

No. 19-5241

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IN THE SUPREME COURT OF THE UNITED STATES

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ZACK ZAFER DYAB, PETITIONER

v.

NICOLE ENGLISH, WARDEN

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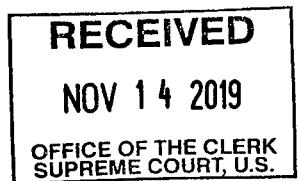
ON PETITION FOR A WITE OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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REPLY BRIEF TO THE GOVERNMENT'S RESPONSE

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Petitioner submits the following in reply to the Solicitor General's response.

The question presented in the government's response is simply a cannard or red herring, and therefore is irrelevant to the petition.

1- The Solicitor General stated in his question that Santos, 553 U.S. 507 (2008), was decided before petitioner pleaded guilty.

2- To raise a claim based on statutory interpretation decision is when the controlling law of the Circuit precedent is not foreclosed on the petitioner's claim.

3- Petitioner contends that the saving clause in 28 U.S.C. Sec. 2255(e) permits a federal prisoner to challenge his conviction in an application for a writ of habeas corpus under 28 U.S.C. Sec. 2241 based on intervening decision of statutory interpretation which became available under the controlling Circuit law and if he can demonstrate that Sec. 2255 motion is "inadequate or ineffective to test the legality of his detention".

4- The initial Sec. 2255 is considered inadequate or ineffective when petitioner can show that he had an obstructed chance to present his actual innocence claim. (petition Pg. 10).

5- The Solicitor General conceded in his response brief that the remedy provided by 28 U.S.C. Sec. 2255(e) is "inadequate or ineffective to test the legality of [a prisoner's] detention" if (1) an intervening decision of this Court has narrowed the reach of a federal criminal statute, such that the prisoner now stands convicted of conduct that is

not criminal; and (2) controlling circuit precedent squarely foreclosed the petitioner's claim at the time of his trial (or plea), appeal , and first motion under Section 2255.

6- In United States V. Wheeler, 2019 U.S. LEXIS 1990, No. 18-420, March 18, 2019, this Court denied the government's request for writ of certiorari and affirmed the Court of Appeals' decision that (1) Sec. 2255(e), saving clause could be invoked on actual innocence claim, and (2) 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.

7- Petitioner contends that his claim is similar to the claim in Wheeler, 139 S. Ct. 1318 (2019). The petitioner's habeas petition challenging his conviction pursuant to Santos which was an intervening decision of statutory interpretation, which became available when the Eighth Circuit changed its controlling law. See, Mathison V. Berkabile, 2014 U.S. Dist. LEXIS 48229, April 8, 2014. Petitioner contends that invoking the saving clause of Sec. 2255(e) is the proper vehicle to address the issue.

8- The response brief referenced United States V. Rubashkin, 655 F.3d 89, 865-867 (2011), as a case where the Court allowed more than illegal gambling cases. In Rubashkin the Court explained the difference between Rubashkin's bank fraud case and Santos' in relation to the merger problem. Rubashkin's case is not a measure to be used as a case where the Court allowed issues other than illegal gambling. There

are many cases that were denied after Rubashkin's for being cases other than illegal gambling, and for Santos was not retroactive to cases on collateral review at that time. (Petition 9).

#### CONCLUSION

Petitioner has met the requirements to invoke Sec. 2255, Saving Clause, and his petition should be granted.

Respectfully Submitted;

November 4, 2019.



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