19-8629

N O. _____

I N T H E

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

REV. CARPEAH RUDOLPH NYENEKOR, SR.

Petitioner

V.

UNITED STATES OF AMERICA

Respondent

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

PETITION FOR WRIT OF CERTIORARI

Rev. Dr. Carpeah Rudolph Nyenekor, Sr.
I.D. No. 69089-054, P.O. Box 630
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QUESTION PRESENTED

In Illinois V. Gate, 462 U.S. 213 (1983), the Supreme Court Stated that, when a Search Warrant has been Dismissed based on Falsely Sworn Affidavit, and Two State Court has Dismissed the Warrant and its Application in T W O Separate State Court Trial, a United States Attorney C A N N O T Use the same Affidavit and Search Warrant known to be false and Mislead a Federal Grand Jury to Indict the Same Aquitted defendant the Third Time in a Federal District Court as done in this Case which the United States Court Of Appeals Now Overruled in direct Conflict with its Own Rulling and Precedents and that of its Sisters Circuits.

Moreover, the Supreme Court has Stated in Several of of its Precendents that, a Search Warrant may not Rest only Upon a M E R E Affirmance or belief without disclosure of Supporting Facts and Evidence upon which it may be issued, nor should a Issueing Judge Conclude, and Accept without questioning the Veracity of the Evidence, and Affording little if any Weight to the Police's Conclusory Statement that, the Warrant is Requested based on only the Officer's training and experience that the Person who arrest is sought has committed a crime.

THE QUESTION PRESENTED HERE IS:

Since the various Circuits are in Conflict on the Meaning of Duel Sovereignty Doctrine in that, this Court has Specifically Stated that, when re-trying a defendant, the Reviewing Court MUST evaluate the Second Charges for Double Jeopardy Safe Guide

and see whether the Second Charge have the same Elements that made up the Same Crime Charge in the First Instance, because, what has been done in a State Court is Res Judicata and CANNOT be Re-Examined on the Premised that, what a State Court has done and decided cannot be redone or else, Due Process under the Double Jeopardy Clause is compromise and defendants right to a Fair trial is violated.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Rev. Carpeah Rudolph Nyenekor, Sr., Respectfully Prays that a Writ of Certiorari be issue to Review the Judgment of the United States Court of Appeals for the Second Circuit.

Opinion Below

The Second Circuit, in an Unpublished Memorandum, Affirmed Rev. Nyenekor's Interlocutory Appeal Challenging the Government

Lack of Probable Cause to "Re-prosecute this New York State Case Premised on a Defective and Falsely Sworn Affidavit Application used to Obtained a Search Warrant which the Issueing Judge has D i s m i s s e d in a City Court trial, and a Second time, in the Supreme Court of New York due to Violation of the Doctrine of Collateral Estoppel and RES JUDICATA base on the Decision of the Supreme Court in Monge V. California, 524 U.S. 721, 118 S.Ct. 2246 (1998), and Allen V. McCurry, 449 U.S. 110, 110 S.Ct. 411 (1980) and its Progeny which the Second Circuit REFUSED to accept or acknowledged.

Moreover, in illegally Prosecuting Petitioner, the Government Violated the "Speedy Trial Provision of the New York State Rule of Crim. P. §§§ 30.20, 30.30, and 160.60, and the Federal Rule of Crim. Proc., Rule 48(a)," et seq..

JURISDICTION

On August 21, 2020, the Second Circuit Affirmed Petitioners Interlocutory Appeal. On December 19, 2019, the Second Circuit Clerk Denied Petitioners Petition for Rehearing En Banc.

The Court has Jurisdiction Under 28 U.S.C. § 1254(1)

The Unpublished Opinion of the Second Circuit Court of Appeals is Appended hereto as App. 1a-3a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution:

No Person Shall be .... Deprived of Life, Liberty, or Property, Without Due Process of Law.....

Sixth Amendment to the United States Constitution:

In all Criminal Prosecutions, the Accused Shall enjoy the Right to a Speedy and Public Trial, by an Impartial Jury of the State and District wherein the Crime Shall have been Committed, which District Shall have been previously ascertained by Law, and to be informed of the Nature and Cause of the Accusation; to be Confronted with the Witnesses against him; to have Compulsory Process for Obtaining Witnesses in his Favor, and to have the Assistance of Counsel for his Defence if he so Chooses.

STATEMENT OF THE CASE

Appellant, a Parolee was forcibly Order to Move from his home where he Reside with his Wife, two adult Sons ages 18, 21, and Petitioners 16 Years old daughter, and four Grand Children, to a "PAROLE ROOMIMG HOUSE" in the City of Newburgh, New York, where [THREE RIVAL GANGS] was Competiting for Control of the Notorious drugs Infested Neighborhood where Murder, Robbery, a Gang war, and human Multilation is the way of life on a daily basis in this Part of the City.

The Reason for such danger move is that, the Parole Officer demanded Petitioner to give him the (PASS WORD) to the Computers in each of Petitioners Children Bed Room, and the Key to all Three of the bed rooms and the Front door of Petitioners home, and Petitioner refused such Intrusion because, Petitioners two adult Sons was in College and working as Financial Consultant as does Petitioners Sixteen year Old daughter who work for a Collection Agency and Insurance Firm.

In addition, the Parole Officer has arranged for the Department of Social Services to Paid the Rent for the Rooming house without Petitioners Consent, and Petitioner Protested the Move before the New York State Parole Commissioner and the Chairman of the Department of Social Services in that, Petitioner was working full time and did not qualify for any Government Subsidy, and the Complaint was Granted, and Petitioner Order to be Remove from such dangerous environment as a Elderly Pastor.

The Parole Officer called a second time Requesting the "PASS WORD AND DOORS KEYS TO PETITIONERS CHILDREN COMPUTERS AND BED ROOM", or else, Petitioner will NEVER live with his Family, and Petitioner agreed to Rent a room in a decent neighborhood for Petitioners safety, See Foot Note 1 to 3 for detail.

On March 1, 2013, the Parole Officer told Petitioner to meet him at the Rooming house along with the Two ladies that Petitioner will be Renting from, and Petitioner did, but, the Parole Officer Never show up, and the next thing Petitioner saw was, the Two Police Officers that Petitioner Sue in three Civil Action burst through the door with Gun drawn, and Petitioner and the Two Female Parishioner was told to laid on the floor, and one of the Officer yielding, T H R E W what seen like a Clear Plastic Bag on the floor of the doorless Closet in the Parole room, and Petitioner was immediately remove from the Room to the Police Headquarter.

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1. This Case derived from several Civil Action that Petitioner filed against Two City of Newburgh Police Officers that racially Profiled Petitioner and as a result, Petitioner Loose two cars and job. In RETALIATION to those Civil Action, Petitioner has been a Victim of continued Racial Profilling, harassment, and False Prosecution which Landed Petitioner on a THREE YEARS PAROLE SUPERVISION.

2. While on Parole, the Parole Officer is a friend to both of the Officers against whom I have legal problem. On numerous occassions, Petitioner will be called at the Police Station and surrounded by group of White Officers as they POKE fun at me. I then filed numerous Complaints and as a result, I was told to Move out of my Own house to go and rent Apartment Unless, I give the Parole Officer my Childrens "DOOR KEYS AND COMPUTER PASS WORD, AND I REFUSED.

While transported to the Newburgh Police Station, Petitioner was taken up Stair in a Room where one of the brother of the T W O defendants in Petitioners Civil Action was typing. As Petitioner sat down on a Chair, Petitioner was told to Sign the letter he met the Officer typing, and Petitioner Refused.

The Officer warned Petitioner that failure to sign the paper would result to Petitioner been charge with numerous drugs Seized from Petitioners doorless Closet in his Parole Room despite, there was no drug in the Parole Room that was neatly swept upon arrival at 6:30 A.M.. "THE LETTER TURN OUT LITTLE TO BE A CONFESSION LETTER THAT IS GIVING TO ALL BLACK RESIDENTS THAT FILED COMPLAINT AGAINST ANY OFFICER IN THE CITY which Black Residents has been Contesting to for the Past Several years.

However, Petitioner and his Two Female from his Church was charged with "Possession of Control Substance with Intend to Distribute. The Charges was Contested by Petitioner and his Female friend, and the 1.8 gram of Crack Cocaine and (76 Pieces of some Assorted drugs which Comprises of 54 grams of Crack Cocaine, 0.8 grams of Powder Cocaine, and Heroins was Send to the State Police laboratory for DNA and Finger Print Analysis, all the drugs came back N E G A T I V E for Petitioner and his Co-defendants, and the only Finger Print and DNA found was that of the Two Officers that Petitioner Sue in his Civil Action.

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3. The First time Petitioner was order to Move on a Dangerous Gangs infested Street that house the City's Notorious "ASHES BADIT, BLOOD, and CRIPS", Petitioner Refused and was sentence to a Year for Refusal to Comply with Parole Condition.

Petitioner and his Three Co-defendants was Tried in a FIVE days Bench Trial before Newburgh City Court Judge, Peter W. Kulkins, the Search Warrant Issueing Judge, and Petitioner and his Three Codefendants was A C Q U I T E D, and the Search Warrant and the Affidavit Application was Subsequently DISMISSED based on DNA and Fingerprint Analysis Couple with No Confidential Informant fitted with Electronic Monitoring device who bought drug from Petitioner at anytime upon which the "SWORN AFFIDAVIT APPLICATION AND SEARCH WARRANT WAS ISSUE by Judge Kulkins Without Seeing any drug.

After Dismissal of the "FIRST TRIAL," Petitioner was Indicted yet again in the Supreme Court of New York. After Numerous Challenges to the (76 Pieces of Assorted drugs) send to the Mid Hudson Lab for DNA and Fingerprint Analysis, the Case was Dismissed a SECOND TIME after "S I X M O N T H S of Discovery and PRE TRIAL MOTION against Petitioner and his three Codefendants, and Petitioner ORDER RELEASE. See the Original Interlocutory Brief and Exhibits which was N E V E R Review Prior to the Dismissal of this Case.

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4. After Six Consecutive Months of Discovery and Pre Trial Motion has ended and the case Dismissed a SECOND TIME, The U.S. Attorney did not Appeal instead, Petitioner was taken to the United States Southern District Court where the Two Newburgh Police Officers and a F.B.I. Agent Appeal to Two Young Assistant United States Attorney to Mislead a Grand Jury to Indict Petitioner on One Count of "POSSESSION OF 28 GRTAMS OF CRACK COCAINE WITH INTEND TO DISTRIBUTE" on the Very Same Deffective Sworn Affidavit and Search Warrant that has Susequently been Dismissed by the Issueing Judge in a Newburgh City Court Trial as asserted above.

REASONS FOR GRANTING THE PETITION

1. Review is warranted to determine whether, if a Judge who **W R O N G L Y** Issued a Search Warrant based on Falsely Sworn Affidavit, Make an about face and **DISSMISSED** the Search Warrant and Exonerate the Defendant in a State Trial, can the Same Search Warrant and Affidavit be **RE-USED** to Indict the Acquitted Defendant a **T H I R D T I M E** in a United States District Court WITHOUT Offending the Doctrine of Collateral Estoppel and Res Judicata.

Whenever a State Issued Affidavit used to **MISLEAD a City Court Judge to wrongly issue a Search Warrant has been been dismissed by the issuing Judge in a trial held before the issuing Judge, THAT SEARCH WARRANT HAS BEEN VOID AND DEFECTIVE IN ALL RESPECT under the Doctrine of Collateral Estoppel and Res Judicata, and can no longer be used to indict the same Defendant after been found not guilty in two seperate State Court proceeding where the charges and purported crime alleged to have occurred.** United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984). Malley, 475 U.S. at 344. Leon Reaffirmed the Doctrine of **Franks v. Deleware**, 438 U.S. 154, 98 S. Ct. 2674 (1978), which **Alleged that, a warrant must be VIODED, "if the issuing Judge in issuing a warrant was MISLEAD by information in Affidavit that the Affiant knew was FALSE or would have know was FALSE except for his reckless disregard of the truth."** Leon, 468 U.S. at 923.

It is a Well Settle law that, when a Search Warrant has been dismissed based on Falsely Sworn Affidavit, and Two State Court has dismissed the Warrant and its Application, a United States Attorney CANNOT use the same Affidavit and Search warrant known to be false, and Mislead a Federal Grand Jury to Indict a Innocent Man without regard to the truth as decided by the Second Circuit in United States V. Clark, 638 F.3d 89 (2d Cir. 2011) and United States V. Ciambrone, 601 F.2d 616 (2d Cir. 1979), which the Second Circuit N O W, Overruled wihtout Justification, and in Conflict with other Sisters Circuit such as Ninth Circuit's Ruling in United States V. Basurto, 497 F.2d 781 (9th Cir. 1974).

Moreover, a Search Warrant may not Rest upon M E R E Affirmance or belief without disclosure of Supporting Facts and Evidence upon which it may be issued. United Statwes V. Dubrofsky, 581 F.2d 208, 212, (9th Cir. 1978), Nor Should a Issueing Judge Conclude, and Accept without questioning the Veracity of the Evidence, and affording little if any weight to the Police's Conclusory statement that, the warrant is requested based on only the officer's training and experience that the person who arrest is sought has committed a crime. Illinois V. Gate, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), quoting, United States V. Jones, 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.ed. 2d 697 (1960); and as concluded by other Circuit in United States V. Cervantes, 703 F.3d 1135, 1139-40 (9th Cir. 2012), and specificly warned in United States V. Rubio, 727 F.2d 786, 795, (9th Cir. 1983).

2. WHETHER THE ASSISTANT U.S. ATTORNEY CAN USE THE SAME AFFIDAVIT AND SEARCH WARRANT KNOWN TO BE FALSELY SWORN TO MISLEAD A FEDERAL GRAND JURY TO RE-INDICT AND RE-TRIED APPELLANT A T H I R D T I M E ON THE SAME STATE CHARGES IN THE UNITED STATES DISTRICT COURT.

This case derived from a March 1, 2013 retaliatory arrest in violation of New York State Public Health Law § 220.16 Sub-Divison 12, and § 220.50(1) and (2), of the New York State Penal Law, et seq.

A Newburgh Police Officer who appellant Sue in numerous Civil Action alleged that he fitted a C.I. with Electronic Recording Monitoring device to go and buy Heroine from Appellant from a BASEMENT APPARTMENT DURING THE WEEK OF FEBRUARY 18 and 25, 2013. As a result of this false allegation, he claim to submit a Application of Affidavit to a Newburgh City Court Judge, in the State of New York.

The Judge did not see any evidence of the drugs alleged to have been purchase during the week of February 18 and 25, 2013, nor interview the C.I. to see if the allegation was true or not, INSTEAD, Judge Kulkins issue a sweeping search warrant to Search the whole of a Basement Appartment in a Parole Rooming building with a total of SEVEN ROOMS in the Multi Family home that has been converted into Parole Rooming house for over three years and the Police knew all of this as they have been called to the Rooming house on numerous occassions.

It is a well settle law in this Circuit that a Prosecutor may not use his influence to mislead a Grand Jury based on a Falsely Sworn Affidavit known to be false to obtain an indictment to prosecute a innocent person. United States V. Fields, 592 F.2d 638 (2nd Cir. 1978), United States V. Clark, 638 F.3d 89 (2nd Cir. 2011), and as held in the case of United States V. Basurto, 497 F.2d 781 (9th Cir. 1974).

While the facts of these cases may not exactly parallel those of the instant case, this Court hold that the Rullings reagarding the consequences of a violation or abused of this Prosecutorial duty must, be applied where the Prosecutor has knowledge that testimony before the grand jury was perjured, Mooney V. Holohan 294 U.S. 103, 55 S.Ct. 340 (1935); Giles V. Maryland, 386 U.S. 66, 87 S.Ct. 793 (1967); Napue V. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959), and numerous other cases decided by this Court.

The Court said in Basurto Supra, that the "Purpose of that requirement is to limit a person's jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecutor or the Judge.....as decided in Stirone V. United States, 361 U.S. 212, 80 S.Ct. 270 (1960).

In this case, the Prosecutor use of the "SAME FALSELY SWORN AFFIDAVIT USED TO OBTAIN THE SEARCH WARRANT TO INDICT APPELLANT BY MISLEADING THE GRAND JURY SHOULD BE DEEM DEFECTIVE as held in United States V. Ciambrone, 601 F.2d 616 (2nd Cir. 1979), in that the Prosecutor deliberate act was willful in all respect, thereby, WARRANTING DISMISSAL of the case.

3. WHETHER THE ASSISTANT U.S. ATTORNEY AND THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION TO RE-TRIED A NEW YORK STATE CASE THAT HAS BEEN DISMISSED AND VENUE NO LONGER LIES WITH THE THE DISTRICT COURT.

The District Court lacks Personal and Subject Matter Jurisdiction to Re-prosecute a State Case that has been dismissed based on Falsely sworn Affidavit and Search Warrant known to be false, and after the STATUTE OF LIMITATION HAS EXPIRED UNDER THE Fed. R. Crim. P. Rule 48(a), and DISMISSED DUE TO LACK OF PROBABLE CAUSE AND EVIDENCE AFTER THE CLOSED OF DISCOVERY AND THREE DAYS PRIOR TO TRIAL. Smalis V. Pennsylvania, 106 S.Ct. 1745 (1986), and as held in Fong Foo V. United States, 369 U.S. 141, 82 S.Ct. 671 (1962).

In Evans V. Michigan, 133 S.Ct. 1069 (2012), The Supreme Court stated that the FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE held to BAR Re-Trial of Acquital after a Trial Judge or Court has acquitted a person on the premised that: (1) The Judge or Court allegedly erroneously held particular items to be element of offense, or (2) granting a Mid-Trial directed

Verdict of Acquital, or allegely because of Failure to PROVE CASE OR ISSUES INVOLVING THE ELEMENTS OF THE CASE also constitute Acquittal. United States V. Bali, 163 U.S. 662, 671, 16 S.Ct. 1192 (1896), and also as held in United States V. Dixon, 509 U.S. 688, 113 S.Ct. 2849 (1993), and its progeny.

For the reasons stated herein, Appellants move the Honortable court to dismiss this case for lack of Probale Cause, and subject Matter Jurisdiction for retrial.

4. WHETHER THE ASSISTANT U.S. ATTORNEY CAN ASK A FEDERAL COURT JUDGE TO RE-TRIED A NEW YORK STATE CASE AFTER EXPIRATION OF THE SPEEDY TRIAL PROVISION UNDER NEW YORK STATE R. Crim. P. §§§ 30.20, 30.30, and 160.60, AND THE FEDERAL RULE OF Crim. P. Rule 48(a) IN DIRECT VIOLATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL AND RES JUDICATA.

Appellant was arrested on March 1, 2013 by the State of New York in violation of its Public Health law §220.16 SubDivision 12, and §220.50 (1) and (2) of the New York Penal Law.

Appellant arrest was premised on a FALSELY SWORN AFFIDAVIT AND SEARCH WARRANT KNOW TO BE FALSE. The Issuing Judge Acquitted Appellant in the First City Court Trial based on the "Falsely Sworn Affidavit Application and Search Warrant deliberately used for the Search, and couple with DNA and Finger Prints analysis exonorating Appellant.

The Assistant United States Attorney cannot secretly use his INFLUENCE TO ASK A U.S. MAGISTRATE JUDGE TO ISSUED AN ARREST WARRANT AFTER THE STATE CASE HAS BEEN DISMISSED BASED ON LACK OF PROBABLE CAUSE, AND AFTER THE EXPIRATION OF BOTH THE STATE AND FEDERAL SPEEDY TRIAL PROVISION IN DIRECT VIOLATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL AND RES JUDICATA. Monge V. California, 524 U.S. 721, 118 S.Ct. 2246 (1998), and as asserted by the Second Circuit in United States V. Bolardo, 408 F.2d 112 (1969), and also in Allen V. McCurry, 449 U.S. 110, 110 S.Ct. 411 (1980), and its progeny.

The Supreme Court held that if a State Court grant a defendant Motion at the Close of the Prosecution case on the ground of "LACK OF PROBABLE CAUSE AND EVIDENCE, it constitute an A C Q U I T T A L.

The Supreme Court went further to emphasied that in the context of a "SECOND PROSECUTION," the reviewing Court must evaluate the SECOND CHARGES FOR DOUBLE JEOPARDY SAFE GUIDE, AND SEE WHETHER THE SECOND CHARGES HAVE THE SAME ELEMENTS THAT MADE UP THE SAME CRIME CHARGE IN THE FIRST INSTANCE. United States V. Monge, 118 S.Ct. at 2248-49.

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5. After Petitioner has been Acquitted in the T W O State Court on this State Drug Charges, and has been Indicted a T H I R D time in the Southern District Court of New York, THE FEDERAL JURY FIND APPELLANT N O T G U I L T Y in the T H I R D T R I A L based on the Fact that Appellant has been Acquitted on T w o Separate Occassions in the State Court of New York.

It is Appellants Contention that the District Court LOSS ITS JURISDICTION, and "V E N U E" NO LONGER LIES WITHIN THE DISTRICT COURT AS DECIDED IN Kassin V. Muligan, 55 S.Ct. 595,. Even under the DUAL SOVEREIGNTY DOCTRINE, SHAM PROSECUTION that seeks to CIRCUMVENT a defendants DOUBLE JEOPARDY PROTECTION BY APPEARING TO BE PROSECUTED BY ANOTHER SOVEREIGNTY, WHEN IT IS IN FACT CONTROLLED BY THE SOVEREIGNTY THAT ALREADY PROSECUTED THE DEFENDANT FOR THE SAME CRIME, can not withstand a double jeopardy challenge or Probable Cause.

A S H A M PROSECUTION IS, IN ESSENCE, A MISUSE OF THE DUAL SOVEREIGNTY RULE. Under that Rule, for example, when a State Court Proceeding is completely DOMINATED OR MANIPULATED BY THE FEDERAL AUTHORITIES that already prosecuted the defendant, so that the State Court Proceeding will be MERELY A TOOL of the Federal Authorities, it has to fail since...it cannot withstand DOUBLE JEOPARDY CHALLENGE.

Moreover, even a TRANSFER of CASE FROM STATE TO FEDERAL COURT d o e s....NOT V A C A T E what has been done in a State Court before Removal, and what has been decided in State Court is RES JUDICATA AND CAN NOT BE RE-EXAMINED as held in "King V. Worthington, (1881) 104 U.S. 44, 14 Otto 44, 26 L.Ed 652, and numerous other cases from the Second Circuit and decided in the Supreme Court of the United States.

C O N C L U S I O N

WHWEREFORE, for the Reason Setforth herein Sua Sponte, Petitioner Respectfully and Prayfully Move the United States Supreme Court to **G R A N T** the Petition for a Writ Of Certiorari to **S E T T L E** the Dispute amongst the various Circuit as to whether, **"A CRIMINAL DEFENDANT WHO HAS BEEN TRIED AND ACQUITTED DUE TO A FALSELY SWORN AFFIDAVIT APPLICATION USED TO OBTAIN A SEARCH WARRANT,"** Can be Re-tried later in a Federal Court based on the **D U A L SOVEREIGNTY Doctrine** as Presented before the Supreme Court for Clerity and Unaminity between the various Circuits since every Circuit has Rendered Opposing decision contrary to its Sister Circuit.

Dated: March 15, 2020

Respectfully Submitted,

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