No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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ERIC SIJOHN BROWN -- Petitioner

vs.

UNITED STATES OF AMERICA -- Respondent(s)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals
For The Third Circuit



PETITION FOR WRIT OF CERTIORARI

Eric S. Brown

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## QUESTION PRESENTED

( 1 ) Does the Third Circuit Court Of Appeals decision contrevene Buck v. Davis,85 U.S.L.W. 4037,2017 BL 54115 (U.S.2/22/17) because the 3rd Circuit in denying a certificate of appealability motion, decided the merits of petitioner's §2255 claim and petitioners certificate of service attached to the plea agreement was issued without any signatures ?

( 1a ) Buck held that an appeals court's statutory juridiction to grant or deny a certificate of appealability under 28 U.S.C. § 2255 isn't coextensive with a merits analysis.

( 1b. ) Brown pursued a habeas claim, arguing that his attorney was ineffective. The district court rejected that claim, and the U.S.C. of Appeals for the 3rd Circuit refused to grant a C.O.A. because Brown failed to show "extraordinary circumstances" warranting relief.

## LIST OF PARTIES

[X] All parties in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS


OPINIONS BELOW ..... 1

JURISDICTION ..... (iii)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... (vi-a

STATEMENT OF THE CASE ..... (ii)

REASONS FOR GRANTING THE WRIT ..... (vi)

CONCLUSION ..... (viii


## INDEX TO APPENDICES


APPENDIX A Order from 3rd Circuit Court of Appeal

APPENDIX B Order from U.S.District Court

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

## TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

Strickland v. Washington,466 U.S. 688,104 S.Ct.2052,80L.Ed.2d674(1984)...>(v

Dillingham v. Warden,Chillicothe Corr. Inst.,2017 US Dist LEXIS 91423 ...>(v

Lee v. United States,528 U.S.____,____,137 S.Ct.1958(2017) ...> (viii.)

United States v. Class, No. 16-424 ---137 S.Ct. 1065;197 L.Ed.2d 175 (2017)

United States v. Saferstein,673 F.3d 237,244 3d.Cir 20012 ...>(2.)

Collins v. Youngblood,497 U.S. 37,52,110 S.Ct.2715,L.Ed.2d 30(1990)...>(2.)

Calder v. Bull, 1 L.Ed 648,3 DALL 386 ...>(2.)

Fernandez-Varga v. Gonzales,548 U.S.30,37,126S.Ct.2422,165L.Ed.2d323(2006)(1

Buck v. Davis,85 U.S.L.W. 4037,2017 BL 54115(2/22/17) ...>(iv.)

STATUTES AND RULES

Rule 29

U.S.Const. Article 1 § 9, cl.3

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[■] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 7-20-2017.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 12-21-2017, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## STATEMENT OF THE CASE

__Procedural History

On April 11, 2013, a federal grand jury returned an indictment charging Eric Sijohn Brown ("Brown") "with conspiracy to commit loan and wire fraud in violation of 18 U.S.C. § 371 (Count I); false statements in connection with an FHA loan, and aiding and abetting, in violation 18 U.S.C. §§ 1010 and 2 (Counts II & III); loan fraud, and aiding and abetting, in violation of 18 U.S.C. §§ 1014 and 2 (Count V through VII, & IX through IXX): aggravated identity theft and aiding abetting, in violation of 18 U.S.C. §§ 1028(a)(1) and 2 (Count XX); wire fraud, and aiding and abetting, in violation of 18 U.S.C. §§ 1343 ,1349, and 2 (Counts XXI & XXIII); and tax evasion, in violation of 26 U.S.C. § 7201 (Counts XXV,XXVI, & XXVIII)."

Brown appeared before the Honorable Berle M. Schiller on April 8, 2014, at which time he entered a guilty plea to Counts 1,2-3,5-7,9-13,16-19,21,23,25,26 and 28. Counts 14,15, and 20 were dismissed.

On October 30,2014, Judge Schiller sentenced Brown to the following: 60 months imprisonment and 3 years of supervised release for (Count I) conspiracy to commit loan and wire fraud; 24 months imprisonment and 1 year supervised release for (Counts 2 and 3) false statements in connection with an FHA loan, and aiding and abetting; 180 months imprisonment and 5 years of supervised for (Counts 5 through 7,9 through 13, and 16 through 19) loan fraud and aiding and abetting; and 60 months imprisonment and 3 years of supervised release for Counts 25,26 and 28 tax evasion. All sentences were to run concurrently and Brown was ordered to pay $10,849,873 in restitution and a $2000 special assessment. Brown was represented by Alan J.

Tauber,Esq from time of his arrest through sentencing.

On November 13, 2015 newly retained counsel, Alexander N. Turner, Esq filed his §2255. On March 2, 2016, Brown filed a pro se motion to amend his previously filed motion.

The District Court appointed CJA counsel, Salvatore Adamo,Esq to represent Brown in this matter and scheduled an evidentiary hearing to address the issue of Brown's claim that his plea counsel failed to advise him of the enhancement he would receive by entering a plea.

On January 31,2017, an evidentiary hearing was held before the undersigned, at which time Brown's plea counsel, Mr.Tauber and petitioner testified.

On April 27,2017 Notice of Appeal was given to the U.S.C.of Appeals for the 3rd Circuit from the denial of a motion pursuant 28 U.S.C § 2255, entered in this action on the 26th day of April, 2017 before the Honorable Berle M. Schiller.

On September 20,2017 the request for a C.O.A. was denied.
On December 21, 2017 petitioners Rehearing En Banc was denied by the 3rd Circuit Court of Appeals.

## D I S C U S S I O N

Brown avers that his sixth amendment right to counsel was violated, when counsel advised him (Brown) to enter a guilty plea and the plea agreement was devoid of a factual basis.

Furthermore, Brown avers that the government in its response to Browns §2255 has submitted an "Guilty Plea Memorandum" which was created years after the guilty plea was entered.

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Brown states that it was error for the 3rd Circuit to deny him a COA to pursue his 6th Amendment claim on Appeal where he demonstrated in effective assistance when his attorney failed to provide him a factually based plea memorandum during the guilty phase of his plea proceeding. Brown has vehemently sworn that it was the plea agreement that was in front of him at the time of the guilty plea proceeding. Brown avers that he was never provided with a copy of a plea memorandum until two years later.

### INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment right to counsel is the right to the effective assistance of counsel. Here Brown has shown both that counsel performed deficiently and that counsel's deficient performance caused him prejudice.

The Strickland standard's first prong sets a high bar. A defense lawyer navigating a criminal proceeding faces any number of choices about how to best make a client's case. The lawyer has discharged his

constitutional responsibility so long as his decisions fall within the wide range of professionally competent assistance. It is only when the lawyer's errors were so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment that Strickland's first prong is satisfied.

---- It would be patently unconstitutional for the government to submit a fraudulent plea memorandum two years later, to which included factual basis of the plea.

INEFFECTIVE ASSISTANCE OF COUNSEL

To satisfy the Strickland standard, a litigant must also demonstrate prejudice, i.e., a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

---- A jury may conclude that Browns crime calls for a sentence of life or freedom.

S Y L L A B U S & A R G U M E N T

Petitioner Brown was convicted of conspiracy to committ loan and wire fraud along with aggravated identity theft. Brown ultimately pled guilty believing his attorney that he would be in the sentencing range of 100 - 110 months of imprisonment, which is based on the actual loss amount that would be attributed to him. After Brown had pled guilty the government attributed over $7,000,000, which triggered a 20 level enhancement due to the fraud loss range.

Under Brown's circumstances, fraud loss calculation was the most important factor in his decision to accept or reject a plea deal and "going to trial after some time in prison was not meaningfully different from going to trial after somewhat less time," Brown states.

Brown avers that the possibility of even a highly improbable result was pertinent to the extent it affected his decisionmaking. But for his attorney's incompetence, Brown would have known that accepting the agreement would have led to an 20-level enhancement. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are from the defendant's perspective, similarly dire, (Browns age [50]), even the smallest chance of success at trial may look attractive. For Brown being 50 years of age was not meaningfully different from losing trial and being mid sixties or eighties; Brown states he would have rejected any plea leading to him being released in his mid sixties from prison. Brown avers that the government nor the court cannot say that it would be irrational for someone in Brown's position to risk additional time in exchange for holding on to some chance of avoiding being released from prison in his mid sixties.

(ii):... Moreover, the Court made a mistake when it decided to not issue Brown a certificate of appealability, Brown points to (Exhibit A) U.S.C.A. for the 3rd Circuit Order), to which the 3rd Circuit ruled on the merits of Browns case... The COA inquiry, to which this Court has emphasized, is not coextensive with a merits analysis. Brown avers that at the COA stage the only question is whether the applicant has shown that "jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are

adequate to deserve encouragement to proceed further... "When a court of appeals sidesteps the [COA] process by 1st deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. As explained recently in Dillingham v. Warden,Chillicothe Correctional Inst., 2017 U.S.Dist.LEXIS 91423,[2017 WL 2569754](S.D. Oh. June 14,2017),the jurisdiction of a circuit court over a habeas appeal depends on there being a properly-issued certificate of appealability.

## C O N C L U S I O N

Brown avers that he can still show prejudice despite the near certainty of conviction and greater sentence had he gone to trial. In the unusual circumstance of this case, "Brown" adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to an enhancement by 20 levels.

Brown has relied on the Supreme Court decision in Lee v. United States, 528 U.S.___,__,137 S.Ct.1958(2017), to which the S.Ct. stated that a defendant who received wrong advise from his attorney about whether he'd be deported by pleading guilty to a drug charge can show he was prejudiced by it.

Brown has also relied on United States v. Class, No. 16-424 -- 137 S.Ct. 1065;197 L.Ed.2d 175; 2017 to which the Supreme Court granted the argument of "[w]hether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction.

Brown states that this court compel the 3rd Circuit Court of Appeals to revisit this issue. Browns statute(s) of convictions is 18 U.S.C. §§§§§ 371,1010,1014,1028,1343,1349 and 2 also 26 U.S.C. § 7201. Brown maintains that he had a constitutional right not to be indicted. Brown avers that it is constitutionally impermissible for an indictment to charge that false statements in connection with FHA loan, and Aiding and Abetting in violation of 18 U.S.C. §§ 1014 and 2, had a aggravated loss amount over $10,000,000. In other words Brown assert a constitutional immunity from prosecution of the specified loss amount.

Brown avers that this case has raised the question on whether his guilty plea has waived his right to chlallenge the constitutionality of the statute of conviction. Here, Brown was oringinally held responsible for the specified actual loss amount, of $10,000,000, that was stipulated to in the plea agreement. The government attributed over $10,000,000 in loss amount, which was calculated in order to trigger the 20 level enhancement. Brown avers that he has a constitutional right not to be indicted under false pretense and the fact that the goverment used majority of the stipulated loss amount from 2005,06,07 and 2008, which according to United States v. Class it was constitutionally impermissable to attribute the specified loss amount of over $10,000,000, because majority of the stipulated loss amount was not part of the statute prior to it being amended in May of 2009, prior to May of 2009 financial institutions only covered FDIC Insured. Brown states that under §1014 because some of the Mortgage Lending Buisnesses charged in the indictment and stipulated to in the loss amount of the plea agreement according to Ex Post Facto it was not binding until May of 2009. Therefore Brown is requesting that this court remand for New Trial, based on the facts above.

In the Supreme Court
For the United States

Eric St John Brown
petitioner

vs

United States of America
respondent

CASE no. _____

CASE law in support of Issue

memorandum OF Law: Addendum

Comes Now Eric Brown respectfully Request that this Honorable Court apply the following cases that is cited to the Ex Post facto Inquiry that this petitioner has brough forth.

a. Ex Post Facto Analytical Framework

(i) The United States Constitution proclaims that no "ex post facto Law shall be passed." U.S. Const. art 1 § 9, cl. 3 An ex post facto inquiry is really a question of whether it is permissible for a statute to apply retroactively. Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006).

A retroactive statute is one that takes away or impairs vested rights, create new obligations, imposes a new duty, or attaches a new disability with respect to transactions or events that have already passed.

The United States Supreme Court has set forth a framework for courts to apply in determining whether a statute may or may not apply retroactively. this test is applicable when, as here, in Browns case implicates a federal statute enacted after events in the suit.

Brown cites the following cases in support of this court applying the standards of Ex post facto, specifically United States v. Saferstein, 673 F.3d 237, 244 3d. Cir 2012; Collins v. Youngblood, 497 U.S. 37, 52, 110 S.Ct. 2715 111, L.Ed. 2d 30 (1990); Calder v. Bull, 1 LEd 648, 3 DALL 386

Because the United States District Court erroneously applied the Amended May of 2009 version of financial institutions and other coverage, this case should be remanded back to the District Court for procedural error, with instructions for New Trial.

Respectfully Submitted

3-30-18
dated

Eric di John. Brown
/Eric. Si John Brown.