

Case No. 18-8996

FILED

JUN 13 2019

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

IN THE  
SUPREME COURT OF THE UNITED STATES

ZACK ZAFER DYAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for *Writ of Certiorari* to Appeals Court Eighth Circuit  
Appeal No. 18-2456

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PETITION FOR REHEARING PETITIONER'S  
PETITION FOR *WRIT OF CERTIORARI*

Zack Zafer Dyab  
Federal I.D. 15014-041  
USP Leavenworth Camp  
P.O. Box 1000  
Leavenworth, Kansas 66048  
Phone: None

## **QUESTION PRESENTED**

**Does the Petitioner relinquish his substantive rights controlled by the Erie Doctrine, the Enabling Act, 28 U.S.C. Sec. 2072, the Fifth and Fourteenth Amendment's rights when he discovered that he was sentenced to a miscalculated guidelines range six years after sentencing?**

## **LIST OF PARTIES**

All parties appear in the caption case on the cover page.

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	6
CONCLUSION.....	11
DEFENDANT'S CERTIFICATION OF GROUNDS FOR REHEARING.....	12

## INDEX TO APPENDICES

APPENDIX A – Letter from U.S. Supreme Court denying the Petition for *Writ of Certiorari*

APPENDIX B – Eighth Circuit Judgment

APPENDIX C – District Court Order and Opinion

## TABLE OF AUTHORITIES CITED

### Cases

<i>Gardner v. Florida</i> , 430 U.S. at 356 (1976) .....	10
<i>Haines v Kerner</i> , 404 U.S. 519 (1972).....	5
<i>Rosales-Mireles v. United States</i> , No. 16-9493, June 18, 2018.....	5, 6
<i>Townsend v Burke</i> , 334 U.S. 736, 741 (1948) .....	10
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	7
<i>U.S. v. Tucker</i> , 4504 U.S. 443, 447 (1972).....	10
<i>United States v. Dyab</i> , June 19, 2018.....	1
<i>Hanna v. Plummer</i> , 380 US 460, 465.....	2
<i>Erie Railroad Co. v. Tompkins</i> .....	2, 9
<i>Summers v. Hearst</i> , 23 F. Supp 986, 922 (D.C. 2 <sup>nd</sup> 1938).....	2

### Statutes and Rules

8 U.S.C. Sec. 1326 (a), (b)(2).....	6
28 U.S.C. Sec. 1254 .....	2
28 U.S.C. Sec. 1651 .....	5, 8
28 U.S.C. Sec. 2072 .....	i, 9
28 U.S.C. Sec. 2072 (b) .....	9
F.R.A.P. 52 (b).....	7
U.S.S.G. Sec 2B1.1 comment (n.3)(E)(ii).....	4, 10
U.S.S.G. Sec 2B1.1 (a)(2).....	8

**IN THE  
SUPREME COURT OF THE UNITED STATES**

**PETITION FOR REHEARING A *WRIT OF CERTIORARI***

Petitioner respectfully prays that the rehearing a *Writ of Certiorari* issue to review the judgments below

**OPINIONS BELOW**

For Cases from Federal Courts:

- The denial of the United States Supreme Court appears at Appendix A
- The denial of the United States Court of Appeals Eighth Circuit appears at Appendix B to the Petition and the opinion is unpublished.
- The opinion of the United States District Court appears at Appendix C to the petition and is reported at 2018 U.S. Dist Lexis 102251, *United States v. Dyab*, June 19, 2018

## JURISDICTION

Petitioner invokes the Erie Rule, knowing that it's "held that federal courts sitting in diversity cases, when deciding questions of "substantive law" are bound by the state court decisions as well as state statutes. The broad command of Erie was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law." Hanna v. Plummer, 380 US 460, 465 (1965) and that "the new doctrine to Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 LED 1188 (1938) applies to both actions at law and suits in equity in the Federal Courts." Summers v. Hearst, 23 F. Supp 986, 922 (D.C. 2<sup>nd</sup> 1938)

The Petition for *Writ of Certiorari* was denied by the United States Supreme Court on May 28, 2019, and a copy of the denial letter appears at Appendix A.

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Petitioner asserts his equal protection and due process rights of both the Fifth and Fourteenth Amendments with the inclusion of his state substantive guaranteed rights “founded in the Minnesota Bill of Rights,” that have been certainly abridged by the United States probation officer’s mistake.



## STATEMENT OF THE CASE

Petitioner was sentenced on September 15, 2011. On October 31, 2014, the government filed a motion to amend the Petitioner's judgment. The government's motion had two requests.

In the second request, the government moved the court to recognize Barbara Puro (who is not a co-defendant in this case)<sup>1</sup> as jointly and severally liable for restitution on selected properties. See Docket #222.

On October 2015, Petitioner discovered the entry of the *ExParte* government's motion and the entry of the Order to amend judgment.

Petitioner noticed that in the amended judgment, Barbara Puro made liable for restitution on specific property for a totally different dollar amount than the Petitioner.

Neither the government nor the court gave any explanation as to why or how possibly a loss amount could be different between two defendants for the same property.

Petitioner conducted diligent investigation and was able to discover that the calculation of the loss amounts are totally incorrect which resulted in over sentencing by the miscalculated guideline range.

The discovery was supported by documents retrieved from the sheriff's office regarding the foreclosure sales on the properties at issue.

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<sup>1</sup> Barbara Puro is from U.S. District Court case # 11-288 (JNK / JJK)

The government used the method to calculate the loss amount pursuant to U.S.S.G. Sec 2B1.1 comment (n.3)(E)(ii), but the government applied the incorrect figures to the formula. The erroneous calculation of the loss amounts was the factory which created the miscalculation of the guidelines range. The miscalculating of the guidelines range gave the Petitioner an undue sentence, which affected his substantive and constitutional rights and had a serious effect on the fairness, integrity, or public reputation of judicial proceedings and thus warrant relief according to Honorable Judge Sotomayor's opinion in Rosales-Mireles v. United States, No. 16-9493, June 18, 2018.

On January 22, 2018, Petitioner filed a pro se motion pursuant to All Writs Act, under 28 U.S.C. Sec. 1651, raising the above mentioned issue. See Docket #274, 284, which was denied on June 19, 2018. See Docket #285, Appendix C

On September 12, 2018, the Eighth Circuit Court of Appeals ordered that the judgment of the District Court is summonly affirmed. See Appendix B.

On May 28, 2019, the United States Supreme Court denied the Petition for *Writ of Certiorari*. See Appendix A.

COMES NOW, Petitioner, seeking from the Honorable Court to rehear the petition based on the question presented in this petition, thereby applying substantial justice to the Petitioner's case.

Furthermore, the Petitioner asks this Honorable Court for a liberal construction of his *Pro Se* petition in accordance with Haines v. Kerner, 404 U.S. 519 (1972).

## REASONS FOR GRANTING THE PETITION

The Petitioner's substantive rights were violated by the undue sentence which directly associated with the probation officer's miscalculation of his guidelines range, bring to light and reflects upon Honorable Justice Sotomayor's statement in Rosales-Mireles v. United States, if not corrected it would "Seriously effect he fairness, integrity, or public reputation of judicial proceedings and thus will warrant relief."

## ARGUMENT

In the recent Unites States Supreme Court's case Rosales-Mireles v. United States, No. 16-9493, decided in June 18, 2018, Mr. Rosales-Mireles pleaded guilty to illegal reentry in violation of 8 U.S.C. Sec. 1326(a), (b)(2). The probation office in its Pre-sentence Investigation Report mistakenly counted a 2009 state conviction of misdemeanor assault, twice. This double counting resulted in a criminal history score of 13 which placed Mr. Rosales-Mireles in criminal history VI, combined with his offense level 21, that yield a guideline range of 77 to 96 months. Had the criminal score been calculated correctly, Mr. Rosales-Mireles would have been in criminal history V, and resulting guideline range would have been 70 to 87 months.

Mr. Rosales-Mireles did not object to the double counting error before the district court, relying on the erroneous Pre-sentence Investigation Report.

Because Mr. Rosales-Mireles has not objected in the district court, the Court of Appeals for the Fifth Circuit reviewed for plain error.

By applying the Olano framework, United States v. Olano, 507 U.S. 725 (1993), the Fifth Circuit calculated that Mr. Rosales-Mireles had established that the guidelines miscalculation constituted an error that was plain, and satisfying Olano's three conditions. The Fifth Circuit nevertheless denied to exercise its discretion to vacate and remand the case for sentencing, because it concluded that Mr. Rosales-Mireles failed to establish that the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. The Supreme Court did not agree with the Fifth Circuit's conclusion, and reversed the judgment. The Honorable Judge Sotomayer delivered the opinion of court:

"That the rule of criminal procedure 52(b) provided that a court of appeals may consider errors that are plain and affect substantial rights, even though they are raised for the first time on appeal. This case concerns a miscalculation of the United States Sentencing Guidelines range, that has been determined to be plain and to affect a defendant's substantive rights, calls for a Court of Appeals to exercise its discretion under rule 52(b) to vacate a defendant's sentence. The court holds in the ordinary case, as here, seriously affect the fairness, integrity, or public reputation of the judicial proceedings, and thus will warrant relief."

In this instant case, the petitioner has a similar case as Mr. Rosales-Mireles, the only difference is that he discovered the miscalculation of the guidelines range six (6) years after sentencing and could not raise it on direct appeal.

Petitioner relied on the probation officer's accuracy, honesty, and integrity on her Pre-sentencing Investigation Report to calculate the proper amounts of loss, and to have sufficient guidelines range calculated.

On January 22, 2018, Petitioner filed a *Pro Se* motion pursuant to All Writs Act, 28 U.S.C. Sec. 1651. In the motion the Petitioner challenged the miscalculation of the loss amounts, and that he was sentenced on the incorrect information. See dockets 274, 284.

On June 19, 2018, the District Court denied the Petitioner's motion, stating in the relevant part:

"Dyab had an opportunity to contest the overall loss calculation on direct appeal."

See opinion, Docket #285, Pg. 3, Appendix C.

The Petitioner was clearly unaware of the probation office's erroneous mistake in calculating the loss amounts and the guidelines range at the time of his direct appeal and that information was not disclosed by counsel to be able to raise such an error on direct appeal.

The Petitioner was enhanced 18 point levels for the loss amounts under U.S.S.G. Sec. 2B1.1(a)(2) arriving at a total offense level of 31. Criminal history I and an advisory guideline range of 108-135 months imprisonment. The Petitioner was sentenced to 120 months imprisonment.

Had the probation office calculated the correct loss amounts which would have resulted in the proper guidelines range, they would have given the Petitioner a

total offense level of 27, criminal history category I, that would have led to an advisory guidelines range of 70-87 months.

The Petitioner was prejudiced of his substantive due process rights and equal protection under the law that was violated because under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 LED 1188 (1938), and under the Rules Enabling Act (28 U.S.C. Sec. 2072) federal courts are to apply state substantive law, state court decisions as well as state statutes and federal procedural law Sec. 2071 (b), such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Petitioner further supports his petition with an affidavit annexes hereto.

## **PREJUDICE**

The Petitioner relied on the probation officer absolutely and completely for her accuracy. Thereby there was no reason for the Petitioner to have made any speculation of erroneous figures and miscalculated information in the pre-sentencing investigation report. Furthermore, the Petitioner's attorney was not in disagreement with the probation office's findings, which now comes to light that the Petitioner has been prejudiced and denied his substantive rights and proper process due him.

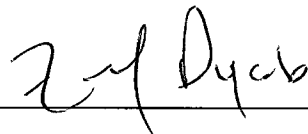
The miscalculation of the guidelines range resulted in the Petitioner receiving 33 months more on the high end of the guidelines range, and 50 months more on the low end of the guidelines range.

*U.S. v. Tucker*, 4504 U.S. 443, 447 (1972); *Townsend v Burke*, 334 U.S. 736, 741 (1948) (Defendants have due process right to be sentenced on the basis of accurate information); see also *Gardner v. Florida*, 430 U.S. at 356 (1976)

## CONCLUSION

Wherefore, for the reasons discussed above, the Petitioner respectfully requests that the judgment by the Eighth Circuit Court of Appeals be reversed and the case remanded with instruction to calculate the correct amounts of loss and resentence the Petitioner to the correct guidelines range under U.S.S.G. Sec. 2B1.1, comment (n.3)(E)(ii).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Zack Dyab", is written over a horizontal line.

Zack Zafer Dyab

June 13, 2019



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Case No. 18-8996

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

**ZACK ZAHER DYAB,**

Petitioner,

v.

**UNITED STATES OF AMERICA,**

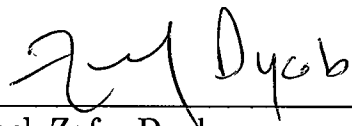
Respondent.

**PETITIONER'S CERTIFICATION OF GROUNDS FOR REHEARING**

COMES NOW, Zack Zafer Dyab, hereby petition this Honorable Court to rehear his petition on the grounds that the District Court abridged and modified the Petitioner's substantive rights.

In addition to the Rules Enabling Act, the Petitioner relies on Honorable Justice Sotomayor's opinion in Rosales-Mireles v. United States, No. 16-9493, decided on June 18, 2018.

Petitioner certifies that his petition for rehearing was presented in good faith  
and does not seek to delay

  
\_\_\_\_\_  
Zack Zafer Dyab

AFFIDAVIT  
BY PETITIONER IN SUPPORT OF PETITION  
FOR RE-HEARING WRIT OF CERTIORARI  
CASE NO. 18-8996

STATE OF KANSAS

COUNTY OF LEAVENWORTH

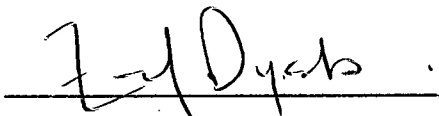
)  
)  
)  
VERIFIED AND SUBSCRIBED

**Comes Now,** Zack Zafer Dyab, in esse, a dual American citizen found in Section 1 of Our Fourteenth Amendments federal Bill Of Rights. Sui Juris, under federalism as a minnesotian under Our union of states, I am lawful man with clean hands, of lawful age, self schooled in the laws, of sound mind and spirit, thereby absolutely Competent to testify in this current cause. I am bringing forward Positively and Unequivocally Facts state to be True from my Personal First-hand Experiences, Knowledge, and research in the Petitioner's case. I further contend I have been denied due process and equal protection under the laws thats guaranteed by my substantive state rights under federalism and our Fourteenth Amendment. Furthermore, I incorporate my petition by reference, for re-hearing Writ of Certiorari, and its contents expressed in the Writ which are essential as to the Truth and Facts stated therein.

I verify under penalty of perjury under the laws of the united States of America that the foregoing Facts are True, Correct, Tmely, and Certain.

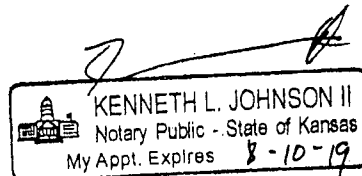
**Further Affiant Sayeth Not.**

Executed this 13 day of June, 2019.

  
Zack Zafer Dyab, Affiant

**VERIFICATION**

Verified and Subscribed by and before me this 13 day of June, 2019.  
did appear before me Zack-Zafer:Dyab, Known to me to be the one whose name is  
subscribed on this instrument to be the same.



Kansas Notary Public

Notary Public and foresaid  
above Commision Expires.

## APPENDIX A

Letter from U.S. Supreme Court denying the Petitioner for *Writ of Certiorari*

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

Scott S. Harris  
Clerk of the Court  
(202) 479-3011

May 28, 2019

Mr. Zack Zafer Dyab  
Prisoner ID # 15014-041  
U.P.S. Leavenworth Camp  
P.O. Box 1000  
Leavenworth, KS 66048

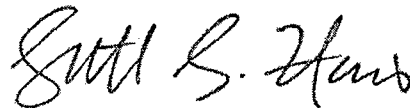
Re: Zack Zafer Dyab  
v. United States  
No. 18-8996

Dear Mr. Dyab:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott S. Harris", written in a cursive style.

Scott S. Harris, Clerk

## APPENDIX B

### Eighth Circuit Judgment

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No: 18-2456

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United States of America

Plaintiff - Appellee

v.

Zack Zafer Dyab

Defendant - Appellant

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Appeal from U.S. District Court for the District of Minnesota  
(0:09-cr-00364-JNE-1)

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**JUDGMENT**

Before SMITH, Chief Judge, WOLLMAN and COLLOTON, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

September 12, 2018

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

## APPENDIX C

District Court Order & Opinion



**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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UNITED STATES OF AMERICA,

Case No. 09-CR-0364 (1) (JNE)

Plaintiff,

v.

**ORDER**

ZACK ZAFER DYAB,

Defendant.

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Defendant Zack Zafer Dyab pleaded guilty in 2010 to conspiracy to commit wire fraud and money laundering in connection with a mortgage-fraud scheme. The amount of restitution owed by Dyab was left open in the plea agreement. Prior to sentencing, the Court concluded, after full consideration of arguments presented by both Dyab and the government, that Dyab owed about \$6.4 million in connection with 26 properties. Judgment was entered accordingly. *See* ECF No. 166.

In 2014, the government requested two changes to the restitution portion of the criminal judgment. *See* ECF No. 222. First, the government asked that certain of the payees be changed to reflect sales on the secondary market of the mortgages at issue. Second, the government asked that approximately \$1.37 million of Dyab's restitution obligation be made joint and several with Barbara Puro, a defendant from a related criminal matter. The Court granted the request without conducting a hearing or otherwise seeking input from Dyab. *See* ECF No. 224. Neither the total amount of restitution owed by Dyab nor his payment schedule was altered in the amended judgment.

About a year later, Dyab filed a motion pursuant to 28 U.S.C. § 2255 contending, among other things, that his due process rights were violated when the restitution order was amended without an opportunity to be heard. *See ECF No. 237*. The Court concluded that the restitution challenges were not cognizable under § 2255. *See ECF No. 242*. The Eighth Circuit agreed. “Because a dispute about restitution does not involve a claim of a right to be released from custody, a prisoner cannot challenge the restitution portion of his sentence under § 2255.” *Dyab v. United States*, 855 F.3d 919, 922 (8th Cir. 2017).

The Eighth Circuit did, however, leave the door open for challenging the amendment of the restitution portion of the criminal judgment through the All Writs Act, 28 U.S.C. § 1651. *Id.* Dyab now returns requesting that the Court “re-open the restitution portion of my judgment” and correct allegedly incorrect information in that amended judgment. *See ECF No. 274 at 7*. Dyab also requests that counsel be appointed to represent him in the prosecution of his motion. *See ECF No. 275*.

Both requests are denied. As an initial matter, the Court stresses the minuteness of the changes affected by the amended judgment. Not one penny was added to Dyab’s restitution obligations. No new factual findings were incorporated. And the Court had already clarified at sentencing that any restitution amounts owed by Dyab would be “due joint and severally with your co-defendant or, if there’s another one, co-defendants.” ECF No. 174 at 11.

This is important for three reasons. First, in order to establish (as he alleges) that his due process rights were violated, Dyab “must show that he has been deprived of a

constitutionally protected life, liberty or property interest.” *Mulvenon v. Greenwood*, 643 F.3d 653, 657 (8th Cir. 2011) (quotation omitted). It is difficult to see how any protected interest of Dyab’s could have been affected through the amendment of the judgment. Dyab remains responsible for the exact same amount that he did at the time the original sentencing judgment was entered, and he must meet those obligations under the exact same conditions as previously imposed.

Second, and relatedly, “most due process claims require [a] specific showing of prejudice.” *Ford v. Fortenberry*, 39 F.3d 1184, at \*1 (8th Cir. 1994) (unpublished table disposition) (citing *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)). Dyab cannot possibly have been prejudiced by the amendments made to the sentencing judgment; indeed, he may benefit, insofar as a portion of his restitution obligations are now shared jointly and severally with Puro. The remaining changes to the sentencing judgment affect only where the money owed by Dyab must go after it is first paid to the Court, a matter of no legitimate concern to Dyab. See *Fuchs v. United States*, No. 13C50099, 2014 WL 1652151, at \*8 (N.D. Ill. Apr. 24, 2014); cf. *United States v. Grimes*, 173 F.3d 634, 639 (7th Cir. 1999).

Third, Dyab’s motion is as much a cat’s paw intended to challenge the *original* restitution judgment as it is an attempt to challenge the *amended* restitution judgment. For example, Dyab contends in his reply brief that his motion “is based, at least in part, on the incoreect [sic] formula that was used to determine actual loss.” ECF No. 284 at 2. But Dyab had an opportunity to contest the overall loss calculations on direct appeal. He declined. “By failing to file a direct appeal, [Dyab] waived his opportunity to challenge

the restitution component of his sentence, as imposed.” *United States v. Williams*, No. 04-CR-0254 (ADM/AJB), 2007 WL 1424663, at \*1 (D. Minn. May 10, 2007) (collecting cases). Insofar as the All Writs Act avails Dyab of an exception to that rule, it can only apply, if at all, with respect to the portions of the judgment that were amended, as any arguments relating to other aspects of the judgment could have been raised on direct appeal at the time the original judgment was entered. And as explained above, the amended portions of the sentencing judgment did not prejudice Dyab in any respect.

Dyab has not and cannot establish a violation of his due process rights through the amendment of the sentencing judgment in this matter. His motion for relief is therefore denied. Because further prosecution of Dyab’s motion would be futile, Dyab’s motion for appointment of counsel is likewise denied.

#### ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Defendant Zack Zafer Dyab’s motion to amend judgment [ECF No. 274] is DENIED.
2. Dyab’s motion for appointment of counsel [ECF No. 275] is DENIED.

Dated: June 19, 2018

s/ Joan N. Ericksen  
JOAN N. ERICKSEN  
United States District Judge

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Case No. 18-8996

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IN THE  
SUPREME COURT OF THE UNITED STATES

ZACK ZAFER DYAB,

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v.

UNITED STATES OF AMERICA,

Respondent.

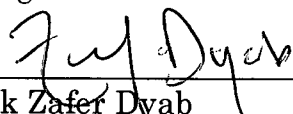
**CERTIFICATE OF SERVICE**

**PETITIONER**, Zack Zafer Dyab, do swear and declare that on this date, June 13, 2019, as required by the Supreme Court Rule 29 I have served the enclosed **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**, and **PETITION FOR REHEARING WRIT OF CERTIORARI**, on each party to the above preceding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them with first-class postage prepaid on the 13<sup>TH</sup> day of June, 2019

Solicitor General of the United States  
Room 5614  
Department of Justice  
950 Pennsylvania Ave. NW  
Washington, D.C. 20530-0001

Clerk of the Court  
Supreme Court of the United States  
One 1<sup>st</sup> Street NE  
Washington, D.C. 20543-0001

I declare under penalty of perjury that the forgoing is true and correct. Executed on June 13, 2019.

  
\_\_\_\_\_  
Zack Zafer Dyab  
Federal I.D. 15014-041  
USP Leavenworth Camp  
P.O. Box 1000  
Leavenworth, Kansas 66048

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Case No. 18-8996

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**IN THE  
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**ZACK ZAFER DYAB,**

Petitioner,

v.

**UNITED STATES OF AMERICA,**

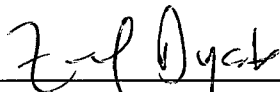
Respondent.

**DECLARATION OF COMPLIANCE**

COMES NOW, Petitioner, in his declaration under penalty of perjury, did comply with 28 U.S.C. Section 1746, and states as Petitioner, he is filing Pro Se and is an inmate confined to an institution, and has deposited the foregoing along with a Petition for Rehearing of his Writ of Certiorari, into the U.S.P. Leavenworth Camp internal mail system this 13<sup>th</sup> day of June, 2019, all of which was deposited in an envelope with the proper postage attached and mailed to the following:

Solicitor General  
of the United States  
Room 5614  
Department of Justice  
950 Pennsylvania Ave. NW  
Washington, D.C. 20530-0001

Clerk of the Court  
Supreme Court of the United States  
One 1<sup>st</sup> Street NE  
Washington, D.C. 20543-0001

  
\_\_\_\_\_  
Zack Zafer Dyab  
Federal I.D. 15014-041  
USP Leavenworth Camp  
P.O. Box 1000  
Leavenworth, Kansas 66048  
Phone: None