22-5750

ORIGINAL

No._____

In The

Supreme Court of the United States

SALVADOR DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

Salvador Diaz
P. O. Box 151
Horntown, VA 23395
(347) 344-6571
Sal13diaz@hotmail.com

Pro Se Petitioner

QUESTIONS PRESENTED

Where the COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits, did the court of appeals err when it denied Petitioner's COA application by merely reciting the requirements for granting a COA under § 2253(c)(2) that a substantial showing of a denial of a constitutional right be demonstrated?

Did the Second Circuit frivolous reviews of Petitioner's submissions violate the Due Process Clause of the Fifth amendment?

RELATED CASES

28 U.S.C. § 2255 Proceedings Below:

Diaz v. United States. No. 21-3141 (2d. Circuit, May 04,2022) (Order denying motion for certificate of appealability)

Diaz v. United States, 21cv2403 (17cr0227) (S.D. N.Y. December 17, 2021) (Opinion and order denying 28 U.S.C. § 2255 motion)

In Re: Salvador Diaz, 21-2614 (2d. Circuit, February 09, 2022) (Order denying petition for a writ of mandamus)

Diaz v. United States, 21cv2403 (17cr0227) (S.D.N.Y. September 03, 2021) (Order denying motion to obtain grand jury transcript)

Diaz v. United States, 21cv2403 (17cr0227) (S.D.N.Y. September 15, 2021) (Order denying motion to disqualify judge)

Underlying Criminal Proceedings:

United States v. Diaz, No. 17cr0227 (S.D.N.Y. July 13, 2018) (Opinion of district court denying motion to dismiss challenging validity of underlying conviction)

United States v. Diaz, No. 18-3086 (2d. Circuit, January 22, 2019) (Order dismissing interlocutory appeal)

United States v. Diaz, No. 19-1895 (2d. Circuit, July 22, 2022) (Opinion of the Second Circuit affirming judgment of district court on direct appeal)

TABLE OF CONTENTS

INDEX OF APPENDICES

Appendix A:

Appendix B:

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

STATUTES AND RULES

RULES

OTHER AUTHORITIES

In the
Supreme Court of the United States

Salvador Diaz,
Petitioner,
v.
United States of America,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the proceedings in the Second Circuit Court of Appeals.

OPINIONS BELOW

The Order of the Second Circuit denying a Certificate of Appealability ("COA") is reproduced in the appendix bound herewith as Appendix ("App.") A at 1. The opinion of the district court is reproduced as App. A, at 2-11.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). On July 14, 2022, the Court of Appeals denied Petitioner's motion for panel rehearing, hearing *en banc* (App. A at 24).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the Petition Clause of the First Amendment, the Due Process Clause of the Fifth Amendment, and the Sixth Amendment to the U.S. Constitution.

The statutory provisions involved are 18 U.S.C. § 2250, 18 U.S.C. § 1001, 28 U.S.C § 1254(1), 28 U.S.C. § 2253, 28 U.S.C. § 2255, 34 U.S.C. § 20911(5)(B), Fed. R. of Evid. Rule 104(e), Fed. R. Crim. Proc. Rule 12(b)(3),

STATEMENT OF THE CASE

Indictment

An indictment filed on April 12, 2017, charged that from at least in or about 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, Petitioner, being an individual required to register under SORNA by reason of a conviction under Federal law, knowingly did fail to register and update a registration as required by SORNA in violation of 18 U.S.C. § 2250.

Petitioner failed to verify his address each year from 2015 through 2017, as required by law and changed his residence without updating his registered address in New York.

On November 16, 2018, the District Court issued an Order requiring that the government submit a letter addressing the effect of *Nichols v. United States*, 136 S. Ct. 1113 (2016), on this case. The District Court explained:

The Court understands *Nichols* to hold that a sex offender who changes his residence does not need to update his registration in the jurisdiction where he is departing but, rather, needs to re-register only in the jurisdiction where he establishes a new residence. *See* 136 S. Ct. at 1117–18. Applied here, the Court stated, *Nichols* suggests that Petitioner was not required to notify New York authorities of his change of residence; he was (allegedly) required to notify only the authorities in his new state of residence.

Accordingly, the District Court Ordered:

> 1. In light of *Nichols*, the Government must explain why the Indictment properly states an offense, given that it alleges that Petitioner "changed his

> residence without updating his registered address in New York," Dkt. 12 (emphasis added).
>
> 2. The Government must also explain why venue is proper in this District, given that Nichols suggests that Petitioner 's alleged offense was his failure to report his change of residence to New Jersey and/or Virginia authorities, not New York authorities. The Government's explanation regarding venue should address *United States v. Holcombe*, 883 F.3d 12 (2d Cir. 2018), and the Court of Appeals decisions cited therein.

Less than three days following the District Court's Order, the government filed a superseding indictment changing the theory of prosecution. Rather than charging Petitioner as a federal offender under 18 U.S.C. §2250(a)(2)(A), the government charged Petitioner as a state offender under 18 U.S.C. § 2250(a)(2)(B), alleging that from at least in or about 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, Appellant, being an individual required to register under SORNA who did travel in interstate commerce, knowingly did fail to register and update a registration as required by SORNA in violation of 18 U.S.C. § 2250. The indictment charged that Appellant moved from New York to New Jersey to reside and failed to register as a sex offender in that State.

Defense Counsel Letter

Following Petitioner's expression to court-appointed Defense Counsel DeMarco and the District Court of his desire to challenge the validity of his underlying SORNA-triggering conviction at trial, the court instructed Mr. DeMarco to file motion to that effect by January 15, 2018. Instead, without a word to his client, Mr. DeMarco filed a letter (App. A at 52-58) with the court on January 8, arguing that Petitioner should not be permitted to collaterally attack his prior conviction. Counsel cited *Custis v. United States*, 511 U.S. 485 (1994) and additional circuit cases to suggest that a defendant cannot attack prior convictions necessary for a later

conviction. Counsel also argued that Petitioner had taken advantage of multiple opportunities to contest the validity of his underlying conviction.

Petitioner's Communication with Court Regarding Counsel

On February 5, 2018, Petitioner filed a letter with the Court requesting to replace Defense Counsel DeMarco. On March 1, 2018, the court refused to replaced DeMarco and appointed DeMarco as standby counsel while it allowed Petitioner to represent himself. Mr. DeMarco was relieved as attorney-of-record on March 2, 2018 and Petitioner proceeded *pro se.*

Motions to Dismiss

On March 2, 2018, Petitioner, *pro se,* filed a motion to dismiss arguing that the charges against him should be dismissed because they were based on an invalid underlying conviction, which had been obtained in violation of Due Process by Court Martial December 1, 2000.

Decision on First Motion

On July 13, 2018, the District Court denied Petitioner's motion to dismiss (App. A at 27-38). Relying on cases such as *Lewis v. United States*, 445 U.S. 55 (1980) and *Custis v. United States*, 511 U.S 485 (1994), the Court explained that it has consistently been held that a defendant may not use a subsequent criminal proceeding to argue that their prior conviction was obtained in violation of the Constitution. The court adopted the reasoning of *United States v. Delgado*, 592 F. App'x 602, 603 (9th Cir. 2015), which held that a defendant may not challenge the prior conviction that made him a SORNA offender during a prosecution for failure to register. The court stated nothing in SORNA authorizes a defendant to argue that his prior conviction was obtained in violation of the Constitution, *Delgado,* 592 F. App'x at 603, and SORNA focuses only on "the fact of the [prior] conviction." *Custis*, 511 U.S. at 491.

Because the procedural validity of Petitioner's prior conviction was not at issue in the prosecution, he thus could not use the proceeding to attack it.

At a conference held on August 21, 2018 the Court further informed Petitioner that he would not be allowed to put forth evidence regarding challenging his underlying conviction at trial.

Decision on Second Motion

On February 23, 2019, just before commencement of trial, Petitioner filed a motion to dismiss for improper venue, and because the charge in the indictment that defendant "did travel in interstate and foreign commerce" failed to state an offense because he was a federal offender, Petitioner argued, interstate travel is not an element of the offense. Petitioner argued that in alleging travel in interstate and foreign commerce solely for the purpose of attaching venue, the government was knowingly attempting to deprive the defendant of his Sixth Amendment Constitutional right to a "public trial, by an impartial jury of the state and district wherein the crime shall have been committed." Dkt. 135. On February 25, 2019, the first day of trial, the District Court denied the motions to dismiss on the grounds that they were filed out of time, and therefore waived, and in any event, without merit. The Court held that Section 2250 phrases the "federal conviction" and "interstate commerce" theories of the offense in terms of "or" indicating that the government may proceed under either one. If an unregistered sex offender travels in interstate commerce, the government has a federal interest in prosecuting him, regardless of whether he is a federal or state sex offender. The Court also stated that it was not aware of any case addressing the issue. As to venue, the District Court held, the Second Circuit held in *United States v. Holcombe,* 883 F.3d 12 (2d Cir. 2018) that venue for a failure to register is proper in any district in which the defendant begins or ends his interstate travel.

Pretrial Conferences

On November 20, 2018, the Court asked Petitioner at his pretrial conference whether he still wanted to represent himself and Petitioner responded, "as long as my only alternative is Mr. DeMarco, yes, I proceed myself." On February 15, 2019, the Court again asked Petitioner whether he still wanted to represent himself. Petitioner responded "I don't. I would love to have another attorney but not Mr. DeMarco." The Court replied "Right. And I'm not going to give another attorney, because I think when I told you when I replaced the federal public defender that I was willing to do it. You are entitled to counsel, but you are not entitled to your choice of counsel. You have now gone through two, and I'm not giving you another one."

New Counsel

Ms. Susan Kellman was appointed as new counsel on February 20, 2019, less than five days before trial was set to begin on February 25, 2019.

Trial

The jury found Petitioner guilty of failing to register or update his sex offender registration.

Court of Appeals

On Appeal, Petitioner argued that the District Court violated Petitioner's Constitutional right to a trial in the state and district wherein the crime was committed when it permitted the government to supersede the indictment and charge him under the interstate commerce theory of SORNA. Petitioner is a federal offender and therefore venue was proper only in the state in which he failed to register. Petitioner further argued that the Appeals Court's decision in *United States v. Holcombe*, deciding that venue is proper in the state from which the offender departed prior to relocating to a new state of residence, is incorrect. Petitioner contended that venue is

only proper in the new state of residence as SORNA requires registration in the state in which the offender "resides, where the offender is an employee, and where the offender is a student."

Petitioner also argued that the District Court erred when it held that Petitioner could not prove his prior conviction was obtained in violation of the constitution because the language in SORNA (34 U.S.C. § 20911(5)(B)) suggests that a predicate conviction can be challenged especially given the unfair conviction exception, and the legislature could not have rationally intended to only allow challenges to foreign convictions but not unfair convictions obtained in the United States.

Panel Opinion

On July 22, 2020, a panel of the Second Circuit Court of Appeals affirmed the decision of the District Court. (App. A at 39-48). In rejecting Petitioner's argument that collateral challenges to predicate convictions under SORNA are permitted, the Court cited *Custis v. United States*, 511 U.S. 485, 497 (1994) and *Lewis v. United States*, 445 U.S. 55, 67 (1980) and expressed that this Court has routinely interpreted statutes that rely on a prior conviction as precluding defendants from collaterally challenging the predicate conviction in a subsequent proceeding. The Court noted that SORNA requires the fact of a prior conviction as an element of the registration offense, *see Lewis*, 445 U.S. at 67, and lacks explicit terms authorizing a defendant to challenge the predicate conviction, *see Custis*, 511 U.S. at 491-92.

The Court also noted that Petitioner's argument that SORNA permits attacks through the "foreign conviction exception" was unpersuasive as the exception is limited to foreign conviction and Congress did not intend to extend it to domestic convictions.

Regarding Petitioner's Eighth Amendment punishment argument, the Court held that precedent precluded the argument that sex offender registration and notification requirements are

punitive, *see Pataki*, 120 F.3d at 1285, and the Supreme Court's similar conclusion in *Smith v. Doe*, 538 U.S. 84, 105 (2003) foreclosed their ability to revisit the *Pataki* decision.

Lastly, the Court noted that while Petitioner argued that the District Court erred when it denied as untimely his motion to dismiss for improper venue, he raised his venue objection more than two months after the pretrial motion deadline and that the District Court held that his explanation for the delay – that he did not understand venue and waiver as a *pro se* litigant – did not constitute good cause to excuse waiver because the court had previously explained the concepts to him. The Court stated that Petitioner waived any challenge to the District Court's findings on the issue because he failed to address it in his opening brief.

The Court was silent on Petitioner's claims under Rule 104(e), *Holcombe, Nichols* ,and *Carr v. United States,* 560 U.S. 438 (2010).

The Court affirmed the judgment of the District Court.

Concurring Opinion

Judge Calabresi drafted a concurring opinion stating that SORNA is punitive and does constitute punishment, but that the Court was required to follow precedent, which holds that SORNA is not punitive.

Habeas Corpus

Petitioner filed a motion to vacate under 28 U.S.C § 2255 on the grounds that he was: denied assignment of effective counsel; denied the right to present evidence in his defense; convicted in an improper venue; and convicted under an unlawful indictment. The motion was docketed as 21-cv-2403 and assigned to the same judge who presided at the trial.

Petitioner also filed a motion to obtain grand jury transcript arguing that there was a particularized need as the transcripts were necessary as evidence in support of his claim of

unlawful indictment. Petitioner also moved, under 28 U.S.C. § 455, for the judge to recuse from the habeas proceeding because of bias.

The judge summarily denied both motions. It denied access to jury transcripts (App. A at 12-14) because Petitioner had failed to make the strong showing of particularized need required and refused to disqualify (App. A at 15-23) herself because Petitioner stated no facts suggesting that the undersigned "displayed a deep-seated favoritism or antagonism that would make fair judgment impossible."

Petitioner filed a petition for a writ of mandamus in the court of appeals. While the petition was pending, the district court denied the motion to vacate without ordering an evidentiary hearing. (App. A at 2-11).

Court of Appeals (Habeas Petition)

The Court of appeals denied Petitioner's petition for a writ of Mandamus (App. A at 26) because Petitioner failed to demonstrate that exceptional circumstances warranted the writ.

The Court denied the motion for COA simply citing the statute without assessing the issues raised in the motion to vacate. App. A at 1.

REASONS FOR GRANTING THE PETITION

The Second Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctioned similar departure and criminal conduct by the Southern District of New York as to call for the exercise of this Court's supervisory power, or in the alternative this Court original jurisdiction.

This case presents the unique opportunity to address the reason why the Founding Fathers insisted in the Bill of Rights; to prevent government abuse of innocent citizens. Here, the

government has overlooked every protection in that document to convict a person who has committed no crime.

This case is rather unique in that a crime in violation of 18 U.S.C. § 1001, was committed under color of law and it is openly documented in the record. Such crime is so repugnant to the Constitution as to call for this Court's original jurisdiction under Article III of the Constitution since it will be in aid of the Court's appellate jurisdiction, exceptional circumstances warrant the exercise of the Court's discretionary powers, and adequate relief cannot be obtained in any other form from the originating circuit.

Point 1: THE COURT OF APPEALS' DENIAL OF PETITIONER'S MOTION FOR A COA WAS ERROR.

Does the requirement for a COA violates the Petition Clause in the First Amendment?

The language of 28 U.S.C. § 2253 appears to conflict within itself as to whether there is a right to appeal from district courts denial of motions under 28 U.S.C. § 2255. This Court should grant certiorari to resolve the conflicts between 2253, 2255, and the Petition Clause.

28 U.S.C. § 2253. Subparagraph (a) reads:

> "In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held."

This appears to suggest that an appeal is a matter of right. However, subparagraph (c) reads:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

In Contrast, the Historical and Revision Notes to 28 U.S.C. § 2253 shows that the

original text prior to the amendment did not include section (c)(1)(B). And there is no explanation for the inclusion of (c)(1)(B).

Amendments

1996—Pub. L. 104–132 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

The inclusion of section 2255 in 28 U.S.C. § 2253 as requiring a COA prior to appeal is in direct conflict with the language of 28 U.S.C. § 2255 which establishes appeal as a matter of statutory right.

28 U.S.C. § 2255(d) -- An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

Strong support is also found in the Advisory Committee Notes to 28 U.S.C. § 2255, Rule 4:

> Subdivision (a) adopts the majority rule and provides that the trial judge, or sentencing judge if different and appropriate for the particular motion, will decide the motion made pursuant to these rules, recognizing that, under some circumstances, he may want to disqualify himself. A Petitioner is not without remedy if he feels this is unfair to him. He can file an affidavit of bias. ***And there is the right to appellate review if the trial judge refuses to grant his motion.*** (Emphasis added).

Finally, there is the Petition Clause in the First Amendment which prohibits Congress from making law respecting an individual's right to seek redress of wrongs. Petitioner believes

the COA provisions violates the constitutional mandate of the Petition Clause.

The Court of Appeals Erred in Denying Petitioner's Motion for A COA

In any event, even by the standard of 28 U.S.C. § 2253, the denial of the COA by the court of appeals was error. The court denied Petitioner's motion by merely reciting the requirements for granting a COA under § 2253(c)(2) that" a substantial showing of a denial of a constitutional right" be demonstrated. App. A at 1. The court failed to meet the Due Process obligation required by the statute. "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell,* 527 U.S. 322, 336 (2003).

The error here is indisputable as the appeal court did not review Petitioner's claims and declined to do so again when urged so in the motion for reconsideration.

District Court Assessment of Petitioner's Claim

The record clearly shows that the district court's assessment of the constitutional claims is deliberately biased and wrong. See App. A at 2 and 50.

The Petitioner filed four issues in his motion under 28 U.S.C. § 2255.

A. Petitioner Was Denied Assignment of Unconflicted Counsel

A defense counsel has "a duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes." ABA Standard 4-1.3(d).

A "lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued" ABA Model Rule of Professional Conduct 1.2(a) (2016).

"[I]t is the defendant's prerogative, not counsel's, to decide on the objective of his defense." *McCoy v. Louisiana,* 584 US__ (2018). (slip op., at 2).

Mr. DeMarco, expressed to the Court his disagreement with his client theory of defense, but after the conference of October 11, 2017, where the Court noted that it was the client's decision to make, Mr. DeMarco and the Petitioner left the court with the understanding that Mr. DeMarco would prepare a motion to dismiss arguing that the underlying conviction was invalid and, therefore, an exception to the registration requirement under §2250. To that effect, on November 12, 2018, the Petitioner prepared and emailed a letter (Dkt.65) to his attorney outlining support points for the projected motion. On January 08, 2018, Mr. DeMarco, without any discussion with his client, filed a letter (App. A at 52) with the court arguing that his client was not permitted to challenge his underlying conviction. The court accepted Mr. DeMarco's submission and cancelled the previously scheduled briefing that the court had set for submission of the motion. (Dkt. 54).

From his initial assignment until he was terminated Mr. DeMarco did nothing but undermine his client's case as lead defense counsel and as standby counsel. His actions were in direct contrast with every ethical and professional capacity expected of a defense counsel and clearly constituted, as a minimum, ineffective assistance of counsel. The Petitioner asked the court to replace Mr. DeMarco and the court declined leaving the Petitioner with no other option than self-representation.

By refusing to assign new counsel in light of Mr. DeMarco's adversarial filing, the court effectively denied assignment of unconflicted counsel to the accused in violation of the Sixth Amendment.

> "When an indigent defendant is unable to retain his own lawyer, the trial judge's appointment of counsel is itself a critical stage of a criminal trial. At that point in the proceeding, by definition, the defendant has no lawyer to protect his interests and must rely entirely on the judge. For that reason, it is "the solemn duty of a ... judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage

of the proceedings." *Von Moltke*, 332 U. S., at 722."

Mickens v. Taylor, 535 U.S. 162, 184 (2002).

Defense Counsel Performance

The ABA Standards for Criminal Justice: Defense Function, Standard 4-5.2 Control and Direction of the Case, subparagraph (a) states: "Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds." Subparagraph (b) is more specific:

The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:

(i) whether to proceed without counsel;

(ii) what pleas to enter;

(iii) whether to accept a plea offer;

(iv) whether to cooperate with or provide substantial assistance to the government;

(v) whether to waive jury trial;

(vi) whether to testify in his or her own behalf;

(vii) whether to speak at sentencing;

(viii) whether to appeal; and

(ix) any other decision that has been determined in the jurisdiction to belong to the client.

Reason (ix) applies here, among others. At the conference of 10/11/2017, the Court heard the Petitioner unequivocally state the objective of his defense: to challenge the applicability of section 2250 to him because his underlying conviction was obtained in a

fundamentally unfair trial and without due process

While in *McCoy*, it was clear that defense counsel had his client best interest in mind; this is hardly the case here. Mr. DeMarco's filing was unequivocally adversarial in tone and context

This was clearly, ineffective assistance of counsel in violation of the Sixth Amendment.

Showing of Prejudice is not Required when Error is Structural.

"Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of counsel jurisprudence, *Strickland v. Washington*, 466 U. S. 668 (1984), or *United States v. Cronic*, 466 U. S. 648 (1984), to McCoy's claim. To gain redress for attorney error, a defendant ordinarily must show prejudice. See *Strickland,* 466 U. S., at 692. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review... Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U. S. 279, 310 (1991).

An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U. S., at ___ (slip op., at 6) (citing *Faretta*, 422 U. S., at 834). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error

will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U. S., at ___–___ (slip op., at 6–7) (citing *Gonzalez-Lopez*, 548 U. S., at 149, n. 4, and *Sullivan v.Louisiana*, 508 U.S. 275, 279 (1993)).

Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. See *Cooke*, 977 A. 2d, at 849 ("Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole."). Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt." *McCoy,* 584 U.S., at __ (slip op., at 11-12).

Assignment of New Defense Counsel

The district court ordered a conference on February 20, 2019 to announce the appointment of a new defense counsel.

Petitioner met new counsel and immediately notified counsel of his intention to file a motion to dismiss on grounds of improper venue and failure to state a crime. Petitioner stressed the importance of filing immediately because Rule 12(b)(3) indicated motion must be filed before start of trial. Defense counsel accepted a copy of the motion and said they would review it but they had a lot of documents to review before trial. Over the next three days, after many email exchanges and phone conversations it became apparent that counsel was not going to file the motion. On February 23, Petitioner sent the motion directly to the Court via email.

B. The Superseding Indictment Was Unlawful.

As relevant here, 28 U.S.C. § 2250 provides:

"(a) IN GENERAL.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

"(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act; "shall be fined under this title or imprisoned not more than 10 years, or both."

"For a defendant to violate this provision, Carr and the Government agree, the statute's three elements must "be satisfied in sequence, culminating in a post-SORNA failure to register." Brief for United States 13; see also Reply Brief for Petitioner 4, 7, n. 6. A sequential reading, the parties recognize, helps to assure a nexus between a defendant's interstate travel and his failure to register as a sex offender. Persons convicted of sex offenses under state law who fail to register in their State of conviction would otherwise be subject to federal prosecution under §2250 even if they had not left the State after being convicted—an illogical result given the absence of any obvious federal interest in punishing such state offenders. "

Carr v. United States, 560 U.S. 438, 443 (2010).

"Had Congress intended to subject any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution under §2250, it easily could have adopted language to that effect. That it declined to do so indicates that Congress instead chose to handle federal and state sex offenders differently. There is nothing "anomal[ous]" about such a choice. To the contrary, it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision. It is similarly reasonable for Congress to have given the States primary responsibility for supervising and ensuring compliance among state sex offenders and to have subjected such offenders to federal criminal liability only when, after SORNA's enactment, they use the channels of interstate commerce in evading a State's reach."

Id at 449.

Congress crafted §2250 to keep jurisdiction over federal offenders regardless of interstate travel and over state offenders only when they travel between states.

The government applied an irrelevant element to take advantage of the dichotomy

created by the wrongly decided *United States v. Holcombe*, 883 F.3d 12 (2d Cir. 2018) decision and dupe the jury into thinking that actual evidence of a crime was being presented, and to circumvent the Petitioner's right to constitutionally proper venue.

In *Holcombe*, the Second Circuit appeared bent on affirming the conviction in spite of the Supreme Court rulings in *Nichols v. United States,* 136 S. Ct. 1 113 (2016). The appeal eagerly sought to establish a distinction between the two cases by pointing to immaterial issues, such as, "We note, too, that Nichols did not address venue, and involved a defendant who was a federal sex offender, not, as here, a state sex offender. See 136 S. Ct. at 1116–17. A federal sex offender, unlike a state sex offender, does not need to travel interstate to commit a SORNA offense." *Holcombe* at 10. Ultimately, the court ended up relying in a number of cases that hardly supported its ruling because all of the cases cited preceded *Nichols*. *United States v. Kopp*, 778 F.3d 986, 988–89 (11th Cir. 2015); *United States v. Lewis*, 768 F.3d 1086, 1092–94 (10th Cir. 2014); *United States v. Howell*, 552 F.3d 709, 717–18 (8th Cir. 2009). The *Nichols* ruling rendered all those cases irrelevant because *Nichols* represents a fresh interpretation of section 2250 and the SORNA statute and it appears to address venue; the Seventh Circuit (*Haslage*), the district court (Dkt. 96), the legal community (*supra*) all appear to agree that the *Nichols'* opinion affects the issue of venue in SORNA prosecutions.

United States v. Haslage, 853 F.3d 331 (7th Cir. 2017) was one of the first case decided after *Nichols*, and in light of *Nichols* the Seventh Circuit overrode its prior position. The Second Circuit noted in *Holcombe* that "("When a federal statute defining an offense does not specify how to determine where the crime was committed, the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." (quotation marks omitted)). "Whether venue is proper in a particular district turns on the elements of the

underlying crime and where the acts satisfying those elements occurred." But the Second Circuit failed to follow on its rhetoric and accept that *Nichols* had, in fact, determined where venue was proper in 2250 prosecutions for failure to register.

Ultimately, *Holcombe* was a wrongly decided opinion so controversial on the issue of venue that prompted the legal community to the following conclusion:

Commentary

> "The Court's decision on venue gives new significance to the jurisdictional hook element of a SORNA offense involving a sex offender convicted under state law. For other federal crimes involving interstate travel – such as kidnapping in violation of the "Lindbergh Law" – there is little question that the core underlying offense occurred in both jurisdictions. Here, based on the Court's ruling, a defendant could be tried in the departure state even if when he stepped across state lines he had no plans to remain in the arrival state, without re-registering, in violation of SORNA. The Court's discussion of *Nichols* also sets up the interesting parallel in that the departure state may be involved in the offense and a proper venue for a state-law convicted sex offender who travels across state lines without registering, but not for a federal-law convicted sex offender otherwise subject to the same registration requirements. Although the Court's interpretation of the statute is tough to dispute, it does create a legal anomaly that is hard to rationalize from a policy perspective."

https://www.pbwt.com/second-circuit-blog/circuit-holds-that-interstate-travel-element-confers-multiple-venues-for-prosecution.

This is a perfect opportunity for this Court to erase the bad precedent set by the Second Circuit in *Holcombe* and resolve an emerging conflict.

Government Conspiracy: Judge Leads Prosecutor to Superseding Indictment

On November 16, 2018, the Court issued order, directing the government to address the effect of *Nichols v. United States,* 136 S. Ct. 1 113 (2016) on the case. The Court ordered the government to:

1. In light of *Nichols*, the Government must explain why the indictment properly states an offense, given that it alleges that Mr. Diaz "changed his residence without updating his

registered address in New York," Dkt. 12 (emphasis added).

2. The Government must also explain why venue is proper in this District, given that Nichols suggests that Mr. Diaz's alleged offense was his failure to report his change of residence to New Jersey and/or Virginia authorities, not New York authorities. The Government's explanation regarding venue should address *United States v. Holcombe*, 883 F.3d 12 (2d Cir. 2018), and the Court of Appeals decisions cited therein. Dkt. 96.

In its response, the government explained that it had issued a superseding indictment where venue was now proper in the district because "[t]he original indictment in this case charged the defendant with being a "sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice)." See 18 U.S.C. § 2250(a)(2)(A). The superseding indictment now charges the defendant with traveling in interstate commerce. See id. § 2250(a)(2)(B)." Dkt. 99 at 2.

The Government's answer was disingenuous. The government's explanations were less than forthcoming. The government omitted keys points in *Holcombe* directly on point to the issues of venue: federal vs. state offenders, and interstate travel, and has been conspicuously silent on *Carr.* The Court summed it up best, "oops, let me supersede." Dkt. 117 at 12.

The entire timeline here makes a reasonable person doubt whether a grand jury really existed. The judge order was issued on November 16 and the superseding indictment was presented to the court on November 19. So, not only is there reason to question whether the grand jury was made aware of how the elements of the charges applied to federal and state offenders, there is actual reason to question whether a grand jury was actually convened.

The judge and prosecutors jurimandered an indictment in which they discarded the constitution (venue), on-point precedents (*Nichols, Carr*), and adopted dubious case law

(*Holcombe, United States v. Van Buren,* 599 F.3d at 170 (2d Cir. 2010)) to create a patchwork indictment which failed to state a crime and stripped the Petitioner of the protection of the law.

An impartial judge would have revealed the grand jury transcript. An honest judge would have recuse herself from the case as required by 18 U.S.C. § 455.

The District Court Judge Broke the Law.

18 U.S.C. § 1001 - Statements or entries generally

> **(a)** Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> **(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> **(2)** makes any materially false, fictitious, or fraudulent statement or representation; or
>
> **(3)** makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

The district judge's denial of motion to dismiss was in violation of 18 U.S.C. 1001.The judge denied the motion claiming it was out of time and meritless.

Rule 12(b)(3). *Motions That Must Be Made Before Trial.* The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a defect in instituting the prosecution, including:
(i) improper venue;
(ii) preindictment delay;
(iii) a violation of the constitutional right to a speedy trial;
(iv) selective or vindictive prosecution; and
(v) an error in the grand-jury proceeding or preliminary hearing;
(B) a defect in the indictment or information, including:
(i) joining two or more offenses in the same count (duplicity);
(ii) charging the same offense in more than one count (multiplicity);
(iii) lack of specificity;
(iv) improper joinder; and
(v) failure to state an offense;

(C) suppression of evidence;
(D) severance of charges or defendants under Rule 14; and
(E) discovery under Rule 16.

The motion was timely and consistent with the requirements of Rule 12(b)(3). The motion was submitted before the first day of trial and when the basis for the motion was reasonably available.

On February 23, 2019, just two days before the start of trial, the Petitioner filed a motion to dismiss pursuant to Rule 12(b)(3) based on improper venue and defective indictment for failure to state a crime.

On February 25, the judge denied the motion stating that:

> "Section 2250 phrases the "federal conviction" and "interstate commerce" theories of the offense in terms of "or" indicating that the government may proceed under either one. That makes sense: If an unregistered sex offender travels in interstate commerce, the government has a federal interest in prosecuting him, regardless of whether he is a federal or state sex offender. ***I'm unaware of a case that directly addresses this issue,*** but in *United States v. Van Buren*, a federal sex offenders was prosecuted under the interstate travel theory; the Second Circuit affirmed the conviction albeit on other grounds, Van Buren is 599 F.3d at 170 (2d Cir. 2010)."

Dkt. 146 at 19, 20. (Emphasis added).

The Petitioner was not permitted to argue on the matter. "No. You submitted your motion and I've ruled on that. We're not going to argue it." *Id* at 20.

Judge Caproni's declaration that she was unaware of a case directly addressing the issue was in violation of 18 U.S.C. § 1001(a)(2) in that she knowingly and willfully lied.

On July13, 2018, when the Petitioner was under the original indictment, the judge formally cited *Carr v. United States* as supporting laws when addressing the elements of failure to register.

> "As applied to Diaz, the elements of failure to register, pursuant to 18 U.S.C. § 2250, are that the defendant: (1) was required to register as a sex offender under SORNA; (2) is a "sex offender" by reason of a conviction under federal law (including under the Uniform Code of Military Justice); and (3) knowingly failed to register or update his registration. *See* 18 U.S.C. § 2250(a); *Carr v. United States*, 560 U.S. 438, 445–46 & n.3 (2010); 3 *Modern Federal Jury Instructions: Criminal* ¶ 61.10 (2018). Thus, looking to the second element, a prior conviction for a "sex offense" (as SORNA defines that term) is an element of the crime of failure to register."
>
> App. A at 32.

Following the superseding indictment, the judge denied knowledge of *Carr* and avoided any reference to that decision, including through the habeas proceedings, when the petitioner raised the argument at every opportunity that the superseding indictment violated the provisions of *Carr*. The judge's silence on the issue knowingly and willfully concealed the material facts submitted by the petitioner in violation of 18 U.S.C. § 1001(a)(1) and knowingly and willfully made documents knowing the same to contain fraudulent statements in violation of 18 U.S.C. 1001(a)(3).

> "A sequential reading, the parties recognize, helps to assure a nexus between a defendant's interstate travel and his failure to register as a sex offender. Persons convicted of sex offenses under state law who fail to register in their State of conviction would otherwise be subject to federal prosecution under §2250 even if they had not left the State after being convicted—an illogical result given the absence of any obvious federal interest in punishing such state offenders."
>
> *Id.*
>
> "Had Congress intended to subject any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution under §2250, it easily could have adopted language to that effect. That it declined to do so indicates that Congress instead chose to handle federal and state sex offenders differently."
>
> *Id* at 449.

The law is clear. By explicitly requiring sequential adherence to the statute, the law demands that federal offenders be charged only under 18 U.S.C. § 2250(a)(2)(A). "For a

defendant to violate this provision, Carr and the Government agree, the statute's three elements must "be satisfied in sequence, culminating in a post-SORNA failure to register."" *Carr v. United States,* 560 U.S. at 443. Since the Government did not observe the sequential construct of the statute, the Petitioner did not violate the provision of §2250 and was convicted under a fatally defective indictment.

The district court's letter of November 16, strongly suggests a conspiracy between judge and prosecutors. It details a road map for the government to draft the unlawful superseding indictment. It directed that the Government "explanation regarding venue should address" *Holcombe.* It conveniently avoided the legitimate controlling cases; *Nichols* and *Carr* while embracing *Holcombe* and *Van Buren.*

The Petitioner was indicted against clearly established federal law and the intent of the statute.

C. The Court's Findings of Law Were Not Supported by the Evidence.

The district court deliberately misinterpreted and unreasonably applied the Supreme Court's decision in *Custis.*

-Nothing in SORNA limits the statute's reach to procedurally sound convictions or otherwise authorizes collateral attacks on those convictions. See Delgado, 592 F. App'x at 603. As with the felon-in-possession laws, SORNA focuses only on "the fact of the [prior] conviction." Custis, 511 U.S. at 491. The procedural validity *vel non* of Diaz's prior conviction is thus not at issue in the instant prosecution, and Diaz may not use this proceeding to collaterally attack it. App. A at 34.

The Court's denial of Petitioner's motion to dismiss was a deliberate misapplication of *Custis v. United States,* 511 U.S. 485 (1994). That decision only applied to the Armed Career

Criminal Act of 1984, 18 U. S. C. § 924(e).

Held:

1. With the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions that are used to enhance his sentence under the *ACCA*. Pp. 490-497.

(a) Congress did not intend to permit collateral attacks on prior convictions under § 924(e). The statute's language-which applies to a defendant who has "three previous convictions" of the type specified focuses on the fact of the conviction, and nothing therein suggests that the prior final conviction may be subject to attack for potential constitutional errors before it may be counted. That there is no implied right of collateral attack under § 924(e) is strongly supported by § 921(a)(20), which provides that a court may not count a conviction "which has been ... set aside" by the jurisdiction in which the proceedings were held, and thereby creates a clear negative implication that courts *may* count a conviction that has not been so set aside; by the contrast between § 924(e) and other related statutes that expressly permit repeat offenders to challenge prior convictions that are used for enhancement purposes, see, e. *g.*, 21 U. S. C. § 851(c);

Custis at 485.

We granted certiorari to determine whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under the ACCA.

Id at 487.

We granted certiorari, 510 U. S. 913 (1993), because the Court of Appeals' decision conflicted with recent decisions from other Courts of Appeals that permitted defendants to challenge prior convictions that are used in sentencing under § 924(e)(1).

Id 490.

Custis argues that the ACCA should be read to permit defendants to challenge the constitutionality of convictions used for sentencing purposes. Looking to the language of the statute, we do not believe § 924(e) authorizes such collateral attacks.

Id.

Congress' passage of other related statutes that expressly permit repeat

offenders to challenge prior convictions that are used for enhancement purposes supports this negative implication. For example, 21 U. S. C. § 851(c), which Congress enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, sets forth specific procedures allowing a defendant to challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense.

Id at 491.

The language of §851(c) shows that when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so. Congress' omission of similar language in § 924(e) indicates that it did not intend to give defendants the right to challenge the validity of prior convictions under this statute.

Id at 492.

This lack of such intent in § 1202(a)(1) also contrasted with other federal statutes that explicitly permitted a defendant to challenge the validity or constitutionality of the predicate felony. See, e. *g.,* 18 U. S. C. § 3575(e) (note following ch. 227) (dangerous special offender) and 21 U. S. C. §851(c)(2) (recidivism under the Comprehensive Drug Abuse Prevention and Control Act of 1970). The absence of expressed intent, and the contrast with other federal statutes, led us to determine that "the firearms prosecution [under § 1202(a)(1)] does not open the predicate conviction to a new form of collateral attack." 445 U. S., at 67.

Similarly, § 924(e) lacks any indication that Congress intended to permit collateral attacks on prior convictions used for sentence enhancement purposes. The contrast between § 924(e) and statutes that expressly provide avenues for collateral attacks, as well as our decision in Lewis, supra, point strongly to the conclusion that Congress did not intend to permit collateral attacks on prior convictions under § 924(e).

Id at 493.

We therefore hold that § 924(e) does not permit Custis to use the federal sentencing forum to gain review of his state convictions.

Id at 497.

Every paragraph above explicitly indicates that the Supreme Court's findings applied only to § 924(e). This is logical because the Supreme Court based its rulings on the belief that some statutes permitted the challenge and others did not. And based on that belief, it had only

examined the language of § 924(e); this Court did not examine the language of SORNA. It was the obligation of the district court to look at the language of SORNA. The Court observed that some statutes permit collateral attacks and some do not. Before reaching its conclusions, the Court looked to the language of the statute. This is the only portion in *Custis* that can be applied to SORNA's cases. The district court was required to look at the language of SORNA before making a ruling on Petitioner's motion.

Had it done so, the district court would have learned that the language of SORNA *does* limit the statute's reach to procedurally sound convictions. It explicitly lists as 'unqualifying' those convictions not obtained with sufficient safeguards for fundamental fairness and due process for the accused. See 34 U.S.C. § 20911(5)(B). This clearly signifies the intent of Congress with respect to unfair proceedings and due process; not that it should have ever been in doubt by any court since these are the constitutional intent of the Bill of Rights.

Although, this observation is made in reference to foreign convictions, it can hardly be argued that Congress intended to extend protection against fundamentally unfair trials and due process violations to foreigners and deny them to United States citizens. Additionally, every American is entitled to those protections under the United States Constitution. So, it makes sense that Congress would extend those protections to foreigners who may have lack them during their trials. The language of SORNA does demonstrate that the statute is open to challenges of fundamentally unfair trials and due process violations.

In spite of all the opinions and dicta about challenges to prior convictions, no one has produced a statute that explicitly prohibits them. If so were the case, the statute would likely be unconstitutional and in violation of the Petition Clause. This notion is strongly supported by :

First Amendment: "Congress shall make no law … abridging … the right of the people

... to petition the Government for a redress of grievances."

Federal Rule of Evidence, Rule 104(e) - Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence. Petitioner's rights under this rule were denied.

And directly related to the Petitioner's underlying conviction by court-martial, this Court has held that:

> "Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void -- not voidable, but void -- and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment."

Dynes v. Hoover, 61 U.S. 65, 81 (1857).

> "[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers -- as well as civilians -- from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness"

Burns v. Wilson, 346 US 137, 142 (1953).

Also see Federal Rule of Civil Procedure, Rule 60(b).

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

The law is clear; the Petitioner has the constitutional, statutory, and procedural rights to challenge a prior conviction when his life, liberty, or property is threatened. It was error to deny the Petitioner the opportunity to present a valid defense at trial.

This is a very important constitutional question which has not been properly answered.

D. Petitioner Was tried in an Unconstitutional Venue

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. U.S. Constitution, Article III, § 2, Clause 3.

"The Sixth Amendment to the U.S. Constitution guarantees a defendant the right to trial by "an impartial jury of the state and district wherein the crime shall have been committed." Reflecting this constitutional command, the Federal Rules of Criminal Procedure also state that "the government must prosecute an offense in a district where the offense was committed." FED. R. CRIM. P. 18." *United States v. Haslage*, 853 F.3d 331, 333 (7th Cir. 2017).

Petitioner was tried and convicted in the Southern District of New York which the Court, in light of *Nichols,* appeared to recognize was not the proper venue for the trial.

The government subverted the statute's intent and stripped the Petitioner's constitutional right to proper venue by issuing an unlawful superseding indictment charging the Petitioner under the state offender's clause of 18 U.S.C. § 2250. See *Carr v. United States,* 560 U.S. 438, 443 (2010). *Supra.*

The Petitioner was deliberately tried in an unconstitutional venue.

Venue in New York was Improper

Congress's intent in structuring SORNA prosecutions as two different tracks, one federal and one interstate, was subverted by the Court of Appeals' sanction of the government's superseding of the indictment to charge Petitioner under 18 U.S.C. § 2250(a)(2)(B) as an interstate offender, when his requirement to register was by virtue of his federal conviction only. The Court of Appeals also avoided a discussion of *Holcombe* in which this Court stated that a federal offender, like Petitioner, does not need to travel interstate to commit a SORNA offense. See 18 U.S.C. § 2250(a)(2)(A). *Holcombe*, 883 F.3d 12, 16 (2d Cir. 2018). Petitioner was denied Due Process as he did not receive the proper judicial review to which he was entitled to as the Court of Appeals avoided reviewing its own precedent and Supreme Court's.

As this Court emphasized in *Carr v. United States*, 560 U.S. 438, 451 (2010), Section 2250 criminal liability has two alternate sources of power to achieve Congress's aim of broadly registering sex offenders. One section is for federal offenders, like Petitioner, and the other is for state offenders who travel in interstate commerce. Since Petitioner is a federal offender, the government should not have been permitted to supersede the indictment to allege an interstate commerce theory of a SORNA violation in order to prosecute Petitioner in an unconstitutional venue, where no crime had occurred. The writ of certiorari should be granted to address the error.

As this Court stated in *Carr*, "Section 2250 imposes criminal liability on two categories of persons who fail to adhere to SORNA's registration requirements:

> Section 2250 imposes criminal liability on two categories of persons who fail to adhere to SORNA's registration requirements: any person who is a sex offender "by reason of a conviction under Federal law ... , the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States,"

§2250(a)(2)(A), and any other person required to register under SORNA who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country," §2250(a)(2)(B).

Carr, 560 U.S. at 551.

These distinct categories represent "two alternatives sources of power to achieve Congress's aim of broadly registering sex offenders." *Id.* In *Carr*, the government stated that "placing pre-SORNA travelers within the statute's coverage . . .ensures that the jurisdictional reach of Section 2250(a)(2) has a comparable breadth as applied to both federal and state sex offenders." *Id.* To ensure a logical result, as the government in *Carr* recognized, for a defendant to violate the SORNA provision, "the statute's three elements must be satisfied in sequence, culminating in a post-SORNA failure to register." *Carr*, 560 U.S. at 446.

SORNA is a unique statute, imposing criminal liability for conduct that occurs after a criminal conviction. Carr's mandate to consider the SORNA statute sequentially required that the government charge Petitioner as a federal offender, since his SORNA conviction was by Court Martial. Consequently, venue in New York was not proper, as there was no allegation that Petitioner had failed to register in New York State.

In the present case, the prosecution, the district court, and the court of appeals have simultaneously refused to answer any of the arguments raised by the Petitioner invoking this Court's decision in *Carr v. United States*, 560 U.S. 438 (2010) after the issuance of the superseding indictment. Certainly giving the appearance of a conspiracy to deny due process to the Petitioner.

Petitioner cannot think of a better reason to grant certiorari.

Point 2: SECOND CIRCUIT STANDARD OF REVIEW VIOLATES DUE PROCESS

This Court should grant the writ because the alternative would be deleterious the our

system of law. In the instant case, the judge and the Government collaborated to convict an innocent person of a victimless crime through sheer manipulation of the judicial system. The mere curiosity as to how easily (at the expense of tax payer) this can be achieved, should be sufficient reason to grant certiorari. But, most importantly, the Court should grant the writ to determine why do we have a system where the principal players find it necessary to break the laws they swore to uphold and send John Does to prison.

Not granting the writ would perpetuate the status quo. Granting it would provide the opportunity to delve into some of the issues that have afflicted our judicial system for decades.

Would an environment in which fair trials and observing due process are the norm lead to a reduction in the number of cases before the courts of appeal? Less crowded prison? Reduced caseload for attorneys?

It is well settled that the "pleadings of a *pro se* plaintiff must be read liberally and should be interpreted 'to raise the strongest argument that they suggest'" *Triestman v. Federal Bureau of Prisons,* 470 F.3d 471, 474-76 (2d Cir. 2006). It is also generally accepted that "[t]here cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant." *Townsend v. Sain,* 372 U.S. 293, 314 (1963).

The Second Circuit standard of review falls way short of these standards. As a *pro se* litigant, the Petitioner filed several pleadings with the court and in every instance the court denied with one-line quotations from irrelevant sources and signed by the Clerk of the Court.

After the district judge ruled that "Mr. Diaz will not be permitted to introduce evidence at trial that tends to show that the conviction or registration proceedings are invalid, nor will Mr. Diaz be permitted to make any such arguments to the jury." (Dkt. 84), Petitioner argued that this

ruling violated his rights under Fed. R. of Evid. 104(e). The district judge responded by stating she would only consider it if she was overturned by the court of appeals. The Petitioner applied for an interlocutory appeal (18-3086) The court of appeals dismissed the motion claiming lack of jurisdiction. App. A at 25. On direct appeal, the court of appeals was silent on Rule 104(e). App. A at 39-48.

On direct appeal, Petitioner was represented by counsel and the court of appeal did issue an opinion.

In *Holcombe,* the Second Circuit split with the 7th Circuit's decision in *Haslage* where that court reversed its prior position with respect to venue in the departing location for failure to register under section 2250 in light of the *Nichols* decision. The 2d Circuit held that venue was proper in the departing location. Noting that "[w]hen a federal statute defining an offense does not specify how to determine where the crime was committed, the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." And, that "[w]hether venue is proper in a particular district turns on the elements of the underlying crime and where the acts satisfying those elements occurred." The 2d Circuit completely overlooked that this is precisely what *Nichols* had done and in doing so, it held that no crime was committed in the departing district. This was the basis for the district court inquiry into the Petitioner's original indictment and the superseding indictment.

The 2d Circuit also held in *Holcombe* that *Nichols* was not about venue, and that it was a federal case, where the interstate travel provision of section 2250 did not apply because it only applied to state offenders. As these rulings were favorable to the Petitioner as a federal offender, in direct appeal, he raised these along with the provisions of *Carr* as reasons why his indictment was unlawful. The 2d Circuit was completely silent on *Nichols, Holcombe, Carr,* and the

Petitioner's *pro se* supplemental brief submitted in addition to the brief submitted by the court-appointed appellate counsel.

The Petitioner argued that the SORNA statute recognized his right to challenge the validity of his conviction because SORNA language stated that qualifying convictions consist only of those obtained with sufficient safeguards for fundamental fairness and due process of the accused. The 2d Circuit and district judge concluded that this only applied to foreign convictions suggesting that Congress had meant these well settled constitutional principles to foreign convictions but not to domestic convictions.

In support of the same argument, the Petitioner also invoked:

The Petition Clause in the 1st Amendment; Also see *Dynes v. Hoover,* 61 U.S. 65, 81 (1857); ("Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void -- not voidable, but void -- and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment."); *Burns v. Wilson,* 346 US 137, 142 (1953) ("[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers -- as well as civilians -- from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness.")

The 2d Circuit and the district court were also silent on these.

Following the district court biased denial of Petitioner's motion to obtain grand jury transcript and refusal of district judge to recuse herself as required by section 455, Petitioner filed a petition for a writ of mandamus (21-2614) in the court of appeals. The court of appeals denied the petition because Petitioner had not demonstrated that exceptional circumstances

warranted the requested relief. App. A at 26.

The accepted and usual course of judicial proceedings generally dictate that no semblance of a full and fair hearing exists unless the court reaches and decides the issues of facts presented to the court. Also see *Graham v. Henderson*, 89 F.3d 75,79 (2d Cir. 1996) ("the pleadings of a pro se plaintiff must be read liberally and should be interpreted 'to raise the strongest arguments that they suggest'"); *In re Murchison*, 349 U.S. 133, 137, (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

The Second Circuit failure to maintain vigilance over the district court and deliberate indifference over this indigent appellant's proceedings demand this Court intervention and issuance of the writ of certiorari.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

Salvador Diaz

Dated: September 29, 2022

Salvador Diaz
P.O. Box 151
Horntown, VA 23395
(347) 344-6571
sal13diaz@hotmail.com