

No.

19-498

IN THE

SUPREME COURT OF THE UNITED STATES

RAYMOND LAMONTE ROGERS,

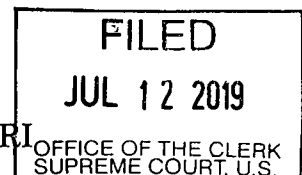
Petitioner(s)

v.

UNITED STATES OF AMERICA

Respondent(s)

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



PETITION FOR WRIT OF CERTIORARI

RAYMOND LAMONTE ROGERS
P.O. BOX 3000-Medium
Forrest City, AR 72336
870-494-4200

QUESTION(S) PRESENTED FOR REVIEW

- (1). Whether or not the Tenth Circuit Court of Appeals [erred], when denying your Petitioner, a certificate of appealability (COA) pursuant to 28 U.S.C.S. § 2253(c) to appeal the Kansas District Court's dismissal of your Petitioner's 28 U.S.C.S. § 2255 Motion to vacate for lack of subject matter jurisdiction?
- (2). Was the Fifth and Sixth Amendments in the United States Constitution violated when your Petitioner was criminally prosecuted without an indictment?
- (3). Is your Petitioner entitled to immediate release for his current unlawful detention?

PARTIES TO PROCEEDING

☒ 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 judgement is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	5
STATEMENT OF THE CASE.....	6
REASONS FOR GRANTING THE WRIT.....	13
CONCLUSION.....	15

INDEX TO APPENDIX

- APPENDIX A: Tenth Circuit Court of Appeals COA denial order.
- APPENDIX B: Kansas District Court's Memorandum and Order.
- APPENDIX C: Petitioner's Criminal Docket Sheet.
- APPENDIX D: Copy of First Superseding Indictment before it was dismissed on November 28th, 2011.
- APPENDIX E: Copy of Jury Instruction No. 18 charging an offense never charged by any grand jury.
- APPENDIX F: United States Government's admission that the Kansas District Court "constructively amended" the indictment through its jury instructions allowing Mr. Rogers to be convicted for an offense no grand jury charged him with violating.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
ROGERS v. UNITED STATES, 520 F. APP'X 727, 728 (10th Cir. 2013).....	7
SLACK v. MCDANIEL, 529 U.S. 473, 146 L.Ed. 2d 542, 120 S.Ct. 1595 (2000).....	8
SANDERS v. UNITED STATES, 373 U.S. 1, 10 L.Ed. 2d 148, 83 S.Ct.1086 (1963)..	9
HUGHES v. UNITED STATES, 18 L.Ed.3, 303 S.Ct. 4 WALL 232-237.....	10
STEPHENS v. UNITED STATES, 246 F.2d 607 (10th Cir. 1957).....	10
STORTI v. MASSACHUTETTS, 46 L.Ed.120, 183 U.S. 138.....	11
STIRONE v. UNITED STATES, 361 U.S. 212, 4 L.Ed.2d 252, 8 S.Ct. 270 (1960)...	11
EX PARTE BAIN, 121 U.S. 1, 30 L.Ed.841, 7 S.Ct.781 (1887).....	11
GOTO v. LANE, 265 U.S. 393, 68 L.Ed.1070, 44 S.Ct.525 (1924).....	11
BOWEN V. UNITED STATES, 946 F.2d 734, 737 (10th Cir. 1991).....	13
VAVLITIS V. UNITED STATES, 9 F.3d 206, 209 (1st Cir. 1993).....	13
HERTULAR V. UNITED STATES, 562 F.3d 433 (2nd Cir. 2008).....	13
MCKAY V. UNITED STATES, 30 F.3d 1418 (11th Cir. 1994).....	13
GOFT V. UNITED STATES, 187 F. App'x 486, 491 (6th Cir. 2006).....	13
FRIEDMAN V. UNITED STATES, 649 F.2d 199 (3rd Cir. 1981).....	13
VAN SOMEREN V. UNITED STATES, 118 F.3d 1214 (8th Cir. 1997).....	13
UNITED STATES V. WALKER, 363 F.3d 711 (8th Cir. 2004).....	14

STATUTES AND RULES

18 U.S.C.S. § 2113(a)(d)

18 U.S.C.S. § 924(c)

18 U.S.C.S. § 922(g)

28 U.S.C.S. § 2253(c)

28 U.S.C.S. § 1254(1)

28 U.S.C.S. § 2255(a)(b)(h)

28 U.S.C.S. § 1291

RULES COVERNING SECTION § 2255 PROCEEDINGS RULE 4(b)

OTHER

SECTION 2 IS AIDING & ABETTING

SECTION § 2072 of TITLE 28; UNITED STATES CODE

SECTION § 3771 and § 3772 of TITLE 18; UNITED STATES CODE

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

[X] 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,

[X] is unpublished.

The opinion of the United States court of appeals appears at Appendix B

to the petition and is

[] reported at _____; or,

[] has been designated for publication but is not yet reported; or,

[X] is unpublished.

☐ For cases from **state courts**:

The opinion of the United States court of appeals 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 United States court of appeals 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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was
April 15th, 2019

☒ 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: _____, 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment- Due Process of the Law Clause;

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury; nor be deprived of life, liberty, or property, without due process of law.

Sixth Amendment-Rights of the Accused;

In all criminal prosecutions, the accused shall... be informed of the nature and cause of the accusation.

28 U.S.C.S. § 2253(c) – Certificate of Appealability;

Unless a circuit justice or judge issues a certificate of appealability; an appeal may not be taken to the court of appeals from;

- (A). the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or
- (B). the final order in a proceeding under section § 2255 [28 U.S.C.S § 2255].

STATEMENT OF THE CASE

On December 3rd, 2010, a Criminal Complaint was filed in the Kansas District Court against your Petitioner, and his two co-defendants alleging bank robbery in violation of 18 U.S.C.S. § 2113(a) Section 2, possessing a brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C.S. § 924(c)(1)(A) Section 2, (DOC. #1). On December 7th, 2010, a Grand Jury returned a three count Indictment against your Petitioner and his two co-defendants in the Kansas District Court for bank robbery in violation of 18 U.S.C.S. § 2113(a) Section 2, possessing and brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C.S. § 924(c)(1)(A) Section 2, and being a felon in possession of a firearm in violation of 18 U.S.C.S. § 922(g) Section 2, (DOC. #12). Your Petitioner and his two co-defendants were arraigned on December 8th, 10th and 13th, 2010, (DOCS. #14, 20, 21).

On June 21st, 2011, a Grand Jury returned a First Superseding Indictment charging your Petitioner with all three counts contained in the December 7th, 2010, Indictment plus three additional counts; See (Appendix D), (1) bank robbery in violation of 18 U.S.C.S. § 2113(a) Section 2, (2) possessing and brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C.S. § 924(c)(1)(A) Section 2, and (3) being a felon in possession of a firearm in violation of 18 U.S.C.S. § 922(g) Section 2, (DOC. #54). On July 6th, 2011, your Petitioner was arraigned on the June 21st, 2011 First Superseding Indictment (DOC. #63).

On November 28th, 2011, the Kansas District Court “dismissed” the June 21st, 2011, First Superseding Indictment, in toto, against your Petitioner and his two co-defendants, at the request of the AUSA’s Motion to “Dismiss” (DOCS. #89, 91). On November 29th, 2011, your Petitioner was illegally tried and convicted in the Kansas District Court by way of a jury trial for armed bank robbery in violation of 18 U.S.C.S. § 2113(a)(d) Section 2, possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C.S. § 924(c)(1)(A) Section 2, and being a felon in possession of a firearm in violation of 18 U.S.C.S. § 922(g) Section 2. The Kansas District Court sentenced your Petitioner to 234 months (DOCS. #98, 103, 120). The Tenth Circuit Court of Appeals affirmed your Petitioner’s sentences and convictions on direct review. *See United States v. Rogers*, 520 F. App’x 727, 728 (10th Cir. 2013). No Writ of Certiorari was filed thereafter.

On December 2nd, 2013, your Petitioner filed a Section § 2255 Motion in the Kansas District Court raising numerous claims of “Ineffective Assistance of Counsel” and “Due Process Rights Violation” claims (DOCS. #146, 147, 148, 155, 158). The Kansas District Court denied his § 2255 Motion in a MEMORANDUM AND ORDER stating, “Because review of defendant’s motion and the accompanying court record conclusively show that he is not entitled to relief, this court denies the motion without an evidentiary hearing.” In this same denial order, the Court denied a COA (DOC. #162). No appeal was taken on the denial order.

On November 19th, 2018, your Petitioner filed a Section § 2255 Motion in the Kansas District Court raising a “Subject” and “Personal” matter [jurisdiction]

violation claim. Your Petitioner argued in his new § 2255 Motion, that the Kansas District Court was without “Subject” and “Personal” matter [jurisdiction] to criminally prosecute him or his two co-defendants for the crimes they currently stand sentenced in Federal Prison, because the Kansas District Court’s November 28th, 2011, Dismissal Order dismissing the June 21st, 2011, First Superseding Indictment, in toto, effectively “terminated” the criminal case since no indictment, counts or charges remained pending (DOC. #200). The Kansas District Court determined that your Petitioner’s § 2255 Motion was a Second or Successive Motion subject to authorization by the Tenth Circuit Court of Appeals under § 2255(h), so the Kansas District Court dismissed the § 2255 Motion for “lack of subject matter jurisdiction.” In this same denial order, the Kansas District Court denied a COA after applying the [wrong] COA analysis to its [procedural] ruling. *See* (Appendix B). Your Petitioner requested a COA in the Tenth Circuit Court of Appeals, which the Tenth Circuit Court of Appeals has now denied. *See* (Appendix A).

Your Petitioner is now requesting for Certiorari review of the Tenth Circuit Court of Appeals COA denial order. Your Petitioner argues that the Tenth Circuit Court of Appeals [erred] when it concluded that your Petitioner cannot meet the COA [procedural] component as set by this United States Supreme Court in *Slack v. McDaniel*, 529 U. S. 473, 484 (2000). In your Petitioner’s COA Application and Combined Opening Brief filed in the Tenth Circuit Court he argued that his newly filed November 19th, 2018, Section § 2255 Motion is not a Second or Successive Motion under § 2255(h), which is subject to authorization by the Tenth Circuit

Court of Appeals as both lower courts have determined, because his December 2nd, 2013, § 2255 Motion was never adjudicated “on the merits.” The Kansas District Court dismissed your Petitioner’s December 2nd, 2013, § 2255 Motion without an evidentiary hearing on any of the grounds presented in the motion after the District Court concluded that “based on review of the record all assignments of error is without merit in facts.” (DOC. #162). Your Petitioner argued in his COA application in the Tenth Circuit Court of Appeals that the District Court’s findings, thus based, is precisely a findings, the United States Supreme Court stated in *Sanders v. United States*, 373 U.S. 1, 10, L.Ed.2d 148, 83 S.Ct. 1086 (1963) only constitutes a ruling that the Petitioner’s pleadings are “deficient” and the ruling is not an adjudication “on the merits” of any grounds presented in the motion. *See Sanders v. United States*, *supra*, 1, 10, (1963); in *Sanders*, the Supreme Court set forth the circumstances under which prior determinations of the merits may effectively bar relitigation of habeas claims”. The *Sanders* Court held that controlling weight may be given to denial of a previous application for a federal habeas corpus, or for correction or vacation of a sentence pursuant to 28 U.S.C.S. § 2255 only if; (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. The *Sanders* Court also held that, “[a]” prior determination [on the merits] is deemed made of an application raising factual issues not conclusively resolved by files and records only if, an evidentiary hearing was held.

See Sanders v. United States, supra, 1, 10 (1963); *also see Hughes v. United States*, 18 L.ED.3rd 303 S.Ct. 4 Wall 232-237 (1886); *also see Stephens v. United States*, 246 F.2d 607 (10th Cir. 1957); *also see Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (“[a] petition which is filed after an initial petition was dismissed without adjudication on the merits is not a second or successive petition”). Wherefore, in accordance with the principles articulated by the Sanders court as to what the court held to be deemed a determination on the merits ruling of a prior motion for successiveness purposes, and because the Kansas District Court disposed of your Petitioner’s December 2nd, 2013, § 2255 Motion without a hearing, therefore, without making findings of fact and conclusions of law on the substantive merits of the grounds raised in the motion as required by the § 2255 statute, than jurists of reason can find it debatable whether the Kansas District Court correctly denied your Petitioner’s November 19th, 2018, § 2255 motion for lack of jurisdiction. According to *Sanders v. United States, supra*, 1, 10 (1963); *also see Slack v. McDaniel, supra*, 120 S.Ct. 1595 (2000); *also see Stephens v. United States*, 246 F.2d 607 (10th Cir. 1957). Furthermore, although the Tenth Circuit Court of Appeals never reached the [Constitutional] component of the COA analysis, your Petitioner argues that jurists of reason can find it debatable whether his November 19th, 2018, § 2255 Motion raises a valid claim of the denial of a constitutional right. Your Petitioner’s claim that he and his two co-defendants were criminally prosecuted in the Kansas District Court [without an indictment] in violation of the Constitution’s Fifth and Sixth Amendments raises a claim of your Petitioner’s “right to be tried” in accordance

with Due Process of the Law under the Fifth Amendment, and your Petitioner right to be “informed of the nature and cause of the accusation” in accordance with the Sixth amendment. For these such reasons, jurists of reason can find it debatable whether the Tenth Circuit Court of Appeals was correct when it declined to grant a COA.

Alternatively, your Petitioner is requesting for this United States Supreme Court to rule “on the merits” of his Fifth Amendment Due Process Right violation claim, of which he raised in his November 19th, 2018 § 2255 Motion. That the Kansas District Court “lacked [Subject] and [Personal] matter jurisdiction” during his criminal prosecution. *See Storti v. Massachusetts*, 45 L.ED. 120, 183 US 138; *also see Stirone v. United States*, 261 U.S. 212, 4 L.ED.2d 252, 8 S.Ct. 270 (1960); *Ex parte Bain*, 121 U.S. 1, 30 L.ED. 841, 7 S.Ct. 781 (1887); *also see Goto v. Laney* 256 U.S. 393, 68 L.ED. 1070, 44 S.Ct. 525 (1924). In support of this request, your Petitioner has attached hereunto as (Appendix C) a copy of his “Criminal Docket Sheet” to provide this Supreme Court with conclusive documented record evidence showing that the June 21st, 2011, First Superseding Indictment was “dismissed”, in toto, upon a “Motion to Dismiss” which was filed by the AUSA (Aaron L. Smith), on November 28th, 2011, before your Petitioner was tried by jury trial. This documented record evidence shows that no new indictment was ever returned by a grand jury after the dismissal of the June 21st, 2011, First Superseding Indictment or before the jury trial took place on the crimes your Petitioner is currently in federal prison for. *See* (Appendix C, DOCS. #89 and 91). Also, attached hereunto as

(Appendix D and E) is record documented evidence of his “Criminal Indictment” (before it was dismissed), and “Jury Instruction No. 18” to provide this Court with more conclusive documented record evidence which proves the Kansas District Court “constructively amended” the charges the grand jury originally charged him and his two co-defendants with violating during his jury trial. *See* and compare (Appendix D and E). These documents provided in Appendix D, E, and F presents conclusive proof that the Kansas District Court acted without lawful [subject] and [personal] matter jurisdiction to criminally prosecute your Petitioner by way of a jury trial on the offense charged in Jury Instruction No. 18. *See* (Appendix E); *also see Stirone v. United States*, supra, 361 U.S. 212, 8 S.Ct. 270 (1960); *also see Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781 (1887). Based on all the documented record evidence attached hereunto and presented in Appendix C, D, E and F of this petition, this United States Supreme Court can agree with your Petitioner that he was not afforded Due Process of the Law in violation of the United States Constitution’s Fifth and Sixth Amendments during his criminal proceeding. Wherefore, your Petitioner prays this United States Supreme Court will grant his Certiorari Petition and exercise the supervisory power granted to this Court under the United States Constitution to order your Petitioner and his two co-defendants released from their unconstitutional detention immediately, or to provide your Petitioner with any other relief this honorable court deems he is entitled to.

REASONS FOR GRANTING THE PETITION

- (1). The denial of a certificate of Appealability (COA) presents a serious question of law of national importance to the public of the issue because it deals with a Federal Circuit Court's lawful jurisdiction to review and correct a Federal District Court's erroneous procedural ruling that it lacks subject matter jurisdiction of a case properly presented before it.
- (2). The Subject and Personal matter in which he and his two co-defendants have been sentenced to federal prison for, pursuant to an illegal criminal prosecution, which was initiated in a United States District Court without an indictment found by a grand jury is a violation of the United States Constitution's Fifth and Sixth Amendments.
- (3). Your Petitioner's subject and personal matter jurisdictional violation claim raised in his § 2255 Motion, presents a serious question of law of national importance to the public of the issue. The Federal Circuit Courts are "split" on the question of whether or not a Superseding Indictment displaces a preceding Indictment rendering the preceding Indictment null? *See Bowen v. United States*, 946 F.2d 734, 737 (10th Cir. 1991); *also see Vavlitis v. United States*, 9 F.3d 206, 209 (1st Cir. 1993); *also Hertular v. United States*, 562 F.3d 433 (2nd Cir. 2008); *also see McKay v. United States*, 30 F.3d 1418 (11th Cir. 1994); *also see Goft v. United States*, 187 F. App'x 486, 491 (6th Cir. 2006); *also see Friedman v. United States*, 649 F.2d 199 (3rd Cir. 1981); *also see Van Someren v. United States*, 118 F.3d 1214 (8th Cir.

1997); *also see United States v. Walker*, 363 F.3d 711 (8th Cir. 2004).

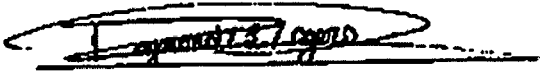
Wherefore, there can be no doubt that once the Tenth Circuit rules “on the merits” of the jurisdiction claim raised by your Petitioner in his § 2255 Motion, there is a 99% chance that your Petitioner’s case will come back before this Court for this Court to resolve the split amongst the Federal Circuit Courts, if this Court decides to not rule “on the merits” of your Petitioner’s jurisdictional claim in this Certiorari proceeding.

- (4). In accordance with *Slack v. McDaniel*, *supra*, 529 U.S. 473, 484 (2000) and the principles articulated in *Sanders v. United States*, *supra*, 1, 10 (1963) as to what constitutes an “on the merits” determination of a prior application for second or successive purposes, the Tenth Circuit Court of Appeals [erred] when it denied our Petitioner a COA. Your Petitioner should be granted a COA and in the interest of justice relief from his unconstitutional detention forthwith.
- (5). Your Petitioner’s case raises jurisdictional issues, which are a serious question of law of national importance to the public of the issue. Since your Petitioner is currently being denied access to the Federal District Court in Kansas, and the Tenth Circuit Court of Appeals, after which the Kansas District Court acted without Subject and Personal matter jurisdiction to criminally prosecute your Petitioner and his two co-defendants for the crimes they now stand sentenced to federal prison on.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


 *Pro se*

Date: July 12, 2019

§ 1746 DECLARATION UNDER THE PENALTY OF PERJURY

I declare (certify, verify, or state) under the Penalty of Perjury under the laws of The United States of America, that the foregoing is true and correct. Executed on July 12, 2019.

Respectfully Signed,

 *Pro se*
