No. 19-3026

# IN THE
# UNITED STATES COURT OF APPEALS
# FOR THE SEVENTH CIRCUIT

**Yorie Von Kahl,**
***Appellant***

**v.**

**Frederick Entzel,**
***Appellee***

**APPEAL FROM THE UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS (Peoria)**
**JAMES E. SHADID, UNITED STATES DISTRICT JUDGE**
**District Court Case No. 18-cv-01245**

# APPELLANT'S OPENING BRIEF

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## I. JURISDICTION[1]

Jurisdiction in the District Court was pursuant to 28 U.S.C. §§ 1331, 2241(c)(3) with auxiliary jurisdiction pursuant to 28 U.S.C. §§ 1651(a), 2201 and 2202. Pet. [D. Doc. 1], p. 3 ¶ 4. The Court's initial order, opinion and judgment were entered on January 29, 2019. App. to Br. 1-8, 9 (Ord. 1, Jdgmt. 1). Appellant timely filed a motion to amend or alter judgment pursuant to Federal Rule of Civil Procedure 59(e) [D. Doc. 17], which the Court denied on August 23, 2019, on which date the Court entered an amended judgment. App. to Br. 31 (Jdgmt. 2). Appellant's notice of appeal was timely filed on October 15, 2019. D. Doc. 25. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## II. STATEMENT OF THE CASE[2]

On July 2, 2018, Appellant filed a petition for a writ of habeas corpus in the U.S. District Court for the Central District of Illinois, Case No. 1:18-cv-01245. [D. Doc. 1]. He alleged that, while sentenced in 1983 into the U.S. Parole Commission's ("USPC") jurisdiction for parole purposes, the USPC determined that on his aggregate life plus 15-year sentence he would serve no more than 30 years and repeatedly determined that his mandatory parole release ("MPR") date is "2/12/2013." Pet. [D. Doc. 1], pp. 3-4 ¶¶ 7-10, 7 ¶ 25, but that in 1993 the Bureau of Prisons ("BOP") generated Program Statement ("PS") 5880.30 purporting to empower itself to make parole decisions and applied it to Appellant in 1994 to add 10 years to his MPR date. *id.*, p. 4 ¶¶ 11-13. He alleged that his imprisonment by Appellee, on behalf of the BOP pursuant to PS 5880.30, and beyond the MPR date of 2/12/2013 as determined by the USPC, is prohibited by 18 U.S.C. § 4001(a), and violated separation of powers by usurping the sentencing court's Article

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[1] Abbreviates of documents cited in this brief are set forth in the Table of Contents, p. xv.

[2] Due to the Court's refusal to permit Appellant sufficient pagination, he is unable to argue three sub-issues related to the second issue presented herein and an additional issue. He has not waived them willingly. Such issues should be considered on the record as argued in the Court below.

III Judicial power, Congress' Article I legislative power and Article II Appointments Clause power, as well as due process of law that is specified in the parole statute. *Id.*, pp. 8-9 ¶¶ 30-32.

Appellant argued that under the Parole Commission and Reorganization Act of 1976 ("PCRA"), 18 U.S.C. §§ 4201-18, the USPC was vested with exclusive authority and jurisdiction to make all parole-related decisions, to administer § 4206 (including the MPR provision, § 4206(d)), and to promulgate rules and regulations for such purposes and that no statutory authority existed in the BOP for such purposes. Mem. P&A w/Pet., [D. Doc. 2], pp. 6-8, 10-11 & nn. 2, 15-18, 24-25, 27-28. He argued that subsequent legislation effected by the Comprehensive Crime Control Act of 1984 ("CCCA")/Sentencing Reform Act of 1984 ("SRA") as amended repealed the PCRA at the end of a 5-year period requiring the USPC to set release dates for prisoners, including Appellant, within their parole guideline range within the 5-year period, and that further subsequent amendments, if and as applicable to him, effected the final repeal of the PCRA no later than November 1, 2002, with the USPC's final assessment of his MPR date as 2/12/2013. *Id.*, pp. 12-15 & nn. 3-4. He also argued that a 1987 amendment restoring the USPC's discretion under § 4206 by express terms applied to offenses committed after its enactment (December 7, 1987) and that such express language and the anti-retroactivety rules of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *INS v. St. Cyr*, 533 U.S. 289 (2001) precluded its retroactive application to him "should" the issue "arise." *Id.*, pp. 12-13 & n. 3.

Appellee proffered no statutory authority for the BOP to make any parole-related decisions, much less to alter or interfere with such decisions made by the USPC, or to do so by internal program statements. Evading the legal issues entirely, Appellee through DOJ attorneys instead surreptitiously put forth purported facts underlying Appellant's criminal judgment and a series of USPC Notices of Action ("NOA") followed by citations to *United States v. Wilson*, 503 U.S.

329, 335 (1992), 28 C.F.R. § 0.96, and 18 U.S.C. § 3585(b) to PS 5880.30 - - not to show statutory authorization but to simply demonstrate *how* the BOP de-aggregated Appellant's "aggregate term of life plus 15-years [sic]," Resp. to Pet. [D. Doc. 9], pp. 1-5, and re-aggregating individual mandatory release periods into what it purported to be a "correctly calculated" MPR date "as February 12, 2023" and submitted a concocted document titled Sentence Monitoring Independent Sentence Computation ("SMISC") printout dated 7/19/2018 as evidence of its correctness. *id.*, p. 5; Resp. to Pet. Apx. (D. Doc. 9-2], p. 042.

Appellee argued that a purported waiver by Appellant of a 1997 statutory interim parole hearing ("SIH") constituted a waiver of all such "hearings through the present," Resp. to Pet. [D. Doc. 9], p. 3 (citing no authority), and that the BOP's construction of the MPR statute, § 4206(d), through PS 5880.30 rendered it as *not* requiring a mandatory "release" date, but merely a "record review date," and the USPC will thus "hold a hearing" for Appellant prior to the MPR date as altered by the BOP - - *i.e.*, 2/12/2023 - - and *then* "make a determination on parole," *id.*, p. 6; Resp. to Pet. Apx. [D. Doc. 9-2], pp. 032, 036, implicitly arguing the USPC's continuing existence beyond the final repeal of the PCRA as alleged by Appellant.

Admonished by the court that under 28 U.S.C. § 2248, his failure to contest Appellee's allegations would risk their being treated as true, Appellant with supporting documents showed that the true facts underlying his criminal judgment showed that the trial judge, then Chief U.S. District Judge Paul Benson, had secretly conspired and colluded with the prosecution, DOJ hierarchy, U.S. Marshals and the FBI (with full knowledge of FBI Headquarters ("HQ")) by issuing secret judicial orders disseminating propaganda, participating in secret "prosecutorial strategy" conferences - - pre-indictment and pre-trial - - and by participating during the trial in

the secret rehearsal of a key govermnent witness' testimony. Tr. [D. Doc. 14-1], pp. 5-8 (citing documents).

Appellee's response compelled Appellant to raise additional amended grounds for relief. He thus alleged that the face of the SMISC showed that he was entitled to mandatory release under the federal good-time statute no later than December 22, 2009; that the USPC's actions beginning in 1986 extending his 10-year reconsideration hearing of June 1994 to a 15-year reconsideration hearing of June 2001 pursuant to the retroactive application of amended regulations (28 C.F.R. §§ 2.12 and 2.14) violated the Constitution's *Ex Post Facto* Clause; that the BOP's PS 5880.30's retroactive application to Appellant insinuated by Appellee through 18 U.S.C. § 3585(b) to add ten years to Appellant's MPR date violated both due process of law and the Constitution's *Ex Post Facto* Clause. Tr. [D. Doc. 14-1], pp. 4-5 (amended Grounds Six-Nine); *id.*, pp. 36-57.

Appellee made no effort to address or deny any facts alleged in Appellant's traverse nor addressed any of the amended grounds.

The district court grounded its decision directly on appellant's criminal judgment, App. to Br. 1-2, while purporting that the "conduct underlying [his] convictions has no bearing on the decision here, so the Court will not determine the[ir] accuracy... here." *id.* 1 n. 2.

Acknowledging Appellant's argument "that the BOP illegally altered his mandatory parole release date in 1994, adding ten years to his mandatory release date" and "that the BOP had no statutory authority to change this date and effectively usurped the powers of the [USPC]," *Id.* 3, and "that the BOP does not have authority to change the date and only the [USPC] can set the mandatory release date under § 4206(d)," *id.* 5, but held that it would not "rule on" this statutory authority "issue," *id.* 6, because "regardless" of the BOP's questioned authority to "determine the

...date," *id.*, it agreed with the BOP's interpretation of § 4206(d) through PS 5880.30 and its de-aggregation/re-aggregation mathematical formulation by which the BOP altered the date, *id.* 4, upon which it purported that the BOP "correctly calculated" the date "as February 12, 2023." *id.*

The court purported that § 4206(d) "plainly requires that prisoners serve an aggregate of two-thirds of all consecutive terms before being eligible for a mandatory release hearing." *Id.* Although without an evidentiary hearing and disputed, the court held that Appellant's waiver of a 1997 hearing perpetually:

> waived his [parole] hearings and thus pervented the [USPC] from either correcting his mandatory release date, making a § 4206(d) determination that he should not be paroled, or even ordering him released on parole.... Once the [1997] hearing was waived it was up to [Appellant] to reapply for parole.

*Id.* 6 (misciting USPC regulation governing waivers of "parole consideration"). The court held that Appellant remains "free to reapply for parole with the [USPC]" and that "[i]f he does so, the [USPC] will be able to determine his eligibility for parole pursuant to § 4206(d)." *Id.* 7.

The Court summarily rejected Appellant's amended grounds, *Id.*, applied an unanalyzed *res judicata* defense to his *ex post facto* claims, *id.*, and held his good-time credit mandatory release premised on the face of Appellee's SMISC as meritless because his "release is at the discretion of the [USPC] and his good-time credits do not impact his mandatory release date." *id.* 7-8.

Seeking reconsideration, Appellant argued that contrary to the court's determination, the actual conduct underlying his criminal judgment had decisive effect on the court's decision and judgment because it was obtained by a fraud on the trial court by a conspiracy with the DOJ, the prosecuting U.S. Attorneys Office, U.S. Marshals Service and FBI with a biased and corrupt judge, that its use thereafter defrauded every court, and its continued use in the habeas court "infects its own judgment with the fraud." R59(e) Mot. [D. Doc. 17], pp. 6-12. He alleged that

Appellee and his DOJ attorneys were privy to the facts underlying the fraudulent judgment. *Id.* 11 n. 3.

Appellant alleged that the court misapprehended his claim which challenged both the BOP's statutory authority to administer § 4206(d) and the correctness of its determined date, *Id.*, pp. 12-13, and the court's misconstruction and misapprehension of § 4206(d) by its reading its words in isolation and out of context, ignoring directly related sections of the PCRA, and the USPC's official interpretation of § 4206(d) through its legislative regulations and its application thereof to Appellant. *id.*, pp. 14-15.

Relying on the SMISC advanced by Appellee, Appellant argued that the court misconstrued and misapplied the federal good-time statute's mandatory release requirement for his release no later that "12-22-2009," which, even without his extra good-time credit of nearly 900 days entitled him to mandatory release. *Id.*, pp. 20-24.

Appellant further alleged that the court manifestly erred by summarily rejecting his amended claims and by failing to hold an evidentiary hearing on disputed facts, *Id.*, pp. 24-29, and by its wholesale disregard, misapplication, and failure to recognize and apply controlling law in respect to the parole statutes as amended and utterly misapprehended his *ex post facto* claims entirely. *id.* 30-38.

Appellee neither challenged the facts showing its continuing fraud into the Court below, nor did it deny the fraud in such court or all preceding courts through use of the fraudulent criminal judgment. And, Appellee again did not address Appellant's argument that the BOP had no statutory authority to make parole-related decisions, administer § 4206(d), or alter the MPR date of 2/12/2013 as determined by the USPC. Appellee did, however, respond to Appellant's argument that his good-time mandatory release date and MPR date reflected on the face of

Appellee's SMISC respectively as "12-22-2009" and "10-15-2009" were both "meaningless" because they were based on a "ficticious 40-year term" inserted into the document by a BOP employee, and that the SMISC was not an "official" but a bogus document specially "created solely to confirm" the MPR date argued by Appellee and that, regardless of the bogus SMISC, the BOP's altered MPR date was "properly calculated." Resp. to R59(e) Mot. [D. Doc. 22], pp. 1-4; Resp. to R59(e) Mot., Exh. A [D. Doc. 22-1], pp. 2-3.

The court conceded error in refusing to consider Appellant's amended claims. App. to Br. 15 (Order 2). Addressing the good-time credit mandatory release date issue, it noted the "confusion" caused by the SMISC's "quite misleading information" and that the bogus SMISC was, in fact, not an "official" document at all. *Id.* 17-18. However, the court held that because Appellant has a "life sentence" he does not have "an 'expiration' date" for his imprisonment and he is "not able to earn good time credits." *Id.* And, again, the court upheld the BOP's alteration of his MPR date, without deciding the question of statutory authority, as nonetheless "correct." *Id.* 13, 18-20. The court held that 28 U.S.C. § 2255(e) barred it from addressing the fraud on the court claim and purported that the fraud claim had been "raised in his direct appeal and his [first] § 2255 motion," *Id.* 21-22, and that it had "not erred in relying on [the fraudulent criminal judgment] in the...decision here." *id.* 22-23.

The court held it was neither bound by the plain command of a 1987 amendment requiring only prospective application, nor the anti-retroactivity rules of *Landgraf*, *supra* and *St. Cyr*, *supra*, but was bound by the panel ruling in *Norwood v. Brennan*, 891 F.2d 179, 181 (7th Cir. 1989), applying the amendment retroactively. *Id.* 24-25. It further purported to hold that the retroactive application of USPC regulations (28 C.F.R. §§ 2.12 and 2.14) extending his 10-year reconsideration hearing in June 1994 to a 15-year reconsideration hearing in June 2001, did not

violate the Constitution's *Ex Post Facto* Clause, *id.* 25-27, in part because his disputed 1997 waiver of a single SIH hearing waived all such hearings, as well as his reconsideration hearing, *id.* 27, and that the retroactive application of PS 5880.30 through 18 U.S.C. § 3585(b) to add 10 years to his MPR date did not violate the *Ex Post Facto* Clause. *id.* 27-28. The court determined that the "BOP recalculated [Appellant's] sentence" by altering his MPR date and that "it did so under the direction of BOP Program Statement 5880.30, which was issued in 1993," *Id.* 28, and any "entitlement to release" on his mandatory release date has been thereby postponed "until and unless the Parole Commission makes the decision to release him." *id.* 29.

The court entered final judgment on August 23, 2019. App. to Br. 31.

## III. ISSUES

### A. The District Court Erred by Misapprehending Appellant's Fraud on the Court Claim and by Applying 28 U.S.C. § 2255(e) and Res Judicata to Bar Relief

#### 1. Summary of Argument

Appellant alleged upon undisputed evidence that his criminal judgment, advanced by Appellee and his DOJ attorneys, had been obtained by fraud committed on his trial court by his trial judge, who with actual bias conspired with the U.S. Attorney's ("USA") Office, the Department of Justice ("DOJ") hierarchy, and other DOJ component agencies, and that the continued use of the fraudulent judgment to obtain the instant judgment is fraudulent as well. He invoked the court's inherent power to redress the fraud. However, the court recast the claim as an attack on his sentence and conviction, whereupon, it invoked 28 U.S.C. § 2255(e) to bar consideration and, relying once again upon the fraudulent judgment, dismissed the fraud claim with prejudice and denied the petition. The court also cited decisions in his direct appeal and the appeal from the denial of his first § 2255 motion, purporting that his fraud claim had there been raised.

A federal court's inherent power to investigate and redress fraud on the court extends to consider the fraudulent conduct entering its own proceedings from its source beginning in and continuing through other courts in other jurisdictions. *Dotson v. Bravo*, 321 F.3d 663, 667-69 (7th Cir. 2003); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421-28 (1923); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 15-16 (1907). Appellant's sentencing court, through § 2255 or otherwise, does not have any authority to redress the fraud carried into the court below thirty-seven years after sentence was imposed.

Appellant cited Supreme Court and Seventh Circuit precedent and 28 U.S.C. §§ 132(b)-(c), 455(a)-(b), to show that his criminal proceedings were structurally defective constitutionally and statutorily, and alleged that the fraudulent criminal judgment was used to defraud subsequent courts, including the court below by Appellee and his DOJ attorneys, with knowledge of its fraudulent and unconstitutional foundation, resulting in a fraudulent judgment - - all of which are factors subject to consideration by the court's inherent power for determining the egregiousness of the continuing fraudulent conduct. *Dotson, supra*, 321 F.3d at 667-69.

On Appellant's direct appeal, the conspirators concealed their acts involving the biased judge and government attorneys and fraudulent nature of the criminal judgment, thereby gaining a fraudulent judgment on appeal. And, in his first § 2255 proceeding, the same conspiratorial forces remained in control of the sentencing court and the USA's Office, who continued to conceal the fraud underlying the original and direct appeal judgments, thereby succeeding to obtain judgment on the § 2255 motion and its appeal.

In enacting § 2255, Congress never anticipated a sentencing court corrupted by bias and in conspiracy with a USA's Office, the entire DOJ and its agencies, or a prisoner having to run a

gauntlet of such corruption. "The problem, quite simply, is not one that Congress could have contemplated." *Webster v. Daniels*, 784 F.3d 1123, 1138 (7th Cir. 2015) (en banc).

The court's unanticipated citation to Appellant's direct appeal and § 2255 proceedings as involving his fraud claim to support § 2255(e) as a bar to the claim is sheer disingenuity. Whether meant as claim or issue preclusion cannot be determined by the court's barren comment. Res judicata is an affirmative defense and requires the party invoking it to establish its elements and the record must show that the party against whom it is asserted had "a full and fair opportunity to litigate" it. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). There is no such showing. Moreover, res judicata is inapplicable, where, as here, "the first judgment was obtained by extrinsic fraud (*i.e.*, a fraud that went to the integrity of the judicial proceeding in the first judgment)." *Hale v. Runyon*, No. 95-2098, 1996 U.S. App. LEXIS 24406, at 6 (7th Cir. Sept. 13, 1996) (citing cases). In any case, the facts underlying the fraud were concealed by the conspirators and unknown to Appellant.

Judge Benson's bias rendered Appellant's criminal judgment structurally defective "from beginning to end," *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991), invalidating his conviction, *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), and "judgment." *Lockheart v. Hulick*, 443 F.3d 927, 929 (7th Cir. 2006), stripped the court of its "adjudicatory capacity," *Fowler v. Butts*, 829 F.3d 788, 794-95 (7th Cir. 2016); 28 U.S.C. §§ 132(c), 455(a)-(b), *additionally* rendering its "resulting judgment...invalid as a matter of law." *Rivera v. Illinois*, 556 U.S. 148, 160-61 (2009). *See also Nguyen v. United States*, 539 U.S. 69, 78-83 & n. 17 (2003). *Every order through the judgment* by the corrupt and biased judge are one and all "nullities...not voidable, but simply void, and this even prior to reversal." *Vallely v. Northern F. & M. Ins. Co.*, 254 U.S. 348, 353-54 (1920) (citing cases), and the conspiracy using the biased judge and

prosecuting attorneys - - all officers of the court - - to obtain the criminal judgement by fraud *additionally* "vitiate[d] the...judgment[]." *United States v. Throckmorton*, 98 U.S. 61, 64 (1878).

Appellee's use of the fraudulent and constitutionally void criminal judgment to obtain the judgment in issue continued the fraud, and the lower court's express reliance upon it to deny Appellant's petition and to thereby continue his unconstitutional imprisonment through its own fraudulent judgment, are factors for this Court to consider. *Dotson, supra*, 321 F.3d at 669. This Court's "duty and power" is to deny all benefits of the continuing fraud to its perpetrators and to provide "appropriate direction" to the lower court in ensuring "full protection to the public against" the fraud. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 249-51 (1944).

2. Argument

(A). Standard of Review

Denial of a habeas corpus petition under 28 U.S.C. § 2241 is reviewed *de novo*. *Pope v. Perdue*, 889 F.3d 410, 413 (7th Cir. 2018); *Prevatte v. Krueger*, 865 F.3d 894, 896 (7th Cir. 2016). Orders denying Rule 59(e) motions are generally reviewed for abuse of discretion, *Rivas-Melendrez v. Napolitano*, 689 F.3d 732, 736 (7th Cir. 2012) (citing *Foster v. DeLuca*, 545 F.3d 582, 583 (7th Cir. 2008)); *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 368 (7th Cir. 2003), except in respect to issues of law for which review is *de novo*. *id.* (citing *Sosebee v. Astrue*, 494 F.3d 583, 589 (7th Cir. 2007)).

(B). The District Court Misapprehended the Nature and Scope of Appellant's Fraud Claim and Its Power and Duty to Redress It

The facts are not in dispute. On February 19, 1983, Appellant's trial judge, Chief U.S. District Judge Paul Benson, issued a secret *ex parte* "judicial order" to "disseminat[e]" an Internal Revenue Service ("IRS") report in respect to Appellant and his co-defendants regarding an organization called "Sheriff's Posse Comitatus" ("SPC") and its purported members and related

tax protest groups and persons,[3] with full knowledge of the Federal Bureau of Investigation ("FBI"), including FBI Headquarters ("HQ"), the U.S. Attorney ("USA") Rodney Webb, Assistant U.S. Attorney's ("AUSAs") Gary Anear, Lynn Crooks (lead prosecutor at trial), and Dennis Fisher (second), R59(e) Mot. [D. Doc. 17], pp. 9-11; Tr. Apx. pp. 103, 106 [D. Doc. 13-2, pp. 43, 46]; App. Doc. 5, Attach. 18.[4] On February 21, 1983, Benson was participating in secret "prosecutive strategy" conferences with USA Webb, U.S. Marshals, FBI, and Chief of the DOJ's Criminal Division, Lawrence Lippe, against Appellant and his co-defendants. R59(e) Mot., *supra*, p. 10; Tr. [D. Doc. 14-1], pp. 6-7; Tr. Apx., p. 111 [D. Doc. 13-2, p. 51]. Charges in the indictment returned on March 11, 1983 were coordinated by Lowell Jensen, Assistant AG over the DOJ's Criminal Division on behalf of USA Webb. Tr. Apx., p. 113 [D. Doc. 13-2, p. 53]. USA Webb signed the indictment and on March 11, 1983, Appellant and his co-defendants were haled before Benson for arraignment on March 14th, where Benson tongue-in-cheek told

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[3] On direct appeal, Appellant's convictions were affirmed by the majority's view that the "widespread" pre-trial "media coverage" was "largely factual in nature" and, purporting to "distinguish between largely factual publicity and that which is invidious and inflammatory," decided that the "media coverage" was "thorough" and "on the whole objective." *United States v. Faul*, 748 F.2d 1204, 1212 (8th Cir. 1984). The majority believed the defendants were a "Posse Comitatus group," *Id.*, at 1212 n. 4, *which was not only false but no part of the trial record.* There has never been any proceeding or hearing at any time relative to the "factual...nature," "objective[ness]," or the truthfulness of the media stories. *In fact, they were mostly false.*

[4] The last document was received after the judgment issued below pursuant to an FOIA/Privacy Act request pending since 2014. Doc 5, Attach. 16-18. It is a copy of a letter from USA Webb and AUSA Fisher to FBI Special Agent Joe Powell informing him that Benson's *ex parte* "Order has not been filed in any Court and it is, therefore, secret," and "it should not be put in any file and no written reference should be made in any report of the Bureau without the authorization of Rodney S, Webb, United States Attorney for the District of North Dakota." *id.*, Attach. 18. Requested copies of the original *ex parte* order and the request seeking the order, have not been provided and remain concealed. Appellant formerly obtained a later revised version of the IRS report from non-governmental sources leaked by IRS agents to the public, *see*, Tr. Apx. 134-143 [D. Doc. 13-3, pp. 4-13], which was ordered by the IRS to be destroyed, and courts have found it to contain falsehoods and defamitory statements chilling to First Amendment rights of those implicated. Tr. [D. Doc. 14-1, p. 8 n. 3].

them, "You have the right to a speedy, fair and public jury trial," and set a trial date. *See Von Kahl v. Bureau of National Affairs, Inc.*, Case No. 1:09-cv-00635, USDC, Dist. of Col., Doc. Entry 58-1, pp. 15, 29, 43, 47.[5] During Trial, Benson participated with AUSA Crooks in secretly rehearsing a crucial government witness' testimony the night before he testified. R59(e) Mot., *supra*, p. 10; Tr., *supra*, p. 7 n. 2; Tr. Apx., pp. 045-047 [D. Doc. 13-1, pp. 50-52].

Appellant argued that the judgment and commitment order ("J&C") signed by Benson is constitutionally and structurally defective as issued by the biased judge and structurally defective from Benson's violations of 28 U.S.C. § 455, rendering the court incompetent to exercise its "judicial power" pursuant to 28 U.S.C. §§ 132(b)-(c). R59(e) Mot. [D. Doc. 17], pp. 10 n. 2, 11 (citing cases). Ultimately, he argued that the conspiracy proceeded to "deprive [him], his co-defendants and the public of a constitutional trial and to obtain a judgment by a fraud on the court (and every court thereafter in which the judgment has been and continues to be used)," *Id.* p. 10, that its use in the court "infects its own judgment with the fraud," *id.*, and that "[t]he fraud perpetrated on the trial court by the biased Judge Benson in collusion with the prosecution has been carried into this Court and infects its own judgment." *id.*, p 12. Moreover, he alleged that "Benson and his cohorts knew he was violating the law and they all colluded together knowing their acts were illegal and have persisted to date to hide the truth," *Id.*, p. 10 n. 2, and that "all federal officers involved, including [Appellee] and the U.S. Attorney's Office personnel, are presumably 'in privity' of the true facts underlying the original trial, appeal, and post-judgment

[5] Transcripts of Arraignment from *United States v. Faul, et al.*, Case No. C3-83-16-03, U.S. District Court for the District of North Dakota, March 14, 1983, as certified and submitted with the indictment, judgment and commitment order and jury verdict forms, for which judicial notice here is appropriate and mandatory. Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, 2019 ed., p. 90 (Judicial notice is properly proposed in the appellate brief). *See also In re Lisse*, 921 F.3d 629, 637 (7th Cir. 2019).

proceedings relative to the criminal judgment." *id.*, p. 11 n. 3 (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Beard v. O'Neal*, 728 F.2d 894, 897-98 (7th Cir. 1984)).

The court construed his argument that it "committed error by relying on the criminal judgment which was allegedly 'obtained by collusion with a biased judge and a fraud on the court,'" App. to Br. 20-21, and, omitting the undisputed allegations that *use of the fraudulent judgment in its own proceedings infected its own judgment with the fraud*, dismissed the claim "with prejudice pursuant to 28 U.S.C. § 2255(e)" by recasting the claim as an "attack [on] his sentence and conviction itself, not the calculation of his sentence." *id.* 21.

Purporting that federal prisoners may only "attack their conviction or sentence...by way of motion under 28 U.S.C. § 2255," *Id.* (citing cases), excepted only "if the remedy under § 2255 'is inadequate or ineffective to test the legality of the detention,'" *id.* (citing § 2255(e)), the court cited cases for the proposition that § 2255(e) applies only when there is a change in the law since a prisoner's first § 2255 proceeding, so that it could not have been previously asserted, the new rule applies retroactively on collateral review and constitutes a miscarriage of justice. *id.* It then ruled that Appellant's "claims that his conviction and sentence were a result of fraud and collusion with a biased judge do not fall within the § 2255(e) savings clause" and purported that "at least part of [his] argument has been raised in his direct appeal and his § 2255 motion," *Id.*, 22 (citing *United States v. Faul*, 748 F.2d 1204, 1210 (8th Cir. 1984); *Von Kahl v. United States*, 242 F.3d 783, 793 (8th Cir. 2001)), to support its dismissal under § 2255(e) and to hold it was not error for the court to rely on the fraudulent judgment, *id.* 22-23, and relying on it once more, *id.*, at 11, denied relief, continuing his imprisonment, *id.*, and entered an amended judgment thereupon. *id.*, 31.

(1). The District Court's Power to Redress the Fraud in Issue is Part of Its Inherent Power, Not Subject to § 2255, and Extends to Fully Redress the Fraudulent Conduct to its Source in the District Court

Fraud on the court includes fraud that "'does or attempts to defile the court itself or... perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases.'" *Drobny v. Comm'nr of IRS*, 113 F.3d 670, 677-78 (7th Cir. 1997) (quoting *Kenner v. C.I.R.*, 387 F.2d 689, 691 (7th Cir. 1968)). Examples include "exertion of undue influence upon [a] judge...and the fraudulent submissions by a lawyer for one of the parties," *In re Goff 225, Inc.*, 652 F.3d 806, 809 (7th Cir. 2011) (citing cases), or any other conduct that "corrupts the judicial process itself." *Citizens for Appropriate Rural Rds. v. Foxx*, 815 F.3d 1068, 1080 (7th Cir. 2016). *See also In re Whitney-Forbes*, 770 F.2d 692, 698 (7th Cir. 1985). Far beyond the mere rights of private parties, such fraud involves "issues of great moment to the public," because it violates "the very institutions set up to protect and safeguard the public." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

A court's inherent power to investigate fraud on the court is as unquestionable as it is comprehensive. *Hazel-Atlas*, *supra*, 322 U.S. at 245-46; *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 46, 49 (1991); *Citizens for Appropriate Rural Rds.*, *supra*, 815 F.3d at 1080; *Drobny*, *supra*, 113 F.3d at 677-78. It extends to assess the impact, effect and egregiousness of all the fraudulent conduct in respect to the entire course of the litigation, *Fuery v. City of Chicago*, 900 F.3d 450, 464 (7th Cir. 2018); *Dotson v. Bravo*, 321 F.3d 663, 667-69 (7th Cir. 2003), "no matter who commits" it, *De Manez v. Bridgestone Firestone North American Tire, LLC*, 533 F.3d 578, 585 (7th Cir. 2008), even if it begins in and succeeds through prior courts in other jurisdictions. *Dotson*, *supra*; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421-28 (1923); *Old Wayne Mut. Life*

*Ass'n v. McDonough*, 204 U.S. 8, 15-16 (1907); *See White v. Crow*, 110 U.S. 183, 189 (1884) (collateral review of judgments are generally foreclosed "'unless impeached for fraud'") (quoting *Cornett v. Nash*, 109 U.S. 258, 266 (1883)).

"[A] decision produced by fraud on the court is not in essence a decision at all," *Drobny*, *supra*, 113 F.3d at 689, and "vitiates...documents, and even judgments." *United States v. Throckmorton*, 98 U.S. 61, 64 (1878). Such fraud "cannot be complacently tolerated." *Hazel-Atlas*, *supra*, at 246. Where a "convincing case of palpable fraud" is shown "it is hard to justify a holding that it could not be considered," *Drobny*, *supra*, at 667, and, once proven, always "require[s] courts, in some manner, to devitalize the judgment." *Hazel-Atlas*, *supra*, at 245.

(a). The District Court's Failure to Assess the Egregiousness and Effects of the Fraud into Its Own Proceedings Led to the Erroneous Application of § 2255(e)

Non-criminal fraud is established by preponderance of the evidence. *Ramirez v. T&H Lemont, Inc.*, 845 F.3 772, 776-82 (7th Cir. 2016). Here, the evidence of the fraud by far exceeds even the former clear and convincing standard. *id.* Appellant provided "a meaningful evidentiary showing" more than sufficient to "warrant a belief in a reasonable person" that the DOJ and U.S. Attorney's Office, together with the DOJ and its component agencies and officers, conspired with an actually biased judge to undermine his criminal proceedings entirely to successfully obtain the criminal judgment. *Citizens for Appropriate Rural Rds.*, *supra*, 815 F.3d at 1080 (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004)).

Appellant further alleged that Appellee and his DOJ attorneys were "in privity" of the facts underlying the fraud through his direct appeal and first § 2255 proceedings, throughout which the conspirators continued the fraud and that, in any case, the evidence of the fraud was fully on

record in the court below and Appellee and his DOJ attorneys were thus fully aware of the fraudulent nature of the criminal judgment upon which they pressed forward to judgment.[6]

Federal courts assess the "impact or effect that [fraudulent] conduct had on the course of the litigation," *Fuery*, *supra*, 900 F.3d at 464, including "'the egregiousness of the conduct in question *in relation to all aspects of the judicial process*,'" *Dotson*, *supra*, 321 F.3d at 667 (quoting *Barnhill v. United States*, 11 F.3d 1360, 1368 (7th Cir. 1993)), as it succeeded through prior courts in distinct jurisdictions to assess its effect on the "overall scheme to defraud." *id.* The defrauder's failure to "rectify" his deception or to otherwise "ameliorate" the effects of the fraud are factors considered and there is "[n]o rule" that "prohibits...consideration" of the defrauder's "actions prior" to the "underlying" action into which the fraud continues, *id.*, at 668-69, as is the defrauder's silence or concealment. *United States v. Osborne*, 931 F.2d 1139, 1167 (7th Cir. 1991) (citing *United States v. Bishop*, 774 F.2d 771, 773 (7th Cir. 1985)).

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[6] The conspiracy included the "first-degree execution-style murder" of Appellant's father and co-defendant by a U.S. Marshal and the killing of a local sheriff by the conspirators after obtaining fraudulent jury verdicts and prior to entering the fraudulent judgment, and it has thus far succeeded in covering up those murders. *See* App. Doc. 5, Attach. 28-31. These facts involve the egregiousness of the fraudulent conduct and are subject to judicial notice. FRE 201(a), (d). *See* Note 5, *supra*. The conspirators' acts are criminal offenses. *See e.g.*, 18 U.S.C. § 1503 (corruptly influencing federal judge or administration of justice); *id.* § 371 (conspiracy to commit offense against or to defraud United States); *id.*, § 2 (aiding and abetting offense against laws of the United States); *id.*, § 3 (accessory after the fact); *id.*, § 4 (misprision of felony). The record shows that the underlying motive (at least in large part) was the conspirators' perception of the defendant's religious views *vis-à-vis* their race. *See e.g.*, Tr. Apx. 087-101 [D. Doc. 13-2, pp. 27-41]; *id.*, 134-143 [D. Doc. 13-3, pp. 4-13]. *See also* App. Doc. 5, Attach. 19-31. The acts clearly evince a conspiracy as well to violate Appellant's (and his co-defendants') civil rights. 42 U.S.C. § 1985. And still, *even after all these years*, after filing his R59(e) motion, a friend of Appellant's paid an attorney, Brandon Sample to assist him. Immediately thereafter, U.S. Marshals approached his friend in an attempt to intimidate him from assisting Appellant. *See* App. Doc. 5, pp. 7-8 ¶¶ 23-24; App. Doc. 30, p. 4 & Exh. 1. Sample was made aware of the incident and became uncooperative with Appellant, who believes he had been intimidated, and, therefore, felt compelled to let him go and proceed pre se. App. Doc. 5, p. 8 ¶ 26. The conspiracy - - criminal and otherwise - - has and continues to corrupt the due administration of justice.

Fraud on a court continuing from prior court proceedings requires showing a "causal connection" therefrom to rights at stake in the latter proceeding, *Toledo Scale Co.*, *supra*, 261 U.S. at 423, which is met by showing "'that one event was the factual cause of another'" where "'the latter would not have occurred "but for" the former.'" *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. __ , (2017), 197 L.Ed.2d, 585, 594. Examples of the required "relation" include the defrauder's failed duty to disclose evidence in the prior proceedings that would have "weakened its case" or maintaining "silence...accompanied by acts which actually prevented" the victim party's use "of such evidence." *Toledo Scale Co.*, *supra*.

(i). The Fraud Proceeded by Violations of the Most Fundamental Due Process Requirements and Statutory Mandates Depriving the Court of Jurisdiction and Invalidating Its Actions

The DOJ's corrupt use of the actually biased Judge Benson throughout the criminal proceedings as a secret partisan activist of the prosecution peremptorily stripped those proceedings of the most fundamental due process requirement – *i.e.*, "'a fair trial in a fair tribunal,'...before a judge with no actual bias against the defendant or interest in the outcome of [Appellant's] case." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (citing cases). *See Harrison v. McBride*, 428 F.3d 652, 668 (7th Cir. 2005) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). Benson's very "presence" on the bench permeated a "structural defect[] in the constitution of the trial mechanism" polluting "the entire conduct from beginning to end." *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). *See Harrison*, *supra*.[7]

[7] Due process of law "'is a requirement of [Article III] judicial power,'" *Northern Pipeline Const. Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 82 n. 38 (1982) (Plurality) (quoting *Crowell v. Benson*, 285 U.S. 22, 60-61 (1932) (Brandies, J. dissenting)), and the "constitutional requirement for the exercise of that power must be met at all stages of adjudication." *id.*, at 82 n. 29. Due process fundamentally requires "a legally competent tribunal having jurisdiction to preside" as "essential to the passing of an enforceable judgment," *Powell v. Alabama*, 287 U.S. 45, 65 (1932); *see Twining v. New Jersey*, 211 U.S. 78, 110-11 (1908) (court having jurisdiction

Benson's bias fully evinced by his secret partisanship with the DOJ and prosecution, issuing secret *ex parte* "judicial order[s]," secretly colluding to develop "prosecution strategy" and his secret participation in rehearsing government witness testimony *each* additionally mandated his self-disqualification as a judge, 28 U.S.C. §§ 455(a), (b)(1), (3), (4) & (5) (i), (iii) & (iv), all of which prohibited him from sitting in the case at all and from "hold[ing]...court" and "exercis[ing]" its "judicial power," 28 U.S.C. 132 (b)-(c), dispossessing the court of any "judicial capacity" whatsoever. *Fowler v. Butts*, 829 F.3d 788, 794 (7th Cir. 2016). *See Nguyen v. United States*, 539 U.S. 69, 78-83 & n. 17 (2003) (court composed with statutorily disqualified judge is legally incompetent, deprives its actions of validity, and precludes jurisdiction to exercise its judicial power) (citing cases).

"A biased judge[] is intrinsically a lawless judge," *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949) (Frankfurter, J., dissenting), and Judge Benson's bias is self-evident in his undisputed conspiratorial acts. He knew he was violating his oath of office and due process of law and he knew "both the facts and law" mandating his self-disqualification under §§ 455(a)-(b) "better than" all the defendants and their lawyers, *Fowler*, *supra*, at 794, and chose to violate them knowing he could not "continue in an adjudicatory capacity," *id.*, and was thus statutorily precluded from "hold[ing]...court" and "exercis[ing] its "judicial power." 28 U.S.C. § 132(c). *See Nguyen*, *supra*, 539 U.S. at 78-83 & n. 17. Section 455(b)'s self-disqualification requirements are unexceptionable, *see* § 455(e), and, like the statute in *Nguyen*, involves "action...that could never have been taken at all," 539 U.S. at 79, and for which the resulting "plain defect in the composition" of the court cannot be "cure[d]" even by a pre-violation stipulation of the parties.

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is due process requisite) (citing cases), and requires that "all stages of a criminal trial be conducted by a person with jurisdiction to preside." *Gomez v. United States*, 490 U.S. 858, 876 (1989).

*id.*, at 81 (citing *William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645, 650 (1913)). Only courts composed of statutorily authorized judges are "empowered to exercise [their] jurisdiction." *Nguyen*, *supra*, 539 U.S. at 83 & n. 17. A court "not organized in conformity" with relevant statutes "is virtually no court at all," *William Cramp*, *supra*, 228 U.S. at 652, and statutes that evince an "authority Congress clearly withheld," *Nguyen*, *supra*, at 80, are jurisdictional, *id.*, at 83 n. 17. *See Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (citing cases).[8]

Benson's *deliberate* constitutional and statutory violations require that *all* of his orders and judgments be treated "as nullities," and "not voidable, but simply void, and this even prior to reversal." *Vallely v. Northern F. & M. Ins. Co.*, 254 U.S. 348, 353-54 (1920) (citing *Elliott v. Piersol*, 26 U.S. (1 Pet.) 328, 340 (1828); *Old Wayne*, *supra*, 204 U.S. 8); *see also United States v. Walker*, 109 U.S. 258, 266 (1883) (a court's decree outside "the law of its organization...is void"). The constitutional violation "invalidates the conviction," *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), as it "automatically vitiates the judgment," *Lockheart* 443 F.3d 927, 929 (7th Cir. 2006), and for the statutory violation the "resulting judgment...[is] invalid as a matter of law." *Rivera*, *supra*, 556 U.S. at 161. Moreover, the "decision produced by a fraud on the court is

[8] Like the statute at issue in *Nguyen*, the manifest "policy" underlying § 455 "concern[s] the proper organization of the federal courts." 539 U.S. at 78-80. Section 455's policy is "to guarantee litigants a fair forum," *United States v. Will*, 449 U.S. 200, 216 (1980), and "to promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. 847, 849 (1988). Unlike the statute at issue in *Nguyen*, § 455(a) is exceptionable by permitting a waiver if the facts potentially requiring self-disqualification for reasons that may question a judge's impartiality are fully disclosed by the judge on the record and all parties agree to a waiver. *Fowler*, *supra*, 829 F.3d at 794. *See* 28 U.S.C. § 455(a). Section 455(b), however, is like the statute at issue in *Nguyen*, absolutely unexceptionable, 539 U.S. at 80. *See Fowler*, *supra*; *United States v. Smith*, 775 F.3d 879, 881 (7th Cir. 2015) (§ 455(b)'s disqualification mandates can never be waived) (citing § 455(e)). Section 455(a) may thus not strictly be jurisdictional, but § 455(b) undoubtedly is no less than the statute in *Nguyen*.

not in essence a decision at all," *Drobny*, *supra*, 113 F.3d at 677, and the fraud inherently "vitiates" the "judgment." *Throckmorton*, *supra*, 98 U.S. at 64.

Finally, Appellant's specific and undisputed allegations and evidence that the biased Judge Benson colluded with prosecuting officers of the trial court, the DOJ hierarchy, U.S. Marshals Service, and FBI entirely overcomes any "presumption of regularity" the trial record otherwise imports, *Walker v. Johnston*, 312 U.S. 275, 286 (1941) (positive allegations of due process violation); *see also Harrison*, *supra*, 428 F.3d at 668 (positive evidence of biased judge); *Bracy v. Schomig*, 286 F.3d 406, 409 (7th Cir. 2002) (en banc) (same); *and see Drobny*, *supra*, 113 F.3d at 677 (specific facts showing fraud on the court will "'impugn'" the "'official record'") (citing *Kenner*, *supra*, 387 F.2d at 691).

(ii). The Fraud Continued Through Direct Appeal

When Appellant filed for direct appeal (along with his co-defendants), the trial court forwarded the corrupt trial record and judgment to the appellate court. Judge Benson and USA Rodney Webb, his lackeys AUSAs Gary Anear, Lynn Crooks and Dennis Fisher, all parties to the conspiracy and fraud with the biased judge and officers of the trial and appellate court, Tr. Apx. 103, 106, 111 [D. Doc. 13-2, pp. 43, 46, 51]; App. Doc. 5, Attach. 18, concealed the facts of Benson's secret role as partisan of the prosecution and the conspiracy to defraud the trial court. While USA Webb through AUSAs Crooks and Fisher argued to deny the appeal and sustain Benson's ruling and orders including the fraudulent judgment upon the corrupt record, while "'purposely ke[eping] silent, intending that the court rely on the'" fraudulent record, *Osborne*, *supra*, 931 F.2d at 1167 (citing *Bishop*, *supra*, 774 F.2d at 773), which it did. Thus, "the trail of fraud continued through the District Court and up to the Circuit Court of Appeals," *Hazel-Atlas*, *supra*, 322 U.S. at 250, where the conspirators obtained another fraudulent

judgment. Had the conspirators disclosed the truth, the appellate court would have (assuming it had not been corrupted) vacated the judgment, declared the entire criminal proceedings void for the fraud, dismissed the case, and ordered Appellant and his co-defendants released. By the conspirators' "silence" Appellant and his co-defendants were deprived of the use of the evidence, *Toledo Scale Co.*, *supra*, 261 U.S. at 423, and, unable to raise the fraud, the appellate court was deprived of the means to redress it.

(iii). The Fraud Continued Through Appellant's First § 2255 Proceeding and Appeal

By the time Appellant filed his first § 2255 motion, Webb had succeeded in obtaining appointment as a U.S. district court judge assigned to Appellant's sentencing court at Fargo, North Dakota. Benson was then still a member of that court, which now had two corrupt judges.[9] With his § 2255 motion, Appellant moved to have Benson recused – not for his fraudulent conduct and actual bias, which then still remained hidden, but by questioning his impartiality under § 455(a) relative to his pre-trial relationships with the deceased marshals and in light of his Masonic membership with its oaths and obligations. The motions came before Webb, who immediately granted the recusal motion and ordered recusal of *all* judges of the District, Tr. Apx. 75-76 [D. Doc. 13-2, pp. 15-16], while he and his co-conspirators (including Benson and the AUSAs still under the U.S. Attorney's Office) *concealed* the facts underlying Benson's bias and the fraud throughout the trial and direct appeal, thereby enabling the conspiracy and fraud to continue *undetected* and thus to sustain the previously obtained fraudulent judgment (trial and

[9] Webb's appointment could have *only* succeeded by the concealment of his corrupt and fraudulent conduct from the Senate and President by the DOJ and its component agencies and officers involved in and in privity of the conspiracy, including Webb (and obviously Benson), all of whom thereby also defrauded the Senate and Office of the President and the judiciary. The DOJ, U.S. Attorney's Office, U.S. Marshals Service, FBI, and other components thus succeeded in gaining *another* corrupt and secret partisan judge on that court – neither of which, like the other conspirators, were fit for *any* office of public trust.

direct appeal) and successfully to obtain two more (§ 2255 proceeding and appeal) – once again by "silence." *Osborne*, *supra*.

(iv). The District Court Erroneously Applied § 2255(e) to Bar Redress of the Continuing Fraud

Courts having jurisdiction have always had "the right to decide every question" arising in the cause, *Elliott v. Piersol*, 26 U.S. (1 Pet.) 328, 340 (1828), and by collateral review to "'inquir[e] into every other court when the proceedings in the former'" are corrupted by fraud and "'are relied upon and brought before the latter [by a party] claim[ing] the benefit of such proceeding'" regardless of the nature or jurisdiction of the court issuing the questionable "'decree or judgment.'" *Old Wayne*, *supra*, 204 U.S. at 15-16. *See Dotson*, 321 F.3d at 667-69; *Toledo Scale Co.*, *supra*, 261 U.S. at 421-28. Moreover, having jurisdiction, a court "'has no more right to decline [its] exercise.., than to usurp that which is not given.'" *Pratt v. Hurley*, 79 F.3d 601, 603 (7th Cir. 1996) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)); *United States v. Will*, 449 U.S. 200, 216 n. 19 (1980) (same), nor any right to "'avoid'" questions over which its jurisdiction extends. *id.* (quoting *Cohens*, *supra*).

A court's inherent power to redress fraudulent judgments and to prevent fraud from contaminating its proceedings does not arise by statute, *Hazel-Atlas*, *supra*, 322 U.S. at 245-48; *Universal Oil*, *supra*, 328 U.S. at 580; *Chambers*, *supra*, 501 U.S. at 44, 46, 49, and neither statutes nor rules are "substitutes" for that power. *id.*, at 46. Absent a specific statute limiting a court's "subject-matter jurisdiction" precluding adjudicative powers entirely, a court is unrestrained from exercising its inherent powers "to protect the integrity of [its] proceedings." *De Manez*, *supra*, 533 F.3d at 586.

Jurisdiction for § 2255 arises from 28 U.S.C. § 3231 and a § 2255 motion "is one in a criminal case." *Webster v. Caraway*, 761 F.3d 764, 768 (7th Cir. 2014). Section 2255 is not "a

jurisdictional statute," *Id.*, and § 2255(e) does not "purport to contract...jurisdiction" conferred by § 3231, nor does it "restrict the sources of jurisdiction available" for "habeas corpus" including 28 U.S.C. § 1331. *id.*, at 768-69. Moreover, § 2255(e) creates a "nonjurisdictional defense," *Hicks v. Stancil*, 642 Fed Appx. 620, 622 (7th Cir 2016), the "benefits" of which "can be waived or forfeited." *Webster v. Caraway*, *supra*, 761 F.3d at 770. Ordinarily, affirmative defenses not raised at the time a defendant files an answer are deemed waived, *Castro v. Chicago Housing Auth.*, 360 F.3d 721, 735 (7th Cir. 2004) (citing *Perry v. Sullivan*, 207 F.3d 379, 382 (7th Cir. 2000)), and are not acceptable absent "'adequate notice to the plaintiff.'" *id.* (quoting *Venters v. City of Delphi*, 123 F.3d 956, 969 (7th Cir. 1997)).

While cases are ordinarily decided by "the adversarial process," *Community Bank of Trenton v. Schnuck Markets, Inc.*, 887 F.3d 803, 805 (7th Cir. 2018), and judges do not "do [a party's] research and try to discover whether there might be something to say against [a party's] reasoning," *Bonte v. United States Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010), nor "invent legal arguments for litigants," *Community Bank*, *supra*, here, Appellee's silence prompted the court to research, invent and raise all Appellee's arguments, and removed the adversarial process from the proceedings on the fraud claim entirely – without notice to Appellant or any opportunity to address the § 2255(e) defense at all. Neither Appellee nor his DOJ attorneys raised the § 2255(e) defense, but rather, like the conspirators throughout, they remained absolutely silent, clearly intending that the court rely on the fraudulent judgment in rendering judgment. *Osborne*, *supra*, 931 F.2d at 1167; *Toledo Scale Co.*, *supra*, 261 U.S. at 423. The court should have concluded concession upon such "silence." *Bonte, supra.*[10]

[10] Such silence is evidence of great weight. Appellant's specific facts and evidence shifted the "burden of persuasion" to Appellee to show that Judge Benson was not biased, *Cartalino v. Washington*, 122 F.3d 8, 11 (7th Cir. 1997), and "to show such integrity of conduct and of such

Appellant filed his habeas petition by invoking jurisdiction pursuant to 28 U.S.C. §§ 1331, 2243(c)(3) and auxiliary powers pursuant to 28 U.S.C. §§ 1651(a), 2201-02, Pet. [D. Doc. 1], p. 3 ¶ 4, and to redress the continuing fraud injected by Appellee he invoked the court's inherent power. R59(e) Mot. [D. Doc. 17], pp. 6-12. Appellee seeking to "'benefit'" by the fraudulent criminal judgment, the court below was fully empowered to collaterally "'inquir[e]'" into the trial court to protect itself and Appellant from such judgment, *Old Wayne*, *supra*, 204 U.S. at 15-16; *see Toledo Scale Co.*, *supra*, 261 U.S. at 421-28, and no part of § 2255 even arguably acts either as a bar against nor a substitute for a court's "inherent power" to "protect the integrity of its proceedings" from the continuing fraud. *De Manez*, *supra*, 533 F.3d at 586; *Chambers*, *supra*, 501 U.S. at 46.

Assuming, *arguendo*, that § 2255 supplants a court's inherent power to redress fraud on the court, upon the unique facts of this case, it is here structurally defective. First, the fraud is shown to have been continued in the court below and § 2255 only redresses challenges to the sentence, conviction, or judgment of the sentencing court. § 2255(a), (b). *See United States v. Hayman*, 342 U.S. 205, 216-22 & nn. 25-38 (1952) (delineating history and purpose of § 2255). Nothing in its text or history suggests a remedy in the sentencing court for a fraud committed on another court in another jurisdiction 37 years after sentencing.

Second, a § 2255 proceeding is "not a habeas corpus proceeding," *Hayman*, *supra*, 342 U.S. at 220, but a habeas substitute, *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012); *Boumediene v. Bush*, 553 U.S. 723, 774-77 (2008), designed to provide the prisoner with the "'same rights'" of a habeas petitioner "'in another and more convenient forum,'" *id.*, at 775 (quoting *Hayman*,

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compliance with the law" by the conspiring officers "as will sustain" the judgment. *Moffat v. United States*, 112 U.S. 24, 30 (1884).

*supra*, at 219), by "directing claims...to the sentencing court, *a court already familiar with the facts*." *id.* (emphasis added).

Appellant filed his first § 2255 motion in the sentencing court with Judge Benson and USA-cum-Judge Webb – both then members of that court. Both were fully "*familiar with the facts*" of *their conspiracy* to defraud that very court and of the structural defect *they injected* into and contaminated the entire "trial mechanism" through with *their fraud*, destroying the "'judicial machinery.'" *See Fulminante*, *supra*, 499 U.S. at 309-10; *Drobny*, *supra*, 113 F.3d at 677-78. AUSAs Crooks and Fisher – both parties to the fraud – remained entrenched in the USA's Office and as officers of the court, and part of the entity responsible to litigate on behalf of the government, with full knowledge of those crucial facts.

Like the public and his co-defendants, Appellant did not know these crucial facts when he filed his first § 2255 motion and, due to the conspirator's silence and failure to disclose them during those proceedings through appeal, the fraud there continued unabated and unredressible. *Osborne*, *supra*, 931 F.2d at 1167; *Dotson*, *supra*, 321 F.3d at 668.

The very "focus" of § 2255(e) turns upon whether "'the remedy by motion is inadequate or ineffective to test the legality of [the prisoner's] *detention*.'" *Webster v. Daniels*, 784 F.3d 1123, 1138 (7th Cir. 2015) (en banc) (quoting § 2255(e)) (emphasis by Court). *See also Brown v. Caraway*, 719 F.3d 583, 588 (7th Cir. 2013). Indeed, that is the very focus of § 2255 itself. *See* § 2255(a) (motion to be filed by "prisoner...claiming the right to be released"). "'[A]dequacy'... requires determining what the essential function of habeas corpus is and whether it is impaired" in a given set of "circumstances." *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998). Its "essential function is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *Id.*, (citing cases). The

very "core of habeas corpus...goes to the constitutionality of his physical confinement," *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973), with the "traditional function...to secure release from illegal custody." *id.*, at 484. *See Boumediene*, *supra*, 553 U.S. at 745.

Thus, "whether section 2255 is inadequate or ineffective depends on whether it allows the petitioner 'a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction or sentence,'" *Daniels*, *supra*, at 1136 (quoting *Davenport*, *supra*, 147 F.3d at 609), and it "can fairly be termed inadequate when it is so configured as to deny a convicted defendant *any* opportunity for judicial rectification of so fundamental defect in his conviction as having been imprisoned for a nonexistent offense," *Davenport*, *supra*, at 611, arguably "an inadequacy of constitutional dimensions." *id.*

*Davenport* created a non-textual three-part test for determining when § 2255 is inadequate or ineffective – *i.e.*, requiring a post-sentencing change in law made retroactive by the Supreme Court; the change must elude permission in § 2255 for successive motions; and the change in law cannot be different in the district of confinement to that of sentencing. 147 F.3d at 611-12. *Daniels* denounced reading *Davenport's* three-part test, as applied in such cases as *Unthank v. Jett*, 549 F.3d 534 (7th Cir. 2008) and *Taylor v. Gilkey*, 314 F.3d 832 (7th Cir. 2002), as "an absolute restriction on the savings clause" and its "general language" to rather require "appropriate applications of the law to the facts before the court," 784 F.3d at 1137, which of course is what *Davenport* indicated. 147 F.3d at 609 (whether fundamental habeas functions "are impaired in the circumstances before us" by any limited use of § 2255). *See Also Poe v. LaRiva*,

834 F.3d 770, 772-73 (7th Cir 2016) (recognizing *Davenport's* 3-part test as but "[o]ne circumstance under which this Court has permitted resort to § 2241").[11]

*Daniels,* having "take[n] into account the fact that a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence," 784 F.3d at 1139, upon the unique "argument that a particular sentence was *unconstitutionally* forbidden (either as a matter of law or as a matter of fact), rather than just outside the scope of a statute," *id.*, 1137, held that "there is no categorical bar against resort to § 2241 in cases where new evidence would reveal that the Constitution categorically prohibits a certain penalty," *id.*, at 1139, and remanded to the § 2241 court to assess the new evidence against the trial record. *id.*, at 1140 *et seq.*

Here, the "fundamental defect in [Appellant's] conviction" goes far beyond his "having been imprisoned for a nonexistent offense," *Davenport, supra,* 147 F.3d at 611, for which he had been "den[ied]...*any* opportunity for judicial rectification." *id.* There is a fundamental "structural defect[] in [his] trial mechanism" that effected the "entire conduct [of the proceedings] from beginning to end," *Fulminante, supra,* 499 U.S. at 309-10, carried out by the trial judge and prosecutors – crucial officers of the court – to prevent the "'judicial machinery [from] perform[ing] in its usual manner its impartial task of adjudicating'" Appellant's case. *Drobny, supra,* 113 F.3d at 677-78. Appellant's conviction, sentence, judgment *and* imprisonment are "unconstitutionally forbidden" *both* "as a matter of law *and*...fact," *Daniels, supra,* 784 F.3d at

[11] *Daniels* noted another "illustration of a situation" unrelated to *Davenport's* three-part test in which § 2255 would be inadequate or ineffective – *i.e.*, "in rare circumstances [where] 'the operation of the successive rules [would] absolutely prevent[] the petitioner from ever having an opportunity to raise a challenge to the legality of his sentence'" in respect to which no claim of actual innocence was necessary. 784 F.3d at 1136-37 (citing *Garza v. Lappin,* 253 F.3d 918, 922 (7th Cir. 2001). And, this Court has applied § 2255(e) to permit direct access to § 2241 in cases involving "the interaction of *old* constitutional rules with *new* statutory interpretations," *Gray-Bey v. United,* 209 F.3d 986, 990 (7th Cir. 2000).

1137, *because* in his case the new evidence "reveal[s] that the Constitution categorically prohibits [*any*] penalty" whatsoever. *id.*, at 1139.

The undisputed facts conclusively prove that Appellant has never been charged, arraigned, tried, convicted, or sentenced by a constitutionally or legally constituted court and that his imprisonment is and always has been unlawful. The most fundamental requirements of due process have been violated at every step and stage – not by mistake or mere trial error, but by design. As a matter of law, his criminal judgment is substantively and structurally void. The conspiracy spearheaded by the undisputedly biased Judge Benson, an "intrinsically lawless judge," *Wilkerson*, *supra*, 336 U.S. at 65 (Frankfurter, J., dissenting), made the trial court "virtually no court at all," *William Cramp*, *supra*, 228 U.S. at 652, "invalidate[d] [the] conviction," *Sullivan*, *supra*, 508 U.S. at 279, and judgment. *Lockheart*, *supra*, 443 F.3d at 929; *Rivera*, *supra*, 556 U.S. at 160-61; *Throckmorton*, *supra*, 98 U.S. at 64. *All* are unconstitutional, fraudulent and *void ab initio*. *Vallely*, *supra*, 254 U.S. at 353-54.

In enacting § 2255, Congress never anticipated a sentencing court like that here, where the court was subsumed by hostile and criminal court officers hell-bent to destroy due process in the proceedings. To run a gauntlet of such corruption is not the "'more convenient forum'" intended, *Boumediene*, *supra*, 553 U.S. at 775, and the issue of adequacy depends as well "upon the rigor of any earlier proceedings" consonant with "the test for procedural accuracy in the due process context," *id.*, at 781, which is non-existent where, as here, a biased judge has presided, *Fulminante*, *supra*, 499 U.S. at 309-10, or fraud has succeeded. *Drobny*, *supra*, 113 F.3d at 677-78. Where "'hostile influences'" have effected control of the court and the "'processes of justice'" are "'subverted'" due process is violated and "'jurisdiction'" is lost, *Fay v. Noia,* 372 U.S. 391, 411 (1963) (quoting *Frank v. Mangum*, 237 U.S. 309, 346, 347 (1915)) (Holmes, J.,

dissenting), and in such "case...the whole proceeding is a mask" and "make the trial absolutely void." *Moore v. Dempsey*, 261 U.S. 86, 91-92 (1923).[12]

Appellant's case involved "'a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void.'" *Fay*, *supra*, 372 U.S. at 414 (quoting *Brown v. Mississippi*, 297 U.S. 278, 286, 287 (1936) (citing *Moore*). "Constitutional rights cannot be abrogated by rule making or legislation," *Miranda v. Arizona*, 384 U.S. 436, 491 (1966), and "'no act of Congress can authorize a violation of the Constitution.'" *United States v. Villamonte-Marquez*, 462 U.S. 579, 585 (1983) (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)); *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975).

Here, § 2255 has proven to be absolutely inadequate and ineffective to test and redress Appellant's undisputably illegal detention and, upon the extraordinary facts and circumstances, has proven to be but a safe haven for the conspirators to continue their fraud. Even if § 2255 could be construed to displace a court's inherent power, which no court has suggested, here, the "problem, quite simply, is not one that Congress could have contemplated." *Daniels*, *supra*, 784 F.3d at 1138.

(b). The District Court's Application of Res Judicata to Appellant's Direct Appeal and First § 2255 Proceedings are Erroneous

In face of Appellee's utter silence, the lower court invented a desultory res judicata defense and applied it to support its § 2255(e) bar. Citing Appellant's decisions on direct appeal and the appeal of the denial of his first § 2255 motion, it purported that his fraud claim had been there

[12] *Moore* and *Frank* involved intimidation by a mob – an external hostile influence. The hostile influences in Appellant's case were the biased judge and prosecutors – officers of the court – *and* the DOJ, U.S. Marshals Service, FBI and other DOJ components – internal and external forces.

raised "in part." App. to Br. 22 (citing *Faul*, *supra*, 748 F.2d at 1210; *Von Kahl*, *supra*, 242 F.3d at 793).

While the court clearly intended to apply its meager citations as a form of res judicata, it not only did so without notice to Appellant, depriving him of any opportunity to address such defense, but left its comments so bereft of fact or citation that whether it intended to apply the defense a "claim" or "issue preclusion" is simply incomprehensible. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) ("[C]laim preclusion and issue preclusion" are "collectively referred to as res judicata"). In any case, neither is applicable here.

"[C]laim preclusion" is typically called "res judicata" and "issue preclusion" as "collateral estoppel." *E.g.*, *Adams v. City of Indianapolis*, 742 F.3d 720, 735-36 (7th Cir. 2014); *Matrix IV, Inc. v. Amer. Nat'l Bank & Trust Co.*, 649 F.3d 539, 547 (7th Cir. 2011). "In federal court, res judicata – or claim preclusion – has three elements:

> (1) an identity of parties or their privies in the first and second lawsuits; (2) an identity of the cause of action; and (3) a final judgment on the merits in the first suit,"

*Adams*, *supra*, at 736 (citing *Matrix IV*, *supra*, at 547), and the "narrower preclusion doctrine – 'collateral estoppel' or 'issue preclusion'" has four:

> (1) the issue sought to be precluded is the same as an issue in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must have been fully represented in the prior action.

*id.* Both "of course, [are] subject to due process limitations," *Taylor*, *supra*, 553 U.S. at 891, and are applicable only if there is an otherwise prior final judgment and *only* where the parties "'have had a full and fair opportunity to litigate the claim or issue in the prior proceedings, *id.*, at 892 (citing *Montana v. United States*, 440 U.S. 147, 153-54 (1979)), and when the judgment was entered by a "court of competent jurisdiction." *Comm'nr of Internal Revenue v. Sunnen*, 333

U.S. 591, 597 (1948). *See United States v. Tohono O'odham Nation*, 563 U.S. 307, 179 L.Ed.2d 723, 730 (2011); *Montana*, *supra*, at 153. *And see Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 & n. 4 (1996) (res judicata requires prior judgment of "a court of competent jurisdiction" and the "opportunity to be heard" as "essential to due process in judicial proceedings") (citing cases). Neither form of "preclusion" is a rule of law or statute and both have developed as a "rule of federal practice," *Peoples v. United States*, 403 F.3d 844, 847 (7th Cir. 2005). Neither "apply on collateral review; if they did there would be no collateral review." *id.* (citing cases).

Both claim and issue preclusion are affirmative defenses which "can be forfeited if not pleaded - - so it can be waived expressly." *Arrow Gear Co. and Precision Brand Products, Inc. v. Downers Grove Sanitary Dist., et al.*, 629 F.3d 633, 638 (7th Cir. 2010). *See Nayak v. Farley*, 763 Fed. Appx. 570, 571 (7th Cir. 2019) (claim preclusion); *McDonald v. Adamson*, 840 F.3d 343, 347 (7th Cir. 2016) (collateral estoppel); *see also Nat'l Organ. for Women, Inc. v. Scheidler*, 267 F.3d 687, 708 (7th Cir. 2001) (affirmative defense of res judicata is waived if not pleaded); *Castro*, *supra*, 360 F.3d at 735.

The first element of claim preclusion is met in each proceeding – *i.e.*, "'an identity of the parties or their privies.'" *Matrix IV*, *supra*, 649 F.3d at 547 (cite omitted). *See Montana*, *supra*, 440 U.S. at 153 (citing cases). The United States represented by DOJ attorneys had more than "a sufficient 'laboring oar' in the conduct" of the earlier litigation, *Id.*, at 155; *see id.*, at 154 ("'[O]ne who prosecutes in the name of another.., or who assists in the prosecution or defense of an action...is as much bound...as he would be if he had been a party to the record'") (citing cases); *see Nayak*, *supra*, 763 Fed. Appx. at 572 ("'It is the identity of interest that controls in

determining privity, not the nominal identities of the parties'") (citing cases).[13] Remaining elements of claim preclusion are not remotely identified in the lower court's ruling and do not exist.

There is no "'identity of the same cause of action,'" which "depends on the same set of operative facts or the same transaction," *Matrix IV*, *supra*, 649 F.3d at 547, which "depends on factual overlap" *vis-à-vis* the historical "test for identity..: 'Would the same evidence support the present and former cause of action?'" *Tohono O'odham Nation*, *supra*, 536 U.S. at ___, 179 L.Ed.2d at 730-31 (quoting 2 H. Black, Law of Judgments § 746, p. 866 (1891)). The focal point for identity is "whether the claims comprise the same 'core of operative facts [that] give rise to the remedy,'" *Matrix IV*, *supra* (cite omitted), "look[ing] to the events on which the claims are based." *Nayak*, *supra*, 763 Fed. Appx. at 547-48.

On direct appeal the claim alleged that Judge Benson's impartiality was questionable "because he had a professional or personal relation with the deceased United States Marshals" with "affidavits alleg[ing] [he] could not be impartial because of the deceased Marshals contact with the court" and by "cit[ing] numerous rulings at trial as evidence of the judge's bias." *Faul*, supra, 748 F.2d at 1210-11. In his first § 2255 motion and his recusal motion filed therewith, Appellant alleged Benson's impartiality was questionable, requiring his recusal based on his Masonic oath and obligations *vis-à-vis* government officials involved in the case, including the deceased Marshal Muir. Upon these allegations the recusal motion was granted, but the § 2255

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[13] Appellant alleged (and Appellee did not dispute) in arguing the continuing fraud that in respect to "all matters relating to his original trial, appeal and post-judgment proceeding, all federal officers involved, including [Appellee] and U.S. Attorney's Office personnel, are presumed 'in privity' of the true facts," R59(e) Mot. [D. Doc. 17], p. 11 n. 3 (citing *Sunshine Anthracite Coal Co.*, *supra*, 310 U.S. 381; *Beard*, *supra*, 728 F.2d at 897-98), and that the DOJ conspired with the biased Judge Benson to "obtain the judgment by fraud on the trial court (and every other court thereafter in which the fraudulent judgment has been and continues to be used)," *id.*, pp. 9-10, including the court below. *id.*, p. 12.

motion was denied. With obvious effort to avoid the Masonic oaths and obligations issues (and with no evidentiary hearing), the court of appeals denied the claim in its entirety without citing a single operative fact in one terse paragraph.[14]

While identity of action goes beyond claims "actually decided" and includes those that "could have been brought," *Nayak*, *supra*, 763 Fed. Appx. at 572, the same core of operative facts remains the criteria and, the core of operative facts in *Faul*, *supra* and *Von Kahl*, *supra* have no relationship to the facts underlying the fraud in issue – *i.e.,* Judge Benson's actual bias disclosed by his issuance of the secret *ex parte* judicial "Order" to "disclose" propaganda on behalf of the DOJ, his secret "prosecutive strategy" conference with USA Webb, the U.S. Marshals Service, FBI, and the DOJ's Chief of its Criminal Division, and his secret rehearsal with AUSA Crooks of government witness testimony, all known to privies of the DOJ and concealed by them at all times. The fraud claim (and its actual bias element) were never "decided" in those proceedings and because of the non-disclosure and silence by the privies it was never, nor "could have been brought," *Nayak*, *supra*, because the continuing fraud remained concealed by the privies. *Dotson*, *supra*, 321 F.3d at 677-78; *Toledo Scale Co.*, *supra*, 261 U.S. at 423.

The continuation of the fraud by the concealment through both of those proceedings dispenses with claim preclusion's third element – *i.e.,* requiring a "final judgment on the merits in the first suit." *Adams*, *supra*, 742 F.3d at 736. The judgments in both proceedings were obtained by fraud

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[14] "Kahl raises several claims directed at the conduct of the district judge who presided over Kahl's trial, many of which are recycled from elsewhere in his brief and do not require additional discussion. With respect to his claim of judicial bias, the Supreme Court has made clear that 'opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.' *Liteky v. United States*, 510 U.S. 540, 555...(1994). Suffice it to say that Kahl's arguments for disqualification neither constitute reasonable bases to question the judge's impartiality, *see* 28 U.S.C. § 455(a), nor meet the *Liteky* standard." *Von Kahl*, *supra*, 242 F.3d at 793.

and both are thereby "vitiate[d]," *Throckmorton*, *supra*, 98 U.S. at 64, and neither are "final on the merits," *Adams*, *supra*, and, as a matter of law, are "never...final." *Drobny*, *supra*, 113 F.3d at 677. Claim preclusion thus doesn't even arguably apply.

The party invoking the affirmative defense of issue preclusion must identify "the actual findings in the [prior] ruling that it claims are entitled to preclusive effect," *In re Calvert*, 913 F.3d 697, 701 (7th Cir. 2019), and the court must "determine what matters were actually decided," *id.*, which "must be grounded on the actual findings and analysis" of the prior court. *id.* (citing cases). The lower court raised and applied preclusion of its own volition and without determining "what matters were actually decided" and failed to "ground" its decision on any "actual findings [or] analysis" by either court. *Calvert*, *supra*.

The fraud here in issue was never an issue in the prior proceedings and clearly not "essential to the final judgment." *Adams*, *supra*, 742 F.3d at 736. Due to the concealment and continuing fraud, the judgments in these proceedings can never be "final," *Drobny*, *supra*, 113 F.3d at 677, and, as a matter of law, are "vitiate[d]." *Throckmorton*, *supra*, 98 U.S. at 64. Appellant never had "a 'full and fair opportunity' to litigate the issue" in those two proceedings, *DeGuelle v. Camilli*, 724 F.3d 933, 935-36 (7th Cir. 2013), and absent availability of the concealed facts essential to the issue, simply had no means to "foresee that the same issue might arise in future litigation." *id.* Thus, none of the elements for issue preclusion have been nor can be met.

"[A] judgment obtained through fraud cannot act as a bar to a subsequent suit on the same cause of action." *Hale v. Runyon*, No. 95-2098, 1996 U.S. App. LEXIS 24406, at 2-3 (7th Cir., Sept. 13, 1996) (citing *Sunnen*, *supra*, 333 U.S. at 597; *Miller v. United States*, 438 F.Supp. 514, 523 (E.D. Pa. 1977)). "[E]xtreme applications of res judicata may be inconsistent with a federal right that is 'fundamental in character,'" *Richards*, *supra*, 517 U.S. at 797, and may only apply

"absent fraud or some other factor invalidating the judgment." *Sunnen*, *supra*, 333 U.S. at 597. Thus, res judicata may be avoided by showing "that the first judgment was obtained by intrinsic fraud, *i.e.*, a fraud that went to the integrity of the judicial proceeding in the first judgment." *id., at 3* (citing *Toledo Scale Co.*, *supra*, 261 U.S. 399; *Throckmorton*, *supra*, 98 U.S. at 64).

Habeas corpus is itself a "right" fundamental in character, *Boumediene*, *supra*, 553 U.S. at 798, as is an accused's right not to be tried by a biased judge. *Bracy v. Gramley*, *supra*, 520 U.S. at 904-05. When habeas corpus passed from English law into the Suspension Clause and thus American jurisprudence, it was not subject to res judicata, *Sanders v. United States*, 373 U.S. 1, 7-8 (1963) (citing English & Federal cases), and the writ is arguably protected from res judicata by the Constitution itself. *Boumediene*, *supra*, at 746 (citing *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)). *Cf. Agnello v. United States*, 269 U.S. 20, 34-35 (1925) ("'A rule of practice must not be allowed for any technical reason to prevail over a constitutional right'") (cite omitted).

Neither § 2255(e)'s non-jurisdictional defense nor res judicata (in any form) was raised or pleaded by Appellee and Appellant was not permitted to litigate them. Section 2255 is structurally defective for providing a remedy in light of the extraordinary circumstances and has proven to be inadequate and ineffective to do so. Moreover, the elements of res judicata are not shown and do not exist in fact and the prior judgments, undisputably fraudulent, preclude res judicata.

B. The District Court erred in upholding Appellee's continuing imprisonment of Appellant, because:

(1) His current imprisonment is effected by the Bureau of Prisons ("BOP") under direction of Program Statement ("PS") 5880.30, thereby altering his mandatory parole release ("MPR") date set by the U.S. Parole Commission ("USPC") as 2/12/2013 to 2/12/2023, adding ten years and violating 18 U.S.C. § 4001(a)(1);

(2) Under the Parole Commission and Reorganization Act of 1976 ("PCRA"), 18 U.S.C. §§ 4201-18, authority to make parole-related decisions was vested

exclusively in the USPC, and the BOP's purported interpretation and administration of § 4206(d) through PS 5880.30, altering that date to 2/12/2023, is ultra vires and violates separation-of-powers;

(3) The USPC's determination of Appellant's MPR date as 2/12/2013, never alleged nor found to be arbitrary, unconstitutional, or unauthorized by statutory or regulatory provisions, is entitled to deference and judicial enforcement;

(4) The Court, evading requirements of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), upheld the BOP's ultra vires actions to administer the MPR provision and USPC regulations, by-passing the USPC violated separation-of-powers again;

(5) Although disputed, without an evidentiary hearing, the Court held that Appellant's waiver of a single 1997 statutory interim parole hearing ("SIH") thereby waived all SIH and other parole hearings since then, as well as parole consideration, and prevented the USPC from performing its functions, violating separation-of-powers again;

1. Summary of Argument

The Parole Commission and Reorganization Act of 1976 ("PCRA"), 18 U.S.C. § 4201-18, created the U.S. Parole Commission ("USPC") as an "independent agency" in the Department of Justice ("DOJ") with Presidentially-appointed members vested with exclusive authority to make parole-related decisions and to promulgate regulations for such purposes. *id.*, §§ 4201(6), 4202, 4203(a)(1) & (b)(1). For prisoners serving 5 years or more, Congress mandated that they "shall be released on parole" after serving 2/3rds of "each consecutive term or terms, or" after serving 30 years of "each consecutive term or terms" of 45 or more years, "whichever is earlier," provided that the USPC shall not release such prisoner "if it determines" he has seriously or frequently violated institution rules or that there is a reasonable probability he will commit Federal, State, or local crimes. *id.*, § 4206(d). The Act authorized the USPC to parole prisoners on the basis of their records without conducting a "parole determination proceeding" (*i.e.*, a parole hearing), *Id.*, § 4208(a), and permitted a prisoner to waive a particular hearing. *id.*

The USPC promulgated a regulation for administering § 4206(d) mandating a prisoners release on parole at the "two-thirds" period "or" the 30-year period, "whichever comes first, unless pursuant to a hearing" the USPC determines one of the two conditions preventing release exist, 28 C.F.R. § 2.53(a), permitting such release on the record without a hearing, *id.*, § 2.53(b), and a regulation requiring consecutive sentences to be treated as a single aggregate sentence for all parole-related decision-making. *id.*, § 2.5; 45 Fed. Reg. 44924-25, July 2, 1980.

The PCRA authorized courts to impose a maximum sentence leaving the prisoner subject to be "eligible for parole at such time as... the Parole Commission may determine," 18 U.S.C. § 4205(b)(2), under which Appellant was sentenced. Pet. [D. Doc. 1], p. 3 ¶ 7.

Pursuant to § 4206(d) and its regulations, the USPC, beginning in 1984, with its last assessment on May 4, 2002, determined that Appellant's mandatory parole release ("MPR") date is "2/12/2013," Pet. [D. Doc. 1], pp. 3 ¶ 8, 7 ¶ 25, and per Appellant's request for the worst-case scenario, determined that he would serve at most 30 years on his single aggregate life plus 15-year sentence. *id.*, pp.3-4 ¶¶ 9-10.

In 1984, Congress codified the single aggregate sentence rule requiring the BOP to treat consecutive sentences as a single aggregate sentence for all administrative purposes. 18 U.S.C. § 3584(c).

In 1993, the BOP generated Program Statement ("PS") 5880.30 purporting to empower itself to determine MPR dates under § 4206(d), and, in 1994, applied it to Appellant altering his MPR date to 2/12/2023. Pet. [D. Doc. 1], p. 4 ¶¶ 11-13.

Appellant argued that the PCRA vested authority to make parole-related decisions, administer § 4206(d), and promulgate regulations for such purposes exclusively in the USPC and that the BOP had no such authority and, thus, his imprisonment pursuant to PS 5880.30 is prohibited by

18 U.S.C. § 4001(a); the BOP's actions violate separation of powers by usurping the sentencing court's Article III judicial power, Congress' Article I legislative power, and Article II's Appointments Clause requisite infused into § 4202; and due process of law infused into the PCRA's procedural requirements. *id.*, pp. 8-9 ¶¶ 28-32.

Appellee did not address the statutory authority issue and simply demonstrated how the BOP applied it to de-aggregate his admittedly "aggregate term of Life plus 15-years [sic]" into separate sentences, determined a "two-thirds" date for each, then aggregate the two-thirds periods to establish an "aggregate two-thirds date [of] 40 years" purported to be "correctly calculated as February 12, 2023" for which it cited as evidence a Sentence Monitoring Independent Sentence Computation ("SMISC") printout dated 7/19/2018. Resp. to Pet. [D. Doc. 9], pp. 1-5; Resp. to Pet. [D. Doc. 9-2], p. 042. Appellee asserted that, as interpreted through PS 5880.30, § 4206(d)'s "two-thirds date is not a release date" and "plainly requires that prisoners serve an aggregate of two thirds of all consecutive terms before being eligible for a 'mandatory' parole hearing." Resp. to Pet., *supra*, p. 6.

The Court expressly *refused* to "rule" on Appellant's argument that the BOP had no authority to determine his MPR date or make any parole-related decision as to him, and only the USPC had such authority, App. to Br. 3, 5-6, and purported that "regardless" of the BOP's authority to "determine the...date," it "correctly calculated" the date "as February 12, 2023" and, therefore, "[he] could not have a right to be paroled under 4206(d) until that date." *id.* 4-6. The Court purported that § 4206(d) required prisoners to serve an aggregate of two-thirds before being eligible for a mandatory release hearing, *Id.* 4, and that, although disputed, Appellant waived a 1997 statutory interim hearing ("SIM") which effected purpetual waivers of all SIMs and reconsideration hearings, unless or until he reapplies for parole. *id.* 3, 6-7, 27. The Court held

that § 4206(d) precludes him from being paroled or considered for parole absent a hearing, *id.* 6-7, 18, 27, and the waiver prevented the USPC from exercising any parole powers as to him. *Id.*

The Court was required, but failed to apply *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) to review the challenged agency action here, *City of Arlington ("Arlington") v. FCC*, 569 U.S. 290, 296 (2013); *Encino Motorcars, LLC v. Navarro*, 579 U.S. ___, 195 L.Ed.2d 382, 392 (2016), and preliminarily to determine "which" of the two agencies here purporting to administer § 4206(d) was "charged" by Congress "with filling the gaps." *Chicago Mercantile Exchange et al v. SEC*, 883 F.2d 537, 547 (7th Cir. 1989). When the "related sections" of the PCRA, 18 U.S.C. §§ 4201(1) & (6), 4202, 4203(a)(1) & (b)(1), 4205(b)(2), and 4206(a)-(d) are read together, it is as indisputable as it is undisputed that the text unambiguously vested the entirety of parole-related powers exclusively in the USPC and it alone had authority to fill the gaps.

Congress furthermore gave the USPC exclusive notice-and-comment rulemaking authority to administer the PCRA, 18 U.S.C. §§ 4201(6), 4203(a)(1), thus expecting it to use that power to interpret its sections and intended such regulations to carry the force of law. *Encino*, *supra*, 195 L.Ed.2d at 392. And, of course, USPC regulations carry the force and effect of law. *Rodriguez v. U.S. Parole Comm'n*, 594 F.2d 170, 173 (7th Cir. 1979). Moreover, insofar as the statute is ambiguous, the interpretation by the administering agency is entitled to deference if its interpretaion is "'reasonable,'" *Encino*, *supra*, or "'permissible,'" *Arlington*, *supra*, 569 U.S. at 296. Courts, accordingly, have long given deference to the USPC's interpretation of the PCRA and its regulations, *see e.g.*, *Cafi v. U.S. Parole Comm'n*, 268 F.3d 467, 472-74 (7th Cir. 2001); *Slader v. Pitzer*, 107 F.3d 1243, 1249-50 (7th Cir. 1997), and this Court has long held that:

> Because Congress committed parole decisions to the Commission's discretion, *see* 18 U.S.C. §§ 4203(b), 4218, we cannot disturb those decisions unless they are arbitrary or contravene applicable constitutional, statutory, or regulatory provisions....

*Storm v. U.S. Parole Comm'n*, 667 Fed. Appx. 156, 157 (7th Cir. 2016) (citing cases).

Section 4206(d) and 28 C.F.R. § 2.53(a) plainly "entitles an inmate to 'mandatory parole' unless the [USPC] makes specific findings to overcome the statutory presumption of release," *Bowers v. Keller*, 651 F.3d 1277, 1279-80 & n. 3 (11th Cir. 2011), and the USPC's official interpretation is that absent such findings by a "majority vote" of its Commissioners, the USPC '"must grant [the prisoner] mandatory parole in order to comply with... § 4206(d).'" *id.*, at 1286 (quoting Memorandum of USPC Legal Counsel Rockne Chickinell, May 13, 2005). *See* Mem. P&A w/Pet [D. Doc. 2], p. 14.

The relevant text of the PCRA *and* the text of § 3584(c) independently conclusively show the BOP's actions are "ultra vires," *Arlington*, *supra*, 569 U.S. at 297, and PS 5880.30, insofar as it self-empowered invasion into the parole-related decision-making jurisdiction of the USPC, *and* the BOP's resulting order or decision re-setting Appellant's MPR date as 2/12/2023, are accordingly purely "'legal nullit[ies]' regardless of its content." *Galindo v. Sessions*, 897 F.3d 894, 898 (7th Cir. 2018).

The Court's ruling that § 4206(d) requires a hearing (not release), that Appellant's 1997 waiver of an SIH waived *all* hearings perpetually, and its *sua sponte* attempt to apply 28 C.F.R. § 2.11(b) as requiring him to reapply for parole consideration, *see* App. to Br. 6, compounds the errors. Waiver of a parole hearing and waiver of parole consideration are distinct. A prisoner may waive a particular hearing, 18 U.S.C. § 4208(a), but where a particular waiver with the time and place of the specific hearing is not waived, it must be held at the next scheduled hearing, *id.*, § 4208(b), because "[a] prisoner who recieves an initial hearing need not apply for subsequent

hearings," 28 C.F.R. § 2.11(a), and, in any case involving a sentence of 7 or more years, a subsequent hearing "shall be held" within 24 months. 18 U.S.C. § 4208(h)(2). Parole consideration may also be waived and, if so, the prisoner "may later apply for parole" to be heard at the next scheduled visit of the USPC. 28 C.F.R. § 2.11(b). Appellant's purported 1997 waiver doesn't even identify "the time or place of the proceeding" as required by § 4208(b). Whether it consitutes a "knowing and intelligent waive[r]," § 4208(a), is doubtful, aside from the fact that it was forced upon him by the USPC's *refusal* to provide statutorily mandated materials he had requested. *See* Tr. [D. Doc. 14-1], p. 32 (citing evidence); *see also id.*, pp. 26 n.11, 28 & n. 12 (same). What is not in doubt, although ignored by the Court and Appellee, is that the waiver form (USPC I-24) shows no time or place of a scheduled hearing for purposes of a waiver and *expressly* does not waive "parole consideration." Resp. to Pet. Apx., Exh. L, p. 1 [D. Doc. 9-2, p. 032]. He was thus never required to reapply for parole.

Section 4206(d) *plainly* does not mention any "hearing" and the PCRA *plainly* authorizes release on parole without a hearing, 18 U.S.C. § 4208(a), while the USPC regulation mandates release on parole, "unless" the USPC holds a hearing and makes specific findings, 28 C.F.R. § 2.53(a)-(b), which is the USPC's official position on the matter. *Bowers*, *supra*, 651 F.3d at 1279-80 & n. 3, 1286.

The Court thus not only rubber-stamped the ultra vires and purely lawless actions of the BOP, but in upholding its actions and sanctioning the BOP's determination of Appellant's MPR date as 2/12/2023, and then only a *hearing*, it "'substitut[ed] [its] own interstitial lawmaking' for that" of the USPC, *Arlington*, *supra*, 569 U.S. at 305, which "*Chevron* prevents," *id.*, but itself invaded the USPC's jurisdiction, violating separation of powers. *Chicago Mercantile Exch.*, *supra*, 883

F.2d at 547-48. *See also United States v. Plain*, 856 F.2d 913, 918 (7th Cir. 1988) (courts' attempts to determine parole release dates violates separation of powers).

The MPR date originally determined for Appellant by the USPC was both fully within its jurisdiction to decide, and decisively set by using its duly promulgated regulations precisely, as it was required to do. Its *unchallenged* regulations, interpretation, application of § 4206(d), and its ultimate determination that his MPR date is "2/12/2013" - - the date he was mandated to be released - - is clearly reasonable. Appellant therefore is entitled to mandatory release on 2/12/2013, as determined by the USPC and required by § 4206(d), 28 C.F.R. §§ 2.5, 2.53(a), *see Bowers*, *supra*, 651 F.3d at 1279-80 & n. 3, 1286, and the post-PCRA legislation cited above, including 18 U.S.C. § 3584(c).

2. Argument

(A). Standard of Review

The denial of a habeas corpus petition under 28 U.S.C. § 2241 is reviewed *de novo*. *Pope*, *supra*, 889 F.3d at 413; *Prevatte*, *supra*, 865 F.3d at 896. Legal questions, including the district court's interpretation of a statute, are reviewed *de novo*. *Nielen-Thomas* v. *Concorde Inv. Servs., LLC*, 914 F.3d 524, 527 (7th Cir. 2019), including whether statutory provisions apply retroactively. *Jeudy v. Holder*, 768 F.3d 595, 600 (7th Cir. 2014); *Siddiqui v. Holder*, 670 F.3d 736, 747 (7th Cir. 2012). A district court's finding of fact is reviewed for clear error, *Bartlett v. Battaglia*, 453 F.3d 796, 799 (7th Cir. 2006), while its "'legal analysis and methodology'" is reviewed *de novo*. *In re: Southwest Airlines voucher Litigation*, 898 F.3d 740, 743 (7th Cir. 2018), as is its legal conclusions. *United States v. Ballard*, 883 F.3d 500, 504 (7th Cir. 2018); *United States v. Freeman*, 650 F.3d 673, 678-79 (7th Cir. 2011). Orders denying Rule 59(e)

motions are generally reviewed for abuse of discretion, *Rivas-Melendrez*, *supra*, 689 F.3d at 736; *Neal*, *supra*, 349 F.3d at 368, except in respect to issues of law which are reviewed *de novo*. *id.*

(B). Relevant and controlling statutory text and regulations duly promulgated thereunder conclusively show Appellant's imprisonment since 2/12/2013 has been effected by ultra vires agency action and that he is entitled to release instanter

This appeal involves conflicting decisions of the U.S. Parole Commission ("USPC") and the Bureau of Prisons ("BOP"), both of which have purported to interpret and apply 18 U.S.C. § 4206(d) to Appellant's sentence. Section 4206(d) is a provision of the Parole Commission and Reorganization Act of 1976 ("PCRA") and beginning in 1984 the USPC had determined that Appellant's sentence required a mandatory parole release date ("MPR") thereunder on 2/12/2013. Beginning in 1994, the BOP determined that his MPR date was 2/12/2023 - - an additional ten years of imprisonment - - under § 4206(d) and that it did not establish a release date, but merely made him eligible for a parole hearing.

Appellant argued that the BOP had no statutory authority to make parole-related decisions or to administer § 4206(d) and that the PCRA vested exclusive authority in the USPC to make parole-related decisions, administer § 4206(d), and to promulgate rules and regulations for such purposes. He argued that the USPC's interpretation and application of § 4206(d) through its duly promulgated regulations was authorized, and that he was entitled to the MPR date of 2/12/2013, as determined by the USPC. He argued that the BOP's alteration of that date was effected pursuant to BOP Program Statement ("PS") 5880.30 without statutory authority and that PS 5880.30, insofar as it self-empowered the BOP to make parole-related decisions and administer § 4206(d), and the BOP's alteration of his MPR date thereunder to 2/12/2023, were without statutory authority and unlawful, and that his imprisonment by the BOP beyond 2/12/2013 - - his MPR date determined by the USPC - - is unlawful, requiring his immediate release.

Appellee did not address the statutory authority argument and did not advance any statutory authority for the BOP to make parole-related decisions or to administer § 4206(d). Instead, it argued that PS 5880.30 is "[t]he process" used by the BOP "for establishing the two-thirds date for an aggregate of consecutive parolable sentences" for purposes of § 4206(d). Resp. to Pet. [D. Doc. 9], p. 5. It proffered PS 5880.30's formula showing that "'[e]ligibility is 2/3rds of each sentence added together for an aggregate and then computed from the Date Computation Begins of the first sentence, minus all presentence time.'" *Id.* It proceeded to demonstrate *how* the BOP thereby applied it to Appellant's "aggregate term of Life plus 15-years [sic]" sentence, de-aggregating it and determining a "two-thirds date of 30 years" on his life sentence and "a two-thirds date of 10 years" on his consecutive 10-year and 5-year sentences, which was then re-aggregated to create an "aggregate...date [of] 40 years from the date computation begins, minus presentence time[,]" whereupon, it purported that Appellant's "two-thirds date is correctly calculated as February 12, 2023." *Id.* It proffered as evidence of the *correctness* of the BOP's calculation a Sentence Monitoring Independent Sentence Computation ("SMISC") printout dated 7/19/2018, *Id.*, and applying PS 5880.30, further argued that "a two-thirds date is not a release date, but a record review date" and the USPC "will hold a hearing prior to the two-thirds date and make a determination on parole." *id.*, p. 6. Appellee finally asserted that "[s]ection 4206(d) plainly requires that prisoners serve an aggregate of two-thirds of all consecutive terms before being eligible for a 'mandatory' parole hearing." *id.*

While acknowledging Appellant's argument "that the BOP had no statutory authority to change [his MPR date] and effectively usurped the powers of the [USPC]" and that "only the [USPC] can set the mandatory [parole] release date under § 4206(d)," App. to Br. 3, 5, the Court noted Appellee's failure to "address this argument," *id.* 5, then announced that it would not "rule

on this issue." *id.* 6. Stating that "regardless" of the BOP's authority to determine the date, *Id.*, the Court held that PS 5880.30 was merely "a guide on how" the BOP "calculate[d] his sentence." *id.* 4. Without analysis of § 4206(d) in light of the PCRA as a whole, and ignoring entirely the USPC's regulations for making parole decisions and for administering § 4206(d) and its determination of the date, the Court reiterated Appellee's comment that "[s]ection 4206(d) plainly requires that prisoners serve an aggregate of two-thirds of all consecutive terms before being eligible for a mandatory release hearing." Then, purporting its own application of § 4206(d) to Appellant's sentence, determined that "[f]or his life sentence" alone, § 4206(d) requires 30 years to be served[,]" and then determined that with the 30 years "[c]ombined with the two-thirds value of his 10 and 5 year consecutive sentences, the math quite clearly adds up to 40 years." *Id.* The Court then held that, "[b]ecause the date is correctly calculated" by the BOP and the Court "as February 12, 2023," Appellant "could not have a right to be paroled under § 4206(d) until that date[.]" *Id.* 4-5.

The Court ultimately held that § 4206(d)'s "mandatory release date" only "create[d] a presumption of release" and "does not entitle [Appellant] to immediate release," because ""'mandatory' parole is not really mandatory"" even if the USPC fails to hold a hearing, *Id.* 6 (citing cases), and § 4206(d) precludes release unless the USPC first holds a hearing and determines that release is appropriate. *id.* 18. The Court further purported that, although disputed, Appellant had waived a 1997 statutory interim hearing ("SIH"), which constituted a perpetual waiver of all SIHs, a reconsideration hearing, and parole consideration altogether, *id.* 6, 27, and "prevented" the USPC "from either correcting his mandatory release date, making a § 4206(d) determination that he should not be paroled, or even ordering him released on parole." *id.* 6.

The Court below evaded required *legal* analysis and displaced the USPC's exclusive authority with its own rulemaking to uphold clearly unlawful actions of the BOP.

(1). The USPC's authority to determine Appellant's MPR date under the PCRA is exclusive, comprehensive, and is entitled to deference and judicial enforcement

Judicial review of challenged agency action proceeds under the "now canonical formulation" established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *City of Arlington ("Arlington") v. FCC*, 569 U.S. 290, 296 (2013):

> First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."... But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

*Id.* (quoting *Chevron, supra*, at 842-43). *See also Encino Motorcars, LLC v. Navarro*, 579 U.S. ___, 195 L.Ed. 2d 382, 392 (2016). Moreover, "when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme" and an authorization to promulgate regulations "through notice-and-comment rulemaking" procedures indicates that "Congress intended the regulation to carry the force of law." *Id.* (citing *Chevron, supra*, at 843-44; *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001)). *See Arlington, supra*, at 296 (Congress expects ambiguities in statutory scheme to be resolved by administering agency, "within the bounds of reasonable interpretation, not by the courts") (citing cases). Finally, "when an agency is authorized...to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretaion is reasonable" and, in such case, "the court *must* defer to the agency's interpretation if it is 'reasonable.'" *Encino, supra* (citing *Chevron*, at 844) (emphasis added).

(a). The authority to administer § 4206(d)

Statutory construction is a "'holistic' endeavor." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (citing cases). While a court must first look to the language of the "pertinent statutory provision," *Khan v. United States*, 548 F.3d 549, 554 (7th Cir. 2008), then to "the language of the statute as a whole." *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2016). The ""'true meaning of a single section'"" depends upon ""'related sections,'"" *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 888 (7th Cir. 1996) (citing cases), and courts must "'give effect, if possible, to every clause and word of a statute.'" *Khan*, *supra* (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

Section 4206(d) provides that:

> Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however*, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal State, or local crime.

The only agency mentioned in the subsection is the "Commission" and its power is plainly the power to *prevent* the subject prisoner's otherwise mandatory release on parole expressly authorized only "if it determines" one of two specially defined conditions exist.

To ensure no mistake as to identity, Congress expressly defined the term "'Commission'" to "mean[ ] the United States Parole Commission," 18 U.S.C. § 4201(1), which was established "as an independent agency in the Department of Justice ["DOJ"]... comprised of nine members appointed by the President, by and with the advice and consent of the Senate." *id.*, § 4202. While the power to prevent a prisoner's mandatory release is thus vested solely in the USPC under §

4206(d), the authority to grant or deny parole is even more clearly defined and limited - - albeit exclusively in the USPC in further related provisions.

Congress expressly vested exclusive "power to grant or deny...parole" to "any eligible prisoner" in the "majority vote" of the USPC "pursuant to the procedures" of the PCRA, 18 U.S.C. § 4203(b)(1), and to ensure full comprehensive authority, required the USPC "by majority vote" to "promulgate rules and regulations establishing guidelines for the powers enumerated in subsection [4203](b)...and...as necessary to carry out a national parole policy and the purposes of the" PCRA. *id.*, § 4203(a)(1).

This Court has long held that, under the PCRA, "Congress has delegated sole discretionary authority to grant or deny parole to the [Parole] Commission," *Pulver v. Brennan*, 912 F.2d 894, 896 (7th Cir. 1990) (citing cases); *see also Storm v. U.S. Parole Comm'n*, 667 Fed. Appx. 156, 157 (7th Cir. 2016) (citing § 4203(b)); *United States v. Seacott*, 15 F.3d 1380, 1385 (7th Cir. 1994) (under PCRA, parole-related authority "remained in the exclusive 'discretion of the [Parole Commission].'") (quoting *Prater v. U.S. Parole Comm'n*, 802 F.2d 948, 954 (7th Cir. 1986) (en banc) (brackets by Court), as have other courts, *see e.g.*, *Kindred v. Spears*, 894 F.2d 1477, 1478 (5th Cir. 1990) ("The Parole Commission enjoys absolute suzerainty over matters of parole"), including the Supreme Court. *See United States v. Addonizio*, 442 U.S. 178, 189, 188 (1979) (in enacting PCRA, "Congress ha[d] decided that the Commission [was] in the best position to determine when release is appropriate" and the "decision as to when a... defendant shall actually be released ha[d] been committed by Congress, with certain limitations, to the discretion of the Parole Commission").

The PCRA authorized courts to impose a "maximum sentence of imprisonment" pursuant to which a prisoner would be subject to be "released on parole at such time as the Commission may

determine." 18 U.S.C. § 4205 (b)(2). On June 24, 1983, Appellant was sentenced to life imprisonment with a 10-year sentence ordered to run consecutively thereto and a 5-year sentence ordered to run consecutively to the 10-year sentence with an order that:

> Pursuant to 18 U.S.C. Section 4205(b)(2), the defendant to be eligible for parole at such time as provided by law and as the the Parole Commission may determine.

Pet., Exh. 1 [D. Doc. 1], p. 13 (Judgment and Commitment Order ("J&C")). This parole determination authority vested exclusively by §4205(b)(2) in the USPC is expressly a fundamental part of Appellant's sentence imposed by the sentencing court and is not subject to alteration by the BOP through PS 5880.30 or otherwise. The BOP's action thus goes beyond mere usurpation of USPC jurisdiction and usurps Article III judicial sentencing authroity as well.

Congress unambiguously spoke directly to the question as to the agency it intended to administer parole under the PCRA and unexceptionably vested exclusive authority in the USPC to make parole-related decisions, administer § 4206(d), and to promulgate rules and regulations for such purposes. No such authority exists in the BOP or in the District Court below. When agencies "act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires," *Arlington*, *supra*, 569 U.S. at 297, and a decision upon ultra vires action is but "a 'legal nullity.'" *Galindo v. Sessions*, 897 F.3d 894, 898 (7th Cir. 2018).

(b). <u>The USPC's interpretation and application of § 4206(d) to Appellant's sentence is lawful, comports with its regulations, and is reasonably and permissibly within the terms of the statute</u>

***The single aggregate sentence rule.*** In 1980, the USPC promulgated a regulation mandating that "multiple sentences" once "aggregated... are treated as a single aggregate sentence for the purpose of every action taken by the Commission pursuant to these rules...." 28 C.F.R. § 2.5. *See* 45 Fed. Reg. 44925, July 2, 1980. The rule was promulgated to "resolve...misinterpretations" that had arisen involving parole-related decisions for prisoners with multiple sentences and to

effect "the 'national paroling policy' required by 18 U.S.C. § 4203" to enable the USPC to "fulfill[ ] its Congressionally mandated role of reducing unwarranted sentencing disparity." *Id.* The rule was premised on "longstanding interpretation of law" by courts and Congress, requiring that "aggregated...sentences are considered to have merged into a single sentence equal to the total length of time that the multiple sentences will require the prisoner to serve" and judicial rulings applying the "merger doctrine to all parole decisions as a necessary and Congressionally-intended consequence of [good-time credit and parole] laws." *Id.*, pp. 44924-25. The USPC determined that the "single aggregate sentence" merger doctrine was irreconcilable "with any rule which required the [USPC] to consider the prisoner for parole on each sentence separately," *Id.*, p. 44925 (citing case examples), and grounded the rule on the long standing:

> body of statutory and case law add[ing] up to a consistent Congressional and judicial perception that multiple sentences are appropriately regarded as merged into a single unified sentence for all parole-related decisions (parole release, supervision, and revocation).

*id.* The substance of the rule co-existed with the federal good-time and parole statutes since they were first enacted and continued to be applied with the rule after it was promulgated. *See* Mem. P&A w/Pet. [D. Doc. 2], pp. 19-23 (citing cases).

At the time Congress repealed the federal good-time and parole statutes in 1984, it enacted a provision commanding that "[m]ultiple terms of imprisonment ordered to run consecutively... shall be treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. § 3584(c). Courts have purported that the USPC's single aggregate sentence rule was "accepted by Congress" in § 3584(c), *Chatman-Bey v. Meese*, 797 F.2d 987, 993 n. 8 (D.C. Cir. 1986), and the rule and § 3584(c) have been applied together to preclude de-aggregating multiple sentences. *E.g.*, *Boone v. Menifee*, 387 F. Supp. 2d 338, 346-47 (S.D.N.Y. 2005). Section 3584(c) is an express mandate to the BOP, *United States v. Gonzales*, 520 U.S. 1, 8 (1997), and

both 28 C.F.R. § 2.5 and § 3584(c) were in effect at the time the BOP generated PS 5880.30 and applied it to Appellant.

***The USPC's rule for interpreting and applying § 4206(d).*** The USPC promulgated a specific rule for interpreting and administering § 4206(d), which provided in relevent part that:

> A prisoner...serving a term or terms of 5 years or longer shall be released on parole after completion of two-thirds of each consecutive term or terms or after completion of 30 years of each term or terms of more than 45 years (including life terms), whichever comes earlier, unless pursuant to a hearing.., the Commission determines that there is a reasonable probability that the prisoner will commit any Federal, State, or local crime or that the prisoner has frequently or seriously violated the rules of the institution in which he is confined....

28 C.F.R. § 2.53(a). While the regulation tracked the substantive requirements of § 4206(d), it incorporated the no-hearing provision.

Section 4206(d) plainly "entitles an inmate to 'mandatory parole' unless the Parole Commission makes specific findings to overcome the presumption of release," *Bowers v. Keller*, 651 F.3d 1277, 1279-80 & n. 3 (11th Cir. 2011) (citing 18 U.S.C. § 4206(d) and 28 C.F.R. § 2.53), and it plainly requires the prisoner's release on parole after completing 30 years of his single aggregate sentence "*or*" after completing 30 years of his single aggregate sentence of more than 45 years (including life terms), "*whichever comes earlier*," unless those findings are made upon a hearing. *Compare* § 4206(d) *with* 28 C.F.R. §§ 2.5 *and* 2.53(a). *See also* 45 Fed. Reg., *supra*, pp. 44924-25.

The USPC construed § 4206(d)'s "*sentence* of five years or longer" to simply mean "*term or terms* of 5 years or longer." Congress notably used "a *term or terms*" interchangably to mean "sentence" in a related section of the PCRA. 18 U.S.C. § 4205(f). Congress' use of "term or terms" to interchangeably mean "sentence" in a related section of the PCRA indicates that its use of "sentence" and "term or terms" in § 4206(d) had the same interchangeable meanings as well.

*See State Farm Mut. Auto. Ins. Co. v. Comm'r*, 698 F.3d 357, 370 (7th Cir. 2012) ("a term or phrase is ordinarily given the same meaning throughout a statute"). *See also Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); *Commn'r v. Lundy*, 516 U.S. 235, 250 (1996).

In re-enacting the federal good-time statute in the 1948 revision of the Criminal Code, Congress used the words and phrases "term," "term or terms," "term of sentence," "term of imprisonment," and "consecutive sentences" to interchangeably mean "the aggregate of the several sentences." 18 U.S.C. §§ 4161-65. Soon thereafter, this Court held that "the uniformity sought by Congress" therein required its mandate to "'aggregate'" "'two or more sentences'" *and* the phrase "'maximum term or terms'" requiring release "'as if released on parole'" to *both* mean "the aggregate of the... terms." *United States ex rel. Johnson v. O'Donovan*, 178 F.2d 810, 811-12 (7th Cir. 1949). Moreover, shortly before enactment of the PCRA, this Court upheld a district court's decision construing the words "term or terms" in one section of the pre-PCRA parole statute to require "the same construction" throughout the statute and held that "the words 'term or terms'" required "that consecutive sentences be aggregated for [parole-related] purposes." *United States v. Franklin*, 313 F. Supp. 43, 45-46 (S.D. Ind. 1970), *aff'd*, 440 F.2d 1210, 1212 (7th Cir. 1971). And, contemporary to the enactment of the PCRA, courts were *continuing* to hold that "consecutive sentences are considered to be one term" and that "[o]nce having been aggregated.., consecutive sentences are not to be subsequently de-aggregated." *McCray v. United States Bd. of Parole*, 542 F.2d 558, 560 (10th Cir. 1976) (citing cases). *See* Random House Webster Unabridged Dictionary, 2d ed. (defining "consecutive" to typically mean "following one another in *uninterupted sequence*.... Syn. 1. Continuous") (emphasis added).

Congress clearly defined two distinct service-to-mandatory release periods in § 4206(d) separated by the word "or" and requiring release upon serving one *or* the other "whichever is earlier." The USPC's regulation follows the formulation precisely by separating the distinct periods with an "or" and requiring release upon completion of one or the other "whichever comes earlier." 28 C.F.R. § 2.53(a). The word "or" is ordinarily read as "disjunctive," *Nielen-Thomas*, *supra*, 914 F. 3d at 529; *see also Loja v. Main St. Acquisition Corp.*, 906 F.3d 680, 683 (7th Cir. 2018) ("'Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives.'") (quoting A. Scalia & B.A. Garner, Reading Law 116 (2012)), while "[w]hichever" typically means "being whatever one or ones out of a group." Merriam-Webster's Collegiate Dictionary, 11th ed. *See also* Merriam-Webster's Dictionary and Thesaurus, 2014 ed. ("whichever one or ones"). Congress' strategic placement of "whichever is earlier" immediately following the last of the two service-to-mandatory release periods was meant to qualify them in light of the disjunctive "or." *See United States v. Bass*, 404 U.S. 336, 339 (1971) (qualifying words at end of disjunctive subject-matter intends to "qualif[y] all... antecedents") (citing *Porto Rico Railway., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)).

In § 4206(d), the "or" is reasonably read in its ordinary disjunctive sense and in light of the qualifying requirement "whichever is earlier," it can *only* be read in a disjunctive sense. The USPC's regulation, 28 C.F.R. § 2.53(a) follows using terms with "the same meaning as identical or comparable terms" used in § 4206(d). *See* 28 U.S.C. § 2.1(i).

***Legislative history.*** In reporting the bill which finally became the PCRA, Congress repeatedly used the words "sentence" and "term or terms" interchangeably. *See e.g.*, House Conference Report ("H.C.R.") No. 94-838, Feb. 23, 1976, p. 24 (referring to § 4205(a)'s "term or terms of more than one year" and "one-third of such term" as "sentence of more than one year" and "one-

third of his sentence") (reprinted in 1976 U.S. Code Cong. & Admin. News ("U.S.C.C.A.N."), p. 357); *id.* (referring to § 4205(f)'s "term or terms" and "sentence" interchangeably); *id.*, p. 31 (referring to § 4210's "expiration of the maximum term or terms" as "expiration of sentence") (reprinted in 1976 U.S.C.C.A.N., p. 364).[15] And, expressly in respect to § 4206(d), the report stated that:

> Lastly, this section provides more liberal criteria for *release on parole* for prisoners with long sentences *after they have completed two-thirds of any sentence, or 30 years, whichever occurs first.*

*Id.* p. 27 (reprinted in 1976 U.S.C.C.A.N., p. 360) (emphasis added).

(c). The Court's and BOP's construction and application of § 4206(d) are extratextual and defy Congress' intent

Insofar as the Court below purported that "[s]ection 4206(d) plainly requires that prisoners serve an aggregate of two-thirds of all consecutive terms before being eligible for a mandatory release hearing," App. to Br. 4, and a prisoner cannot ever be released on parole under § 4206(d) unless he first has a hearing before the USPC, *id.*, 6-7, 18, 29, § 4206(d) says no such thing and read together with related provisions and USPC regulations, clearly shows the Court's errors. Section 4206(d) is not a requirement-to-serve to a hearing provision, but a mandatory release absent findings provision.

Section 4208(a) plainly authorizes the USPC to parole a prisoner upon the basis of his record without a hearing. The USPC applies that authority to § 4206(d). *See* 28 C.F.R. § 2.53(b) (obviating any hearing requirement when USPC intends to release prisoner on the record). And, of course, § 4206(d) *plainly* mentions no "hearing" just as it *plainly* does not "require prisoners

[15] USPC regulations similarly "deem" the PCRA's use of the words "term or terms" and "sentence" interchangeably. *Compare e.g.*, 18 U.S.C. § 4205(b)(2) ("maximum sentence of imprisonment") *with* 28 C.F.R. § 2.2(c) ("maximum term or terms") *and*, of course, *compare* 4206(d) ("sentence of five years or longer") *with* 28 C.F.R. § 2.53(a) ("term or terms of 5 years or longer"). *See* 28 C.F.R. § 2.1(i).

to serve an aggregate of all consecutive terms." It plainly requires a prisoner's "release on parole" upon service of "two-thirds of each consecutive term or terms" - - meaning *two-thirds of his single aggregate sentence*, 28 C.F.R. § 2.5 - - *"or"* upon service of "thirty years of each consecutive term or terms of more than forty-five years" - - meaning *"thirty years of his single aggregate sentence of more than forty-five years,"* § 2.5, *supra*. The Court's purported construction of § 4206(d) is purely extratextual and lifted nearly verbatim from a comment in Appellee's response itself, but a fabrication from PS 5880.30. *See* Resp. to Pet.[D. Doc. 9] p. 6.

Insofar as the Court held that Appellant waived a 1997 SIH, he disputed such waiver as involuntary with supporting evidence. Tr. [D. Doc. 14-1], pp. 26 n. 11, 32 (citing evidence). The Court noted the dispute, but without an evidentiary hearing held that he waived the hearing nonetheless, App. to Br. 3, 6, 7, 27, and that such waiver waived *all* SIMS, a reconsideration hearing, and parole consideration permanently, unless he reapplies for parole. *Id.* 6, 27 (citing 28 C.F.R. § 2.11(b)). The actual waiver form clearly shows he only signed the waiver of a SIH for a time and place *left blank*. *See* Resp. to Pet. Apx., Exh. L, p. 1 [D. Doc. 9-2] p. 32. It shows he *did not waive* "parole consideration at this time," a "parole effective date or presumptive parole date," *or* "mandatory parole." *Id.* The PCRA requires a waiver to be made "knowingly and intelligently," 18 U.S.C. § 4208(a), and "written notice of the time and place of the proceeding." *id.*, § 4208(b). The notice does not provide the time and place of a hearing and Appellant could not waive an unknown hearing aside from the documented reasons for which he was compelled to waive a hearing at that time. Tr. [D. Doc. 14-1], pp. 26 n. 11, 32.

In any case, waivers of hearings are hearing specific, 18 U.S.C. § 4208(a), as the waiver form shows. Resp. to Pet. Apx., Exh. L, p. 1 [D. Doc. 9-2,] p. 32, while waiver of "parole consideration" is distinct. 28 C.F.R. § 2.11(b). The waiver of a particular hearing simply defers

the prisoner to the "next regularly scheduled proceeding," 18 U.S.C. § 4208(b), and a prisoner, like Appellant, who had previously had "an initial hearing need not apply for subsequent hearings," 28 C.F.R.. § 2.11(a), which, for prisoners with sentences of 7 years or more, are mandatory "not less frequently" than every 24 months. 18 U.S.C. § 4208(h)(2).

The Court's confusion over the purportedly waived 1997 SIM as a waiver of all SIMS and a reconsideration hearing - - very distinct proceedings, *compare* 28 C.F.R. § 2.14(a) *with* § 214(c); *see Johnson v. Williford*, 821 F.2d 1279, 1280 (7th Cir. 1987) (SIH "is significantly more limited in scope" than reconsideration hearing) - - exemplifies why Congress vested parole-related authority over the PCRA in the USPC, not the BOP or the courts. The Court's purported holding that the disputed waiver "prevented" the USPC from performing its parole-related functions as to Appellant, App. to Br. 6, cites no authority because there is none.

The PCRA was repealed, but was continued for 5 years. Pub.L. 98-473, Tit. II, Ch. II, §§ 218(a)(5), 235(b)(1)(A), Oct. 12, 1984, 98 Stat. 2027, 2032. Courts have held that the 5-year period began on November 1, 1987. The 5-year period was amended and "deemed" to be 10 years, Pub.L. 101-650, Tit. III, § 316. Dec. 1, 1990, 104 Stat. 5115, and the 10-year period was amended and "deemed" to be 15 years. Pub.L. 104-232, § 2(a), Oct. 2, 1996, 110 Stat. 3055. While neither such amendment expressly required retroactive application arguably precluding their application to Appellant under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *INS v. St. Cyr*, 533 U.S. 289 (2001), *see* Tr. [D. Doc. 14-1], pp. 49-51 n. 23; R59(e) Mot. [D. Doc. 17], p. 32, the 15-year period expired on November 1, 2002, and with it the repeal was concluded. Mem. P&A w/Pet. [D. Doc. 2], pp. 12-13 & n. 3.

The PCRA's last assessment of Appellant's MPR date as 2/12/2013 was effected on May 4, 2002, less than 6 months prior to the expiration of the PCRA's repeal. Section 4206(d) "entitles

[Appellant] to 'mandatory parole' unless the Parole Commission makes specific findings to overcome the statutory presumption of release." *Bowers*, *supra*, 651 F.3d at 1279-80 & n. 3. No such findings have ever been made and Appellant is entitled to release on 2/12/2013 as required by § 4206(d) and determined by the USPC. The BOP's interference with that release is unlawful. The Court's interference violates separation of powers. *United States v. Plain*, 856 F.2d 913, 918 (7th Cir. 1988) (court's attempts to set parole release date violates separation of powers). *See also Chicago Merchantile Exch.*, *supra*, 883 F.2d at 548.

Appellant's imprisonment is unlawful and he must be released.

## CONCLUSION

Habeas corpus has historically been used to safeguard individual freedom against arbitrary executive power and unlawful and indefinite imprisonment. Appellant has shown that the core of habeas corpus goes to the constitutionality of a prisoner's physical confinement and has proven with indisputable evidence through statutory and case law history that he should be released for two, compelling reasons; those being, number one, that he did not have an impartial judge, a fact, which created a fundamental defect in the trial mechanism that has infected all legal efforts since, as well as those in the Court below. Second, is that he has served his sentence and years beyond his USPC determined release date. For both of these compelling constitutional issues testing the legality of the prisoner's detention, the only possible remedy – and the traditional function of habeas – is the remedy which Appellant is seeking – release from custody.

The fraud perpetrated on Appellant's trial court by the conspiratorial and collusive acts of his biased trial judge, the U.S. Attorney's Office, the DOJ hierarchy, U.S. Marshals Service, and FBI successfully obtaining the fraudulent judgment used by Appellee's DOJ attorneys below to obtain the judgment here in issue is *conclusively* proven and undisputed. The fraud continued

through Appellant's direct appeal, his first § 2255 proceeding and its appeal, and has been maintained for nearly four decades. It surreptitiously entered the Court below to continue the nefarious task of undermining the machinery of justice.

The Court below, itself contaminated by the continuing and undisputed fraud, *sua sponte* raised and argued on behalf of Appellee and his DOJ attorneys § 2255's savings clause as a purported defense against the fraud, which it supported by arbitrarily citing Appellant's direct appeal and appeal of his first § 2255 proceeding, and by *falsely stating* that his fraud on the court claim was raised therein.

Appellant raised the fraud on the Court below under its inherent power, because it entered the proceedings through Appellee's Response to his habeas Petition. Appellant could not even arguably address the fraud *on the Court below* through a § 2255 motion *perpetrated decades after his sentence was imposed.* The very concept is a *non sequitur* and absurd. Appellant never alleged a fraud upon any court on his direct appeal or in his first § 2255 proceeding - - the details of which then remained under hermetic seal of secrecy by the conspirators.

The authority of a federal court to redress and prevent a fraud committed in its own proceedings even when originating and succeeding through prior courts, including courts in distinct jurisdictions, is long settled. *Dotson*, *supra*, at 667-69; *Toledo Scale Co.*, *supra*, 261 U.S. at 421-28; *Old Wayne*, *supra*, 204 U.S. at 15-16. That such fraud has proceeded through prior courts, rather than barring a court's authority to redress it, is simply a consideration as to its '"egregiousness."' *Dotson*, *supra*, at 667.

The Court's invocation of § 2255(e)'s savings clause as a self-imposed bar to considering and preventing the fraud continued into the proceedings below, like its citations to Appellant's direct appeal and appeal of his first § 2255 proceeding, *at best* enabled the fraud to succeed in

obtaining an additional fraudulent judgment and to continue the fraud into this Court, which has the authority and duty to redress it from the beginning, *Dotson*, *supra*, 321 F.3d at 667-69, and to provide "full protection to the public against" the fraud by denying all benefits to its perpetrators, *Hazel-Atlas*, *supra*, 322 U.S. at 249-51.

The USPC lawfully and permissibly determined that Appellant's MPR date pursuant to § 4206(d) mandates his release on 2/12/2013. Such decision complies with the related provisions, 18 U.S.C. §§ 4201(6), 4202, 4203(a)(1) & (b)(1), 4205(b)(2), 4208(a), and the USPC's regulations, 28 C.F.R. §§ 2.5, 2.53(a)-(b), which have the force of law.

The BOP's altered date of 2/12/2023 pursuant to PS 5880.30 is ultra vires and a nullity. It violates the above provisions of the PCRA and 18 U.S.C. § 3584(c). The Court's upholding the BOP's ultra vires actions and presuming to administer § 4206(d) *sua sponte* evaded *Chevron* requirements, supplanted the USPC's determination with its own interstitial lawmaking, and violated separation of powers.

The District Court's decisions and judgment are error-ridden at every point. Appellant is entitled to the decision of the USPC, and hereby requests that the decisions below be reversed and remanded with instructions to order his release.

Respectfully submitted,

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# DECLARATION OF SERVICE

Yorie Von Kahl, undersigned, hereby declares under penalty of perjury as required by 28 U.S.C. § 1746 that he mailed a copy of his Opening Brief and Short Appendix with First Class Postage and certifed to:

John C. Milsher
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on this 30th day of April, 2021.

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