ORIGINAL

Case No. 19-5241

IN THE
SUPREME COURT OF THE UNITED STATES

ZACK ZAFER DYAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for *Writ of Certiorari* to Appeals Court Tenth Circuit
Appeal No. 19-3010

PETITION FOR *WRIT OF CERTIORARI*

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QUESTION PRESENTED

Does the Petitioner have to test the legality of his detention in the initial 2255 motion, even though the argument would have been rejected on the merits because such a claim was foreclosed by the District and Circuit Court, to be able to invoke Sec. 2255(e), saving clause to test his detention under Sec. 2241?

Did the Tenth Circuit Court of Appeals abuse its discretion by denying the petition under Sec. 2241, when its decision is in conflict with the recent Supreme Court Case in *United States v. Wheeler*, 2019 U.S. Lexis 1990, No. 18-420, March 18, 2019?

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR *WRIT OF CERTIORARI*

Petitioner respectfully prays that the Petition for *Writ of Certiorari* issue to review the judgments below

OPINIONS BELOW

For Cases from Federal Courts:

- The denial of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to the petition and the Opinion is reported at 2019 U.S. App. Lexis 11214, April 17, 2019.

- The Opinion of the United States District Court of Kansas appears at Appendix C to the petition and is reported at 2018 U.S. Dist. Lexis 217246, December 28, 2018.

JURISDICTION

For Cases from Federal Courts:

A timely petition for rehearing *en banc* was denied by the United States Court of Appeals for the Tenth Circuit on June 4, 2019, and a copy of order denying the rehearing *en banc* appears at Appendix B.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner asserts his reliance on Fifth, Sixth and Fourteenth Amendments, due right protection, and thereby the saving clause, Sec. 2255 (e), as a remedy for fundamental defect claim, which resulted in a complete miscarriage of justice.

STATEMENT OF THE CASE

On October 26, 2010, the Petitioner entered a plea of guilty to Count 1 of the second superseding indictment, Conspiracy to Commit Wire Fraud (in violation of 18 U.S.C. Sec. 371; and Count 11 of the second superseding indictment, Money Laundering (in violation of 18 U.S.C. Sec. 1957). See *United States v. Dyab*, Case # 09-CR-00364-JNE-JJK ; Docket # 127.

On September 15, 2011, Petitioner was sentenced to a term of 60 months as to Count 1ss and 120 months as to count 11ss to be served concurrently followed by three years supervised release term. The judgment also required Petitioner to pay restitution in the sum of $6,374,950. The judgment was affirmed without an appeal as a result of ineffective assistance of counsel.

On September 13, 2012, Petitioner sought post-conviction relief under 28 U.S.C. Sec. 2255. On February 20, 2013, the District Court denied his motion and the Eight Circuit Court of Appeals affirmed on December 5, 2013. Petitioner appealed on a *Writ of Certiorari* to the United States Supreme Court and was denied on May 1, 2014.

On October 31, 2014, the government moved to amend the Petitioner's judgment, *Ex Parte*, and the District Court granted the government's motion but failed to give the Petitioner notice of its order, or order the government to give the Petitioner a notice of its motion.

On November 4, 2015, the Petitioner filed a motion under U.S.C. Sec. 2255 after he discovered the entry of the government's motion and the entry of the order

to amend judgment. The Petitioner attacked the new judgment pursuant to *Magwood v. Patterson*, 561 U.S. 320, 130 S. Ct. 2788, 177 L. Ed. 2d 592 (2010), on two grounds: (1) Petitioner was denied his Fifth Amendment right to notice and an opportunity to be heard before the court granted the government's motion to amend judgment, *Ex Parte*, and before the court entered and order amending judgment. (2) the amended sentencing judgment is invalid because it was predicated upon a money laundering conviction which Petitioner is actually innocent of committing pursuant to *United States v. Santos*, 553 U.S. 507, 514 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008). See Docket # 224.

On December 23, 2015, the District Court denied the petitioner's Sec. 2255 motion. The court granted a certificate of appealability. Petitioner appealed, and the Eight Circuit Court of Appeals denied the appeal on May 4, 2017, see *Dyab v. United States*, 855 F. 3d 919 (8th Cir. 2017). The Eight Circuit found that the District Court's order amending Petitioner's judgment did not result in a new sentence or judgment that would permit Petitioner to file a successive Sec. 2255 Id. at 923-24. Petitioner filed a Petition for Writ of Certiorari, which was denied on October 2, 2017, *Dyab v. United States*, 138 S. Ct. 239 (2017).

On November 30, 2018, Petitioner filed a petition under 28 U.S.C. Sec. 2241, with United States District Court of Kansas, at his place of confinement, arguing that his conviction and sentence for money laundering in violation of 18 USC Sec. 1957 is invalid pursuant to *United States v. Santos*, 553 U.S. 507 (2008), invoking

the saving clause of Sec. 2255(e), arguing that the initial Sec. 2255 is inadequate or ineffective to test the legality of his detention.

On December 28, 2018, the District Court of Kansas denied the petition without prejudice. See Appendix C. On January 9, 2019, Petitioner filed a motion for Transfer to Cure Want of Jurisdiction, and a timely notice of appeal.

On January 10, 2019, the District Court of Kansas denied Petitioner's motion to transfer to cure want of jurisdiction.

On April 17, 2019, the Tenth Circuit Court of Appeals denied the appeal. See appeal No. 19-3010, Appendix A.

On June 4, 2019, the Petition for Rehearing *En Banc* was denied. See Appendix B.

Furthermore, the Petitioner asks the Honorable Court for liberal construction if his *Pro Se* petition in accordance with *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

REASONS FOR GRANTING THE *WRIT*

The Tenth Circuit Court of Appeals erred in their determination and denied the petition under Sec. 2241, concluding that the initial Sec. 2255 was not inadequate or ineffective relying on their relevant metric or measure in *Prost v. Anderson*, 636 F. 3d 578, 581 (10th Cir. 2011). The court overlooked the specific circumstances of the Petitioner's initial Sec. 2255 motion. Their denial was in conflict with the recent Supreme Court case in *United States v. Wheeler*, 2019 U.S. Lexis 1990, No. 18-420, March 18, 2019, a claim presenting a fundamental defect which inherently resulted in a complete miscarriage of justice.

The Tenth Circuit Court of Appeal erroneously denied the petition under Sec. 2241 following Prost on two issues:

> 1 – [our decision in Prost nonetheless forces us to conclude that Petitioner cannot now pursue the argument through a Sec. 2241 petition. In Prost we held that "[t]he relevant metric or measure" for determining whether Sec. 2255 is adequate or effective is "whether a Petitioner's argument challenging the legality of this detention could have been tested in an initial Sec. 2255 motion." Prost, 636 F. 3d at 584 (emphasis added)]

See order, (Pg. 4, Ln 15-20), Appendix A.

> 2 – [The Prost court then held that the Petitioner in that case could not pursue a Santos base argument in a Sec. 2241 petition even though adverse Circuit precedent would have prevented him from prevailing on it in his earlier Sec. 2255 motion. See Id. at 590-93. In so holding, the Court explained that the petition was 'entirely free to raise and test a Santos-type argument in his initial Sec. 2255 motion' even though that argument likely would have failed at the time. Id at 590.]

See order, (Pg. 5, Ln 9-14), Appendix A.

ARGUMENT

On September 13, 2012, Petitioner sought post-conviction relief under 28 U.S.C. Sec. 2255 raising ineffective assistance of counsel claim. At that time the Supreme Court's decision in *United States v. Santos*, 553 U.S. 507 (2008), was still evolving between the Circuit Courts. The Eighth Circuit followed their interpretation of the new statutory rule in Santos' application to criminal cases involving a money laundering statute.

The Eighth Circuit restricted their application of Santos-type claims only to criminal activities involving illegal gambling businesses, and held that Santos is not retroactive on collateral review. The Eighth Circuit held that since Santos was a plurality opinion, its precedent is restricted to the narrowest holding that governed five votes. See *United States v. Spencer*, 592 F. 3d 866, 879 n.4 (8th Cir. 2010), citing *Marks v. United States* 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 260 (1977). The Eighth Circuit in Spencer concluded that the following definition in Justice Stevens' concurrence provides the narrowest holding in Santos: "The revenue generated by a gambling business that is used to pay the essential expenses of operating that business is not 'proceeds' within the meaning of money laundering statute." Santos, 553 U.S. at 528, 128 S. Ct. at 2033 ---. *United State v. Mathison*, 2010 U.S. dist. Lexis 75659, 2010 WL 2932957 (D.S.D.) at *3. See also, *United States v. Spencer*, 592 F. 3d 866, 879-80 (8th Cir. 2010)("Santos does not establish binding precedent that the term 'Proceeds' means 'Profits' except regarding an illegal gambling

charge.") (Citation Omitted, Punctuation altered). See also *Bistrup v. Hollingsworth*, 2012 U.S. Dist. Lexis 76097, ("even if Petitioner's interpretation of Santos is accepted, the Supreme Court has not made Santos retroactive to cases on collateral review"). *Banks v. Pearson*, 2009 U.S. Dist. Lexis 128823, 2009 WL 6667964 (S.D. Miss) (concluding Santos is not retroactive to cases on collateral review).

Finally, on April 8, 2014, the Eighth Circuit Court of Appeals came down with their decision on *Mathison v. Berkabile*, 2014 U.S. Dist. Lexis 48229, April 8, 2014. ("New procedural rules generally do not apply retroactively unless the rule is of 'watershed' magnitude implicating 'the fundamental fairness and accuracy of the criminal proceeding' or unless the rule prevents the lawmaking authority from criminalizing certain kind of conduct." The rule in Santos is not a new procedural rule. The Santos decision provides a new definition of a key phrase in the money laundering statute and constitutes a substantive change of law which increases the government's burden of proof, and the decision is therefore retroactive and applies on collateral review. See *Wooten v. Cauley*, 677 F. 3d 303, 308 (6th Cir. 2012); see also, *Davis v. United States*, 417 U.S. 333, 346-347, 74 S. Ct. 2298, 41 L. Ed. 2d 109 (1974) (conviction and punishment for an act is that the law does not make criminal justifies collateral relief.)

Actual Innocence Claim Under Sec. 2241

In *United States v. Alaimalo*, 313 F. 3d 1188 (9th Cir. 2002), after Alaimalo concluded his Sec. 2255 action, "the Ninth Circuit *En Banc* Court held that transporting drug from one location within the United States (California) to another (Guam) does not constitute importation within the meaning of 21 U.S.C. Sec. 952(a) [.]" Thus overruling two previous decisions holding to the contrary (citing *United States v. Cabaccang*, 332 F. 3d 622, 623 (9th Cir. 2003)). Alaimalo was subsequently granted relief under the scape hatch because "Cabaccang effected a material change in the law applicable to Alaimalo's case. Such that legal basis for his actual innocent claim did not become available until Cabaccang was decided." This was so even though Alaimalo did not seed *en banc* review of the denial of his direct appeal, which essentially raised the same issue that was decided by the *en banc* court in Cabaccang:

> "The mere possibility that the Ninth Circuit would overrule its previous holding *en banc* did not make Alaimalo's actual innocence claim 'available' to him for the purpose of Sec. 2241. If it did, there would be a legal basis for any actual innocence claim that is currently foreclosed by binding Ninth Circuit law, as there is always the infinintesimally small possible of sudden en banc reversal. Requiring a Petitioner to raise all theoretically possible actual innocence claims in his first Sec. 2255 motion would put an unreasonable burden on petitioners and the courts. 'It would just clog the judicial pipes to require defendants, on pain of forfeiting all right to benefit from future changes in the law, to include challenges to settled law in their briefs on appeal and in post-conviction filing.' [In re] Davenport, 147 F. 3d [605] at 610 [(7yh cir. 1998)]. Id. at 1048-49 (footnote omitted); see also Id. at 1048 n.2 (the court also noted only 16 cases were heard *en banc* the year that Alaimalo's direct appeal was decided). The Court also stressed that "[f]or purpose of determining whether a claim was unavailable under Sec. 2241, a Court looks to whether controlling law

> in this circuit foreclosed Petitioner's argument." Id 645 f. 3d at 1048 (emphasis in original). Because Cabaccang changed controlling law in the Ninth Circuit the court concluded that Alaimalo did not have an unobstructed chance to present his actual innocence claim prior to that decision. Id at 1049.

The Petitioner in this instant case has the same circumstances presented in Alaimalo's case. The actual innocence claim pursuant to Santos was foreclosed by the Eighth Circuit at the time the Petitioner filed his first Sec. 2255 motion. The Petitioner was barred to bring a second or successive motion because Santos' decision did not announce a new rule of constitutional law rather it was a new statutory interpretation which became "available" by the Eighth Circuit pursuant to *Mathison v. Berkabile*, 2014 U.S. Dist. Lexis 48229, April 8, 2014. Because Mathison changed controlling law in the Eighth Circuit, therefore, the material change in the law made Santos' claim applicable to the Petitioner's case.

INVOKING SAVING CLAUSE OF SECTION 2255(e)

A petitioner which seeks to invoke the saving clause of Sec. 2255(e) in order to proceed under Sec. 2241 must establish: (1) that he relies on "not a constitutional case, but a statutory interpretation case, so [that he] could not have invoked it by means of a second or successive, Sec. 2255 motion." (2) that the new rule applies retroactively to cases on collateral review and could not have been invoked in his earlier proceeding, and (3) that the error is "grave enough ... to be deemed a

miscarriage of justice corrigible therefore in a *habeas corpus* proceeding", such as one resulting in "a conviction for a crime of which he was innocent." Brown v. Riso, 696 F. 3d 638, 640 (7th Cir. 2012); see also Davenport, 147 F. 3d at 611 (referencing the procedure as one to correct "a fundamental defect" in the conviction or sentence).

In addition, if the Court finds that any of the Petitioner's claim satisfy the Davenport test the next question is what circuit law to apply to the claim. The "Court of Appeals for the Seventh Circuit has not decided 'which circuit law applies to a Sec. 2241 petition brought in the district of the Petitioner's incarceration but challenging the conviction or sentence determination of another District Court in another circuit' ". Roberts v. Watson, 2017 U.S. Dist. Lexis 203930, *4 (W.D. Wis. Dec. 12, 2017) (Citing Salazar v. Sherrod, No. 09-cv-619-DRH-DGW, 2012 U.S. Dist. Lexis 123903, *12-13 (S.D. III. Aug. 31, 2012)) Two district courts in the Seventh Circuit have concluded that they "should apply the law of the circuit of conviction in reviewing a sentence or conviction under Sec. 2241, in part to avoid inconsistent results with motion under Sec. 2255, which apply to the law of the Circuit Court where the Petitioner was convicted." Id.

APPLICATION OF RETROACTIVITY TO CASES ON COLLATERAL REVIEW

In United States v. Sanders, 247 F. 3d 139 (4th Cir. 2001), We "assume[d], without deciding, that a Circuit Court can declare a new rule retroactive on

collateral review in an initial Sec. 2255 petition." Id at 246 n.4. In doing so, we noted the contrast in the statutory language governing retroactivity for purpose of Sec. 2255(f)(3) and the statutory language governing retroactivity for the purpose of filing a "second or successive" motion in Sec. 2255(h).Id. Unlike in the former, which reference a "right [that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C.A. Sec. 2255 (f)(3) (emphasis added), the latter specifically provides that "[a] second or successive motion must be certified as provided in Sec. 2244 by a panel of the appropriate Court of Appeals to contain ... a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C.A. Sec. 2255(h)(2)(emphasis added). We also noted, however, that "the language of subsection [(F)(3)] can also be read to require the Supreme Court to make the decision on retroactivity before a petitioner may file an initial Sec. 2255 motion." Sanders, 247 F. 3d at 146 n.4, but see *Dodd v. United States*, 545 U.S. 353, 365-366 n.4 (2005) (Stevens, J., dissenting)(noting but disagreeing with the assumption made by the majority in Dodd and "every circuit to have addressed the issue." "that the decision to make a new rule retroactive for purpose of this section can be made by any lower court," rather than "only [by] the Supreme Court" (first emphasis added)). We now join those circuits that have considered the issue and hold that Sec. 2255 (f)(3) does not require that the initial retroactivity question be decided in the affirmative only by the Supreme Court. See *Wiegand v. United States*, 308 F. 3d 890, 892 (6th Cir. 2004)(holding that "any federal court can make

the retroactivity decision." Dodd v. United States, 365 F. 3d 1273, 1278 (11th Cir 2004)(noting that "every circuit to consider this issue was held that a court other than the Supreme Court can make the retroactivity decision for purposes of Sec. 2255 [(f)(3)]"), aff'd 545 U.S. 353, 125 S. Ct. 2478, 162 L. Ed 2d 343 (2005); United States v. Swinton, 333 F. 3d 481, 486, 487 (3rd Cir. 2003)(concluding that "the statute of limitations provision of Sec. 2255 allows district courts and courts of appeals to make retroactivity decisions"; Fischer v. United States, 285 F. 3d 596, 599-600 (7th Cir. 2002)(noting that "district and appellate courts, no less than the Supreme Court, may issue opinion holding that a decision applies to retroactivity to cases on collateral review." (internal quotation marks and alteration omitted)); United States v. Lopez, 248 F. 3d 427, 432 (5th Cir. 2001)(holding that Sec. 2255 (f)(3) "does not require that the retroactivity determination must be made by the Supreme Court itself").

In the Eighth Circuit's case Mathison v. Berkeile, 2014 U.S. Lexis 48229 (8th Cir. 2014) decided that Santos is applicable and is retroactive on collateral review.

A FUNDAMENTAL DEFECT CLAIM UNDER SEC. 2241

The United States Supreme Court has long recognized a right to traditional *habeas corpus* relief based on an illegally extended sentence. The core of *habeas corpus* has included challenges to the duration of the prisoner's sentence. Indeed, one purpose of traditional *habeas* relief was to remedy statutory, as well as

constitutional, claims presenting a fundamental defect which inherently results in a complete miscarriage of justice and exceptional circumstances where the need for the remedy afforded by the *Writ of Habeas Corpus* is present. But if the court held that a prisoner was foreclosed from seeking collateral relief from a fundamentally defective sentence, and through no fault of his own, has no source of redress this purpose would remain unfulfilled, therefore, 28 U.S.C.S. Sec 2255 (e) must provide an avenue for prisoners to test the legality of their sentences pursuant to 28 U.S.C.S. Sec 2241. The escape hatch applies when a petitioner (1) makes a claim of actual innocence, and (2) had not had an unobstructed procedural shot at presenting that claim, see *Smith v. Martinez*, 2018 U.S. Dis, Lexis 3766, (9th Cir. 2018)

When a petition to be heard on the merits by means of the "saving clause" per 28 U.S.C. Sec, 2255 (e). The saving clause provides that an individual may seek relief from an illegal detention by way of traditional 28 U.S.C. Sec. 2241 *habeas corpus* petition if he can demonstrate that a Sec. 2255 motion is "inadequate or ineffective to test the legality of his detention."

28 U.S.C. Sec. 2255 is inadequate and ineffective to test the legality if a sentence when (1) at the time of sentencing, settled law of the Circuit or the United State Supreme Court established the legality of the sentence (2) Subsequent to the prisoner's direct appeal and first Sec. 2255 motion; the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review. (3) The prisoner is unable to meet the gate keeping provisions of Sec. 2255

(h)(2) from second or successive motions; and (4) due to this retroactivity change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect. See *Wheeler v. United States*, 886 F. 3d 415; 2018 U.S. App. Lexis 7756, March 28, 20183.

In *United States v. Wheeler*, 2019 U.S. Lexis 1990 No. 18-420, March 18, 2019, the Unites State Supreme Court denied the requests for Certiorari and the decision in Wheeler will stand, holding that: - Sec. 2255(e), saving clause could be invoked on actual innocence of the sentence. - Sec. 2255(e), saving clause should be invoked if at the time a defendant was sentenced, precedent made the sentence illegal, but after the prisoner's appeal and Sec. 2255 motion, the settled substantive law was changed and was held to be retroactive.

Accordingly, using Prost as a measure to determine the initial Sec. 2255 is inadequate or ineffective is not how the Supreme Court has long recognized as a venue to solve a fundamental defect claims, which resulted in a complete miscarriage of justice.

APPLICATION OF SANTOS' CLAIM / ACTUAL INNOCENSE

In *United States v. Santos*, 553 U.S. 507 (2008) the United States Supreme Court affirmed the Seventh Circuit decision in Santos, that the word "proceeds" in the federal money laundering statute as applying only to transaction involving criminal 'profits', not criminal 'receipts'.

Justice Scalia delivered the plurality opinion observed that Congress has defined "proceeds" in various criminal provisions sometimes to mean "receipts" and sometimes to mean "profits". The plurality opinion opined that either definition made sense in the context of the money laundering statute. Santos, 553 U.S. at 511-512.

The plurality opinion concluded that "[b]ecause the 'profits' definition of 'proceeds' is always more defendants-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted." Santos, 553 U.S. at. 514.

In this instant case, on October 26, 2010, Petitioner pled guilty to Count 11 of the second superseding indictment charging him with engaging in monetary transactions in criminal derived proceeds in violation of 18 U.S.C. Sec. 1957. The criminally derived proceeds are identified as being proceeds of Count 3, a wire fraud charge in violation of 18 U.S.C. Sec. 1343. However, Petitioner was not convicted of having violated Count 3, it was dismissed by the Court on September 15, 2011, as part of a plea agreement. Petitioner pled guilty to Count 1 of the second superseding indictment charging conspiracy to engage in mortgage fraud, in violation of 18 U.S.C. Sec. 371, while the mortgage fraud conviction is based on wire fraud a "merger problem" arises when defining 'proceeds' as 'receipts' automatically makes commission of the predicate offense a commission of money laundering and where the predicate offense carries a much lower statutory maximum sentence then the associated money laundering charge. See *United States v. Kratt*, 579 F. 3d 558 (6th Cir. 2009) (a merger problem would exist "if" 'proceeds' were to be defined as

'receipts' rather than 'profits'," such that the money laundering charge could be based on the same transaction as the predicate crime. Santos, at Id. 400. The "merger problem" also occurs when a defendant could be punished for the same transaction under the money laundering statute as well as another statute, "namely the statute criminalizing the specified unlawful activities underlying the money laundering charge. Santos, at Id. 402.

In this instant case the statutory maximum for conspiracy to commit wire fraud was five years, while the statutory maximum for money laundering was ten. Because the money laundering charge significantly increased the Petitioner's exposure to prison time, it is necessary to determine whether the predicate offense and the money laundering charge merged. See *United States v. Crosgrove*, 637 F. 3d 646 (6th Cir. 2011), a case identical to Petitioner's where relief from the money laundering conviction was granted.

The Petitioner take the position that pursuant to the Supreme Court's holding in *United States v. Santos*, 553 U.S. 507 (2008), the Petitioner's money laundering conviction in violation of U.S.C. Sec. 1957 should be vacated.

The Petitioner bases his position on Justice Stevens' concurrence in Santos holding that when a merger problem exists, then 'proceeds' may be defined as 'profits'. In *United States v. Rabashkin*, 655 F. 849, 865 (8th Cir. 2011) the Eighth Circuit acknowledged that under Justice Stevens' controlling concurrence 'proceeds' must mean 'profits' whenever a broader definition would 'perverse[ly] result in a 'merger problem' ". 655 F. 3d 849, 865 (quoting Santos, 553 U.S. at 527, 528 n.7).

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 Tenth Circuit Court of Appeals be reversed and the case be vacated and remanded to be heard on the merits.

Respectfully submitted,

Zack Zafer Dyab

July 10, 2019