

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Avniel Awan Anthony — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the 5th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Avniel Awan Anthony
(Your Name)

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Beaumont TX 77720
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

The Probation Department assessed the Movant with two separate enhancements under USSG 3C1.1 and 3C1.2 for obstruction of justice and Reckless Endangerment for incident alleged to have taken place outside the jurisdiction of the United States, in a Cancun Airport in Mexico.

The district Judge sentenced the Movant to a 72 month above guidelines sentence citing incidents that allegedly occurred in Mexico without a determination of guilt by a jury or admission by the defendant in open court, or stating "facts" upon which could be relied on to find guilt.

The defendant (Movant) appealed to the 5th Circuit Court of Appeals, where the District Court's decision was affirmed. Then Appellant's appeal counsel submitted a motion for the United States Supreme Court on Certiorari, in which certiorari was granted on June 25, 2018 and the Supreme Court remanded to the 5th Circuit and vacated the judgment in light of Rosales-Mireles. The 5th Circuit reaffirmed 11-15-18 insisting that there was no plain error.

- (1) Does the U.S. Probation Department have authority to apply enhancements for conduct alleged to have happened outside the jurisdiction of the United States. And if so, can it apply double enhancements on allegations not proven to be facts.
- (2) Does the District Court have jurisdiction to punish Movant by applying 2 separate enhancements for unproven conduct that allegedly occurred in Mexico, before the Movant was in U.S. custody or in U.S. territory, and if so, did the district court err in imposing an 72 month above the guidelines sentence in an upward variance

resulting from the same 2 enhancements without a finding of fact by a jury or admission by the defendant? Or in violation of the USSG § 3C1.2 comment (N.1).

(3) Did the District Court err in ordering the sentence to run consecutive to the pending state charges in the Statement of Reasons where this command appears neither in the oral pronouncement of the sentence nor the written judgment?

(4) Did the District Court err in failing to give Movant fair notice of possible departure and for the reasons listed in the departure?

(5) Did the District Court err when it abused its discretion and failed to give any weight to defendant's mental health history in considering the 3553(a) factors and the need for the rehabilitation and mental health treatment?

(6) Were trial counsel Hermesmeier ineffective for not raising proper objections or submitting Movant's MHMR records for consideration or requesting more time to submit the evidence? And appeal counsel Joel Page for refusing to cite Hermesmeier's deliberate indifference? Or improperly advising the Movant?

LIST OF PARTIES

- ☒ All parties appear 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:

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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 & C to the petition and is

☒ reported at N/A; 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 "D" to the petition and is

☐ reported at N/A; 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 N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 15th 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A N/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 N/A.
A copy of that decision appears at Appendix N/A.

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

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A N/A.

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

PETITION FOR WRIT OF CERTIORARI

Avniel Awan Anthony respectfully petitions for a writ of Certiorari to review the judgment of the United States Court of Appeals for the 5th Circuit in the United States of America v. Avniel Awan Anthony, No. 4:16-CR-128-1, by Stewart, Chief Judge, and DENNIS and WILLETT.

I. JURISDICTION

The Court of Appeals denied Movants Appeal 11-15-2018 and upheld the appeal after this court previously granted certiorari on June 25, 2018. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Honorable Court,

COMES NOW, Avniel Awan Anthony, Movant in pro-se capacity, and respectfully files this petition for writ of certiorari, in support herein, Movant states the following:

LIBERAL CONSTRUCTION

Movant petitions honorable court to liberally construe this motion under the provisions and guidelines in Haines v. Kerner, 404 U.S. 519 (1972) where this court held "a pro-se pleadings are to be held to a less stringent standard than formal pleadings drafted by attorneys." See also U.S. v. Scher, 2011 U.S. Dist. LEXIS 108222 5th Circuit (a pro-se complaint, however inartfully plead must be held to less stringent standards. Franklin v. Rose, 765 F.2d 52 (5th Cir. 1985).

That liberal construction allows active interpretation of a pro-se pleadings to encompass any allegations which may raise a

claim for relief.

BACKGROUND

On 10/3/16, Movant pled guilty to 1 count of false statement in a passport application. Movant's applicable guidelines were 10-16 months resulting from an offense level of 10 criminal history Category 3. The district Judge upward departed from the guidelines and sentenced the defendant to 72 months imprisonment stating that "the guidelines did not adequately take into account all the facts of the case." In which the Judge continued to recite the defendant's history and vague unfounded allegation in the PSR, that allegedly happened in Mexico which Movant denied the veracity of in open court adamantly denying the PSR's version of events.

At that time, the district Judge did not fact find but continued to sentence the defendant to the 72 month above guideline sentence in violation of Rule 32(i)(3)(b) Federal Rules of Criminal Procedure and Rule 52(b).

The District Judge also never orally stated whether Defendant's sentence was to run concurrently or consecutive to any pending state charges, nor mentioned it in the judgment of sentence. It appears for the first time in the Statement of Reasons.

Movant's attorney became Kevin Joel Page who appealed to the Fifth Circuit refusing to respect the pro-se Movant's wishes at that time to argue that Movant never entered a roof or fell through, but he continued to argue against this and denied relief.

Counsel Joel Page then filed a petition for writ of certiorari to the Supreme Court in January 2018 and certiorari was granted by this court 6/25/18.

This court vacated the judgment of the Fifth Circuit and remanded in light of Rosales-Mireles v. U.S. And the Fifth Circuit once again affirmed without hearing any argument from the Movant or addressing the legal issues on merits.

Movant would like to demonstrate to the court that the trial counsel and appellant counsel have both been ineffective and have refused to present any argument or issue that the Movant has brought to their attention. They have both either walked out or refused to work, or submitted motions misrepresenting my arguments or wishes as is evident by counsel Joel Page's appeal motions in which he argues that "Anthony" argues he went into and fell through a roof in the airport," and claiming that. "He argues this is two distinct acts." It is evident from the trial transcripts that the Movant has always maintained that he never went into or fell through any roof, and there was no evidence presented to prove it happened, nor was the Movant allowed time or opportunity to gather or present evidence to counter these allegations. And this should have been the argument on appeal the entire time. The District Judge never made a finding of fact, and the trial counsel Hermesmeier submitted an objection but withdrew it right away.

The appellate counsel and the Appellate Court and U.S. Attorney have been "sandbagging" by arguing around the issues that need to be brought back in front of the court, issues which seriously affect the fairness, integrity, or public reputation of the judicial proceedings plain errors.

This case is not about a simple guidelines error. It is about a guidelines error that was caused by a miscarriage of justice by the judge, and USPO, and Movant's trial counsel. Which the Appellate

counsel Page refuses to directly address as follows:

ARGUMENTS AND AUTHORITIES

- 1) Does the USPO (United States Probation Office) have authority to apply enhancements for conduct alleged to have occurred outside the jurisdiction of the United States - in Mexico - And if so, can it apply double enhancements on allegations not proven to be facts?

The U.S. Probation Department assessed the defendant 4 offense levels with two separate enhancements namely recklessly endangering another during flight from a law enforcement officer and obstruction of justice. (See ROA 118). This district court applied these enhancements to calculate the defendants guidelines erroneously as the district court has no jurisdiction under 18 U.S.C. § 3231 to punish defendant for any conduct originating outside the district's of the United States, especially when such conduct did not constitute a crime at the time in the United States and furthermore being only nothing more than allegations and vague conjecture. Also immigration officials are not "law enforcement" or "police." At the time of the alleged incidents the PSR clearly states that the Movant was "released," not to other law enforcement agents but "immigration officials" where there is no further documentation of any legal process other than Movant being forced drugged and forced on a flight against his will deprived of all his rights. This is an obvious miscarriage of justice in which enhancements shall not be applied. See Stinson v. United States, 508 U.S. 36. "Commentary in the Guidelines Manual that interprets or explains a guideline is

authoritative unless it violates the Constitution, or a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline." And U.S. v. Blocker, 612 F.3d 413 "An error resulting from a straightforward application of the guidelines is plain."

Also here, there is no evidence to support claims, 18 U.S.C. §3583(i), and but for the district court's inadequate explanation, this sentence would be different. See U.S. v. Reggs. In this case in front of the courts as of now, there is no evidence to support the claims. The PSR doesn't reveal how many law enforcement officials were involved or whether police resources were diverted. These are all vague speculative claims with no supporting evidence in the record.

- 2) Does the district court have jurisdiction to punish Movant by applying 2 separate enhancements for unproven conduct that allegedly occurred in Mexico, before the Movant was in U.S. custody or U.S. territory, and if so, did the district court err in imposing a 72 month above guidelines sentence in an upward variance resulting from the same 2 enhancements without a finding of fact by a jury or admission of guilt by the defendant?

The trial counsel Hermesmeier stated in the record that "the guidelines take into account obstructive type of conduct that occurred prior to any attempt at custody by U.S. law enforcement." It occurred in Mexico." This alone shows that the trial counsel and the judge were aware of the question of jurisdiction, yet the trial counsel never entered an objection to this illegal prosecution, neither did the district Judge question the validity of the enhancements or fact find. If the trial counsel would have objected to these

enhancements in the PSR or in open court, during, before or after sentencing. This objection if raised could have resulted in an offense level of 6 criminal history Category of 3 putting the defendant at 0-6 months, the result of which could have probable different outcome, as the sentencing judge never said that he would have continued with the same sentence irrespective of the guidelines. Therefore there was error. The error was plain, it affected the substantial rights of the defendant, and it seriously affects the fairness, integrity and public reputation of judicial proceedings. See U.S. v. Booker, 543 U.S. 220 (2005). And "shocks the conscience" in light of such an extreme departure.

Furthermore, the PSR uses the same language and conduct to apply both enhancements. 3C1.1 says "crawled through the ventilation ducts," and 3C1.2 says; "he crawled through the ceiling and into the air ducts." A play on words which is forbidden by the commentary in U.S.S.G. § 3C1.2, comment (n.1) because "Even if" the alleged conduct occurred from 'start to finish' it could all still fall under U.S.S.G. § 3C1.2 and encompass 3C1.2 at the same time (same conduct) but since the Movant maintained that it never happened that way, Movant directs the court's attention to Booker v. U.S., 543 U.S. 220. This court ruled that a court cannot enhance a sentence on a determination of fact not determined by jury or admitted to by the defendant. Fed. Rules of Crim. Procedure 32(i)(3)(B) also see Rule 52(b). U.S. v. Cabral Castillo, 35 F.3d 182. (Double counting).

It is clear from the record that the defendant Anthony told the district judge in open court that the information in the PSR concerning the alleged incidents in Mexico at the Cancun Airport

was not true or accurate info, and the district judge did not attempt to fact find or allow defendant time or opportunity to gather or present evidence in his favor. The district judge instead departed upward with a 72 month sentence with the explanation that he believed his initial assessment of the facts that appear to be undisputed in the defendant's "background," in which is at best "vague" because defendant already received points for his criminal history. And other charges that received no points, is because either there was a finding of no guilt, or else were juvenile offenses which there were no records for (sealed) 25 years old!!! The district judge didn't offer a detailed response (facts) as to why he adopted a false ambiguous report translated from a different language as facts against the defendant's refusals to accept the false allegations. In imposing an upward variance the district court must more thoroughly articulate its reasons, and its reasons should be fact specific (emphasis mine) and consistent with the sentencing factors enumerated in 18 U.S.C. § 3553(a), U.S. v. Herbert, 813 F.3d 551 5th Cir. 2015. Here in the case of Movant, Anthony, the many allegations the district Judge is citing are not facts. Defendant has not been adjudged guilty or admitted to any allegations in Mexico. There is mere "speculation."

Abuse of discretion. U.S. v. Warden, 291 F.3d 363, 365. Fed. Rules of Crim. Proc. 52(b) Reversible plain error the defendant was never given notice that these false allegations would be used to enhance his sentence or be used as a basis for the district Judge to depart upward, or given opportunity to prepare a defense against such allegations, in accordance with Fed. Rules of Crim. Procedure 32(h) Notice of Possible Departure.

The PSR only notified defendant that the prosecution was requesting an upward variance and sentence outside the guidelines for the uncharged conduct of "identity theft." Not vague allegations about "altercations" on the beach in Cancun or when the defendant was being drugged and beaten by Mexican officials and forced on a plane without a hearing or writ.

It is clear from the record that the defendant was under the impression that he was only pleading guilty to a false statement in a passport application ONLY. Not accepting responsibility for other unfounded allegations occurring in Mexico. Defendant was being advised against his best interest by trial counsel Hermesmeyer. (Also see Johnson v. U.S., 135 S. Ct. 2251 (2015) concerning fair notice.)

- 3) Did the district court err in ordering the sentence to run consecutively to the pending state charges in the Statement of Reasons where this "command appears neither in the oral pronouncement of the sentence or the written judgment?

Neither the courts oral sentence nor the effective portion of its written judgment stated that the defendant's sentence should run consecutively to a non-existing state charge.

That term appeared for the first time in the Statement of Reasons. Because the defendant has a right to be present during sentencing conflicts in the oral and written pronouncement must be resolved in favor of the oral pronouncement. See United States v. Martinez, 250 F.3d 941 (2001). Fed R. Crim P. 32 (K)

It is clear that the defendant Anthony has to be present at any part of sentencing. It is unfair and unconstitutional to add stipulations to his sentence after he has left the courtroom and has

no chance to defend himself or know the full consequences of his sentence. Furthermore, the defendant had no sentence yet in which the district judge could make a consecutive order at that time.

The district judge had no authority. Kentucky v. Stincer, 482 U.S.

730. This was also plain error which affects the substantial

rights of the defendant and seriously affects the fairness, integrity and public reputation of judicial proceedings, and this error in itself merits discretionary remand.

- 4) Did the district court err and abuse its discretion when it failed to give Movant fair notice of possible departure for the reasons listed in the departure?

The PSR only notified the defendant and his counsel that it was requesting a sentence outside the guidelines for identity theft, uncharged conduct in connection with the instant offense. Not the defendant's history or other false allegations that the district judge presented no evidence to support, such as allegations of 'altercations' on the beach and fleeing. This was an error of the Fed. Rules of Criminal Procedure 32(h) Notice of Possible Departure. For the reasons stated and the district judge obviously departed for other reasons. The defendant was not in position to object as he was heavily dosed on psyche medication and following the instructions of his attorney who told him to just agree with the judge. If the defendant could have been given notice for the reasons the district judge would depart he could have prepared a defense which would have shown mitigating circumstances as to his long juvenile background, such as his psyche records. The defendant was not even competent to sign these documents to plead guilty without a psychiatric examination.

- 5) Did the district court abuse its discretion and was it plain error when it failed to fact find or give any weight to defendant's mental health history in considering the 3552 A(2)(D) Factors and the need for rehabilitation and mental health treatment?

The district court erred in not considering any part of the defendant's mental health history in the 3553(a) factors being that it is obvious from the PSR that the defendant has a long history of mental health issues including paranoid skitzophrenia and hallucinations, also PTSD. Rule 32(d)(2)(A) Fed. Rules of Crim. Procedure says that the defendant's psyche history must be submitted for consideration. And Title 18 U.S.C 3661 states "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The Movant's MHMR history or records were never requested, considered or submitted. Nonwithstanding the indications of mental health in paragraphs 90-91 of the PSR, which if that history was submitted could have presented mitigating factors that could probably warrant a downward departure and result in a different sentence had the psyche history been requested or presented. This represents a clear error which affects the substantial rights of the defendant and seriously affects the fairness, integrity and public reputation of judicial proceedings especially when a sentence so high above the suggested guidelines is imposed without such safeguards being afforded or reviewed.

See U.S. v. Dominguez, 542 U.S. 74 and U.S. v. Moss. Abuse of discretion. U.S. v. Warden, 291 F.3d 363. See Fed. Rules of Crim. Proc. 52(b). Movant probably would have received a lesser sentence absent the error.

REASONS FOR GRANTING THIS MOTION

- 6) Were trial counsel Heresmeyer "ineffective" for not raising objections, submitting Movant's psyche history for consideration or requesting evidentiary proceedings? Or advising Movant to plead guilty?

Both trial counsel Heresmeyer and appellate counsel Joel Page have been "sandbagging" and refusing to consult with the defendant, respond to the defendant or present the defendant's issues or arguments based on the merits of the Movant's case. Both lawyers work for the same office and one lawyer is not going to file ineffective assistance of counsel on himself or his colleague, and therefore Movant must bring the deliberate indifference of both lawyers to the attention of this court to obtain relief or Movant's issues will never be resolved or corrected. The plain errors in the record mostly allowed by their ineffectiveness or deliberate indifference will never be remedied without this court's help. In the interest of justice the Movant submits the following information:

- (A) Trial counsel Heresmeyer enters an objection on the basis of lack of notice with respect to the basis for standard departure or above guidelines sentence then withdraws the objection. This was plain error that affected the rights of the defendant to effective counsel.

If the objection would have been the defendant would have had the opportunity and time to present mitigating evidence or gather evidence such as psychiatric records or information to contradict or mitigate the allegations in the defendant's history which could have definitely brought about a different outcome, being the district judge never stated that the sentence would have been the same irrespective of the guidelines. The trial judge would not have been allowed to continue with the above guidelines sentence had it not been for this egregious error by trial counsel, or the withdrawn objection.

The defendant also maintains that he would have went to a trial to disprove all the false allegations used to depart upward had he known or been made aware, by his trial counsel who was advising him to plead guilty, that he could receive an above guidelines sentence for false allegations in the PSR that were presumed to have taken place in Mexico.

The trial judge asked Hermesmeier:

"And proceeding in this fashion is the best way to proceed strategically, in your view, for your client?"

And Heresmeier replies:

"Yes."

This follows, that the Movant was following the instructions of his attorney. So all of the rights he forfeited or advised Movant to forfeit, and the terms Movant agreed to was because Movant trusted his judgment. Movant is not an expert of the law. Hermesmeier is, and he is flagrantly forfeiting the Movant's rights, forfeiting

objections and allowing the miscarriage of justice to go unimpeded.

Hermesmeyer also never entered an objection to the enhancements for conduct alleged in Mexico, although he mentioned it in the record. He never attempted to object which if he had, could have brought about a lower guidelines sentence, as the U.S. Probation Department should not be allowed to assess the defendant for any conduct alleged that the court has no jurisdiction to punish the defendant for occurring outside the jurisdiction of the United States.

In the U.S. Attorney's brief, he even stated 'Anthony filed objections to the other aspects in the PSR but did not object to the proposed enhancements under sections 3C1.1 and 3C1.2 or to the total offense level.' This further proves the ineffectiveness and deliberate indifference of Hermesmeyer.

Hermesmeyer also mentions the Movant's psyche history in the record but never attempted to submit his MHMR history for consideration which could've brought about a different outcome had they been presented. Movant was heavily sedated on medication at the time of sentencing proceedings and could not be expected to be aware of the deliberate indifference of his trial counsel who is expected to do a reasonable job. The defendant vehemently denied the allegations which formed the basis of the enhancements in question, and counsel Hermesmeyer did nothing to assist the defendant in defending himself and even withdrew an objection when given the opportunity to take more time to gather and submit evidence.

During sentencing the trial judge made it clear that there were mitigating factors attorney Hermesmeyer could have raised, however, he failed to inform the court of those factors that the court could have used to give the defendant a lower sentence, such

as his diagnosis of PTSD, paranoia skitzophrenia, and bi-polar disorders. Counsels have been hiding the defendant's psyche records from the court and refusing to bring them to light.

(B) Appellate Counsel Joel Page should have brought these same arguments against Hermesmeier but has been just as ineffective. He refuses to consult with Movant or argue the case on its merits. One example being that the Movant is clearly in the record stating he never went into or fell through any roof nor was he handcuffed nor entered any airplane and the info was false. Joel Page continues to maintain that defendant "fell through" the roof in the airport, but deserves no points, instead of arguing that it was never proven or admitted to that the defendant "fell through" any roof and the district court lacked jurisdiction to punish defendant so harshly above his guidelines with no authority to do so, or without a finding of fact by the judge at least, or allowing defendant to present adverse evidence.

He has refused to present plain error in asking this court to rule on this objection(s) (lack of) by Hermesmeier and bring the matter on appeal of the court not having jurisdiction to apply the enhancements, of the district judge not elaborating as to a legal explanation for how the sentence he imposed takes into account the 3553(a) factors and is an appropriate sentence in light of the defendant's psychiatric history (MHMR).

Counsel Joel Page refuses to mention or bring forth the issue of jurisdiction concerning the two enhancements in question and challenge their validity on the merits, under 18 U.S.C. 3231.

The enhancements in question don't fall under this authority. He has also refused to obtain Movant's psyche records after many requests and submit them. Joel Page has also failed to raise the issue of plain error where the district judge failed to fact find and rule on Movant's denial of the charges alleged against him in Mexico, which formed the basis of the judge departing upward from the guidelines violating Fed. Rules of Crim. Procedure 32(i)(3)(B). See also Rule 52(b). See Booker v. U.S., 543 US 220.

CONCLUSION

The defendant is mentally disabled, mentally challenged, and suffers from several mental illnesses which render him incompetent to complete or participate in certain activities. He suffers paranoia, skitzophrenia, auditory hallucinations, PTSD, anti-social personality disorder. He is serving a 72 month above guidelines sentence for making a false statment in a passport application six years ago, and is serving time in a United States prison where he is being denied proper psychiatric care or treatment. He has served 36 months of this illegal 72 month sentence. He has been beaten by inmates and guards, threatened, forced into acts of violence against his will and out of his control with no recourse or medication because there is no psychiatric doctor on this prison. This in part is due to Movant being improperly designated due to trial counsel not submitting Movant's MHMR records, and the district judge not considering the 3553(a) factors or the need for mental health concerns or types of rehabilitative sentences available.

The 5th Circuit Court of Appeals refused to honor the Supreme

Court's decision to remand for further consideration in light of Rosales-Mireles in order to discourage another petition for Certiorari but now returns the Defendant/Movant pro-se asking that this court grant certiorari once again, and give clear instructions to the 5th Circuit and district court to grant the defendant all the relief to which he is justly entitled. Or immediate release. Spence, 2129 F.3d 162 says when a prisoner's sentence is enhanced without factual basis - and he remains incarcerated pursuant to that sentence it follows that he is a victim of a miscarriage of justice.

Also in accordance with Pepper v. State, 131 S. Ct. 1229 (2011) due to the fact that the Movant in this case has been incarcerated over 3 years, has received over 5 vocational trades, and is enrolled in a residential drug awareness program ("Challenge Program") and has not been in trouble for an extended period of time, this shows mitigating consideration of rehabilitation in general, and so the need for incarceration is diminished.

Also this shows that he would more than likely be serving more time than is actually necessary to meet the goals of rehabilitation, or fair sentencing at this point in time. (See Gall v. United States, 552 U.S. 38 (2007), sentencing must be fair.) Added to the fact that defendant is suffering mental anguish and hardships of being housed on a U.S.P. around violent offenders and being refused psychiatric treatment. This is a danger and miscarriage of justice in itself.

Therefore, the defendant prays that this court take swift action to rectify this matter and grant defendant certiorari, vacate the sentence and remand to the district court for resentencing and

relief that the defendant may justly be entitled to in the way of a fair and rehabilitative sentence.

The Movant begs that this court resolve all questions concerning the rule of law and how it applies to this case in the interest of justice. Thank you and God bless.

Date: December 27, 2018

Respectfully submitted,

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