States attorney.

(j) The term "judicial proceedings instituted by the United States" as used in this section refers to all proceedings, whether criminal or civil, including pretrial and grand jury proceedings (as well as proceedings upon a petition for a writ of habeas corpus initiated in the name of the United States by a relator) conducted in, or pursuant to the lawful authority and jurisdiction of a United States district court. The term "United States district court" as used in this subsection includes any court which is created by an Act of Congress in a territory and is invested with any jurisdiction of a district court established by chapter 5 of this title [28 USCS §§ 81 et seq.].

(k) The interpretation provided by certified or otherwise qualified interpreters pursuant to this

section shall be in the simultaneous mode for any party to a judicial proceeding instituted by the United States and in the consecutive mode for witnesses, except that the presiding judicial officer, sua sponte or on the motion of a party, may authorize a simultaneous, or consecutive interpretation when such officer determines after a hearing on the record that such interpretation will aid in the efficient administration of justice. The presiding judicial officer, on such officer's motion or on the motion of a party, may order that special interpretation services as authorized in section 1828 of this title [28 USCS § 1828] be provided if such officer determines that the provision of such services will aid in the efficient administration of justice.

(l) Notwithstanding any other provision of this section or section 1828 [28 USCS § 1828], the presiding judicial officer may appoint a certified or otherwise qualified sign language interpreter to provide services to a party, witness, or other participant in a judicial proceeding, whether or not the proceeding is instituted by the United States, if the presiding judicial officer determines, on such officer's own motion or on the motion of a party or other participant in the proceeding, that such individual suffers from a hearing impairment. The presiding judicial officer shall, subject to the availability of appropriated funds, approve the compensation and expenses payable to sign language interpreters appointed under this section in accordance with the schedule of fees prescribed by the Director under subsection (b)(3) of this section.

Part VI. PARTICULAR PROCEEDINGS

CHAPTER 153. HABEAS CORPUS

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of

the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a

whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

FEDERAL COURT RULES

Changes to court rules received by the publisher on or before September 1, 2023

Table of Contents

Rules Governing Section 2255 Proceedings

Rule 4. Preliminary Review

(a) Referral to a judge. The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.

(b) Initial consideration by the judge. The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

Appendix D

District Court Denial of §2255

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DUSTIN NGUYEN, Movant, v. UNITED STATES OF AMERICA, Respondent.	)	Case No. 4:22-cv-00222-SMR Crim. Case No. 1:19-cr-00061-SMR-HCA-1 INITIAL REVIEW ORDER

Movant Dustin Nguyen filed this *pro se* Amended Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. [ECF No. 7]. He challenges his sentence in *United States v. Nguyen*, 1:19-cr-00061-SMR-HCA-1 (S.D. Iowa) ("Crim. Case"), in which he was convicted of Receipt of Child Pornography. The Court takes judicial notice of the proceedings in that case.

I. BACKGROUND

Nguyen was sentenced to 120 months' imprisonment after a jury convicted him of receipt of child pornography, in violation of 18 U.S.C. § 2252. J., Crim. Case, ECF No. 106. Judgment was entered against Nguyen on June 30, 2021. J., Crim. Case, ECF No. 106. Thus, his right to appeal his sentenced expire on July 15, 2021. *See* Fed. R. App. P. 4(b) (governing appeal time limits). No direct appeal of the sentence was taken by Nguyen.

If it plainly appears from the face of the motion and any exhibits annexed to it that the moving party is not entitled to relief, the Court shall summarily dismiss the motion; otherwise, the Respondent shall be ordered to file an answer to the motion and the Court will hold further proceedings. 28 U.S.C. § 2255; Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

After careful review of the twenty-five page Motion, it plainly appears that Nguyen is not entitled to any relief. Nguyen had previously filed a motion in this case, asserting seven grounds for

relief but many of them appeared frivolous and the motion was not fully legible. [ECF No. 5]. The Court directed him to file an amended motion that succinctly set forth the grounds for relief with a brief statement of facts in support of his grounds. *Id.* His amended motion also needed to be typed or legibly handwritten.

In his Amended Motion, Nguyen asserts six grounds for relief: (1) actual innocence; (2) constructive denial of counsel; (3) lack of jurisdiction; (4) due process violation in identification; (5) structural error; and (6) unconstitutionality of the crime of his conviction. The amended motion, although in typewritten form, is rambling and it is difficult to discern the grounds supporting Nguyen's asserted relief. Nevertheless, "the files and records of the case conclusively show that Nguyen is entitled to no relief" because he has not made any showing that his "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a)–(b).

Based on its review, the Court finds the files and records of this case conclusively demonstrate Nguyen is not entitled to any relief. This case must be dismissed without a hearing. *See* 28 U.S.C. § 2255; *Franco*, 762 F.3d at 763. Nguyen's Amended Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, [ECF No. 7], is DENIED, and the case is DISMISSED. The Motions at docket 6 and docket 8 are MOOT.

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States Courts, the Court must issue or deny a Certificate of Appealability when it enters a final order adverse to the movant. District courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). A certificate of appealability may issue only if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing is a showing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322,

336 (2003) (citation omitted). Nguyen has not made a substantial showing of the denial of a constitutional right on his claims. He may request issuance of a certificate of appealability by a judge with the Eighth Circuit. *See* Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated this 13th day of February, 2023.

STEPHANIE M. ROSE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

DUSTIN NGUYEN — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, DUSTIN NGUYEN, do swear or declare that on this date, Jan 5, 2024., as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

ORIGINAL MAILED TO:
SUPREME COURT OF THE U.S.
1 FIRST STREET, N. E.
WASHINGTON, DC 20543

The names and addresses of those served are as follows:

1) SOLICITER GENERAL OF THE UNITED STATES, ROOM 5616, DEPARTMENT OF JUSTICE, 950 PENNSYLVANIA AVE., N.W., WASHINGTON DC 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Jan 5, 2024

AT SANDSTONE, MINNESOTA

(Signature)

DUSTIN NGUYEN, No. 19389-030 - K3
P. O. BOX 1000 (FCI SANDSTONE)
SANDSTONE, MN 55072