

No. 17-8167

IN THE SUPREME COURT OF THE UNITED STATES

DAVID L. SPALDING,

Pro Se Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Rehearing for the Writ of Certiorari
to The United States Court of Appeals (5th Cir.)

Respectfully Submitted By:

David L. Spalding

Pro Se Petitioner

#47371-177

FCI - Box 9000

Seagoville, TX 75159-9000

CJA Counsel of Record is:

Brian J. Newman

Newman Law Firm

209 W. 2nd Street - Ste 347

Fort Worth, TX 76102

QUESTIONS PRESENTED

1. Can a non-Article III actor, a court clerk, issue an order or a denial regarding a constitutional right?
- 2A. Is the reputation of the federal judiciary tarnished by a Federal Circuit having two standards for defense funding under the Criminal Justice Act, one for politically-connected defendants and the other for normal defendants?
- 2B. May a District Court allow co-defendants to use the "coat-tails of a politically-connected defendant, allowing them to avoid filing required financial documentation, yet providing them with unlimited funding through the CJA?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

1. CJA Appointed Counsel - Brian J. Newman
Newman Law Firm
209 W. 2nd Str. -- Ste 347
Fort Worth, TX 76102
PH: 817.231.0023
 2. Office of the Court Clerks - Lyle W. Cayce
United States Court of Appeals - Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130
 3. James W. Hendrix
United States Attorneys Office
1100 Commerce Str., -- Ste 300
Dallas, TX 75242
-

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TABLE OF EXHIBITS

APPENDIX 1 - MEDIA

- A1) 03/06/2015, Dallas Observer, Stephen Young, "We're All Paying for John Wiley Price's Defense Lawyer Now."
- A2) 03/06/2015, Dallas Morning News, Kevin Krause, "Taxpayers to foot much of bill for John Wiley Price's defense"
- B) 04/18/2017, Dallas Observer, Stephen Young, "Even if Jury Finds Price Guilty, Judge Will Likely Dismiss Mail Fraud Charges"
- C1) 04/29/2017, Dallas Morning News, Naomi Martin, John Wiley Price on his verdict: "I'm the luckiest black man in America"
- C2) 04/29/2017, Dallas Morning News, Kevin Krause and Naomi Martin, "The Jury has spoken, Price found not guilty of bribery, fraud; aid acquitted"
- D) 05/24/2017, Criminal Legal Report (BNA), Melissa Heelan Stanzione, "The federal judiciary asked Congress for \$7.2 billion in funding for fiscal year 2018..."
- E) 07/11/2017, Dallas Morning News, Kevin Krause, "Judge rules Price on hook for attorney fees"
- F) 03/28/2018, Criminal Legal report (BNA), "Fifth Cir. Applied 'Wrong' Standard on Legal Funds"

APPENDIX 2 - RE: JOHN WILEY PRICE

- G) 09/15/2014, Document 51, Magistrate Judge Renee Harris Toliver, District Court Order DENIED Motion for Appointment of Counsel
- H1) 07/23/2014, Docket #3:14-cr-00293-M-BK, indictment Document
- H2) 01/28/2015, Document 93, Before the Court, District Court Order DENIED Motion for Appointment of Counsel
- H3) 01/28/2015, Document 94, John Wiley Price, Motion to Withdraw Pending Motion for Appointment of Counsel
- H4) 01/28/2015, Document 96, Before the Court, Order GRANTED on Motion to Withdraw Pending Motion for Appointment of Counsel
- I) 03/06/2015, Document 113, Magistrate Renee Harris Toliver, Order GRANTED on Motion for Appointment of Counsel
- J) 04/28/2017, Document 521, Twelve Jurors, VERDICT OF THE JURY in United States v. John Wiley Price

APPENDIX 3 - RE: DAVID LYMAN SPALDING

- K) 02/25/2015, Document 76, David Lyman Spalding, Motion to Request Appointment of New Defense Counsel
- L) 03/03/2015, Document 84, Magistrate David L. Horan, Order DENIED Appointment of New Defense Counsel
- M) 04/08/2015, Document # None, Attorney Gabriel Reyes, Complete Case List of David Spalding's Attorney
- N) 04/12/2016, Document 282, David Lyman Spalding, Judgement in a Criminal Case
- O) 07/20/2017, Document # None, David Lyman Spalding, Letter to Fifth Circuit Judges Clement, Prado and Higginson re: Motion for Reconsideration of Time Enlargement
- P) 07/24/2017, Document # None, David Lyman Spalding, Letter to Fifth Circuit Deputy Clerk requesting information update on Spalding's Motion for Reconsideration of Time Enlargement
- Q) 07/28/2017, Document # None, U.S. Postal Service, USPS Tracking Service providing information on Mr. Spalding's Motion for Reconsideration of Time Enlargement letter to Fifth Circuit judges
- R) 03/21/2018, Document # None, Leigh Lyon, Chief Deputy of Operations, USDC, Dallas, Response to Mr. Spalding's request for Justice Stewart's approval of the Price CJA deal
- S1) Timeline for the Spalding & Price Cases
- S2) Similarly-situated Defendants

ORIGINAL PETITION

- T) Petition for a writ of Certiorari, filed by David Spalding on March 16, 2018, docketed on March 20, 2018

GUIDES, CODES and PLANS

APPENDIX 4

Code of Conduct for United States Judges

APPENDIX 5

Guide to Judiciary Policy, Defender Services Program Guidelines

APPENDIX 6

Judicial Council of the Fifth Circuit, Criminal Justice Action Plan

CERTIFICATE OF SUPREME COURT COMPLIANCE

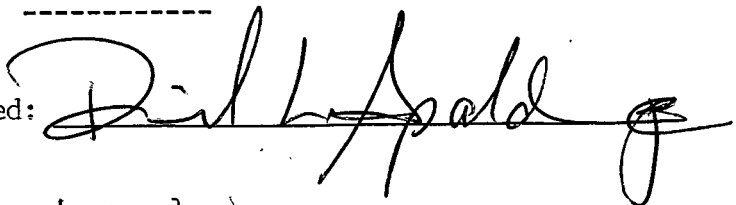
Per the letter from Michael Duggan - Office of the Supreme Court Clerks, as dated of May 15, 2018 - the petition for a rehearing in the above - entitled case, has been mailed, via certified mail - #7016-0910-0001-9163-6468, from the FCI - Seagoville, TX mail-room, on Tuesday, May 29, 2018 - thus complying with the 15 day response timeline. This response corrects the rehearing petition as per Rule 29.2 and/or Rule 44.6.

As per Supreme Court Rule 33.2(b), this revised Petition for a Rehearing, contains pages, which complies within the 15 page limit, as defined.

As per Supreme Court Rule 44.1 and as per said letter from Michael Duggan - Office of the Supreme Court Clerks, I - David Spalding - Petitioner, have sent only one (1) copy with supporting addendums and exhibits, to the Supreme Court. No other copies have been mailed.

As per Supreme Court Rule 44.6 - I - David Spalding herein state that this Petition for a Rehearing is sent in 'Good Faith'. As noted in the petition, said petitioner - David Spalding is requesting a review and rehearing, so petitioner will not be placed in a 'Unreviewable Procedural Default' status, thus forcing a unconstitutional act upon petitioner.

Confirmed and Submitted:

A handwritten signature in black ink, appearing to read "David Spalding", is written over a horizontal line. The signature is fluid and cursive.

JURISDICTION FOR REHEARING

SUPREME COURT RULE 44.2 STATES

"Any petition for the rehearing of an order denying a petition for a writ of Certiorari...shall be filed within 25 days after the date of the order of denial... but its grounds shall be limited to intervening circumstances of a substantial grounds not previously presented."

- (1) The petition for a Writ of Certiorari was filed on March 16, 2018, and docketed on March 20.
- (2) On March 18, the Supreme Court decided "Ayestas v. Davis, #16-6795", wherein the high court said that the Fifth Circuit Court of Appeals imposed a burden that was too heavy when it denied Mr. Ayestas' request for \$20,016 of CJA funding under 18 U.S.C. §3599(f) to investigate certain trial issues.
- (3) On March 26, Mr. Spalding received a letter from Ms. Leigh Lyon, Chief Deputy of Operations, U.S. District Court, Northern Division. In the letter, Ms. Lyon stated, "I do not find any order entered by Judge Stewart [Chief Justice of the Fifth Circuit] in the [Price] case." The funding that took place in the Price case (over \$1.0 Million) required Justice Stewart's approval under the Fifth Circuit Plan for CJA Administration (See Appendix 6).

BACKGROUND

Mr. David Spalding was indicted in the Summer of 2013, and convicted by a jury on April 8, 2015, on six counts of Wire, Mail and Bankruptcy Fraud. The charges stemmed from a failed energy venture, a West Texas Wind farm. The project was partially funded by promissory notes, some of which were not repaid before the company went bankrupt.

BACKGROUND - I. THE CLERKS DENY MR. SPALDING

Following his sentencing on March 16, 2016, Mr. Spalding filed a total of four (4) Motions to proceed Pro Se on his direct appeal. He was denied. All four of the 28 U.S.C. 1654 motions were timely filed, and the court clerks

replied each time with a denial, stating that he needed to attend a Faretta Hearing. In all cases, Mr. Spalding said that he would attend a Faretta Hearing anytime. No hearing was ever scheduled, and the court clerks of the Fifth Circuit, not an Article III judge, DENIED all of the §1654 motions. The Court Clerk's Orders were Final and Dispositive Orders by Inferior Officers of the Court. (See - Original Writ of Certiorari, filed on March 20, 2018 - Exhibit with Court Clerk's Orders).

BACKGROUND - IIA. THE JOHN WILEY PRICE ISSUE

Mr. John Wiley Price is the longest-sitting Dallas County (TX) Commissioner. He was indicted in the Summer of 2014 on eleven counts of Mail, Tax and Bankruptcy Fraud and Bribery. The Price case included as co-defendants Kathy Nealy and Dapheny Fain (United States v. John Wiley Price [01] et al., No. 3:14-cr-00293-m) (Exhibit). (Appendix I - Exhibit - A, B, C, D, E, F. Appendix 2 - Exhibit G, H, I, J).

In early March, 2015, both Mr. Spalding and Mr. Price had hearings requesting Selection of Counsel of Choice under the Criminal Justice Act (CJA), to include funding of all the experts they required, without a spending cap. On March 3, 2015, Mr. Spalding's motion was DENIED. On March 6, 2015, Mr. Price's motions were APPROVED - (Exhibit K - Document 76; March 3, 2015 - Exhibit L).

The cases and the defendants were similarly situated: Both cases were considered complex; Both parties had substantial assets; Both parties were ruled as indigent after forfeiture of their assets; Both parties had been assigned Federal Public Defenders; Both parties filed for Selection of Counsel of Choice, to be paid by the CJA. Mr. Price's motion was GRANTED, along with his co-defendants (See item IIB). Mr. Spalding's motion was DENIED. When Mr. Spalding requested an explanation from the Federal Public Defender's Office, he was told, "You are not John Wiley Price, and you are not black."

The Price trial ended on April 28, 2017, and the jury returned a verdict of Not Guilty on the Mail Fraud charges, and were hung on the other charges. The charges were dismissed on the other defendants - Nealy and Fain.

The U.S. District Court - Dallas allowed the three (3) parties to be granted unusual CJA representation without the approval of the Chief Justice of the Fifth Circuit, Justice Stewart, as required by the Fifth Circuit CJA Plan. The CJA funding paid out so far for the Price co-defendants have surpassed \$1.0 Million, and are not all accounted for yet.

BACKGROUND - IIB. THE CO-DEFENDANTS ISSUE

Mr. Price had two co-defendants, Kathy Nealy and Daphney Fain. The co-defendants never filed a CJA motion, nor did they claim indigent status with a formal CJA - 23 Financial filing. Yet both co-defendants were awarded the same type of CJA funding that Mr. Price received. The two co-defendants never had their assets seized by the government under forfeiture. Once again, the CJA rules and limits were not followed and Justice Stewart's approval signature was not obtained.

The funding to-date for Kathy Nealy has been \$343,797.78 and for Daphney Fain the total has been \$252,348.13. The CJA standard for defense attorneys is currently limited to \$10,300 per defendant, with smaller amounts for paralegals, investigation and other services. (Exhibit I - March 6, 2015).

ARGUMENT

I. CLERK'S DECISIONS

In the Wellness decision, Justice Thomas quotes from Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58, 60, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982)(plurality opinion), saying, "By reserving the judicial power to judges with life tenure, and salary protection, Article III constitutes

'an inseperable element of the constitutional system of checks and balances' a structural safeguard that must 'be jealously guarded.' The Justice continues, "with narrow exceptions, Congress may not confer power to decide federal cases and controversies upon judges who do not comply with the structural safeguards of Article III." (Wellness Int. Network, Ltd., v. Richard Sharif - 2015, 135 S. Ct. - 1932, 1939 - 191 L. Ed - 2d 911 (2015).)

It stands to reason that if the power to decide "federal cases and controversies" can't be conferred on non-Article III judges, they certainly can't be conferred upon clerks of the court. Yet in this case, Mr. Spalding's motions were ruled upon and denied, causing him to lose the ability to proceed as he thought best. (Freytag v. IRS Commissioner 501 U.S. @ 881 - 882 - 1991)(S.E.C. v. Richard Sharif - S. Ct. - 17-130).

The result of these actions taken by the eight (8) various court clerks was to deny Mr. Spalding his Due Process rights and to restrict his ability to pursue his direct appeal as he saw fit. Mr. Spalding's 28. U.S.C. §1654 Motions must be fairly adjudicated by law, and limited to Article III Judges.

IIA. TWO STANDARDS FOR A CJA FUNDING

The funding violations first came about because the U.S. District Court - Northern District, allowed a party, John Wiley Price, to be granted unlimited funding for his defense without the approval of Chief Justice Stewart of the Fifth Circuit. Both Mr. Spalding and Mr. Price had their funds frozen under a forfeiture order. Both parties were similarly-situated (See Exhibit R and S). However, Mr. Spalding's request for representation by an attorney of his choice was denied, while Mr. Price's request was approved. Mr. Spalding was forced to go to trial with a public defender for his attorney that had NEVER had a trial in his career (Exhibit). And Mr. Spalding's case (like Mr. Price's case) was considered "complex. When Mr. Spalding asked the head of the Federal Defender's Office for an explanation, he was told, "You are not

John Wiley Price and you are not black". (Exhibits G, H2, K, L).

In the Summer of 2017 - Mr. Spalding sent certified mail packages involving the Price case of the 'extraordinary and unique CJA funding' that was completely outside the Fifth Circuit - CJA Plan. The certified mail package was sent to BOTH of the Court Clerks and to the Fifth Circuit Justices - Prado, Clements, and Higginson. (Certified Mail Ltr. - Dated July 24, 2017 - with USPS validation of delivery to the Fifth Circuit Court - Exhibit O, P, Q).

The July 24, 2017 certified mail package to the Fifth Circuit was supported with copies of the various Price, Nealy and Fain - CJA Motions and numerous Dallas - Fort Worth, TX news paper articles. Because of the copious amount of articles, some which leveled statements of 'judicial bias, and political cronyism and discrimination' against the USDC - Financial Services Group, were enclosed.

The CJA funding disparities create the possibility of a significant injustice for any party using any **CJA funding**. This "undermines the public confidence in the overall judicial process" (Liljeberg v. Health Servs Acquisition Corp., 484 U.S. 947, 855, 1988).

Whomever, within the Fifth Circuit, that assisted in the Respondents Brief to this Court, concerning the Circuit's CJA funding standards, including §3599(f), where the Fifth Circuit stated that a CJA petitioner must have or demonstrated a 'reasonable and substantial need' has committed a factual lie to the Supreme Court - See "Ayestas v. Davis - Case #16-6795" - vacated and remanded March 21, 2018.

In the Price Case, the defendants - Price, Nealy and Fain, requested and received over \$1.0 Million for the Selection of Outside Counsel of Choice, under CJA statutes §3006(A). The USDC ignored any 'reasonable and substantial' need standards, because the defendants - Price, Nealy and Fain 'didn't feel comfortable with the legal expertise of the Federal Public Defenders Office'.

When discrimination enters the judicial process, it "ratifies and reinforces prejudicial views", that puts the very integrity of the Courts in jeopardy and the judicial discrimination totally eviscerates the "even-handed administration of justice" (Miller El v. Cockrell, 545, 537 U.S. @ 238-2003) and (Davis v. Ayala, 135, S. Ct., 2187, 2208-2015).

Responding to Mr. Spalding's request for financial information of the CJA funding, Leigh Lyon, Chief Deputy of Operations USDC - confirmed on Jan. 16, 2018, as to that date, the fundings in question were:

John Wiley Price

2 attorneys:	\$357,429.65
fact investigators:	\$20,360.00
paralegal services:	<u>\$36,605.95</u>
Total	\$414,395.60

Kathy Nealy

2 attorneys:	\$307,622.70
paralegal services:	\$3,734.40
forensic accountants:	<u>\$32,440.68</u>
Total	\$343,797.78

Daphney Fain

2 attorneys:	\$162,792.69
fact investigators:	\$4,730.00
paralegal services:	\$45,575.23
accounting services:	<u>\$39,250.00</u>
Total	\$353,348.13

Ms. Lyon stated that the USDC Financial Services has not yet received all of the invoices form the three parties. (See Leigh Lyon Ltr. - Jan. 16, 2018 - Exhibit D).

In the case of Ayestas v. Davis, U.S., No. 16-6795, (vacated and remanded March 21, 2018), the Supreme Court said that the Fifth Circuit's standard's under the CJA, "imposed a burden that was too high when it affirmed the denial of Ayesta's request under a federal law authorizing funds to certain indigent parties". The law under which Ayestas requested the funds requires showing that they're "reasonably necessary". But the Fifth Circuit required that applicants show a "substantial need" for the money.

Ayestas argued that the Fifth Circuit's standard - an outlier in the federal circuits - made it so that he had to prove ahead of time that getting the funds would make his claim succeed, an impossible standard, Justice Alito said.

Justice Alito went on to say that "The Fifth Circuit exacerbated the problem" by also requiring Ayestas to show he had "a viable constitutional claim that is not procedurally barred." "That rule is too restrictive," Alito wrote.

IIB. CO-DEFENDANTS ARE COVERED BY CJA FUNDING

The Fifth Circuit - CJA Plan is very specific concerning the rules and procedures involving any and ALL CJA compensation. As discussed, the USDC - Northern District had three (3) CJA hearings alone for the requested compensation and 'selection of counsel of choice', under §3006(A).

But, the two(2) other defendants - Kathy Nealy and Dapheny Fain, basically raised their hand and said 'Me too!!'. In the Fall of 2014 - both Kathy Nealy and Dapheny Fain were afforded the same type of USDC - Northern District of CJA representation of 'selection of counsel of choice', as being requested by John Wiley Price, but, - WITHOUT - the extensive 'financial inquiry' and the numerous Magistrate Court hearings.

The United States District Court - Northern District has no records of the reasoning of the CJA funding provided Kathy Nealy and Dapheny Fain, and/or

records supporting the approval for the excess compensation afforded each defendant and/or any records of a 'memorandum' for the approval for the Chief Judge of the Circuit and/or any approval from the Chief Judge of the Circuit - the Honorable Chief Justice Stewart.

The two (2) defendants - Kathy Nealy and Dapheny Fain were not scheduled for trial until AFTER the trial of John Wiley Price. Both defendants were able to be afforded ALL the representation rights, including paralegals and fact investigators, and their trials were scheduled months away.

CRIMINAL JUSTICE ACT (CJA) STANDARDS

Various judicial and ethical violations occurred under the Criminal Justice Act (CJA) Funding, as previously defined. As per the Guide to judiciary Policy - Vol. #7 - Defender Services - Part A - Guidelines for Administering the CJA and Related Statutes - §110 and forward - Revised as of Dec. 18, 2014. (Front page and pages 17 thru 24. Relevant pages enclosed as Exhibit #5).

Under §230.23.20 - Current Attorney Case Compensation Maximums as per page 20, of the Guidelines, state that the maximum amount one (1) attorney is allowed for a 'non-capital case' is \$10,300 for felony cases. (Page 20 of Guidelines Exhibit #5). As per §230.23.10(c)(2) - states that "Payments above case compensation limits referred to in §230.23.10(c)(2) may be authorized when certified by the presiding judicial officer and **approved by the chief judge of the circuit**. The chief judge of the circuit is permitted to delegate this approval authority to another active or senior circuit Judge." (Page 19 of Guidelines - Exhibit #5).

Furthermore, Section §230.23.40 - Waiving case Compensation Maximums - Overview - (a) - States - "Payments in excess of CJA compensation maximums may be made to provide fair compensation in cases involving extended or complex representation when so certified by the court of U.S. Magistrate Judge and

approved by the Chief Judge of the Circuit (or by an active or senior circuit judge to whom excess compensation approval authority has been delegated. (Page 23 - of Guidelines - Exhibit #5).

Finally - Section §230.30 - Supporting Memorandum Justifying Compensation Claimed - (b)(2) Calim for More than Case Compensation Maximum - States - "Upon preliminary approval of such claim, the presiding judicial officer should furnish to the **chief judge of the circuit** a memorandum containing the recommendation and a detailed statement of reasons. (Page 25 of Guidelines - Exhibit #5).

In order to decide their cases completely, fairly and independently, all judges are required by both the Due Process Clause and the ABA Code to remain impartial and independent. This standard reflects the fundamental right, guaranteed by the Due Process Clause to an 'impartial tribunal'. This very essential right is clearly endangered when a judge's conscious or unconscious partiality threatens to 'infect both the due process and the outcome of a trial'. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship. "Any mere question of a Judge's impartiality threatens the purity of the Judicial process and it's institutions" (See - Potashnick v. Port City Constr. Co., - 609 F 2d 1101, 111 - 5th Circuit - 1980).

The test under the Judicial Code is whether the conduct would create in "reasonable minds" a perception that the judge is engaged in conduct that "reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge" - (See - Model Code of Judicial Conduct - Rev. 1.2). As the Supreme Court has stated and the ABA has re-enforced, this rigorous standard is necessary because the public cannot respect the legitimacy of the Courts if judges do not act as models of independence, integrity and impartiality.

CONCLUSION

This case raises significant doubts about the 'impartiality and fairness' of both the United States District Court - Northern District and the Fifth Circuit Court of Appeals. Because of the 'denial' by ONLY the Office of the Court Clerks, concerning Mr. Spalding's valid §1654 Motions - then Mr. Spalding will be forced to accept a 'unreviewable procedural default' - thus granting the desire - to silence Mr. Spalding so the various 'pre-trial Constitutional violations' can never be heard on any type of appeal - either a 2255 or the pending 'direct appeal', - especially the issues involving the CJA funding in the Price Case.

As ALL parties will agree too, the very serious negative cynicism and outright discriminatory practices that has been previously leveled against the USDC and now, the Fifth Circuit Court of Appeals, as argued by the 'two - tiered' system of CJA Funding, will further 'inflare the attitude' of political cronyism, judicial bias and blatant discrimination. Did the 3 Justices of the Appeals Court subscribe to the 'two - tiered system' of CJA funding or just ignore the facts?

Because of the publically expressed disdain towards the USDC and the Fifth Circuit Court of Appeals, any future proceedings by potentially biased judges, will be questioned by the public involving due process, fairness and the very important reputation of the honored judicial system.

As this Court has stated - "Any potential for bias is unacceptable because in every judicial preceeding, there must NOT be even the probability of unfairness".

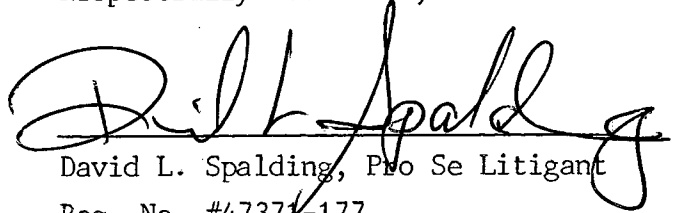
CLOSING

Mr Spalding herein requests that the Supreme Court GRANT either of the two (2) recommendations:

1. GRANT a Judgement of Acquittal for Mr. Spalding.
2. GRANT, VACATE & REMAND(GVR) Mr. Spalding on his conviction and Remand to another Circuit for a new trial.

Mr. Spalding PRAYS that the Supreme Court will GRANT a Rehearing on this matter.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "D. L. Spalding", written over a horizontal line.

David L. Spalding, Pro Se Litigant

Reg. No. #47371-177

F.C.I. Seagoville

P.O. Box 9000

Seagoville, TX 75159-9000