21-5727

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Frank Cisneros#10132-040 — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Frank Cisneros #10132-040
(Your Name)

Marianna FCI P.O. Box 7007
(Address)

Marianna, FL 32446
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

(1) Whether an attorney's admitted failure to investigate or present a defendant's affirmative withdrawal from a conspiracy beyond the applicable statute of limitations period as a defense, with no other strategic decision but to plead guilty, is unreasonable or in conflict with established federal law?

(2) Whether an enhancement of a defendant's sentence is based upon conduct prior to a withdrawal and the statute of limitations period, and results in an additional amount of time in prison, is unreasonable or in conflict with federal law?

(3) Whether the courts' denials of an affirmative withdrawal from a conspiracy as a viable defense, after they conceded that withdrawal occurred beyond the applicable statute of limitations period, is unreasonable or conflicts with clearly established federal law?

LIST OF PARTIES

[X] 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 judgment is the subject of this petition is as follows:

RELATED CASES

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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

[X] reported at 2021 U.S. App. LEXIS 2510; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2019 U.S. Dist. LEXIS 183749; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits 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 _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and 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.

18 U.S.C. § 3282(a)

Offenses not capital (a) In general. Except otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Amendment 5 Criminal actions-Provisions concerning-Due process of and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeapordy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

In Feruary of 2013 petitioner was specifically charged with conspiring to commit racketeering acts going "back to the mid-1990's, up and through the time of the indictment or at least until 2012" App. D Pgs 6-7, in violation of 18 U.S.C. §1962(d)(Count One) and conspiring to possess with intent to distribute 5 kilograms or more of cocaine from 2006-2012 in violation of 21 U.S.C.§§846 and 841(a)(Count 12; later changed to 14).

Against petitioner's desire, counsel sought and initiated cooperating plea negotiations. These were terminated after counsel coerced petitioner into proffering by threat of prison "for the rest of your life" App. F Pg 30, and when he could not answer the government's questions they perceived petitioner was lying.

On March 1, 2013 a detention hearing (DH) was held, and after evidence was presented by both parties, the Honorable Judge Ellen Carmondy granted pre-trial release based upon the lack of violence by petitioner, his lack of involvement, and evidence of his 1999 letters withdrawing from the conspiracy, App. G , Pg60.

In July of 2013, after repeated attempts by counsel to convince petitioner to cooperate and his refusal, counsel entered a frivilous motion for a Kastigar Hearing, knowing it was not permissible, when there were other permissible options available to determine the sufficiency of the evidence, or if the court had jurisdiction over the matter, and to put the prosecution's case to meaningful adversarial testing. As counsel's choice was impermissible it was denied.

On October 7, 2013 petitioner attempted to proffer after counsel a-

gain misadvised petitioner that losing at trial would result in a life in prison. Though the proffer did not go as bad as the first, petitioner was still unable to answer many of the government's questions, but the government agreed to dismiss Count Fourteen and enter a motion on his behalf in exchange for his guilty plea to Count One. On October 13, 2013 petitioner pled guilty. Sentencing was scheduled for February 25, 2014.

After months of adjournments, and several other codefendants pleading guilty, some agreeing to cooperate with the government, in May of 2014 the government informed petitioner they would not be entering a motion on his behalf for his assistance, or for the fact that others cooperated due to petitioner's cooperation. And a new sentencing date was set for June 17, 2014.

On June 9, 2014 petitioner had major back fusion surgery and asked counsel to adjourn his sentencing. Counsel requested an adjournment but not nearly as far out as petitioner needed to fully recover. At sentencing he was under heavy narcotic medication for pain.

At sentencing he was held responsible for 5 kilograms of cocaine, including 555.97 grams of pre-withdrawal/statute of limitations (sol) possession in 1998. He was also held responsible for 248 kilograms of a codefendants marijuana distribution, though petitioner was not named in the marijuana conspiracy. This gave petitioner a base offense level of 32 and he was enhanced 3 points for his pre-withdrawal/sol leadership positions, as well as 2 points for an enhancement for a firearm. Petitioner was given a 3 point reduction for acceptance of responsibility, and after the court varied down for the overstatement of the criminal history, he was sentenced

to the bottom of the guidelines of 210 months.

On May 12, 2016 the Sixth Circuit court of appeals affirmed his sentence and in April of 2017 petitioner entered his amended motion to vacate, set aside, or correct a sentence. Petitioner cited counsel's deficient performance, failing to investigate and present his withdrawal beyond the sol period, and a number of counsel's misadvices that infected his decision making process.

Though the District court held an evidentiary hearing to resolve the factual dispute about whether counsel misadvised petitioner if he was convicted at trial he would be sentenced to life in prison, they again denied his §2255 and a certificate of appealability (COA) even after counsel testified he advised petitioner the government "carry the keys to your-- locking [you] up for the rest of your life." App. F, Pg 30. The District court deciding even if counsel performed deficiently, without a viable defense petitioner could not show prejudice. The District court ruling petitioner's withdrawal was not a viable defense because it was irrelevant to his guilt and sentence, even though it was beyond the applicable sol period.

On January 28, 2021 the Circuit court denied petitioner's request for a COA, agreeing with the District court's decision that peitioner's 1999 withdrawal was not a viable defense, though the Circuit court deemed his withdrawal was by incarceration alone. Petitioner requested a rehearing and rehearing en banc, which were both denied on April 19, 2021. App. C.

REASONS FOR GRANTING THE PETITION

Petitioner asserts the District and Circuit courts (the courts) made decisions confilicting with previous Sixth Circuit, Sister Circuit, and Supreme Court precedent, with regards to a withdrawal beyond the applicable statute of limitations (sol) period as a viable defense. These decisions were made in order to deny petitioner's §2255 and a Request for a Certificate of Appealability (COA).

Petitioner's §2255 surrounded a claim of ineffective assistance for counsel's admitted failure to investigate and present petitioner's withdrawal beyond the applicable sol period defense, which the government and courts conceded occured in 1999. As the burden for establishing an entitlement to an evidentiary hearing is relatively light, and petitioner's §2255 and the files and records of the case contain records establishing his claims, Martin v U.S. 889 F. 3d (6th Cir 2018); the heart of this issue lies with the courts' decisions so far departing from the accepted and usual course of judicial proceedings and conflicting with clearly established federal law. Petitioner asserts this case is of national importance as, allowing these decisions to stand would cause a regressive shift promoting further violation of a defendant's most basic constitutionl rights, using these decisions to diregard, and essentially nullify, precedent of clearly established federal law, as determined by this Supreme Court. Therefore, an exercise of this Court's supervisory power is in order to avoid further departure and the harm it will cause to others.

Swiley v Jackon U.S. Dist. LEXIS 107571 (6th Cir 2020), relying on Strickland v Washington 466 U.S. 668, 687-96 (1984), and Wiggins v Smith 539 U.S. 123 S. Ct. 2527, 156 L. Ed. 2d (2003):

> It is well established that "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland 466 U.S. at 691. The duty to investigate derives from counsel's basic function, which is "to make the adversarial testing process work in the particular case." Kimmelman v Morrison 477 U.S. 365, 384, 106 S. ct 2574, 91 L. Ed 2d 305 (1986)(quoting Strickland 466 U.S. at 690)..."In any ineffectiveness case, a particular decision not to investigate must be directly assedsed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgements." Strickland 466 u.S. at 691. "The relevant question is not whether counsel's choices were strategic, but were they reasonable." Roe v Flores-Ortega 528 U.S. 470, 481 120 S. ct. 1029, 145 L. Ed. 2d 985 (2000)... A purportedly strategic decision is not objectively reasonable "when the attorney has failed to investigate his options and make a reasonable choice between them." Horton v Zant 941 F. 2d 1449, 1462 (11th Cir 1991)(cited in Combs v Coyle 205 F. 3d 269 288(6th Cir 2000). In Wiggins v Smith 539 U.S. 510, 524-29, 123 S. ct. 2527, 156 l. Ed. 2d 471 (2003), the Supreme court held that the petitioner was entitled to a writ of habeas corpus because his counsel had failed to conduct a reasonable investigation into potentially mitigating evidence with respect to sentencing. Id. According to tje Court, "Counsel chose to abandon their investigation at an unreasonable juncture making a fully informed decision with respect to sentencing strategy impossible." Id. at 527-28;

> Lafler v Cooper 566 U.S. 132 S. Ct. 1376, 182 LED 201, 398:
>
> The right to counsel does not begin at trial. It extends to "any stage of the prosecution, formal or informal, in court or out... U.S. v Wade 388 U.S. 218, 206, 87 S. ct. 1926, 18 L. Ed. 2d 1149 (1967)...Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because "any amount of [additional] jail time has Sixth Amendment significance." U.S. Glover 121 S. Ct. 696. 148 L. Ed 2d 604.

FACTUAL BACKGROUND

Petitioner was arrested on February 12, 2013, and from the first defense strategy meeting on February 17, 2013, there was a significant disagreement between petitioner and counsel. The substance of this disagreement surrounded the fact that pettioner believed he should

not have been charged, or had a significant and reasonable defense against charges presented, while counsel denied teh viability of petioner's one line of defense. In such, according to the law, petioner was correct.

> The law i, the Sixth Circuit is clear that "defendants have the burden of proving withdrawal because it is an affirmative defense." U.S. v Dents 1992 U.S. App. LEXIS 28982 (quoting U.S. v Lash 937 F. 2d 1077, 1083 (1991).

Updated in U.S. v Ledbetter U.S. Dist. LEXIS 106063 (2013)

> Withdrawal from a conspiracy constitutes an affirmative defense for which Defendants bear the burden of proof. U.S. Smith 133 S. Ct. at 720. To prevail, Defendants must overcome "well-settled law that once a conspiracy is established...its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." Brown v U.S. 261 F. App'x at 866 (quotation omitted). This typically occurs through "either a full confession to the authorities" or "communication[s] to... co-conspirators that [the defendant] has abandoned the enterprise and its goals." id.
> Incarceration, standing alone, does not constitute withdrawal from a conspiracy. See U.S. v Makki 129 F. App'x 191(holding that withdrawal requires an affirmative act, "even if the defendant is arrested or imprisoned"). None of this is to suggest that Defendants' incarceration is IRRELEVANT to withdrawal... To prevail, however, Defendants must prove "somehting more than [mere] incarceration. U.S. v Johnson 737 F. Ed at 526 (2013)

> The [Ledbetter] parties agree[d] 18 U.S.C. §3282 supplies a five-year statute of limitations for Count One. Therefore, Defendants' argument hinges on whether they accomplished or withdrew from the alleged RICO conspiracy more than five years before the government filed the first indictment, which occurred on June 24, 2014. (Doc. 14). Put differently, if Defendants accomplished or withdrew from the alleged conspiracy before June 24, 2009, then Count One is time-barred, therby providing "acomplete defense to prosecution." Smith 133 S. Ct at 714, 717, 184 L. Ed 3d 570

18 U.S.C. §3282

> "[I]s a law that puts a limit on how much time the government has to obtain an indictment...Thus a conviction cannot be based upon conduct that occured before [the sol] date...Though you may CONSIDER the defendant's conduct prior to the sol to EVALUATE the defendant's conduct WITHIN THE SOL and whether THAT CONDUCT WITHIN THE SOL establishes defendant's guilt beyond a reasonable doubt. You CANNOT USE ANY PRE-SOL CONDUCT FOR ANY OTHER PURPOSE." U.S. v Moody 958 F. 3d 485 (2020) (EMPHASIS mine).

At the first defense strategy meeting petitioner informed counsel that subsequent to his 1998 arrest he affirmatively acted to defeat or disavow the purposes of the conspiracy, Lash 937 F. 2d 1077, 1083 (1991), by communicating his withdrawal to co-conspirators via letters sent from jail in 1999, and his full confession and Grand Jury testimony in 2000, Brown 261 F. App'x 866 (2008). Petitioner also informed counsel that Holland Detectives Rudy Mascorro and Albino Rios obtained these letters through their 1998-99 investigation of petitioner, thus the government knew of petitioner's 1999 withdrawal. Though petitioner was unaware of the law concerning his long past withdrawal he informed counsel he withdrew and that he testified in front of the Grand Jury. With this knowledge, counsel denied petitioner's withdrawal, that was plainly beyond the sol, as a viable defense and sought a cooperating guilty plea, against petitioner's desire to present a defense, and entirely failed to subject the prosecution's case to meaningful adversarial testing. Cronic 466 U.S. at 659. The law provides petitioner's withdrawal began the running of the five-year sol period under §3282, making the end of 2004 the effective sol date barring prosecution, thereby providing a viable defense to prosecution of that conduct. Ledbetter U.S. Dist. LEXIS 106063 (quoting U.S. v Smith 133 S. Ct.714, 717, 184 L. Ed 2d 570 (2013)).

In counsel's sworn affidavit he swears that petitioner's suggestion to investigate Holland Police (HPD) records of evidence "would not have revealed a viable defense for Mr. Cisneros on the RICO charges" App. D, Pgs 2-3, this in defense of his decision that made the investigation unnecessary. He later testifies that he wasn't aware of

petitioner's withdrawal until, as counsel testifies, "later on as I was representing him he said, I was not in the gang. So our defense has to be , I was not in the gang. I quit the gang." App. F, Pg 44 Conversely, counsel's decisions making the particular investigation unnecessary are unreasonable and untrue.

Transcripts of petitioner's March 1, 2013 detention hearing show counsel was fully aware of petitioner's communication he withdrew from the conspiracy from the beginning of his representation of petitioner. The records show counsel's questions to a federal agent concerning his withdrawal letter from 1999: "Just so the record is clear, you're not aware of any letter that was put in by the government of an investigation form or anything from 1999 that he was out of the gang?" App. G, Pg 21; and, "Are you aware in the last five years he's held any titled positions...firearm sales or used by him...been involved in any assaultive behavior?"; all to which the federal agent responded to in the negative. Id at Pgs 15-16.

This proves counsel was untruthful in his testimony; that he was aware of evidence in support of the defense and that the information provided did nothing to suggest further investigation was futile or damaging, but in point of fact suggested just the opposite, as in Bigelow v Williams 357 F. d 562 (6th Cir 2004), which reversed and vacated for counsel's failure to investigate. And as this Court held in Wiggins, petitioner is entitled to relief when counsel fails to investigate potentially mitigating evidence with respect to sentencing. Judge Carmondy granting pre-trial release to petitioner, stating, "I've heard no evidence of any violent activity by this defendant. Now, whether its too little too late that he tried to get out of the la-

tin kings, that will be determined in the prosecution," App. G, Pg 60, proves petitioner's withdrawal was not futile or damaging. Instead of conducting a reasonable investigation into potentially exhonorating or, in the least, mitigating evidence with respect to sentencing, counsel unreasonably chose to abandon his investigation at an unreasonable juncture, in order to convince petitioner to proffer since he had done it before App. F, Pg 30; making an informed decision with respect to [any defense strategy, including] sentencing strategy impossible. Wiggins v Smith 539 U.S. 510, 524-29, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Counsel even testifies petitioner did not want to proffer, and that he wanted to go to trial on three separate occassions during EH App. F, Pgs 31, 33, 43 , but counsel's misadvice infected petitioner's decision making process, Rodriguez-Penton v U.S. 905 F. 3d 481, 488 (6th Cir 2018)(citing Lee v U.S. 137 S. Ct 1958, 1967 (2017). Counsel actually confessing he used the threat of a life in prison to coerce petitioner to proffer, advising him that "they [the government] carry the keys to your-- locking [you] up for the rest of your life" App. F, Pg 30. This clearly shows counsel's misadvice infected petitioner's decision making process, and he entirely failed to subject the prosecutions case to meaningful adversarial testing at critical stages of the proceedings, which presumes prejudice under U.S. v Cronic 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed 3d 657 (1984), though proof of prejudice apparent by the denial of proper fair and just proceedings or the denial of the proceedings themselves, Lee 198 L. Ed. 2d (2017)(citing Roe v Flores-Ortega 528 U.S. 483, 120 S. Ct 1029, 145 L. Ed. 2d 985,

Petitioner was denied:

1) A proceeding to determine the sufficiency of evidence, or if the court had jurisdiction over the matter due to the statute of limitations under §3282, which could have been done by a number of permissible motions, rather than counsel's unreasonable choice to enter a motion for a Kastigar Hearing that was IMPERMISSIBLE under petitioner's Pocket Immunity agreement. Counsel failed to investigate his options, therefore could not have made a reasonable choice between them. Swiley v Jackson 2020 U.S. Dist. LEXIS 107571 (quoting Horton v Zant 941 F. 2d 1449, 1462 (11th Cir 2000);

2) The trial proceeding itself, Flores-Ortega 528 U.S. 483, 120 S. Ct. 1029, 145 L. Ed 2d 985 (2000), if the court found it had both jurisdiction, and the sufficiency of evidence to prosecute petitioner;

3) A fair and just plea proceeding, where the government did not use, or counsel objected to the use of petitioner's pre-withdrawal/sol conduct: petitioner's 1998 possession of 543 grams of cocaine; 1996 leadership order of a firebombing (that never developed); and pre-1999 firearm possession; to convice the trial court to accept petitioner's guilty plea. This pre-sol conduct given after trial court stated, "That's a bunch of conclusions. Tell me what it is specifically that would illustrate those conclusions." App. D, Pgs 6-7; 19;

4) Fair and just sentencing proceedings without using petitioner's pre-sol leadership positions to enhance his base offense 3 levels and producing 47 months of additional time in jail proving Sixth Amendment significance. Glover 121 S. Ct. at 696. App. E, Pg 13.

Though petitioner's withdrawal well beyond the applicable sol period was plain, and the courts should have concluded so and granted relief for the trial court's failure to apply the requisite weight and application provided by law, it was counsel's obligation to present petitioner's withdrawal beyond the sol defense to subject the prosecuition's case to meaningful adversarial testing. The record Is clear counsel did not, and did not provide effective assistance of counsel prescribed by the Sixth Amendment, according to Sixth Circuit precedent and Supreme Court ruling.

The record shows petitioner presented clear evidence substantiating his withdrawal and counsel's failure to investigate and present his withdrawal to the courts throughout his §2255 proceedings. As the courts denied petitioner's withdrawal in order to deny his ineffective assistance of counsel claims, the heart of the matter lies within the courts' decisions contrary to their own concessions of petitioner's long past withdrawal, and more importantly, contrary to clearly established federal law as determined by the Supreme Court in United States v Smith 133 S. Ct. 184 L. Ed. (2013):

> A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution...regardless of when the purported withdrawal took place....[W]ithdrawal terminates the defendant's liability for post-withdrawal acts of co-conspirators [and] also starts the clock running on the time within which the defendant may be prosecuted, and provides a complete defense when the withdrawal occurs beyond the applicable statute-of-limitations period...Thus [] union of withdrawal with a statute-of-limitations defense can free the defendant of criminal liability. Id. at 574-78

PETITIONER'S ARGUMENTS

To "withdraw" in common language is defined "to terminate one's participation in or use of something" (Merriam-Webster's Dictionary).

The courts concede petitioner's withdrawal was well beyond the applicable sol period in 1999. App. A, Pg 7; App. B, Pg 12. The fact they had knowledge of a"letter put in by the government...from 1999 that he was out of the gang?" App. G, Pg 21 and failed to use his 1998 arrest or 2000 full confession as the relevant withdrawal date proves their concessions of his 1999 withdrawal came by way of his affirmative showing he withdrew from the conspiracy, Brown 261 F. App'x 866 (2008), by his communication to co-conspirators. Id. at As such, according to the law, they must also concede to petitioner the requisite weight and application of the law that his affirmative withdrawal provides a complete therefore viable defense. Ledbetter U.S. Dist. LEXIS 106063 (quoting Smith 133 S. Ct. at 574). Contrary to their concessions, and conflicting with Sixth Circuit and Supreme Court prcedents, the District court contends petitioner's withdrawal is meritless, because its irrelevant to his guilt and sentence, App. B, Pg 12, and the Circuit court contends petitioner's withdrawal was by incarceration alone, and not a viable defense. And,because it was not a viable defense counsel could not have been ineffective, even if his performance was deficient. But, as withdrawal requires an affirmative act, "even [though]the defendant is arrested or imprisoned," Ledbetter 106063 (citing Makki 129 F. App'x 191); the Circuit court's contention petitioner's withdrawal was by incarceration alone, is in conflict with established federal law. Likewise, a withdrawal with a sol defense can free the defendant of criminal liability, Smith 184 L. Ed. 575-78; and under Sixth Circuit court instruction in Moody, "a conviction cannot be based upon conduct that occurred before [the sol] date,"

and, "it CANNOT BE USED FOR ANY OTHER PURPOSE [such as to enhance a defendant's sentence]." id at 485 (EMPHASIS mine).

Contrary to the law, the government used, and the trial court accepted, petitioner's 1998 possession of 543 grams of cocaine as an element of the offense, App. B, Pg 3, and based petitioner's conviction upon that conduct, App. D, Pg 6-7. Moreso, in further violation of the law, petitioner's pre-sol leadership positions were used to enhance his base offense 3 levels, App. E, Pg 13, even after federal agent Yandle testified petitioner had not held any titled positions in the five years prior to the first indictment filed. App C, Pg 15 This led to a sentence of 47 additional months in prison, which in itself has Sixth Amendment significance, Glover supra at 203, 121 S. Ct. 696, 148 L. Ed. 2d 604, thus proving petitioner's withdrawal was significant to his sentence as well as his guilt, therefore was in fact a viable defense to the prosecution in his case.

Furthermore, the courts reasoned Defendant clearly rejoined the Hlk and its activities in 2008, App. A, Pg 7, App. B, Pg 25, and the District court unreasonably applied "[T]he law is clear a defendant's actions after a withdrawal can negate the withdrawal. See e. g. U.S. v Lash 937 F.3d 1077, 1084 (1991)('Continued acquiescence [to the conpiracy] negates the withdrawal[.]')(citing U.S. v Hyde 225 U.S. 347, 371-72 (1912)" App. B, Pg 25. Conversely, there are several problems with the court's application of the law.

The courts' concessions of petitioner's withdrawal beyond the sol period is in conflict with the Lash court's decision defendant's "continued acquiescence" to conspiracy. Continued defined is "to

maintain without interruption". It also is defined as "to resume (as in a story) after an intermission" (Merriam- Webster's Dictionary). Petitioner asserts the Lash Court's "continued" references "to maintain without interruption", while the District court can only mean "to resume () after an intermission", as they repeatedly concede petitioner's withdrawal in 1999, and, according to the courts "rejoined" Apps. A; B, Pg 7; 25. Petitioner's withdrawal would certainly fall short of "to maintain without interruption", and even the courts' unreasonable application would fall short, as a nine year intermission cannot "negate" the fact that petitioner's withdrawal was well beyond the applicable sol period. Therefore it cannot "negate" the fact that a defendant who withdraws outside the relevant sol period has a complete, therfore viable, defense to prosecution. Smith 133 S. Ct. 184 L. Ed. at 574. And, even if there is later criminal conduct within the sol period, a defendant's conviction cannot be based upon conduct that occurred before the sol date. Moody F. 3d at 485(2020).

In the Lash Court ruling, Senior Circuit Judge Wellford dissented in regards to defendant's Lash and Tommasi, respectively. He significantly notes:

> "A few months of employment is insufficient, in my view, to counter the fact he was disassociated with and withdrawn from all conspirators." And, "[s]ubsequent activity[] should be the subject of a separate indictment. I find no basis to 'neutralize' the fact of a long past withdrawal by reference to other 'wheeling and dealing' by Tommasi. I therefore would dissent and reverse convictions of Lash and Tommasi."

In further contradiction, the Lash Court decided the defendants' withdrawals were not beyond the applicable sol period, while both courts' concessions of petitioner's withdrawal was beyond the ap-

plicable sol period. Petitioner asserts his withdrawal well exceeds the combination of Lash and Tommasi's withdrawals, thus believes the requisite weight should be applied in his case, as his long past withdrawal is precisely what the Supreme Court in Smith ruled is beyond the applicable sol period and provides a complete therefore viable defense to prosecution.

The burden for establishing an entitlement to an evidentiary hearing is relatively light, and where there is a factual dispute, the habeas court must hold an evidentiary hearing to determine the truth of petitioner's claims, The courts abused their discretion making decisions contrary to and unreasonably applying federal law in order to deny petitioner relief, an evidentiary hearing, or COA when petitioner's motion and the files and records of the case contain facts supporting his arguments, 28 U.S.C.§2255(h), Martin v United States 889 F. 3d 827, 832-33, 835-36 (6th Cir 2018).

Petitioner asserts these decisions in his case are of national importance, as if the courts' decisions stand, this could cause a regressive shift promoting future unnecessary harm to defendants. It would allow the lower courts to further violate the most basic of a defendant's constitutional rights, using these decisions to rule contrary to, or unreasonably applying, and essentially nullifying, clearly established federal law as determined by this Supreme Court. The courts' decisions have so far departed from the accepted and usual course of judicial proceedings it is imperative for this Supreme Court to exercise their supervisory power in order to prevent this regressive shift, and the future harm of others due to further departure using the courts' decisions.

In summation, the law provides that a withdrawal beyond the applicable sol period is a complete therefore viable defense to prosecution. The record clearly showed petitioner's withdrawal in 1999 was plainly beyond the applicable sol period. The record is also clear that counsel denied petitioner his right to present his affirmative defense by denying its viability and failing to investigate or assert petitioner's one affirmative defense, thus entirely failed to subject the prosecution's case to meaningful adversarial testing. The record shows this infected petitioner's decision making process causing him to plead guilty when counsel testifies, he really wanted to go to trial.

Though it was counsel's duty and obligation to assert petitioner's one affirmative defense, the government- who is a representative of a sovereignty whose interest in a criminal prosecution is not to win a case, but that justice shall be done, Berger v U.S. 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed 1314 (1935)- had evidence of petitioner's affirmative withdrawal from the gang in 1999; and the trial court was aware of petitioner's 2000 full confession, which is an affirmative showing he withdrew from the conspiracy. Yet, having this evidence, neither the government, nor the trial court, applied the requisite weight the law requires for a withdrawal beyond the applicable sol period. This denied petitioner his due process right to fair and just pre-trial, trial, and sentencing proceedings, as the court relied on materially inaccurate information, and he was found guilty based in part upon pre-sol conduct, and was sentenced based upon pre-sol leadership conduct in violation of the law. This led to additional, thus prejudicial, time in prison.

Therefore, petitioner respectfully prays this Supreme Court will remand petitioner's case, with clear instruction that petitioner's withdrawal beyond the applicable sol period provides a complete therefore viable defense to the prosecution, as they used pre-sol conduct to obtain a conviction. And, that even if petitioner's guilt could have been established by his conduct within the sol period, petitioner's withdrawal was a viable defense as it is mitigating evidence with respect to sentencing, and his pre-sol conduct, specifically his leadership positions, cannot be used to enhance his sentence.

Petitioner wholeheartedly thanks this Supreme Court for their time and consideration in this very important matter. May God bless you, and God bless America.

Sincerely,

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