NO. 24-5707

IN THE
SUPREME COURT OF THE UNITED STATES

GARY E. PEEL,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to United States Court of Appeals For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals, in violation of Supreme Court precedents[1] erred by affirming federal convictions for non-criminal conduct and by denying an evidentiary hearing when unimpeachable, exonerating, newly discovered evidence proves "actual innocence."
2. When an actually innocent person is federally convicted of non-criminal conduct, is there no post-conviction remedy when the Seventh Circuit Court of Appeals ignores or misinterprets multiple controlling Supreme Court precedents (See footnote 1) that would otherwise mandate vacating the wrongful convictions?

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[1] *Ex Parte Bain,* 121 U.S. 1 (1887) - lack of subject matter jurisdiction;
Williams v United States 327 U.S. 711, 717-718, 90 L.Ed. 962 (1946)
-improper "borrowing" of state law to rescue an otherwise failed federal criminal prosecution;
Calder v Bull 1 L.Ed. 648, 3 Dall 386, 390 (1798), et al.
-*Ex Post Facto* Clause (Art. I, Sec. 9, Cl. 3) violation;
Ashcroft v Free Speech Coalition 535 U.S. 234 (2002), et al.
- Free Speech Clause (First Amendment) violation;
Andrus v Allard, 444 U.S. 51, 55, 62 L.Ed.2d 210, 2216 (1979), et al.
- Due Process "Takings" Clause (Fifth Amendment) violation;
Adoptive Couple v Baby Girl, 570 U.S. 637, 186 L.Ed.2d 729, 759 (2013)
- Due Process "Fair Notice" Clause (Fifth Amendment) violation;
Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935)
-Due Process "Fair Trial" Clause (Fifth Amendment) violation; and
Village of Willowbrook v Olech 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)-Fourteenth Amendment "Equal Protection" Clause violation.

PARTIES TO THE PROCEEDINGS

The Parties below were (1) Gary E. Peel and (2) the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Gary E. Peel respectfully petitions this Court for a Writ of Certiorari to review the decisions of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions of the Seventh Circuit, *on direct appeal*, are reported at 595 F.3d 763 (7th Cir. 2010)(Appendix) and 668 F.3d 506 (7th Cir. 2012)(Appendix H).

The 6-13-22 Order of the District Court denying Peel's' "COMBINED PETITION for WRIT OF ERROR *AUDITA QUERELA* (as to Count of the Indictment), WRIT OF ERROR *CORAM NOBIS* as to Counts 3 &4 of the Indictment, and/or, alternatively RELIEF FROM "AMENDED JUDGMENT IN A CRIMINAL CASE" pursuant to a WRIT OF ERROR UNDER THE ALL WRITS ACT 28 U.S.C. §1651 (as to Counts 1,3 & 4 of the Indictment" is reported at 06-cr-30049-SMY (S.D. Ill. Jun. 13, 2022)(Appendix G).

The 3-23-23 Order of the Seventh Circuit, denying the appeal of Peel's above referenced "Combined Petition...." (Appendix E) is reported at No. 22-2616 (7th Cir. Mar. 23, 2023)

The 5-2-23 Order of the Seventh Circuit (Appendix D), denying Peel's request for rehearing and rehearing *en banc* with regard to his "Combined Petition..." is reported at No. 22-2616 7th Cir. May 2, 2023.

The 7-29-24 Order of the Seventh Circuit, denying Peel's MOTION TO RECALL THE MANDATE (Issued May 10, 2023) is attached at Appendix B.

The 8-22-24 Order of the Seventh Circuit, denying Peel's request for rehearing and rehearing *en banc* pertaining to the MOTION TO RECALL THE MANDATE (Issued May 10, 2023) is attached at Appendix A.

JURISDICTION

The Seventh Circuit issued its decision, denying Peel's MOTION TO RECALL THE MANDATE (Issued May 10, 2023) on7-29-24. On 8-22-24, the Seventh Circuit denied Petitioner's timely filed Petition for Rehearing and Rehearing *en banc*. This Petition for Writ of Certiorari has been timely filed. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §1254(1)

However, as discussed *infra* with regard to Counts 3 & 4 of the Indictment (Appendix L) charging possession of child pornography in violation of 18 USC §2252A(a)(5)(B), Peel challenges federal court subject matter jurisdiction because the Indictment, on its face, and as confirmed by all relevant trial testimony, alleges the child pornography "victim" to have been a 16-year-old [adult] when the subject photographs were produced in 1974 when federal law defined an adult for the purposes of sexual activities, as a person who had attained the age of 16.

PEEL STILL SUFFERS ADVERSE CONSEQUENCES

Peel still suffers adverse consequences from his convictions. These include a denial of his bankruptcy discharge and sex offender registration restrictions.

CONSTITUTIONAL PROVISIONS INVOLVED

With regard to the Count 1 bankruptcy fraud conviction, The Fifth Amendment Due Process "Fair Trial" Clause is implicated.

Count II of the Indictment (Appendix L), alleging obstruction of justice was dismissed, as duplicitous of Count 1, following Peel's first direct appeal.

With regard to possession of child pornography convictions (Counts 3 & 4), the following *constitutional* provisions are implicated, i.e. the *Ex Post Facto* Clause (Art. I, Sec. 9, Cl. 3) of the United States Constitution provides: "No Bill of Attainder or *ex post facto* Law shall be passed."

- The First Amendment Free Speech Clause provides, in pertinent part, "Congress shall make no law... abridging the freedom of speech;
- The Fifth Amendment Due Process "Takings" Clause, provides, in pertinent part, "No person shall be deprived of life, liberty, or property, without due process of law; ...nor shall private property be taken for public use, without just compensation,"
- The Fifth Amendment Due Process "Fair Notice" Clause, provides, in pertinent part, " No person shall be... deprived of life, liberty, or property, without due process of law; and
- The Fourteenth Amendment Due Process "Equal Protection" Clause, provides in pertinent part, "...No State shall ...deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

With regard to the possession of child pornography convictions (Counts 3 & 4), the following *statutory* provisions are implicated, i.e.

1. Section 2252A(c), Title 18, United States Code, provides:

Any person who-

....

(5) either-

(A)....

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).

....

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that –

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

2. 18 USC §§7(3) & 13(a), the Assimilative Crimes Act, provides, in relevant part,

"Whoever ... is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

JURY INSTRUCTIONS INVOLVED

With regard to the possession of child pornography convictions (Counts 3 & 4), the following jury instructions are implicated, i.e.

A. The Seventh Circuit's own pattern criminal jury instruction, [18 U.S.C. § 2252A(c) Affirmative Defense To Charges Under 18 U.S.C. §§ 2252A(a)(1), (a)(2), (a)(3)(A), (a)(4) or (a)(5)]- provides:

> "If the defendant proves that it is more likely than not that the alleged child pornography was produced using actual adults at the time the material was produced, then you should find him not guilty of possessing child pornography."

B. The trial Court's judicially noticed fact and caveat/instruction to the jury (Appendix K) that:

> "And this Court does take judicial notice of the fact. This is not an issue in this case."

STATEMENT OF THE CASE

In 1974, when the federally defined age of consent for sexual activity was 16, Peel had an affair with his then wife's 16-year-old (adult) sister. During that brief consensual affair Peel took a handful of nude Polaroid photographs of the adult sister. While this affair was ill advised and morally offensive, it was not a federal criminal offense in 1974.

On 7-22-05 Peel filed for Chapter 7 bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of Illinois (Case No. 05-33328). On 11-9-05 Peel's ex-wife, a disputed contingent creditor, filed a Proof of Claim for $2,800,000 (Claim #2-1). Peel attempted to settle his ex-wife's claim by offering her approximately $5-600,000 (including stock).

Peel was indicted on March 22, 2006, with federal jurisdiction asserted under 18 USC §152(6) for bankruptcy fraud, 18 USC§1512(c)(2) for obstruction of justice, and two counts under18 USC §2252A(a)(5)(B) for possession of child pornography.

At trial, the Government argued that Peel utilized the nude photographs of his ex-wife's sister in a failed attempt to coerce a bankruptcy settlement to his ex-wife's financial *detriment*, i.e. less than her $2,800,000 claim. Newly discovered evidence (decisions of three separate courts) now proves that the Government utilized the ex-wife's false $2,800,000 claim to secure Peel's conviction. Peel's settlement $5-600,000 offer greatly exceeded the true value of his ex-wife's claim ($158,455.63).

In 1974, when the subject photographs were *produced*, there were no federal child pornography laws concerning production or possession and a 16-year-old was an adult.

Congress established 16 as the age of consent for sexual activity in 1889 (20 Cong. Rec. 997). In 1978 Congress passed the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) criminalizing the use of children to create pornography but did not prohibit mere possession of child pornography. In 1984 Congress enacted the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 raising the age of consent for sexual activity to 18, still without criminalizing possession of child pornography. It was not until 1990, with the passage of the Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Title III, 104 Stat 4816, that Congress extended the

federal child pornography laws to criminalize possession of child pornography. The Seventh Circuit's reliance upon the 1984 statute to justify Peel's conviction (see 668 F.3d at 509) is a "red herring." That statute is only applicable to alleged child pornography *produced* after that statute's passage in 1984. The charging statute, its affirmative defense, the Seventh Circuit's corresponding affirmative defense jury instruction (with committee comments) and the Supreme Court decisions in *Ashcroft v Free Speech Coalition* and *United States v Stevens* all mandate the date of *production* (here, 1974) as the exclusive factor for purposes of determining minority status. The Seventh Circuit is not at liberty to alter this factor.

The trial judge took judicial notice that 16 was the age of consent in 1974, but – without objection by defense counsel- instructed the jury that that was not an issue in the case.

Additionally, Peel's defense lawyers failed to seek a dismissal of the child pornography counts even though the Indictment (Appendix L), on its face, alleged the child pornography "victim" to have been 16 years old (an adult) when the subject photographs were *produced.*

Peel's defense lawyers also failed to raise the charging statute's affirmative defense or tender the Seventh Circuit's exonerating pattern criminal affirmative defense jury instruction that the alleged child pornography "victim" was an *adult* when the subject photographs were *produced.*

A jury verdict of "guilty" was returned on all four (4) counts on 3-23-07. Judgment and conviction were entered on 11-19-07.

Peel's first direct appeal [595 F.3d 763 (7th Cir. 2010)] affirmed, in part, and reversed, in part, the judgment. Count 2 was thereafter dismissed as duplicitous of Count 1.

The 8-1-11 Amended Judgment (Appendix I) imposed the same sentence. A second appeal was taken. On 2-6-12, the Seventh Circuit affirmed Peel's conviction and revised sentence [668 F.3d 506 (7th Cir. 2012)].

During the trial and during the first and second direct appeal, the lack of subject matter jurisdiction for the child pornography charges were never raised by trial or appellate defense counsel. No constitutional issues were raised by defense *trial* counsel. Only First Amendment and *Ex Post Facto* constitutional issues were raised by defense *appellate* counsel. Both constitutional arguments were rejected by the Seventh Circuit.

On 8-1-11, Peel, *pro se,* filed his first §2255 Motion. (Case No. 11-CV-660). Same was dismissed on 12-7-11.

On 12-19-11 [twelve (12) days later] the Bankruptcy Court entered an Order disclosing "*newly discovered evidence*" – discussed *infra* – that the actual value of Peel's ex-wife's bankruptcy claim was only $158,455.63, not $2,800,000 as presented by the Government to the criminal trial jury (and substantially less than the approximate $500,000-$600,000 that said jury was informed Peel had offered to *coerce* his ex-wife into a settlement that was to her financial detriment. The jury was not informed that Peels' ex-wife's $2,800,000 was a false claim and therefore a

felony under 18 USC §152(4), i.e. that the wrong person had been charged with bankruptcy fraud.

On 3-29-12 Peel filed a Second §2255 Motion. (Case No. 12-CV-275). It and a Certificate of Appealability were denied on 4-29-12, (2013 U.S. Dist. LEXIS 60865).

An appeal seeking consolidation and recall of prior mandates was denied on 10-18-13, [Appellate Case No. 13-2124, Reh. Den. on 12-3-13. Cert. Den. 2-24-14, (188 L.Ed.2d 354)]. On 5-11-14, a *habeas* Petition -*without raising constitutional issues* – was filed in the Eastern District of Kentucky (No. 14-CV-77). It was denied on 7-21-14 (2014 U.S. Dist. LEXIS 98552). Denial affirmed on 2-26-15 (Appellate No. 14-6005, Reh. Den. on 11-16-15, Cert. Den. 193 L.Ed.2d 411).

On 10-13-15 Peel filed, in the Seventh Circuit, an "Emergency Motion for Immediate Release from Custody or in the Alternative for Permission to File a Second or Successive Motion for Relief Under 28 USC §2255 Based Upon Newly Discovered Evidence." It was denied on 10-16-15. Reh Den. on 11-2-15 (Appellate Case No. 15-3269).

On 12-4-15 Peel filed a "Motion to Reform Judgment and Sentence Under Rule 60(b) in Case 06-CR-30049. It was denied on 5-12-16 as time barred. On 3-25-16, Peel filed, with the Seventh Circuit, a "Motion for Leave to File a Second or Successive Collateral Attack to Recall Mandate." It was denied on 4-11-16. Reh. Den. on 5-2-16 (Appellate Case No. 16-1665).

On 7-25-16 Peel filed a "Motion to Set Aside Amended Judgment in A Criminal Case for Fraud Upon the Court Pursuant to F.R.Civ.P. 60(d)(3)." It was

denied on 8-15-16. On 12-29-16, the Seventh Circuit ordered the District Court Order of 8-15-16 vacated with instructions to dismiss for lack of jurisdiction and denied the "implicit request for permission to bring a successive **§2255** motion..." (Appellate Case No. 16-3297). On 1-18-17, a "Petition for Original Writ of *Habeas Corpus*" was filed with the Supreme Court.(Case No. 16-8577). It was summarily denied on 4-24-17.

On 9-28-17, Peel filed a *Habeas* Petition in the Southern District of Illinois. [Case No. 17-cv-1045]. It was procedurally denied on 7-18-18. That *Habeas* appeal [Appellate Court No. 18-2732], along with all pending motions, was denied on June 4, 2021, Reh. Den. on 6-30-21. Cert. Den. 10-4-21 (Case No. 21-5129).

On 11-1-21, Peel filed a COMBINED PETITION for WRIT OF ERROR *AUDITA QUERELA* (as to Count 1 of the Indictment), WRIT OF ERROR *CORAM NOBIS* (as to Counts 3 & 4 of the Indictment), and/or, alternatively, RELIEF FROM "AMENDED JUDGMENT IN A CRIMINAL CASE" pursuant to a WRIT OF ERROR UNDER THE ALL WRITS ACT (28 USC §1651) (as to Counts 1, 3 & 4 of the Indictment). Same was denied on 6-13-22 (Doc.#286)(Appendix G). Peel's "Motion to Reconsider" was denied by "Memorandum and Order" entered 9-7-22 (Doc.#290). On 9-14-22 Peel filed his "Notice of Appeal."

On 3-23-23 the Seventh Circuit Court of Appeals (Case No. 22-2616) DENIED the COMBINED PETITION for WRIT OF ERROR *AUDITA QUERELA* (as to Count 1 of the Indictment), WRIT OF ERROR *CORAM NOBIS* (as to Counts 3 & 4 of the Indictment), and/or, alternatively, RELIEF FROM "AMENDED JUDGMENT

IN A CRIMINAL CASE" pursuant to a WRIT OF ERROR UNDER THE ALL WRITS ACT (28 USC §1651) (as to Counts 1, 3 & 4 of the Indictment)(Appendix E). A Petition for Rehearing and/or Rehearing *en banc* was DENIED on 5-2-23 and the Mandate was issued on 5-10-23 (Appendix F).

ON 5-18-23 a PETITION FOR WRIT OF CERTIORARI was filed with the United States Supreme Court and assigned Case No. 22-7678. The PETITION FOR WRIT OF CERTIORARI was DENIED on 10-2-23 (Appendix C).

On 6-10-24 Peel filed his Motion to Recall the Mandate (Issued May 10, 2023.

On 7-29-24 the Seventh Circuit entered an Order denying Peel's MOTION TO RECALL THE MANDATE (Issued May 10, 2023), (Appendix B).

A Petition for Rehearing and/or Rehearing *en banc* was denied by the Seventh Circuit on 8-22-29, (Appendix A).

REASONS FOR GRANTING THE WRIT

The reasons for granting the Writ of Certiorari are multiple and relate to both the bankruptcy fraud conviction and the child pornography convictions.

I.-Previous Post-Conviction Petitions Have *Not* Been Addressed *On Their Merits.*

The Seventh Circuit's justification for rejecting Peel's persistent post-conviction petitions is that Peel has impermissibly attempted to relitigate issues presented in previous collateral attacks.

However, while the Seventh Circuit did (erroneously) address Peel's *ex post facto* argument on *direct* appeal, none of Peel's constitutional issues

(including the erroneous *ex post facto* argument) have been addressed in Peel's post-conviction actions. Additionally, none of Peel's ineffective assistance of counsel claims, his other constitutional claims, the Seventh Circuit's failure to abide by multiple Supreme Court precedents, nor Peel's entitlement to an evidentiary hearing based upon unimpeachable, exonerating, newly discovered evidence were ever addressed on their merits in any of Peel's post-conviction filings. Utilizing the argument that Peel is impermissibly attempting to relitigate issues presented in previous collateral attacks is a hollow justification for turning a blind eye when those previously raised issues have never been addressed on their merits by the Seventh Circuit Court of Appeals.

II.-Regarding Peel's Bankruptcy Fraud conviction, the decision of the Seventh Circuit Court of Appeals conflicts with this Court's Fifth Amendment's Due Process "Fair Trial" Clause decisions in *McQuiggin v Perkins*, *Kaufman v United States*, *Mooney v. Holohan*, *Schlup v. Delo*, *Lisenba v California*, and *Colorado v Connelly*.

Beginning four (4) years after trial, unimpeachable, exonerating, newly discovered evidence confirmed that the Government's bankruptcy fraud conviction, under 18 USC §152(6), was procured *exclusively* by utilizing **false** evidence. The Seventh Circuit, in violation of Supreme Court precedent has denied Peel any opportunity for an evidentiary hearing to demonstrate his "actual innocence" (factually and legally).

To secure Peel's bankruptcy fraud conviction, the Government had posited three (3) theories of criminal culpability.

a. The first theory:

> Peel threatened to send the pornographic photographs to his ex-wife's parents, if his first wife did not abandon her objection to discharge.

This theory *temporally failed* based upon Bankruptcy Court documentation (a Bankruptcy Court Minute Record and associated Transcript of Proceedings) proving that the ex-wife, through her attorney, had withdrawn her objection to discharge two weeks *prior* to any alleged threat or criminal conduct by Peel.

b. The second theory:

> Peel corruptly pressured his ex-wife (bankruptcy creditor) to abandon her attempts to take the deposition of his second wife.

This theory collapsed when the first wife's attorney testified and admitted that the second wife had, in fact, been tendered for her deposition, but that he and the first wife and refused to execute a limited use agreement, a Bankruptcy Court pre-condition for the deposition's taking. (A fax from Peel's lawyer to his first wife' lawyer also confirmed the tender of Peel's second wife for her deposition on two different dates.)

c. The final theory:

Peel threatened to mail the nude pictures of his ex-wife's sister to his ex-wife's parents unless she agreed to a new settlement *to her financial detriment.*

This final theory now fails because of the unimpeachable, exonerating newly discovered evidence[2] that the Government had used the ex-wife's false $2,800,000 bankruptcy claim as the exclusive basis to secure the conviction, when, in fact Peel's settlement offers ($500,000-$600,000, including stock) had greatly exceeded the true value of her claim, i.e. $158,455.63.

i. This final theory provided the sole basis for Peel's bankruptcy fraud conviction

ii. AUSA Jennifer Hudson's closing argument to the jury acknowledged, in part, i.e. "Second, the Government must prove to you that the Defendant attempted to obtain an advantage or promise of an advantage."

Utilizing false evidence to convict Peel of Bankruptcy Fraud, violates the Fifth Amendment's Due Process "Fair Trial" Clause. See *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935); *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Lisenba v California* 314 U.S. 219, 236, 86 L.Ed.

[2] A 12-19-11 Bankruptcy Court decision; a District Court affirmance on 2-13-13 (2013 U.S. Dist. LEXIS 19478); and the Seventh Circuit's 8-2-13 decision in *In re [The Debtor] Gary E. Peel,* 725 F.3d 696 (CA7, 2013)

166 (1941); and *Colorado v Connelly* 479 U.S. 157, 167, 93 L.Ed.2d 473 (1986).

In denying Peel an evidentiary hearing to demonstrate that the above-referenced unimpeachable, exculpatory, newly discovered evidence, proved that false evidence was utilized by the Government as the *only* basis to secure Peel's bankruptcy fraud conviction, the Seventh Circuit violated Supreme Court precedent that permits an evidentiary hearing to demonstrate "actual innocence." See *McQuiggin v Perkins* 569 U.S. 383 (2013), *Schlup v Delo,* 513 U.S. 298, 327 (1995)] and *Kaufman v United States* 394 U.S. 217, 228, 89 S.Ct. 1068, 1075, 22 L.Ed.2d 227 (1969).

In *McQuiggin v Perkins* 569 U.S. 383, 185 L.Ed.2d 1019, 1025, 1331-1332 (2013), the Supreme Court held that the petitioner's right to pursue his claim of "actual innocence" exists 1) despite any conditions or restrictions imposed by AEDPA, 2) even in the absence of showing of cause for procedural default, 3) even if the relief sought is through a second or successive petition, 4) even if a procedural bar to relief would otherwise apply, and 5) even if a statute of limitations might arguably preclude the claim.

And despite *McQuiggin,* both the District Court and the Seventh Circuit Court of Appeals have denied Peel even a modicum of an evidentiary hearing to prove his "actual innocence" of bankruptcy fraud.

III.-Regarding Peel's Possession of Child Pornography convictions, the decision of the Seventh Circuit Court of Appeals conflicts with this Court's decisions in *Lively v. Wild Oats Markets, Inc., Williams v United States,*

Calder v Bull, Ashcroft v Free Speech Coalition, Andrus v Allard, Adoptive Couple v Baby Girl, Mooney v. Holohan,* and *Village of Willowbrook v Olech

With regard to Peel's two possession of child pornography convictions, the Seventh Circuit, without subject matter jurisdiction (because no child was depicted or participatory in the *production* of the subject photographs required by *Free Speech Coalition* and *Stevens),* a), has refused to address the merits of Peel's arguments in the context of contradictory Supreme Court precedents that

a. he has been convicted of non-criminal conduct, leaving the federal courts without subject matter jurisdiction;

b. the Indictment (Appendix L), on its face, and as confirmed by the "victim's" trial testimony, confirmed the alleged the child pornography "victim" to have been an adult, not a child, when the subject photographs were *produced* in 1974;

c. Illinois State law cannot be "borrowed" to rescue a failed federally defined criminal prosecution (See *Williams v United States*), despite the Seventh Circuit's borrowing Illinois State law to the contrary. See *United States v Peel* 668 F.3d 506, 510 (7th Cir. 2012);

d. the *Ex Post Facto* Clause (Art. I, Sec. 9, Cl. 3), the First Amendment Free Speech Clause, the Fifth Amendment Due Process "Takings" Clause, the Fifth Amendment Due Process "Fair Notice" Clause, the Fifth Amendment Due Process, "Fair Trial" Clause, and the Fourteenth Amendment Due Process "Equal Protection" Clause, were all violated in procuring Peel's convictions;

e. the trial judge's caveat/instruction to the jury that the "victim's" age at the time the subject photographs were *produced,* in 1974, was not an issue in the case, despite the charging statute's language to the contrary and despite the Seventh Circuit's corresponding Affirmative Defense Jury Instruction to the contrary, deprived Peel of a "Fair Trial" in violation of the Fifth Amendment's Due Process "Fair Trial" Clause;

Additionally, Peel's trial and appellate counsel provided ineffective assistance of counsel for failure, *inter alia,* to raise, or timely raise, the above-referenced issues.

A. As applied to Counts 3 & 4 of the Indictment (Appendix L), the federal courts lack subject matter jurisdiction to prosecute Peel for possession of child pornography.

The federal Government's authority, if any, to prosecute Peel derives from 28 USC §533(1) which provides "The Attorney General may appoint officials—(1) to detect and prosecute crimes against the United States...." Peel's charging statute, 18 USC §2252A(a)(5)(B), only authorizes prosecution where the child pornography "victim" is a child, or minor, at the time of *production, regardless of the date of possession.* Since the federally defined age of consent was established at 16 in 1889 (20 Cong. Rec. 997) and remained so until 1984 (with the passage of The Child Protection Act of 1984, Pub. L. No. 9-292, 98 Stat.204), the Indictment here Appendix L), in Peel's case – by affirmatively alleging the "victim" to have been 16 years of age (an adult) in 1974 when the subject photographs were *produced,* fails to allege a federal

criminal offense. The alleged "victim's" trial testimony, that she was born on 7-17-57, merely reaffirms her adult status in 1974. When an essential element of the offense is omitted from the indictment, it cannot, consistent with the principle underlying the Fifth Amendment requirement that prosecution for an infamous crime be instituted by a grand jury, be supplied by the prosecutor or by the courts. As stated in *Russell v. United States,* 369 U.S. 749, 770 (1962):

> "To allow the prosecution, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

Federal courts are courts of limited jurisdiction. They have jurisdiction to determine whether they have jurisdiction. See *Lively v. Wild Oats Markets, Inc,* 2006 WL 3425193, n.2. (2006); *United States v. United Mine Workers* 330 U.S. 258, 290, 67 S.Ct. 677, 91 L.Ed. 884 (1947), and *Russell v. United States,* 369 U.S. 749, 770 (1962): However, on that point, *United States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), overruled *Ex Parte Bain,* holding that defects in the indictment are not jurisdictional[3]. *Cotton* also held that "[b]ecause subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived." *Cotton,* at p.625. Then, in *United States v. Muresanu,* 951 F.3d 833, 838 (7th Cir. 2020), the Seventh Circuit recognized a circuit split on the interpretation

[3] Unlike here, in Peel's case, where a non-crime was affirmatively alleged, the *Cotton* indictment did charge a criminal offense but omitted a fact necessary for sentencing (the quantity of drugs possessed).

of observing that

> "The circuits are split on the proper interpretation of Cotton. The Eleventh Circuit reads the Court's holding as limited to defective indictments that omit necessary allegations but nonetheless charge some federal crime. United States v. McIntosh, 704 F.3d 894, 901-03 (11th Cir. 2013). On this view, the rule announced in Cotton does not apply if an indictment fails to allege any federal crime at all. Id. The Fifth and Tenth Circuits read Cotton more broadly, applying it even when an indictment fails to state an offense; on this view, defects in an indictment—of whatever kind—are not jurisdictional. United States v. De Vaughn , 694 F.3d 1141, 1148-49 (10th Cir. 2012); United States v. Cothran, 302 F.3d 279, 283 (5th Cir. 2002).
> We think the Fifth and Tenth Circuits have the better reading..."

The Eleventh Circuit recognized that "indictment errors are not all the same." See *McCoy v. United States,* 266 F.3d 1245, 1249 (11th Cir.2001). In *United States v. McIntosh*, 704 F.3d 894, 902 (11th Cir. 2013), the Eleventh Circuit opined:

> "The former defect [one that alleges no crime at all] deprived the district court of jurisdiction-not because the indictment was defective, but because Congress's grant of jurisdiction to the district courts in criminal cases extends only to "offenses against the laws of the United States. "See 18 USC§3231. If an indictment fails to charge such an offense, then a court has no basis for exercising jurisdiction. See United States v. Peter, 310 F.3d 709, 713–14 (11th Cir.2002)..."

To resolve the Circuit split, and to address Peel's lack of subject matter jurisdiction argument, this Court should find that Peel's possession of child pornography convictions were fatally defective because the Indictment (Appendix L), on its face, and as confirmed by the alleged "victim," failed to allege a federal criminal offense.

B. Illinois State law cannot be "borrowed" to rescue a failed federally defined criminal prosecution.

In a desperate attempt to validate Peel's conviction, the District Court (Doc.#286, p.6) declared that Peel had not demonstrated a "fundamental error that invalidates" his conviction because he "...is, in fact, guilty of the crime." This declaration of "guilt" was erroneously incentivized by the Seventh Circuit's decision (668 F.3d 506, 510) that implied, without declaring, that to uphold the conviction, it had "borrowed" Illinois law in "1976" [sic] when a 16-year old was still deemed a minor.[4] However, the Assimilative Crimes Act, 18 USC §§7(3) & 13(a) forbids "borrowing" state law unless 1) the alleged criminal offense occurs on a federal enclave or federal admiralty/maritime property, *and* 2) the act or omission is not made punishable by an enactment of Congress. Here, the Indictment (Appendix L, pp.4&5) alleges the offense occurred in "St. Clair County, within the Southern District of Illinois" - but no allegation is made, and no trial evidence exists, that the alleged criminal offense transpired on a federal enclave or on federal admiralty/maritime property. Additionally, the alleged offense is specifically made punishable by Congressional enactment (18 USC §2252A). Because neither Assimilative Crimes Act condition is present here, Illinois state law cannot be "borrowed" to force the alleged "victim" into minority status. For this reason alone, the conviction must be vacated.

[4] The Seventh Circuit made no reference to Illinois law in Peel's first direct appeal. (595 F.3d 763). By "borrowing" Illinois law, the District and Appellate Court, not only violated the Assimilative Crimes Act, but and Supreme Court precedent (*Williams v United States)*, but also substituted their own preferred evidence for that submitted at trial, i.e. the judicially noticed fact that "... in 1973 and 1974, the age of consent for sexual activity was 16." [Appendix K]. Superior courts "do not have the right to simplify or otherwise change the facts of a case in order to make our work easier or to achieve a desired result." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1512, 200 L.Ed.2d 821 (2018).

In *Williams v. United States*, 327 U.S. 711, 717, 66 S.Ct. 778, 90 L.Ed. 962 (1946), the Supreme Court, recognizing that 16 was the federally defined age of consent, observed that an offense "prohibited by the Federal Criminal Code" may not be "redefined and enlarged by application to it of the Assimilative Crimes Act."

In *Lewis v. United States*, 523 U.S. 135, 118 S.Ct. 1125, 140 L.Ed.2d 254 (1998), the Supreme Court observed that "The ACA [Assimilative Crimes Act] applies state law to a defendant's acts or omissions that are 'not made punishable by any enactment of Congress.' 18 U.S.C.§13(a)..."

In *United States v. Chaussee*, 536 F.2d 637, 644 (7th Cir. 1976), the Seventh Circuit acknowledged that:

> "It is clear that "[t]he purpose of the Assimilative Crimes Act, ... is to supplement the Criminal Code of the United States by adopting state criminal statutes relating to acts or omissions committed within areas over which the federal government has exclusive jurisdiction and which are 'not made punishable by any enactment of Congress.' The ACT has no application if such acts or omissions are made penal by federal statutes."

As stated in *Torres v. Lynch*, 578 U.S. 452, 468, 136 S. Ct. 1619, 194 L.Ed.2d 737 (2016):

> "The Assimilative Crimes Act (ACA), 18 U.S.C. §13(a), subjects federal enclaves, like military bases, to state criminal laws except when they punish the same conduct as a federal statute."

Simply stated, the District Court and the Seventh Circuit Court of Appeals, lack the authority to "borrow" any State law, to circumvent the federally defined criminal offense (18 USC §2252A and §2256) defining a 16-year-old as an adult (in 1974). So, where's the crime? Please, consider defining it so that Peel, gentlemen's magazine

collectors, art galleries, museums, and archived film aficionados can adjust their conduct accordingly. This analysis was completely ignored by the Seventh Circuit in its decision to reject Peel's Motion to Recall the Mandate.

C. The *Ex Post Facto* Clause (Art. I, Sec. 9, Cl. 3) was violated in procuring Peel's convictions.

An *ex post facto* law makes an innocent act criminal *after* the event, imposes a punishment for an act which was not punishable at the time it was committed, lessens the prosecution's burden of proof, or deprives one of a defense available under the law at the time when the act was committed. See *Calder v Bull* 1 L.Ed. 648, 3 Dall 386, 390 (1798); *Beazell v Ohio* 269 U.S. 167, 169, 70 L.Ed.216, (1925); and *Metrish v Lancaster* 569 U.S. 351, 133 S.Ct. 1781, 185 L.Ed.2d 988 (2013).

Here, in Peel's case, the *ex post facto* clause was violated by:

i. lessening the prosecution's burden of proof, i.e. changing a 16-year-old "***adult***" (in 1974) to a 16-year-old "***minor***" in 2006 (when the Indictment issued);

ii. making the 1974, through 1983, innocent act (*possession*) a crime at a later date (beginning in 1984);

iii. depriving Peel of the *defense* that the alleged "victim" was an adult in 1974 (at the time of *production* -as provided in the charging statute's affirmative defense [and in the Seventh Circuit's own corresponding pattern criminal jury instruction, *infra*];

iv. changing the trial court evidence by contradicting the trial judge's judicial notice "...that in 1973 and 1974, the age of consent for sexual activity was 16;" and

v. punishing the innocent act (of possession from 1974 to1984) when said innocent at was not punishable when it first occurred and for ten (10) years thereafter.

The Seventh Circuit, on Peel's direct appeal, 595 F.3d at 769-770, adopted the *ex post facto* analyses of two District Courts [*United States v. Porter* 709 F.Supp. 770 (E.D.Mich. 1989) and *United States v. Bateman,* 805 F.Supp. 1053, 1055 (D.N.H.1992)], notwithstanding their prosecution under totally different statutes that pre-dated the Supreme Court's decision in *Free Speech Coalition* (2002) and Congress's 2003 addition of the affirmative defense language in Peel's charging statute. Unlike *Porter* and *Batemen,* Peel's charging statute (18 USC §2252A) contained the affirmative defenses at (c)(1) and (c)(2), that there is no crime if the materials were *produced* without using a minor, i.e. **the date of past, current, or future possession is irrelevant.** In rejecting Peel's *ex post facto* argument, 668 F.3d 506, 510 (7th Cir. 2012), the Seventh Circuit failed to recognize the intervening *Free Speech Coalition* (2002) decision that fixed the alleged "victim's" age at the time of ***production*** as the *sole determinative culpability factor* under the statute. This analysis was addressed but erroneously analyzed by the Seventh Circuit in its decision to reject Peel's Motion to Recall the Mandate. While the prospective application of the 1984 statute is entirely appropriate, the retrospective application

of that statute so as to alter the adult status of a 1974 model, violates the *ex post facto* clause. A photograph of a frog produced in 1974 still depicts a frog, not a tadpole, when that photo is possessed 20-30 years later even if Congress criminalizes the possession of a tadpole beginning in 1984.

D. The First Amendment Free Speech Clause was violated in procuring Peel's convictions.

In *Ashcroft v Free Speech Coalition* 535 U.S. 234 (2002), reaffirmed in *United States v Stevens* 559 U.S. 460, 130 S.Ct. 1557, 176 L.Ed.2d 435, 445-446 (2010), the Supreme Court – addressing 18 USC §2256(B)&(D) - declared that child pornography does not exist in the absence of either a real-life minor *at the time of production* or photographing "intrinsically related" to *child sexual abuse or exploitation at the time of production.* Here, the photographic production, in 1974, involved NEITHER. So, even in the absence of the charging statute's affirmative defenses, Supreme Court precedent absolves Peel of criminal culpability under Counts 3&4.

Free Speech Coalition, citing *New York* v. *Ferber,* 458 U.S. 747 (1982), confirmed that if there is no child at the time of *production,* **or** no child sexual abuse or exploitation at the time of *production,* then the governmental interest in protecting children from sexual abuse or sexual exploitation is lacking, regardless of when the subject materials are *possessed.* The governmental interest in protecting children is non-existent when, as here, there is no child at the time of *production* or beginning in 1984 when Peel's alleged "victim" was at least 26 years old. Simply stated, the *ex post facto* clause is violated when Peel's 1974 adult

"victim" is re-defined, at any later time, to be a *minor* to facilitate the possession of child pornography prosecution, and Peel's alleged victim, being an adult in 1974 and at all times thereafter, could not possibly have been the subject of child sexual abuse or sexual exploitation.

This analysis was completely ignored by the Seventh Circuit in its decision to reject Peel's Motion to Recall the Mandate.

E. The Fifth Amendment Due Process "Takings" Clause was violated in procuring Peel's convictions.

In *Andrus v Allard,* 444 U.S. 51, 55, 62 L.Ed.2d 210, 2216 (1979), the Supreme Court recognized the dichotomy between criminalizing the future sale and/or future marketing of property versus the non-criminal right to possess, transport, donate, or devise property that was legally acquired, a distinction erroneously conflated by the Seventh Circuit in *United States v Peel* 595 U.S. at 771 and ignored in the Seventh Circuit's denial of Peel's *coram nobis/audita querela* petition. While the criminalization of future sales and marketing of legally acquired property is constitutional, it is unconstitutional, in violation of the Fifth Amendment's "Takings" Clause to criminalize the mere continuous possession, transportation or devise of that same property which had been legally acquired. Whether the Government's taking is achieved by physical removal of the property, or by incarcerating the possessor, the constitutional violation is the same. Here, Peel's legally acquired and legally possessed photographic property, unlike *Andrus*, involved property protected by the First Amendment, giving his possession additional constitutional protection. *Andrus* eviscerates the Government's

argument, accepted by the Seventh Circuit *sub silencio*, that the mere continued possession of the subject photographs after 1984 became criminal with the passage of the Child Protection Act of 1984, Pub. L. 98-292, 98 Stat. 204. The Seventh Circuit's knowing, or unwitting, acceptance of that argument violates *Andrus, Free Speech Coalition* (affirmed in *Stevens*), the affirmative defense language at 18 USC §2252A(c)(1) & (c)(2), and the Seventh Circuit's own corresponding pattern criminal jury instruction, all of which mandate that minority-majority status, and therefore criminality, be determined as of the date of "production" of the subject photographs, i.e. in 1974 when the age of consent was 16. This analysis was completely ignored by the Seventh Circuit in its decision to reject Peel's Motion to Recall the Mandate.

F. The Fifth Amendment Due Process "Fair Notice" Clause was violated in procuring Peel's convictions.

The Seventh Circuit, [595 F.3d at 771], **erroneously conflated** the constitutional right to continue *possessing* legally acquired property with the prohibited act of currently *selling or marketing* that property. This dichotomy was emphasized in *Andrus v Allard* where the Supreme Court observed that the statutes/regulations would be "invalid and unenforceable" if applied to property "owned before the effective date of the subject statute." Here, the Due Process "Fair Notice" clause was violated by the Seventh Circuit's novel interpretation, contradicting *Andrus v Allard*, that Peel's continuous possession of previously legally acquired photographs could be later criminalized. As stated in *United States v. Burnom*, 27 F.3d 283, 284 (7th Cir. 1994):

> The due process clause, rather than the ex post facto clause, supplies criminal defendants' protection against novel developments in judicial doctrine. [Citations omitted] A "clear break" in the law that imposes criminal liability for acts not previously punishable may not be applied retroactively to criminal defendants' detriment. [Citation omitted.]

The Due Process "Fair Notice" Clause is also violated by the failure to give "fair notice" to Peel, and others similarly situated, that the statutes [18 USC §2256 and §2252A(a)(5)(B)] would be construed differently than as statutorily defined. By newly interpreting the "crime" as pivoting upon the date of *"possession,"* rather than upon the statutorily defined date of *"production,"* the "fair notice" clause is violated. See *Adoptive Couple v Baby Girl,* 570 U.S. 637, 186 L.Ed.2d 729, 759 (2013); *Burgess v United States* 553 U.S. 124, 170 L.Ed.2d 478 (2008); *Lamie v U.S. Tr.* 540 U.S. 526, 157 L.Ed.2d 1024 (2004); *Bouie v Columbia* 378 U.S. 347, 351, 12 L.Ed.2d 894, 898 (1964); and *United States v Burnom* 27 F3d 283 (CA7, 1994). This analysis was completely ignored by the Seventh Circuit in its decision to reject Peel's Motion to Recall the Mandate.

G. <u>The Fourteenth Amendment's Due Process "Equal Protection" Clause was violated in procuring Peel's convictions.</u>

The Equal Protection Clause of the Fourteenth Amendment prohibits singling out a person for criminal prosecution, where others, similarly situated, are not so prosecuted. See *Village of Willowbrook v Olech* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *Bolling v Sharpe* 347 U.S. 497, 499-500, 98 L.Ed.2d 884 (1954); *Lauth v McCollum* 424 F.3d 631, 633 (CA7, 2005); and *Swanson v City of Chatek* 719 F.3d 780, 783-784 (CA7, 2012). Peel is the only person in the entire United States, to be prosecuted and convicted, after 1984, for possession of child

pornography, under 18 USC §2252A when the "victim" was an adult at the time of production (here, in 1974).[5] In the process, Peel was denied the benefits of the affirmative defenses at 18 USC §2252A(c)(1) & (c)(2)

How can this prosecutorial conduct not violate the Fourteenth Amendment? The Seventh Circuit condoned the unilateral prosecution of Peel in the following respects: First, it overlooked the fact that legally acquired and legally possessed property[6] is constitutionally protected from criminal prosecution by virtue of the "Takings" Clause." See *Andrus*. Secondly, the Seventh Circuit's analyses are in direct conflict with *Free Speech Coalition* (2002) and *Stevens* (2010), *infra*. Thirdly, the Seventh Circuit's Peel decisions, when relying on a 1984 statutory age of majority change, are a red herring in direct conflict with Congress' 2003 addition of the affirmative defense language in 18 USC §2252A(c)(1) & (c)(2),[7] which does, in fact, "grandfather" materials that were legally acquired and legally possessed prior to 1984. Fourth, the Seventh Circuit's comments directly conflict with its own corresponding applicable pattern criminal (affirmative defense) jury instruction [18 U.S.C. § 2252A(c) Affirmative Defense To Charges Under 18 U.S.C. §§ 2252A(a)(1), (a)(2), (a)(3)(A), (a)(4) or (a)(5)]- though not tendered to Peel's jury[8]- which provides:

> "If the defendant proves that it is more likely than not that the alleged child pornography was produced using actual adults at the time the material was produced, then you should find him not guilty of possessing child pornography."

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[5] In *Bateman and Porter*, cited in *U.S. v Peel*, 595 F.3d @769, the defendants were convicted under different statutes [18 USC §2252(a), 18 U.S.C.A. § 2255(1), and 18 USC §2254] with different affirmative defenses.

[6] Whether constitutionally protected (as here with First Amendment Free Speech materials) or lacking constitutional protection, as with avian Indian artifacts (*Andrus*) or "pre-ban" elephant ivory (668 F.3d 506, 509).

[7] To comport with *Andrus* and *Free Speech Coalition*.

[8] A *Strickland* violation.

Finally, the Seventh Circuit's comment that "...there's no such 'unless' exception in the child-pornography statute," [668 F.3d at 509] violates the rules of statutory construction[9] by completely ignoring the statute's definitional and affirmative defense language to the contrary.

Materials including vintage pictorial books and photographs, archived "Porno Chic" era film (1969-1984), gentlemen's vintage magazines (*Playboy, Penthouse, Hustler, Barely Legal,* etc.), and *National Geographic* Magazines (featuring indigenous cultures), that include depictions of nude (adult) 16 and 17-year old actors and actresses, have been continuously possessed and regularly sold on the Internet, by individuals, businesses, libraries, museums, archivists, collectors, etc. from circa 1944 to the present, e.g. Golden Age Collection – Vintage Men's Magazines, Hustler & Barely Legal Magazines Combo Subscription | Magsstore, Shop Vintage Men's Magazines Collections: Art & Collectibles | AbeBooks: 32.1 Rare Books ...and Barely Legal Back Issues - Digital - DiscountMags.com. Yet, because only Peel has been selected for governmental prosecution for possession of similar materials under 18 USC §2252A, the Equal Protection Clause is violated. This analysis was completely ignored by the Seventh Circuit in its decision to reject Peel's Motion to Recall the Mandate.

[9] "Words are to be given their ordinary meaning..." *Chicago Transit Authority v. Adams*, 607 F.2d 1284 (7th Cir. 1979).

IV. *Strickland* violations.

While Peel's *coram nobis/audita querela* petition, and related appeal, raised ineffective assistance of counsel claims, neither the District Court, nor the Seventh Circuit, addressed the merits of his arguments, thereby making the motion to recall mandate even more appropriate. The multiple Seventh Circuit errors, which justify recalling the mandate, can be attributed, primarily, to an inadequate trial record and inadequate appellate court briefing.

To prevail on an ineffective assistance claim, Peel must demonstrate (1) that his counsel performed deficiently and (2) that Peel was prejudiced as a result. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Long v. United States*, 847 F.3d 916, 920 (7th Cir. 2017). Often, ineffective assistance of counsel claims are best saved for collateral proceedings so that a more thorough evidentiary record may be developed. *Delatorre v. United States*, 847 F.3d 837, 844-45 (7th Cir. 2017) and *Massaro v. United States*, 538 U.S. 500, 508-09 (2003). The Seventh Circuit has recognized that collateral relief is available to a defendant, alleging ineffective assistance of trial and/or appellate counsel where the jury had been incorrectly instructed, as with the omission of the Seventh Circuit's own applicable affirmative defense pattern criminal jury instruction and the trial court's caveat (Appendix K), in Peel's trial- that its judicially noticed fact (the age of majority in 1974) was "not an issue in the case." See *Cates v. United States*, 882 F.3d 731, 733 (7th Cir. 2018).

Strickland violations cannot be imputed to Peel in post-conviction relief proceedings. See *Chaidez v. United States* .655 F.3d 684, 687 (CA7, 2011); *Padilla v Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); and *United States. v Denedo,* 556 U.S. 904, 908, 129 S.Ct. 2213, 2219, (2009).

a. Counsel's *Strickland* Errors[10] (Re: Counts 3 & 4) Warranting Collateral Relief

1. Failure to seek dismissals of the possession of child pornography counts for failure to allege federal criminal offenses, a subject matter jurisdictional defect. See *Lively v. Wild Oats Markets, Inc,* 2006 WL 3425193, n.2. (2006); *United States v. United Mine Workers* 330 U.S. 258, 290, 67 S.Ct. 677, 91 L.Ed. 884 (1947), *Russell v. United States,* 369 U.S. 749, 770 (1962), and *Ex Parte Bain,* 121 U.S. 1 (1887).

2. Failure to raise the constitutional defenses, discussed *infra,* involving the

a) *Ex Post Facto* Clause (Art. I, Sec. 9, Cl. 3), via *Calder, Beazell, Metrish, Meyer*;

b) Free Speech Clause (First Amendment), via *Free Speech Coalition*;

c) Due Process "Takings" Clause (Fifth Amendment), via *Mooney, Lisenba*;

d) Due Process "Fair Notice" Clause (Fifth Amendment), via *Burnom*;

e) Due Process "Fair Trial" Clause (Fifth Amendment), via *Schlup, Mooney, Lisenba*;

and

[10] Defined for trial counsel in *Strickland v Washington,* 466 U.S. 668 (1984) and supplemented for appellate counsel in *Evitts v. Lucey,* 469 U.S. 387, 396-97 (1985)

f) Fourteenth Amendment "Equal Protection" Clause, via *Bolling*

3. Failure to give statutory notice of the intent to assert the affirmative defenses in 18 USC §2252A(c)(1) & (c)(2) and to tender the corresponding Seventh Circuit pattern criminal jury instruction;

4. Failure to object to the trial court's caveat/instruction to the jury (Appendix K) that its judicially noticed fact was "...not an issue in this case," despite the judicially noticed fact being the *sine qua non* of the charging statute:18 USC §2252A.

b. Appellate Counsel's *Strickland* Errors (Re: Counts 3 & 4) Warranting Collateral Relief Include The Failure To Brief, Or Timely Brief, The Following:

1. The Indictment (Appendix L), on its face, failed to allege a federal criminal offense (because the alleged child pornography "victim" was affirmatively identified as an *adult* at the time of *production*);

2. Legally acquired and legally possessed free speech material is constitutionally protected from criminal prosecution, per *Andrus v. Allard*;

3. The production of the subject materials, in 1974, involved no child, or child sexual abuse- both being prerequisites for child pornography, per *Ashcroft v Free Speech Coalition*;

4. The *Ex Post Facto Clause* (Art. I, Sec. 9, Cl. 3) had been violated by retrospectively re-defining an "adult" in 1974 to a "minor" in 2006 (the date of the alleged criminal conduct), per *Calder* and *Beazell*.

5. The Due Process "Takings Cause" was violated by retrospectively criminalizing the possession of legally acquired materials, per *Andrus*;

6. The Due Process "Fair Notice" Clause was violated by the failure to give fair notice that the statute(s) [18 USC §2256 and 18 USC §2252A(a)(5)(B)] would not be construed as statutorily defined;

7. The impropriety of the trial court's caveat/instruction to the jury (Appendix K) that the age of consent for sexual activity was "...not an issue in this case;" and

8. That trial counsel had been ineffective, in violation of the Sixth Amendment, as listed above.

As stated in *Pittman v. Warden, Pontiac Correctional Center*, 960 F.2d 688, 691 (7th Cir. 1992):

> "In order to merit an evidentiary hearing on his claims [of ineffective assistance of counsel] a petitioner must allege facts that, if proven, would be sufficient to entitle him to [habeas] relief. See *Matta-Ballesteros v. Henman,* 896 F.2d 255, 258 (7th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 209, 112 L.Ed.2d 169 (1990).... Therefore, the question here is whether [habeas petitioner] has alleged facts that, if true, would prove his counsel's ineffectiveness. If so, an evidentiary hearing is **required**." [All emphasis supplied.]

V. The Seventh Circuit 's Decision Has Potentially Wide-Ranging Adverse Effects And Resurrects Conflicts Within The Circuits

By ignoring multiple Supreme Court precedents, as discussed *supra,* the Seventh Circuit has not only undermined hierarchical *stare decisis* and placed itself in conflict with all other Circuit Courts, but it has also placed Seventh Circuit criminal defendants in jeopardy by denying to them the Congressionally established affirmative defenses otherwise available under 18 USC §2252A(c)(2) & (c)(2), by

denying them lack of subject matter jurisdictional defenses, by subjecting them to the improper "borrowing" of state law to rescue an otherwise failed federally criminal conviction, and by denying to them the constitutional defenses that would otherwise be available under the *Ex Post Facto* Clause (Art. I, Sec. 9, Cl. 3); the First Amendment Free Speech Clause; the Fifth Amendment Due Process "Takings" Clause; the Fifth Amendment Due Process "Fair Notice" Clause; the Fifth Amendment Due Process "Fair Trial" Clause and the Fourteenth Amendment "Equal Protection" Clause.

Conclusion

Because the 7th Circuit

1. ignored the lack of subject matter jurisdictional issue (as to Counts 3 & 4)- in defiance of the Supreme Court precedent established in *In re Bain*;
2. wrongfully interpreted the *ex post facto* issue established in the Supreme Court decision in *Calder v Bull*, et. al.;
3. ignored the Fifth Amendment "wrongful takings" clause violation in defiance of the Supreme Court decision of *Andrus v Allred*;
4. wrongfully "borrowed" Illinois law to manipulate the facts to enable the conviction of a federally defined criminal offense in defiance of the Supreme Court decision in *Williams v United States*;
5. ignored the Fifth Amendment "fair trial" clause violation in defiance of the Supreme Court in *McQuiggin v Perkins*, et. al.;
6. ignored the First Amendment "free speech" clause in defiance of the Supreme
7. Court decision in *Ashland v Free Speech Coalition*, et. al.;

8. ignored the Fourteenth Amendment "Equal Protection" Clause violation in defiance of *Village of Willowbrook v Olech*, et. al.; and
9. completely ignored the *Strickland* violations alleged by Petitioner as established by the Supreme Court in *Strickland v Washington*;

this Court should grant this Petition for a Writ of Certiorari to facilitate the vacation of Defendant's wrongful convictions and to facilitate the issuance of certificates of "actual innocence."

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Respectfully submitted,

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