

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re Davis -- PETITIONER

vs.

UNITED STATES OF AMERICA -- REAL PARTY IN INTEREST

ON PETITION FOR A WRIT OF HABEAS CORPUS TO
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

PETITION FOR WRIT OF HABEAS CORPUS

Daniel M. Davis, FRN 10065-023
Federal Correctional Institution Low
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Lompoc, California 93436-2705
No Telephone Available

QUESTIONS FOR REVIEW

- 1. Is the Sixth Amendment violated by denial of counsel at sentencing?**
- 2. Is the Fifth Amendment's Due Process Clause violated by an Involuntary Plea?**
- 3. Does a prosecutor have the authority to enhance a mandatory minimum sentence based upon his personal belief in a defendant's guilt?**
- 4. May an unconstitutional prior conviction be used to enhance a sentence?**
- 5. Is the right to Due Process and Equal Protection Under the Law accorded depending on the charging statute?**
- 6. Is the Eighth Amendment violated by punishing a mentally ill citizen for entirely passive conduct committed without mens rea or criminal intent?**

LIST OF PARTIES

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

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US District Court of Idaho, CR07-255, CV12-646: Ninth Circuit Nos. 09-30059, 10-30298, 13-71441, 16-36012; US Supreme Court No. 16-9668

US District Court, Central District of California, CV15-4077 and CV16-3552: Ninth Circuit Nos. 15-56187, 16-55971; US Supreme Court No. 16-8121

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JURISDICTION

This Court has jurisdiction under 28 USC §2241(c) because Petitioner Davis is now being held in violation of the Constitution and laws of the United States.

Petitioner is serving a sentence of 168 months imposed for 1 count in violation of 18 USC §2252(a)(2). Petitioner is now in custody of the Federal Bureau of Prisons under Warden Steve Langford, Federal Correctional Institution Low, 3600 Guard Road, Lompoc, California 93436-2705.

REASONS FOR NOT MAKING APPLICATION IN THE LOWER COURTS

Habeas corpus relief application was made to the U.S. District Court for the District of Idaho, case CV12-646, but the 28 USC §2255 was denied as to all grounds for relief without consideration of Petitioner's Reply Brief, and COA denied by both the district court and Ninth Circuit, case 16-36012. This Court denied certiorari without opinion, case 16-9668.

A motion under Rule 60(b) would be pointless as it would be put before the same judge who has already decided the case at trial, and stood upon those findings in review of Petitioner's pro se Motion to Withdraw Plea on remand, as well as the Section 2255 noted above. The adamancy with which the district court has issued consistent denials of motions for relief describe denial of due process.

Habeas corpus relief application was made to the U.S. District Court for the Central District of California, but the Section 2241s were recharacterized as successive Section 2255s and dismissed for lack of jurisdiction, in cases CV15-4077 and CV16-3552, and Certificate of Appealability denied by both the custodial court and Ninth Circuit Court of Appeals, case 16-55971.

This Court also has jurisdiction under 28 USC §1254(1) and 28 USC §1651(a), the All Writs Act. Under Federal Rules of Criminal Procedure, Rule 35 permits correction at any time of an illegal sentence. Hill v. United States, 368 US 424, 430 (1962). Application is now made in this Court because all avenues for relief in the lower courts have been exhausted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PROVISION

UNITED STATES CONSTITUTION

FIRST AMENDMENT 25, 29

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FIFTH AMENDMENT 8, 9, 18, 25, 26, 29

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment or 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."

SIXTH AMENDMENT 7, 8, 9, 25, 26

"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 defense."

EIGHTH AMENDMENT 25, 30

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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STATEMENT OF THE CASE

Petitioner Davis was convicted of 1 count in violation of 18 USC § 2252(a)(4) on June 24, 2002 in the U.S. District Court of Idaho, case 1:01-CR-00188-S-EJL, and sentenced to 24 months imprisonment, 36 months supervised release, and sex offender registration for entirely passive receipt of alleged child pornography effected through an illegal government entrapment scheme. ("CR01-188")

Due to ineffective assistance of counsel, Petitioner was denied the benefit of any defense whatsoever, and the government's case was never subjected to any meaningful adversarial testing.

Because of this first conviction, Davis lost all credibility, career, home, and filed bankruptcy. These stresses combined with untreated mental illness, social ostracization, a series of dead-end jobs, and cyclic psychotic episodes, resulting in the irrational decision the only way to be heard by the courts to reverse the illegal conviction was to commit the same offense conduct charged.

That did not result in the anticipated assistance by the United States Probation Officer Mr. J. Kevin Hocevar, but instead to the second conviction in the same court, and by the same judge, case 1:07-CR-00255-S-EJL. ("CR07-255")

On August 16, 2007 Petitioner Davis was convicted of 1 count in violation of 18 USC § 2252(a)(2), and sentenced to 168 months imprisonment, lifetime supervised release, and lifetime sex offender registration, for entirely passive possession of alleged illegal images, this time online.

Again, due to ineffective assistance of counsel, Davis was denied benefit of any defense or pretrial release. The plea was involuntary, coerced after languishing in county jails for 10 months. The sentence was imposed without jurisdiction, the primary statutory 60-month enhancement imposed for the unconstitutional prior conviction, and the secondary 48-month enhancement imposed due to false and unproven allegations based on the prosecutor's personal beliefs, in addition to the statutory mandatory minimum 60-month punishment prescribed.

SUMMARY OF THE ARGUMENTS

1. The district court lacked jurisdiction to impose sentence.

The district court denied Petitioner Davis's unequivocal and reasonable request for alternate counsel for sentencing, failing to complete the court as required by the Sixth Amendment to the U.S. Constitution. The Judgment rendered is therefore void, and habeas corpus relief is justified.

2. Petitioner's guilty plea was involuntary.

Retained defense counsel created an immediate conflict of interest when the lawyer removed personal property from Petitioner's residence without authorization. Counsel also violated the attorney/client privacy privilege by his unauthorized association of another attorney. Counsel also conspired with the prosecutor to coerce Petitioner's guilty plea, denying Davis the constitutional rights to raise a defense and to proceed to trial by a jury of his peers.

3. An enhancement was decided solely on the prosecutor's personal belief.

As a result of the conspiracy perpetrating a fraud on the court, further evidence allegations were made, and Davis's sentence substantially increased by a secondary 48-month enhancement, based simply upon the prosecutor's personal belief in Petitioner's guilt. This led the district court to miscalculate the United States Sentencing Guidelines range, accept a Presentence Report version unknown to Petitioner, and jointly issue an inaccurate and prejudicial public News Release containing the unproven allegations. This egregious misinformation precluded any possible impartiality by the district courts, appellate court, collateral attacks, or fair hearing by the same district court judge.

4. The prior conviction used for an enhancement was unconstitutional.

Through ineffective assistance of counsel in the related prior case, Petitioner was misadvised to waive defenses of insanity, entrapment, insufficient evidence, unconstitutionally vague charging statute definition, involuntary plea, lack of mens rea, and no probable cause for the search warrant to issue.

SUMMARY OF THE ARGUMENTS - PAGE 2

Counsel was so constitutionally deficient that his representation amounted to constructive denial of assistance of counsel. Not only did counsel fail to subject the government's case to meaningful adversarial testing in any manner, but also advised Petitioner to enter a guilty plea for conduct not proscribed. The statutorily-mandated enhancement was based on this prior unconstitutional conviction, and cannot be used to enhance a subsequent sentence.

5. The subduction of due process is based on the charged offense statute.

Petitioner's motions under 18 USC §3742, 28 USC §2241, 28 USC §2255, and Coram Nobis under 28 USC §1651(a) were all denied by district courts contrary to the evidence, testimony, and record, and no motion received an appellate review of the claims de novo. Section 2255s for each conviction were denied without consideration of the Reply Brief. Every motion for relief has been denied despite citation to proper legal authority. No pleading was submitted frivolously or for delay purposes. The apparent inference is that prejudice results from the emotionally-charged nature of the indictment offense.

6. The offense conduct alleged was driven by psychosis and schizophrenia.

The nature and circumstances of the offense conduct charged in both cases is directly related to Petitioner's history of childhood abuses and resulting characteristics of mental illnesses. Petitioner Davis's conduct was entirely passive, involved no harms cited by Congress in enacting the statute charged, was during psychotic episodes brought on by stress, without criminal intent, or element of mens rea. These claims were supported by testimony, evidence, and the record. The second case was a continuation of the first, unresolved case, lack of correct mental health treatment, and an irrational decision that relapse conduct was the only avenue to be heard by the courts. The origin of these cases was unintentional and inadvertent, and Petitioner had no predisposition to receive and/or possess contraband images even when not illegal.

ARGUMENTS

1. THE U.S. DISTRICT COURT LACKED JURISDICTION TO IMPOSE SENTENCE

When a conflict of interest arose between CJA-appointed counsel Mr. Philip Gordon and Petitioner Davis, Petitioner moved pro se for Mr. Gordon's withdrawal (CR07-255, document #78). Mr. Gordon refused to withdraw, but **did** file a vicious tirade in response (CR07-255, document #79). During the November 19, 2008 hearing on Davis's pro se motion (CR07-255, document #122, at page 12), the district court forced Davis to choose between self-representation and staying with Mr. Gordon's representation, stating that Petitioner Davis had exhausted his pleas for counsel. The district court expressed its opinion that Petitioner was not qualified to self-represent, and left Mr. Gordon in place.

When communications between Mr. Gordon and Davis broke down completely and Mr. Gordon walked out on a meeting, Davis filed for Mr. Gordon's dismissal, and requested appointment of alternate counsel (**Appendix A**). The government itself clearly understood and acknowledged the unequivocal request in its email of December 3, 2008 (**Appendix B**). Without holding a hearing to determine Petitioner's ability to self-represent under Faretta v. California, 422 US 806 (1975), the district court denied appointment of alternate counsel on December 9, 2008 (CR07-255, document #93) despite the unequivocal request, and just 10 days before the trial date.

The district court then inexplicably appointed conflicted Mr. Gordon as standby counsel, ensuring Petitioner Davis would not receive constitutionally effective assistance of counsel, or even standby counsel, at sentencing. Even Mr. Gordon's own Motion to Withdraw (CR07-255, document #90) (**Appendix C**) averred he had to withdraw due to unresolvable conflict of interests. By this failure to complete the court, the district court lost jurisdiction to hear the case. The district court should not have appointed Mr. Gordon in such capacity knowing of the conflicts, and Mr. Gordon should not have accepted the appointment.

Petitioner Davis did not choose to make conflict with Mr. Gordon, it arose unbidden. Mr. Gordon was Petitioner Davis's only CJA-appointed attorney. The district court erred in denying the unequivocal request for alternate counsel.

This denial of counsel has long been held to violate the Sixth Amendment, as stated in Johnson v. Zerbst, 304 US 458, 467-68 (1938):

"If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost in the course of the proceedings due to the failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus."

An indigent defendant has the right to appointed counsel in his defense under Gideon v. Wainwright, 372 US 335 (1963). Jurisdictional defects are not waived by a guilty plea. United States v. Caparell, 938 F2d 975 (9th Cir 1991).

"The Sixth Amendment right to counsel is a fundamental constitutional right." Kimmelman v. Morrison, 477 US 365, 382-83 (1986). "Without jurisdiction the court cannot proceed at all in any case. Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Marbury v. Madison, 2 LEd 60, 68 (1803). "Appointing standby counsel in lieu of counsel does not cure the constitutionally deficient court." McKaskle v. Wiggins, 465 US 168, 177-79 (1984). This denial of assistance of counsel stripped the district court of personal and subject matter jurisdiction.

The Supreme Court has long recognized "the critical nature of sentencing in a criminal case." Mempha v. Rhay, 389 US 128, 134 (1967). The sentence imposed should be vacated and the prisoner released pending further proceedings. The judgment of conviction is unconstitutional and void.

2. PETITIONER DAVIS'S GUILTY PLEA WAS INVOLUNTARY

Retained attorney Mr. Crafts created an immediate conflict of interest between himself and Davis by taking and removing personal property from Davis's residence without authorization the day Mr. Crafts was hired by verbal agreement on August 30, 2007. Mr. Crafts' associate Mr. Sutton, who was **never** retained by Petitioner Davis, removed a briefcase from the residence containing coin collections, credit cards, jewelry, collector currency, gold and silver watches and pens, gold and platinum nuggets, and other valuables, again without authorization and without leaving receipt or inventory with Petitioner's mother, who had shared the residence. See U.S. Supreme Court case No. 17-6981.

Possession of the briefcase and \$1,700.00 in collector banknotes ("cash") is documented in Mr. Crafts' billing statement (**Appendix D**) on September 30, 2008, although he and Mr. Sutton took conversion of these items a month earlier, as witnessed by Petitioner's mother, Ms. Rosalie Sullivan by affidavit (**Appendix E**). Mr. Crafts also documented his possession of the coin collections belonging to Ms. Sullivan and Petitioner Davis in his \$26,490.00 billing statement on August 22, 2008, and his fabricated coin sales receipt of the same date (**Appendix F**).

Mr. Sutton documented his possession and unauthorized use of Petitioner's credit cards in his own \$40,612.50 billing statement (**Appendix G**) at page 9, and is confirmed by the CapitalOne Visa statement (**Appendix H**) on August 31, 2007 and again on September 20, 2007. The defense effectively rested on the first day Mr. Crafts was hired.

During the period between Mr. Crafts being retained on August 30, 2007 and Davis's residence being foreclosed upon by the bank on January 25, 2008, both Mr. Crafts and Mr. Sutton exercised care, custody, and control over Petitioner's unoccupied residence and all contents, shown by Mr. Crafts's billing statement (**Appendix D**) as 7 separate entries from September 17, 2007 to October 3, 2007, and Mr. Sutton's billing statement (**Appendix G**) entry on September 27, 2007, wherein

both documented their "visits" with Ms. Sullivan. Mr. Crafts and Mr. Sutton could not have met with Ms. Sullivan on or after September 17, 2007 as her affidavit of April 25, 2013 (**Appendix I**) shows she left the state of Idaho early on that day to move to Minnesota. She was able to take only some of her own property from the residence, using a pickup truck and small U-Haul trailer.

Mr. Crafts did not inform Davis that he took possession of briefcase contents or any other property, and continued to deceive Davis into believing that pretrial release was imminent. As the district court docket shows, there was no such motion ever filed by Mr. Crafts. In fact, Mr. Crafts filed only 5 so-called "defense" motions in CR07-255, as follows:

- 1 - Document #26, 1/17/2008, "Motion for Competency Evaluation (by USA)"
- 2 - Document #28, 2/20/2008, "Second Motion to Continue Trial"
- 3 - Document #34, 5/16/2008, "Second Motion to Vacate Trial"
- 4 - Document #59, 9/4/2008, "First Motion to Withdraw as Attorney"
- 5 - Document #60, 9/4/2008, "First Motion to Continue Sentencing"

Certainly by no reasonable measure did Mr. Crafts earn his billing fees or even the \$5,000.00 verbal retainer agreement. Mr. Sutton's billing statement has no merit because he was never retained in any capacity by Petitioner Davis.

Petitioner Davis was also led to believe Mr. Crafts was conducting a background investigation, interviewing witnesses, exploring defense strategies and challenging the probable cause, method and scope of the search warrant and its execution, consulting expert witnesses in anticipation of asserting the federal insanity defense under 18 USC §17, and performing his fiduciary responsibility as defense counsel at least to the minimum standards of the district. Despite being on notice of Petitioner's directly related prior conviction for the same offense conduct (CR01-188) and assertion of the insanity defense in that case (**Appendix J**), Mr. Crafts conflated the obviously warranted defense with a non-existent "competency defense," which ridiculous non-strategy he later blamed on Petitioner Davis (CR07-255, document #155, Transcript at page 84). The single motion that could possibly be construed as a defense pleading was the motion

for the incorrect psychological evaluation under 18 USC §4241 instead of the correct state-of-mind at the time of the offense conduct evaluation under the applicable statute 18 USC §4242, as was evident from the assertion in the first case (CR01-188), though withdrawn on legal misadvice (**Appendix J**).

Mr. Crafts utterly failed to negotiate for any improvement to the original plea offer wherein the government would "likely" seek a sentence at the lower end of the United States Sentencing Guidelines range. In fact, involvement by Mr. Crafts actually drastically exacerbated the sentencing exposure. There was no "tremendous benefit and advantage" gained by the final plea offer as opined by the district court judge. Petitioner was ultimately denied acceptance of responsibility points, faced with 2 points added for alleged obstruction, and sentenced under Guidelines miscalculated by increasing Davis's Criminal History Category from I to III, base points from 27 to 31, and a Guidelines' increased range from 70-87 months to 135-168 months. Davis received 168 months. There were no actual plea negotiations accomplished by Mr. Crafts.

The Supreme Court said in United States v. Ash, 413 US 300, 321 (1973), "This Court's decisions make it clear that a defendant is entitled to effective assistance of counsel not only at trial, but also at all 'critical stages' of his prosecution." Accord United States v. Cronin, 466 US 648, 658 (1984). Davis was denied effective assistance of counsel long before the coerced guilty plea under duress. Mr. Crafts' representation was so inadequate on all levels and to such a degree that the presumption of performance standard could not be expanded to meet even a minimum standard for the district in this case.

In addition to the ineffective assistance described above, the guilty plea was a product of coercion and fraud on the court. The record reflects Davis's intent to exercise his constitutional right to a trial by a jury of his peers as late as June 18, 2008, with trial set to begin July 1, 2008. The government had filed 8 trial preparation documents by June 17, 2008 and Mr. Crafts, none.

Petitioner had expressed his concerns over Mr. Crafts' lack of trial preparations in correspondence of April 7, 2008 and May 30, 2008 (**Appendix K**), and attempted to be rid of Mr. Crafts by filing a pro se motion on June 12, 2008 (CR07-255, document #37). Mr. Crafts panicked, and colluded with the prosecutor in coercing an involuntary plea. Mr. Crafts hijacked the hearing held on June 18, 2008 (CR07-255, document #119, Transcript).

During the hearing, Petitioner put the district court on notice there was unresolvable conflict of interest and no communications between parties, and Mr. Sutton was not retained. Mr. Crafts then directed the court to recess:

"Judge, I think what we are going to do in this case is we are going to continue this case for 2:00 tomorrow and there may be an entry of a plea at the time. As a result of this case proceeding to trial, we have some information from the government that I think Mr. Davis would like to consider his plea tonight. So if we can set this for tomorrow at 2:00, hopefully we will have a resolution to this matter."

— (Document #119 at page 17)

The prosecutor stood silent, knowing there was no further information to present to Davis in consideration of a change of plea, beyond Mr. Crafts's scheme to coerce Petitioner Davis's guilty plea. This implicated fraud on the court, involving conspiracy by the defense and prosecution, and unknown to Davis.

That evening, Mr. Crafts told Davis there was a jail telephone call made by Petitioner soliciting family members to destroy or hide a hard drive. As Davis knew no such phone call or request had ever been made and he had never owned an "external" hard drive to request the destruction of, Petitioner Davis demanded to hear the alleged phone call recording. When Mr. Crafts could not produce the call, he then switched tactics, and the next day, just before the surprise Change of Plea hearing began on June 19, 2008, Mr. Crafts showed Petitioner Davis a Ziploc baggie of compact disk fragments allegedly representing circumstantial evidence sufficient to incarcerate Petitioner's family pending an obstruction of justice investigation by Immigration and Customs Enforcement agents unless Petitioner Davis entered a guilty plea.

In the courtroom, Mr. Crafts indicated that government agents were present and ready to order the arrest of family members; and that Petitioner Davis had no choice but to enter his guilty plea. It was under this threat Petitioner Davis was forced to waive his constitutional right to a trial by a jury of his peers, and enter the guilty plea. Petitioner's pro se motion to be free from Mr. Crafts was then deemed moot. After forcing his client to plead guilty and forcing a "resolution" to the matter, Mr. Crafts became completely unavailable, and was granted his Motion to Withdraw (Document #59) on September 15, 2008.

The threat to Davis's family members was confirmed by Mr. Crafts' replacement, CJA-appointed counsel Mr. Philip Gordon, in his letter to Petitioner on October 23, 2008 (**Appendix L**), although Mr. Gordon obstinately refused to seek withdrawal of the plea because he was a colleague and friend to Mr. Sutton and Mr. Crafts. The threat was also shown during testimony in the evidentiary hearing held on remand September 2, 2010 (Ninth Circuit No. 09-30059) between Mr. Crafts and the prosecutor (CR07-255, document #155, Transcript at pages 69-71). The evidentiary hearing also elicited admission by Mr. Sutton that his involvement was not by Petitioner Davis's contract, but by Mr. Crafts himself, to act as a "sounding board," and certainly not as "co-counsel" (Document #155, Transcript at page 111). As always maintained, Davis **never** hired Mr. Sutton.

Mr. Crafts's fabricated "Engagement Letter" (**Appendix M**) is the sole basis for the government's claim (and both attorneys) that Mr. Sutton was retained by Davis, but this **letter** was not even seen by Davis until Mr. Crafts submitted it with his Response to a bar complaint on May 6, 2009, the same date as his fabricated billing statement. It is not a valid legal contract by any stretch of the imagination—it bears only Mr. Crafts' endorsement. It is plain that if Mr. Crafts was unqualified to handle the case, Davis would have had no use for him, and could not be expected to pay to further Mr. Crafts' legal education by retaining Mr. Sutton as a "sounding board" and mentor.

Mr. Crafts testified in the evidentiary hearing that he played the alleged jail phone call recording "three to five times" (Document #155 at page 72). This was perjury, and an impossibility because no such call was ever made. No transcript or recording of such alleged jail phone call, or **any** call, was entered on the court record by the government, or even played during the evidentiary hearing, where it would have been central to the government's allegation.

Mr. Sutton also falsely testified that the government learned of the additional hard drives alleged to belong to Davis through this fictional jail phone call, and contacted him to "specifically" request the drives (Document #155, at page 128) as if "clairvoyant." Mr. Sutton's entire testimony and involvement was in violation of the attorney/client privacy privilege by both Mr. Sutton and Mr. Crafts, because Petitioner Davis never hired Mr. Sutton. Absolutely no valid legal document ever proffered supports their claim to the contrary.

Because no such jail phone call was made or recording exists, the inescapable conclusion, no matter how distasteful, is that Mr. Crafts and/or Mr. Sutton supplied the additional drives **and** notified the prosecutor, attributing them to Petitioner Davis without hearing. There was no official chain of custody or even consistent theory of origin shown for the additional alleged drives, which were submitted nearly a year **after** Petitioner's continuous pretrial incarceration, **after** Petitioner's coerced guilty plea, **after** Petitioner's Idaho State Bar Complaint against Mr. Crafts and Mr. Sutton, **after** Petitioner's pro se motion to be rid of Mr. Crafts, and **after** Davis's correspondence of April 7, 2008 and May 30, 2008. They were falsely attributed to Davis, without proof, in the Presentence Report version not shared with Davis, such revision being made the day **after** the district court forced Davis to self-represent on December 9, 2008.

On February 5, 2009 the court summarily dismissed as moot Davis's pro se motions to Suppress, to Withdraw Plea, and for Injunction on the investigation believed to be ongoing against his family, all three of which were filed long

before Petitioner Davis learned of the additional drives being attributed to him, and show Davis's continuing belief in the existence of the threat against family despite cooperating by entering the coerced plea under duress. Davis's pro se motions for Access to Legal Resources and to Dismiss Complaint were both also summarily denied, leaving Davis without standby counsel advocacy, access to a typewriter or word processor and research materials, and at the mercy of the county jail for paper to handwrite motions.

The district court clearly attributed the additional hard drives to Davis as shown by the joint court/government/prosecutor information provided for the KTVB Television News Release of February 9, 2009 (**Appendix N**). This Release is so inaccurate, inflammatory, and prejudicial that it precludes any possibility of an impartial venue for retrial. It clearly demonstrates the district court judge's lack of impartiality and precluded any full and fair hearing on Davis's subsequent appeal and collateral attacks through 18 USC § 3742 or 28 USC § 2255, or any reasonable contemplation of Davis's Motion to Recuse under 28 USC §§ 144, 455.

The KTVB Television News Release is peppered with unproven allegations of both the prosecutor and the district court judge, unsupported by any evidence. The additional hard drives content is attributed to Davis without his knowledge or any proof; it assumes Davis purchased contraband images simply because his personal credit card information was on a data server that processed payments for memberships to such websites; it then builds this prejudice by converting the assumption into a fact by claiming the data showed that Davis purchased illegal materials on three occasions in October and November of 2006; that these transactions occurred while Davis was on supervised release and participating in sex offender treatment; that the home Davis shared with his mother was less than 100 yards from a park and playground equipment; it then continues to imply that Davis is a predator. None of these allegations is true. It closes with Judge Edward J. Lodge's statement that it is one of the most heinous cases in

the court's experience, and the final statement by the government which paints Petitioner Davis in an altogether different picture:

"This case was investigated under Operation Predator, a nationwide ICE initiative to protect children from sexual predators, including Internet child pornographers, those who travel overseas for sex with minors, criminal alien sex offenders, and child sex traffickers."

— (News Release at paragraph 11)

It is not reasonable to believe Judge Lodge could put aside his prejudice, or that a jury could ignore such government-vouched information. The unfounded statement that Davis convinced his mother to hide another hard drive that was later discovered to contain more than 60,000 images of contraband adds further fuel to the fire, and again is not supported by proof. It was logistically impossible for Petitioner to have amassed such volume; given his USPO-confirmed work schedule of being on the road 6 days per week, and dial-up internet modem.

Not only was the extent of contraband attributed to Davis artificially inflated, counting each and every jpeg file as illegal whether of animate object or not, as done in the first case, but the Statement of Reasons (**Appendix O**) attributed the additional hard drives to Petitioner Davis without any proof or valid legal basis. (CR07-255, document #124, Transcript at page 40)

The government knew the guilty plea was entered under coercion and duress, and even confirmed Petitioner believed the threat was real during the evidentiary hearing testimony (CR07-255, document #155 at pages 69-72), and knew its witnesses were committing perjury against Davis. The prosecutor went as far as having the sentencing transcript altered to undermine Petitioner's ineffective assistance of counsel claim by trying to show Mr. Crafts was negotiating for the elimination of obstruction points at the last minute, but the court reporter mistakenly left both original and altered paragraphs (Document #155 at page 41) (**Appendix P**). The fact is it was Petitioner Davis who refused to sign for the surprise obstruction enhancement Mr. Crafts knew about, but neglected to inform Petitioner Davis that it was added to the plea agreement.

The plea was involuntary because Mr. Crafts was not only constitutionally ineffective, but actually worked with the prosecution to secure conviction in this case. A plea is not voluntary if counsel's advice is inadequate, as was Mr. Crafts' representation and advice. Hill v. Lockhart, 474 US 52 (1985). His failure to subject the government's case to meaningful adversarial testing was deficient performance under Strickland v. Washington, 466 US 668 (1984), and McMann v. Richardson, 397 US 759, 771 (1970). His failure to obtain, consult and use necessary experts deprived Davis of effective assistance of counsel under Ake v. Oklahoma, 470 US 68 (1985), as well as his failure to conduct background investigations, under Wiggins v. Smith, 539 US 510 (2003). Because Mr. Crafts's ineffectiveness was prior to the plea entry, the plea should be vacated.-.

Normally a petitioner who succeeded in withdrawing his plea would then be allowed to plead anew. In this case, where Davis intended to assert the federal insanity defense, it would now be impossible to accurately assess Petitioner's state-of-mind during the offense conduct alleged 10 years after the fact. For this reason, and the ineffective assistance of counsel rendered resulting in the denial of constitutional rights to jury trial, due process, as well as the inordinately long sentence already served, Petitioner Davis's convictions should be expunged as an equitable compromise. Petitioner Davis has served the entire mandatory minimum 120 month sentence as of May 1, 2016. He continues to now serve the 48-month term illegally imposed based on the unproven supervised release violations alleged and the additional drives described above.

3. THE SECONDARY ENHANCEMENT UNDER USSG §5K2.0 IS UNCONSTITUTIONAL

The district court's Statement of Reasons (**Appendix N**) indicated at Section 2-B that the statutory mandatory minimum sentence was imposed; the statutory 60-month sentence for the offense conduct charged, and a primary 60-month statutory enhancement due to the existence of the prior conviction, for a total of 120 months. The secondary 48-month enhancement imposed under Section 5-C of

the Statement of Reasons, United States Sentencing Guidelines §5K2.0 cited only the prosecutor's personal belief in Petitioner's guilt of the bases the district court listed at Section 8, "Additional Facts Justifying Sentence In This Case." The burden of proof by facts and evidence was on the government, not on Davis to prove a negative. This burden-shifting is impermissible and unconstitutional. Petitioner did not discover the Statement of Reasons (**Appendix O**) until the Prosecutor "mistakenly" filed it with his Response to Davis's Coram Nobis appeal (Ninth Circuit No. 12-35982, document #13). Davis could not have discovered it through due diligence as he had no idea such document existed.

The Statement of Reasons' false allegations were not admitted to by Davis in open court at sentencing, were not contained in the plea agreement, and not included in the Presentence Report version shown to Davis on October 15, 2008, denying his constitutional right to confrontation under the Fourth Amendment, and assumed an admission in violation of the Fifth Amendment. "By treating the factual statements in the PSR as presumptively accurate, the court improperly shifted the burden of proof to the defendant." United States v. Ameline, 409 F3d 1073, 1084 (9th Cir 2005). "A district court may accept the Presentence Report as its findings of fact at sentencing, but only after it has resolved all objections." United States v. Standard, 207 F3d 1136 (9th Cir 2000).

The government alleged the "period of crimes" began with website purchases by Davis in October and November of 2006 (see **Appendix N**). No evidence of any conduct beyond the purchases using the same credit card payment website alleged to process payments for sites offering illegal content was ever presented. See, Chism v. Washington, 661 F3d 380, 391 (9th Cir 2011) (Use of credit card information to implicate criminal activity is inherently unreliable). The search warrant affidavit was based on these allegedly illegal purchases, lacking the requisite probable cause to issue. Davis rebutted the claim he reoffended while in treatment (**Appendix Q**), which was completed before September of 2005.

In Response to Davis's §2255 habeas petition (CV12-646, document #20) Prosecutor Peters filed a Declaration (Document #31, Exhibit 7, at 11), stating:

"Also on page 35 of his Amended Motion Mr. Davis alleges, without any support, that the government (apparently meaning me) knew there was no basis in fact for the sentencing enhancement imposed by the Court and yet stood silent. Davis is wrong. I fully believed at the time, and still believe today, that the sentence imposed by the Court, which was within the United States Sentencing Guidelines guideline range, was appropriately based on the facts set forth in the Presentence Report. Mr. Davis was representing himself at that time (with the assistance of stand-by counsel) and had every opportunity to object to any facts with which he took issue at that time."

—James M. Peters, Assistant U.S. Attorney

The statement was not exactly responsive or accurate, but shows the allegations were based entirely on the prosecutor's personal assertion. By allowing this license to convict, the prosecutor could claim personal belief Petitioner Davis was responsible for the assassination of President Kennedy, and seek the death penalty imposed as just punishment. The prosecutor already has the power to say who goes to prison, and essentially for how long. This power is unchecked.

"Due process requires that a convicted person not be sentenced on 'materially untrue' assumptions or 'misinformation.' Congress' intent in reliable sentencing information can be clearly discerned in the various amendments to Federal Rules of Criminal Procedure 32." Townsend v. Burke, 334 US 736, 741 (1948); United States v. Puglione, 805 F2d 1117, 1124 (CA7 1986). "Due process requires that sentencing determinations be based on reliable evidence, not speculation or unfounded allegations." United States v. England, 555 F3d 616, 622 (7th Cir 2009). The prosecutor presented nothing to support his allegations. The website purchases did not involve downloading images, and fact that the payments were made through a website facilitating purchases from sites offering child pornography does not demonstrate that the purchased memberships offered such materials. In fact, the purchases were simply a "cry for help," and nothing more. No illegal images were received or possessed either while in treatment or while on supervised release. Prosecutor Peters side-stepped the issue entirely.

The Presentence Report the prosecutor believes is accurate is definitely not. Even before knowing of the revised PSR done the day after Petitioner was denied assistance of counsel, Davis attempted to raise factual disputes with the **known** PSR during sentencing, but the district court put off the objections, then failed to return to them later in the proceedings, violating Federal Rule of Criminal Procedure 32. Once Petitioner Davis discovered the PSR revisions, on October 28, 2015, he submitted a Motion to Correct Presentence Report and Government's Sentencing Memorandum (CV12-646, document #42). An erroneous PSR may be fixed well after a prisoner begins serving his sentence because it is technically "part of the record," which may be corrected "at any time" under Federal Rules of Criminal Procedure 36. United States v. McKay, 757 F3d 195, 200 (5th Cir 2014). The PSR also follows the prisoner after his release.

The district court summarily denied the motion along with several others in its Memorandum Decision and Order of November 1, 2016 (CV12-646, document #48), and failed to rule on Petitioner's Motion to Correct Record (CR07-255, doc. #182), leaving in place unwarranted and prejudicial FBI Alert Codes.

Two motions raising PSR objections were submitted at sentencing by standby counsel Gordon, but were summarily denied by the district court, and not entered on the record. No copies were provided by Petitioner Davis. (CR07-255, document #124, Transcript at page 47). This Court held that any fact, other than a prior conviction, that increases a mandatory minimum sentence is an element requiring finding by a jury. United States v. Alleyne, 133 S Ct 2151 (2013). The Ninth Circuit held, even before the Alleyne decision, that the government bears the burden of proving, by at least a preponderance of the evidence, the facts which are necessary for an enhancement. United States v. Riley, 335 F3d 919, 925 (9th Cir 2003). The total lack of evidence here is less than a preponderance.

The secondary enhancement, which term Petitioner Davis is now serving, is illegal and unconstitutional, and should be vacated. Petitioner Davis should

have received no more than the statutory mandatory minimum, notwithstanding the properly applicable sub-statutory United States Guidelines range and due process violations already noted above. Davis completed the substantial and unduly harsh 120-month sentence imposed (when applying the good time credits earned in the BOP's custody) on May 1, 2016—more than 18 months ago. In the interest of justice, Petitioner Davis should be released from custody immediately. Continued incarceration would be repugnant to the Constitution.

4. THE PRIMARY STATUTE-MANDATED 60-MONTH ENHANCEMENT FOR A PRIOR CONVICTION UNDER THE SAME STATUTE WAS BASED ON AN UNCONSTITUTIONAL PRIOR CONVICTION

The first conviction, CR01-188, was a result of ineffective assistance of counsel before the guilty plea was entered, and involved an unknowing plea, lack of mens rea or criminal intent, clear entrapment, insufficient evidence, and indictment under a statute whose material definition was rendered void for vagueness under Ashcroft v. Free Speech Coalition, 535 US 234 (2002), and lack of probable cause for search warrant, to name a few grounds for relief.

The insanity defense was asserted (**Appendix J**) based on Petitioner Davis's history of childhood abuses resulting in characteristics of mental illnesses (**Appendix R**) and his psychosis-driven responses to the offense material alleged, and the nature and circumstances surrounding the offense conduct charged involving the precipitating stressor of the suicide of Petitioner's sister in March of 1999, and novice Internet search for state child adoption laws in an attempt to assist family in adopting a newly-orphaned niece.

This affirmative defense procedure was misrepresented by counsel as involving a minimum 2-year commitment to a psychiatric institution, possibly up to the remainder of Petitioner's life, and even if deemed competent, Davis would be returned to court to face the federal charge again before the district court. The misadvice demonstrated counsel's confusion of incompetency, a non-defense, with the statutory, affirmative insanity defense under 18 USC § 17.

Prior to and during the plea hearing, Petitioner Davis was overmedicated on a debilitating cocktail of psychotropic drugs including Topamax, Trazadone, and Zoloft, known to both the government and defense counsel. As observed by Justice Kennedy, in Riggins v. Nevada, 504 US 127, 142 (1992):

"Although these drugs have changed the lives of psychiatric patients, they can have unwanted side effects ... More relevant to this case are side effects that, it appears, can compromise the right of a medicated criminal defendant to receive a fair trial. The drugs can prejudice the accused in two principal ways: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel.

During the plea colloquy, defense counsel Peterson advised Petitioner Davis to deny their detrimental effects when questioned by the judge, taking advantage of Davis's maleable state under the influence of the very same drugs. The plea was entered unknowingly and on bad legal advice; but for this deficient legal advice, Petitioner Davis would have proceeded to trial.

Further, defense counsel failed to conduct a background investigation, interview witnesses, consult and use expert witnesses, or subject the government's case to meaningful adversarial testing. Davis himself discovered psychiatric hospital records in January of 2002 related to his 1976 admission, diagnosing schizoid personality disorder and severe chronic depression (**Appendix S**). PTSD (Post-traumatic stress disorder) was also implicated, though the diagnosis was not identified by the American Psychological Association until 1980. Counsel's ineffectiveness denied Petitioner Davis an independent psychological evaluation and partisan expert witness under Ake v. Oklahoma, 470 US 68 (1985), to testify on Petitioner's behalf, in rebuttal to the government's several evaluations.

Counsel did not consult the current treating psychologist (**Appendix T**) or even obtain character references from family, neighbors, employers, or impress on family the importance of their presence in the courtroom for hearings, did not question the sufficiency of the search warrant, affidavit in support, unauthorized expanded scope of the search, or move to suppress the fruits of the

illegal search under Mapp v. Ohio, 367 US 643 (1961). This ineffective assistance of counsel even before the plea was entered is the constructive denial of counsel. This situation therefore meets the exception allowing challenge to a prior conviction used to enhance a subsequent sentence. Burgett v. Texas, 389 US 109, 115 (1967) (It is undisputed that a conviction obtained in violation of a defendant's Sixth Amendment right to counsel cannot be used in subsequent proceedings "either to support guilt or enhance punishment for another offense"); accord Meleng v. Cook, 490 US 488, 492 (1989).

Petitioner did not receive or possess any images of actual, identifiable minors, or any images in violation of 18 USC §2252. Further, this conviction was more than 2 months after this Court's holding the statute defining illegal images was unconstitutionally vague. Ashcroft v. Free Speech Coalition, 535 US 234 (2002), (18 USC §2256(8)(B) and (D) void for vagueness).

Defense counsel did not object, allowing Petitioner Davis to plead guilty to conduct not illegal. "Due process ... is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land." North Carolina v. Pearce, 395 US 711 (1969). The Ashcroft decision left the government's indictment untenable, as the evidence, even before the holding, did not support prosecution. "A defendant cannot be prosecuted absent statutory authority to authorize the prosecution." Krawlewitch v. United States, 69 S Ct 716 n.22 (1949). The constitutionality of the first conviction may be challenged collaterally: "By framing the claim as a challenge to the current sentence as enhanced or lengthened by the former conviction, the prisoner satisfied the 'in custody' requirement." Lackawanna v. Coss, 532 US 394, 401-02 (2001).

The government also conducted an illegal sting operation constituting clear entrapment as a matter of law under Jacobson v. United States, 503 US 540 (1992). Based on mere suspicion by Western Union, Petitioner Davis was assumed to have ordered child pornography from Russia, when in actuality he

had ordered a sterling silver coffee set from a known eBay trader in Moscow. This misinformation was reported to U.S. Customs, which then notified the United States Postal Inspector as if the information was factual. Even after the expanded and unauthorized hours-long search of Petitioner Davis's residence by at least six state and federal agents, no child pornography from Russia was found. Petitioner, in fact, possessed nothing that could have been considered illegal, and no images from Russia.

The government spent months soliciting a psychologically fragile target, professing political opposition to the strict standards of the United States, and sympathetic understanding of both Petitioner's recent loss of his sister to suicide and their childhood histories of sexual abuse, neglect, and malnutrition. The undercover agent posed as a replacement confidante to Petitioner's sister. Davis was obviously reluctant to participate in the scheme by placing an order for vaguely described videos, but did so only when threatened with the loss of communication and abandonment by the agent. The offer form contained no specific descriptions of content, and the sting videos had only text labels. Petitioner Davis never viewed any of the 3 videos delivered by the undercover agent, and stipulation by ineffective counsel is not evidence.

"The government may not play on the weaknesses of an innocent party and beguile the party into committing crimes which the party otherwise would not have attempted; law enforcement officials go too far when they implant in the mind of an innocent person the disposition to commit an alleged offense and induce its commission in order that they may prosecute; when the government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to the citizen's own devices, likely would never have run afoul of the law, the courts should intervene." — (Jacobson, supra, at note 6).

Davis had no predisposition to receive or possess such illegal materials even when legal to possess, and no image predated his sister's suicide.

Suspiciously, the government destroyed all evidence 6 months after conviction, long before the 1-year AEDPA deadline for filing a collateral attack, which challenged the sufficiency of the evidence (CR01-188, document #41).

The government did not reveal this destruction in its Response to Davis's Section 2255 (CR01-188, document #43). Petitioner Davis inadvertently discovered the Destruction Certificates (**Appendix U**) only by the government's error in "mistakenly" and prejudicially submitting them with its Response to a Coram Nobis (CR01-188, document 92) filed February 24, 2012, using the destruction of evidence as a shield, claiming the grant of the writ would bar reprosecution, a prejudice created by itself.

In this precursor case, the district court denied the Section 2255 without consideration of Petitioner's Reply Brief, and denied the Coram Nobis Writ (CR01-188, document #77) procedurally because it determined Davis had failed to show valid reason for not filing the motion earlier, conflicting with the U.S. Court of Appeals for the Second Circuit in Kovacs v. United States, 744 F3d 44, 54 (2d Cir 2014). Davis **had** shown more diligence than the lawyer in Kovacs.

This unconstitutional first conviction ultimately resulted in 16 months of pretrial supervised release, a 24-month sentence, 36 months of post-conviction supervised release, a 60-month statutorily mandated enhancement, and a 48-month secondary enhancement for what are essentially allegations of supervised release violations, and also precluded any appropriate mental health treatment. In effect, this first conviction was punished by 132 months of incarceration, 52 months of supervision, and forced treatment as a sex offender when no motives were sexually-based. It is not logical to assign the life-long label of sex offender when there was no prurient interest, no criminal intent, no mens rea, no conduct beyond mere passive receipt/possession, and no contact victim.

This zealous prosecution of a former victim is likely overcompensation for previous government apathy. It is unlikely Congress intended to punish those who suffered childhood abuses, and developed mental illnesses as a result.

Davis did not receive benefit from plea negotiations reducing 3 counts to a single count for the 3 videos delivered with the anticipatory search warrant

used in the sting operation, as the government was held constrained by single-delivery doctrine under Whalen v. United States, 445 US 684 (1980) (The Fifth Amendment protects against multiple punishments for same offense).

If not for this first unconstitutional conviction and the denial of proper mental health treatment, the total devestment of Petitioner's limited success in life despite untreated mental illness and resultant cyclic psychotic episodes under mounting stresses, there would have been no second conviction, which imposed a statutory mandatory minimum sentence of 60 months in addition to the 108 months of added enhancements described above, as well as a lifetime supervised release—which means Davis forever faces prison inside and outside the penitentiary walls. The second case was really an extension of the first case, not a new case. There is no empirical data to show mere passive receipt and/or possession by itself causes former victims further harm. It is imposed upon them by the National Center for Missing and Exploited Children (NCMEC) whenever another defendant is discovered in possession of their images. NCMEC is largely funded by the government. Petitioner Davis personally does not feel any trauma from the knowledge that his own childhood abuse images circulate in cyberspace, but also acknowledges that others may feel differently.

Because the first conviction was unconstitutional and illegal, it should be vacated, and both primary and secondary enhancements based on the conviction should be vacated. The supervised release should be eliminated.

5. THE DISTRICT COURT DENIED PETITIONER'S FIRST, FIFTH, SIXTH, AND EIGHTH AMENDMENT RIGHTS, AS WELL AS DUE PROCESS AND EQUAL PROTECTION OF THE LAW

In the first case, CR01-188, the district court denied Petitioner Davis's Section 2255 without consideration of his Reply Brief. Davis was transferred to another prison between his filing the Reply Brief and the district court's Memorandum Decision and Order (CR01-188, document #44) on April 12, 2003. When Petitioner Davis discovered he had transposed the Ineffective Assistance of

Counsel and Actual Innocence claims in the §2255, he timely filed a Motion to Amend to correct the deficiency, but the district court recharacterized it as a second or successive §2255 without authorization, and it was procedurally barred. When Davis discovered his Reply was not filed on the court's docket, he timely filed a copy with a Motion to Reconsider, but again, the district court recharacterized the motion as a successive §2255 without authorization, and it too was procedurally barred. The record shows Petitioner Davis did not know of the Section 2255 denial by his Motion to Expedite (Document #50) when these motions were filed.

It was not until the prosecutor filed a Response to Davis's Coram Nobis, as stated above, that Petitioner discovered the government had prematurely, and illegally, destroyed all alleged evidence 6 months before the expiration of the 1-year Antiterrorism and Effective Death Penalty (AEDPA) deadline for filing a collateral attack under 28 USC §2255 (**Appendix U**). The right to file the habeas petition is not waived where a defendant such as Davis received ineffective assistance of counsel prior to the plea entry. Lafler v. Cooper, 566 US 156, 165 (2012) (The Sixth Amendment guarantees a defendant the effective assistance of counsel at all "critical stages of a criminal proceeding," including when he enters a guilty plea). The government knew it not only withheld this information during adjudication of the original Section 2255 in CR01-188, but also opposed the grant of the Coram Nobis relief on the grounds that reprosecution would not be possible due to lack of "evidence," prejudice created by itself.

Petitioner's release into society after the trauma of prison failed, and Davis's life disintegrated during the 36 months of supervised release. Davis hired attorney Albert Sterwerf to resolve the unjust conviction, but he was not familiar with civilian law, having recently resigned from the Navy JAG office. This cost Davis his last \$11,000.00 and chance to recover his life, and led to loss of home and bankruptcy never before experienced.

Petitioner endured psychotic episodes under the accumulated stresses, and irrationally decided the only way to be heard by the courts was to repeat the same offense conduct alleged. As Albert Einstein observed, repeating the same behavior while expecting different results is the definition of insanity. This led to the second arrest on August 16, 2007 and the second conviction for the repeat conduct on February 9, 2009, for which Petitioner Davis remains in custody, and is now serving the secondary, unconstitutional 48-month enhancement term under USSG §5K2.0, the false, unsubstantiated prosecutor's allegations.

Following sentencing and conviction, Petitioner Davis was moved from county jail to Lompoc Federal Correctional Institution (FCI) in May of 2009. Once Davis had access to federal legal resources, he filed a Coram Nobis on July 20, 2009 with both the Ninth Circuit and U.S. District Court of Idaho (**Appendix V**), but Commissioner Peter Shaw rejected the pleading because Davis was represented by counsel on direct appeal (Ninth Circuit No. 09-30059) for the second case. The district court did not file the pleading for unknown reason. As a pro se petitioner, the Ninth Circuit properly should have transferred the Coram Nobis to the district court as the correct venue.

Petitioner Davis refiled a Coram Nobis December 14, 2011 with the district court (CR01-188, document #77). The district court procedurally denied it a year later as untimely, as described above. The Ninth Circuit affirmed the denial without conducting its own standard of de novo review on appeal, under Matus-Leva v. United States, 287 F3d 758, 760 (9th Cir 2002). This Court denied Certiorari without opinion (No. 14-5755).

The district court also denied Davis's Section 2255 (CV12-646, document #48) in the second case, again without considering the Reply Brief (Traverse). It again ignored statutory conventions for habeas corpus, though this time, the Reply Brief was on the district court's docket (Docket #34), and anticipated it by its Order of February 6, 2015 (**Appendix W**).

The Memorandum Decision and Order of November 1, 2016 lists the documents the district court used for being "fully briefed on the matter," but the Reply Brief, document #34, is conspicuously absent from its list noted in the first paragraph. The Reply Brief is an integral and crucial part of the judicial process as the habeas statutes describe:

Rules Governing Section 2255 Proceedings for United States District Courts, Rule 5(d) - "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge."

The traverse (reply) was designed to provide the district court with a statement of the controverted issues:

28 USC §2248 - "The allegations of the return to a writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent the judge finds from the evidence that they are not true."

28 USC §2256 - "If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits." Davis's Reply included answering affidavits.

The district court was **not** fully briefed on the matter, and its erroneous Memorandum Decision and Order, and Judgment, should be vacated.

The prosecutor is responsible for ensuring the defendant receives a fair trial process, but here, the prosecutor again stood silent while the judicial process was subducted. The prosecutor's vitriolic responses, subornation of perjury, personal Declaration, and disingenuous complaints of Petitioner Davis's litigiousness show a diminished view of fundamental fairness. Litigation is the usual means of being heard in the courts, and exercising constitutional rights in such respectful manner is not offensive. The adjudication of the Section 2255 consumed nearly 4 years. Courts have routinely considered claims that excessive delay has resulted in a denial of due process. See, e.g., Fusari v. Steinberg, 419 US 379, 389 (1975) (Length of delay an important factor).

The district court summarily dismissed half a dozen other motions in its Memorandum Decision and Order, and denied Certificate of Appealability as to all

issues presented. The Ninth Circuit denied Petitioner Davis's Application for Certificate of Appealability (No. 16-36012), which included a Response to the district court's erroneous Memorandum Decision and Order. Apparently the Ninth Circuit did not consider the several significant constitutional violations as substantial showing under Slack v. McDaniel, 529 US 473, 484 (2000). This Court denied Certiorari without opinion on October 2, 2017 (No. 16-9668).

Petitioner Davis has been denied Due Process, Equal Protection, and pro se doctrine considerations throughout the proceedings. As the Procedural History (Appendix X) shows, Davis has encountered years of constitutional denials as to each and every claim for relief, procedural bars in the district and appellate courts, and been denied de novo review of the merits of grounds for relief by the Ninth Circuit, denied Certificate of Appealability in every instance, and denied Certiorari without opinion. It can be readily inferred the deprivations of due process by the lower courts are due to the indictment offense statute. Drug offenders may receive sub-statutory mandatory minimum sentences provided by 18 USC §3553(f). Under USSG §3E1.1, 90% of defendants who plead guilty received 2 or 3 point reduction for acceptance of responsibility; Davis did not.

By denying Davis's Section 2255 without consideration of the Reply Brief, and foreclosing any possible reconsideration request by closing with "... This matter shall be dismissed in its entirety," Petitioner is denied access to the courts for redress of grievances against the government. Denial of counsel at sentencing, forcing conflicted counsel on Davis, and allowing plea entered by coercion under conflicted counsel, and imposing a lengthy sentence without any provision for proper treatment violated Davis's constitutional rights.

The Ninth Circuit similarly closed its cases against any possibility of reconsideration with its standard mantra, "No further filings will be entertained in this closed case." (e.g., No. 16-55971, October 31, 2016). Tellingly, Davis's §2255 was denied the day after the §2241 appeal was denied: November 1, 2016.

6. THE PUNISHMENT IN THIS CASE VIOLATED THE EIGHTH AMENDMENT

"Under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes. It is inherently barbaric, and cruel to impose incarceration without treatment." Graham v. Florida, 176 LE2d 825, 826 n.3 (2010). Psychotropic medication alone is not sufficient.

"The mere commission of an act defined as criminal is insufficient to subject a person to legal punishment without proof of criminal intent to perform the forbidden act. Unless a person is of a mental state sufficient to support the intent requirement under the prevailing test of the jurisdiction, he or she will not be punished through the courts." —Morrisette v. United States, 342 US 246, 250 (1952)

Notwithstanding Petitioner Davis's long-standing schizophrenia, no normal person would fail to become desperate and irrational when falsely accused, convicted, and sent to federal prison, labeled a sex offender and felon for life, required to register as a sex offender for life, punished with supervision for life, and forced to attend sex offender treatment programs despite complete lack of deviant intent. The stage was set for the inevitable relapse conduct.

While the district court may have decided Davis attempted to fabricate an insanity defense, the evidence and record contradict this finding. Petitioner Davis could not have faked such defense by being diagnosed with schizophrenia and severe chronic depression already entrenched at age 17 in 1976 (**Appendix S**) some 25 years before the first case, and 10 years before such offense material alleged became illegal, and then reproduced the very same diagnoses more than 25 years later (**Appendix T**). Had the federal insanity defense been asserted in the first case (**Appendix J**), it is probable Davis would have received the correct psychiatric treatment, and there would have been no second case. Psychiatry is no less an exact science than law, and the brain is as subject to disease as is any other organ in the human body. (CR07-255 Transcript, doc. #124 at page 39)

The district court's credibility determinations were solely based upon the observed demeanor in the courtroom, and contrary to the evidence and the record.

Credibility determinations based simply upon an accused's courtroom demeanor, as in this case, are unreliable and do not take into account background conditions that adversely affect presentation. Petitioner had been detained in county jails for 18 months before sentencing, experienced migraine headaches, chronic depression and continued untreated schizophrenia symptoms, denial of needed dental treatment resulting in tooth loss, severe foot pain so intense Davis was at one time confined to a wheelchair, and was suspicious of defense counsel's ulterior motives toward him. Further, Davis's psychotropic medications had been inconsistently administered, and often substituted.

Again citing Justice Kennedy, as to courtroom credibility determinations based solely on a defendant's demeanor:

"It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. ... At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy. ... The side effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense."

—Riggins v. Nevada, 504 US 127, 142 - 143 (1992)

In this case, the Judge clearly did not comprehend the detrimental side-effects of psychotropic medications, manifestations of untreated mental illnesses, or effect of intense physical pain on Davis's courtroom demeanor, or the surrender to manipulation by defense counsel Crafts.

The Judge also did not comprehend the psychogenically-motivated reasons (not excuses) behind Davis's offense conduct. Petitioner Davis submitted his own manuscript describing the life-long damage left by his childhood sexual abuses (CR07-255, document #62, Attachments 1-3), and the starvation, neglect experienced from age 7. The manuscript should have been used to augment the basis for asserting the federal insanity defense by Mr. Crafts.

During the sentencing hearing, Judge Lodge accepted unproven allegations by the prosecutor, defense counsel, and the never-hired attorney Mr. Sutton, as basis for excoriating Petitioner Davis. Instead of gaining understanding of Davis's psychosis, the district court judge commented during the hearing:

"I think you need to take a step backwards and quit feeling sorry for yourself and start thinking about these victims because these children are victims. If you read the report [PSR], and I am confident that you did, you understand how hard this is on a child. It is something that doesn't just go away. Many times it affects their whole life. They have nightmares, a feeling that they are dirty, they have problems in their marriage, they have a very poor image of themselves if somebody has taken advantage of them when they were so young that they couldn't resist or protect themselves." (CR07-255, doc. #124, page 40)

These very effects were described in detail in Petitioner Davis's manuscript, which was begun just weeks after the suicide of his sister in February of 1999. Petitioner's abuses began at age 7, and continued for over 10 years. The fact that Davis was never able to find success in marriage shows the depth of the childhood abuses and lifelong effects it had on his own life.

Davis has never had a contact victim, never escalated passive conduct, had a long history of childhood sexual abuse including use in production of child pornography, had altruistic motivations based in sympathetic vein, not deviant interest, based on characteristics of the resulting mental illnesses. The nature and circumstances of the offense conduct alleged also reflects the lack of mens rea or criminal intent. Davis had no predisposition to possess illegal materials, not even when legal, had no image predating the suicide of his sister, and learned of the existence of such material inadvertently while researching "child adoption" as a completely inexperienced web surfer. It was abuse memories that left him unable to abandon the victims to their abusers.

Throughout the proceedings, the only time Davis has been believed is when making uncounseled pre-Miranda admissions under interrogation, accomodating the polygrapher with "meaningless" uncounseled pre-exam admissions, and compliant admissions to satisfy psychosexual and psychosocial evaluators, or pleading.

In these cases, neither offense alleged was committed with criminal intent or mens rea. No partisan psychological evaluation was arranged for the defense by any attorney. Petitioner Davis certainly did not want to commit a crime, but was not in control at the time of the offense conduct alleged.

In general, courts interpret criminal statutes to require that a defendant possess a mens rea, or guilty mind, as to every element of an offense, and even where no term is specified in a statute, courts read a "background rule" that the defendant must know each fact making his conduct illegal. They infer, absent an express indication to the contrary, that Congress intended such mental-state requirement by the statute. Schizophrenia and cyclic psychotic episodes can negate the ability to appreciate the wrongfulness of one's conduct. See, e.g., Staples v. United States, 511 US 600, 619 (1994); Elonis v. United States, 192 LEd2d 1 (2015). Prosecution of a citizen who is unaware of any wrongdoing for "wholly passive conduct" violates due process. Lambert v. California, 335 US 225 (1957).

Aside from the first unconstitutional conviction and damage resulting, imposition of punishment again, without due process or consideration of facts involved, and without provision for proper treatment, is cruel and unusual.

CONCLUSION

These numerous violations of federally protected rights afforded by the Constitution and Bill of Rights undermine the public's confidence in the fundamental fairness of the judicial process, and criminalizes mental illness.

As no Court has conducted de novo appellate review of Petitioner's grounds for relief, res judicata does not bar application for a writ of habeas corpus. As this Court observed in Knauff v. Shaughnessy, 338 US 537, 551 (1949), the writ is "the unanswerable evidence that our free country permits no arbitrary detention." Though this Court cannot correct an injustice, it can, in appropriate cases such as this, exercise its supervisory power over the lower courts.

Our constitutional rights are meaningless if defense counsel won't assert them, prosecutors won't respect them, and Courts won't enforce them. To elide them is chaos and anarchy, not the rule of law. Petitioner Davis has diligently sought relief through the Courts (**Appendix X**) in the good faith belief of the entitlement to relief, but has no representation, no training in the law, and inadequate law library or access to expert legal advice.

Petitioner Davis is now being held in violation of the Constitution and laws of the United States, a continuing miscarriage of justice. Petitioner Davis respectfully requests this Court grant the Writ of Habeas Corpus on its own authority under 28 USC §2241(c). This Court has long held that the writ of habeas corpus is appellate in nature. Ex parte Bollman, 8 US (4 Cranch) 75, 101 (1807); In re Chapman, 156 US 211 (1895) (Court's habeas corpus jurisdiction is "appellate"); see also Felker v. Turpin, 518 US 651, 660 (1996) ("[W]e conclude that Title I of the [AEDPA] [of 1996] has not repealed our authority to entertain original habeas petitions."). Relief may be granted under the All Writs Act, 28 USC §1651(a), authorizing federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In this unique case's circumstances, Petitioner prays the Court will grant the Writ of Habeas Corpus, release Davis from confinement, expunge the record of the convictions, and grant any other relief deemed just and equitable. No other avenue of relief is available, all lower court remedies are exhausted.
DATED this 29th day of December, 2017.



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