

NO.

IN THE
Supreme Court of the United States

In re: STEPHEN A. SACCOCCIA

Petitioner,

**ON PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2241(a);
PETITION TO TRANSFER PURSUANT TO 28 U.S.C. 2241(b) TO THE APPROPRIATE
UNITED STATES DISTRICT COURT; AND, MOTION TO APPOINT COUNSEL**

SUBMITTED BY:

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QUESTIONS PRESENTED

- I. Whether this Court should overrule *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) jurisdictional proscription on 28 USC 2241 petitions and transfer this case to an appropriate United States District Court pursuant to 28 USC 2241(b) to avoid the Eleventh Circuit's unconstitutional suspension of the *writ of habeas corpus* and refusal to recognize the savings clause found at 28 USC 2255(e)?
- II. If *McCarthan's* jurisdictional proscription on 2241 petitions is correct because, as they state, the "Original Writ in the Supreme Court remains available," whether Supreme Court Rule 20(4) unconstitutionally denies petitioners due process and constitutes a suspension of the *writ of habeas corpus* because this Court is the only forum -- rather than an extraordinary forum -- with jurisdiction to determine habeas corpus proceedings when an intervening Supreme Court decision renders the persons conduct non-criminal?
- III. Whether Petitioner reasonably demonstrates factual innocence on many, if not all, of his money laundering convictions and the use of those convictions to create a 660 year sentence based on conduct rendered non-criminal by this Court in *United States v. Santos*, 553 U.S. 507 (2008), and which were improperly merged from a RICO Conspiracy single count conviction, warranting this Court to issue a writ of habeas corpus pursuant to 28 USC 2241 and 28 U.S.C. § 2255(e)'s saving clause?

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Stephen Saccoccia (“Saccoccia”) respectfully petitions this Court for a writ of habeas corpus; or, in the alternative, to transfer this case to the appropriate United States District Court. In addition, Petitioner moves this Court to appoint him legal counsel.

OPINION AND ORDER BELOW

The Judgment of 660 years imprisonment is attached hereto. The original appellate decision affirming the judgment is reported at *United States v. Saccoccia*, 58 F.3d 754 (1st Cir.1995). Saccoccia filed a Motion to Vacate pursuant to 28 USC 2255. The motion was denied, *Saccoccia v. United States*, 69 F.Supp.2d 297 (D.R.I. 1999) and the United States Court of Appeals for the First Circuit denied a certificate of appealability. *Saccoccia v. United States*, 42 F. App'x 476, 478-79 (1st Cir. 2002)(per curiam).

JURISDICTION

This Court maintains jurisdiction of this case pursuant to 28 USC §§ 1651(a), 2241, 2255(e), Supreme Court Rule 20, and Article III of the United States Constitution. This Court may declare its Rule 20 unconstitutional pursuant to 28 USC 2201.

STATEMENT PURSUANT TO RULE 20.(4) AND 28 USC 2242 (REASON FOR NOT MAKING APPLICATION TO THE DISTRICT COURT OF THE DISTRICT IN WHICH THE APPLICANT IS HELD).

Pursuant to Supreme Court Rule 20(4), Petitioner notifies this Court that he could not make application to the district court for habeas corpus relief because the United States Court of Appeals for the Eleventh Circuit held that the district court's may not entertain such petitions, *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (*en banc*), *cert. denied sub nom McCarthan v. Collins*, ___ US ___ (Dec. 4, 2017).

The Eleventh Circuit directed prisoners to file original habeas corpus proceedings in the

Supreme Court by stating that their prohibition on entertaining habeas corpus applications did not amount to a suspension of the writ because "the Original Writ in the Supreme Court remains available." *Id* at 1094.

Therefore, the Eleventh Circuit directed the petitions to be filed only with the Supreme Court of the United States. *But see* Supreme Court Rule 20(4) (explaining that a denial of a writ of habeas corpus by the Supreme Court is not on the merits). Petitioner thus has no avenue for making an "application to the district court of the district in which the applicant is held." Sup. Ct. R. 20.4(a) (quoting 28 U.S.C. § 2242).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Constitution's *Suspension Clause* found at Article I, Section 9, of the United States Constitution along with the due process clause, U.S. Const. Amend. V, and 28 USC 2241, 2244, and 2255.

STATEMENT OF THE CASE

In 1993, the United States prosecuted Saccoccia and, after a jury trial, the United States District Court for the District of Rhode Island convicted him of various "money laundering" related statutes. Count I involved a claim of a RICO conspiracy in violation of 18 U.S.C. § 1962(d), while 53 other counts asserted "money laundering" violations pursuant to 18 USC 1952, 1956, and 1957, representing the underlying racketeering activity of the RICO conspiracy. Thereafter, the district court sentenced Saccoccia to 660 years. The district court accomplished this during the sentencing hearing by determining that the RICO money laundering conspiracy entailed a total of \$136 million using the preponderance of evidence. While the individual money laundering counts attributed to direct conduct by Saccoccia only amount to about \$9.5 million, the district court used the \$136 million to excuse issuing a statutory maximum sentence on each individual count that was also incorporated into the

RICO conspiracy. The total sentence imposed through this stacking was 660 years in prison, the imposition of consecutive fines of \$15.7 million, and the forfeiture of \$136 million pursuant to the RICO forfeiture allegation of the indictment. Applying the reasoning of this Court's decision in *Pinkerton v. United States*, 328 US 640 (1946), the district court held Saccoccia jointly and severally laible for bank wire transfers during the life of the conspiracy. See, *United States v. Saccoccia*, 58 F. 3d 758 (1st Cir.1995) cert. denied, 517 U.S. 1005 (1996); *United States v. Hurley*, 63 F3d 1, 21-23 (1st Cir. 1995); *United States v. Saccoccia*, 564 F3d 502 (1st Cir. 2009).

Petitioner is currently serving the 660 year sentence at United States Penitentiary Coleman I, located in Coleman, Florida.

In 2008, this Court recognized that the dog cannot wag the tail in money laundering cases and held that, when a merger problem exists, the definition of money laundering as to 18 U.S.C. § 1956 must be “profits” not “gross receipts.” *United States v. Santos*, 553 U.S. 507 (2008). Following this Court's statutory interpretation of the money laundering statute, Saccoccia is being punished for conduct rendered non-criminal by this Court and is factually innocent of his conviction and sentence imposed for laundering \$136 million dollars – a 660 year sentence resulting from the sentencing court's misapplication of the money laundering statute and the improper merging to the RICO Conspiracy count into the individual money laundering convictions. Indeed, the RICO conspiracy alleged 2,132 financial transactions valued at \$136 million dollars alleged as overt acts of the RICO conspiracy count, while the 49 money laundering counts alleged only \$9.5 million. (Understand, the RICO conspiracy count carried a statutory maximum of 20 years, while the money laundering counts carried 10 years for the §1957 violations and 20 years for the §1956 violations).

It appears clear that Saccoccia's continued restraint of personal liberty is predicated on a void Judgment and Commitment Order issued in 1993, and is in violation of the multiple punishment clause of the Double Jeopardy Clause and Separation of Power's Clause of the United States Constitution, as

amended, because Saccoccia already served twenty (20) years in prison, the maximum sentence for the RICO conspiracy that encompassed the various money laundering counts. Had the district court followed *Santos* (which was not available to it at the time) and cured the merger problem by either running the sentence on all of the counts concurrently, or by requiring the government to prove “profits” instead of gross receipts at trial as required by *Santos*, perhaps no problem would exist. Indeed, if the district court provided the “profit” definition to the jury instead of the “gross receipts” definition, most or all of the violations of 18 USC 1957 would have resulted in not guilty verdicts because the government admitted Saccoccia's profits were only 5-10% of the amount, and this would not have met the \$10,000 jurisdictional amount. Similar as to the 1956 transactions, the jury would have had to consider only the small profit Saccoccia made and not the full amounts.

Because *Santos* created a change to the statutory construction of money laundering, and since it recognized the merger problem when the money laundering counts wag the tail of the main offense, the decision is retroactive.

With a retroactive statutory construction decision by this Court that is clearly retroactive, it became time for Saccoccia to petition the courts for relief. However, limitations to 28 USC 2255 prevented Saccoccia from petitioning for a successive 2255 based on *Santos*. Why? Because *Santos* is a rule of statutory construction, not constitutional construction. Therefore, Saccoccia's relief fell under the savings clause pursuant to 28 USC 2255(e). Under this clause, Saccoccia's method to seek relief was to file a petition pursuant to 28 USC 2241 in the district of confinement. This is the method of review of these types of cases in the majority of federal circuits. *United States v. Barrett*, 178 F.3d 34, 52 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248, 251 (3d Cir. 1997); *In re Jones*, 226 F.3d 328, 334 (4th Cir. 2000); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *Martin v. Perez*, 319 F.3d 799, 805 (6th Cir. 2003); *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998); *Alaimalo v. United States*,

645 F.3d 1042, 1047 (9th Cir. 2011); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002).

Saccoccia did just that. He filed a Petition for a Writ of Habeas Corpus in the Middle District of Florida on April 3, 2017 pursuant to 28 USC 2241. *Saccoccia v. Warden*, 5:17cv00138 (M.D. Fla.).

In the interim, the United States Court of Appeals for the Eleventh Circuit decided *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (*en banc*). In that decision, the Eleventh Circuit stated that the savings clause to 28 USC 2255 did not authorize prisoners to file habeas corpus actions in the district court when the Supreme Court sets a new rule of statutory construction whereby the prisoner can make a showing that he is innocent of his conviction and sentence. The Eleventh Circuit held that this does not constitute a suspension of the *writ of habeas corpus* because prisoners can petition the Supreme Court directly. *But see* Supreme Court Rule 20 (denials of habeas corpus petitions are not on the merits and do not preclude filing in other courts).

Possibly this Court will overrule *McCarthan* or it may deny *certiorari* because he is no longer incarcerated. Regardless, the instructions of the Eleventh Circuit are for prisoners to file directly with this Court.

Considering that the Eleventh Circuit directed that prisoners have only one remedy: To ask this Court, and because it moreless prohibited the district courts under its purview not to entertain the 2241 petitions, Saccoccia dismissed his district court action without prejudice. The district court concurred and dismissed the 2241 *without prejudice* on August 7, 2017.

Now, therefore, following the instructions by the Eleventh Circuit for inmates to petition the Supreme Court as the only method to correct post-conviction changes to statutory interpretation – pursuant to cases where the Supreme Court redefined the elements of the crime as in *Santos* – Saccoccia now petitions this Court for habeas corpus relief.

THE REASONS TO GRANT THE WRIT

This Court should overrule *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) jurisdictional proscription on 28 USC 2241 petitions and transfer this case to an appropriate United States District Court pursuant to 28 USC 2241(b) to avoid the Eleventh Circuit's unconstitutional suspension of the writ of habeas corpus and refusal to recognize the savings clause found at 28 USC 2255(e).

“The Supreme Court needs to decide whether § 2255(e) permits litigation [under 28 USC 2241]” *Camacho v. English*, 872 F.3d 811, 815 (7th Cir. 2017) (Easterbrook, J., concurring). Article 1, Section 9 of the Constitution makes it clear that the writ of *habeas corpus* shall not be suspended.

As there must be a remedy for retroactive changes to statutory interpretations to be applied, almost every court of appeals determined that 28 USC 2241(a) habeas corpus proceedings can be used to challenge a conviction when this Court entered a new rule of statutory construction defining the elements of conviction where a person can show that they are factually innocent as a proximate result. See *United States v. Barrett*, 178 F.3d 34, 52 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248, 251 (3d Cir. 1997); *In re Jones*, 226 F.3d 328, 334 (4th Cir. 2000); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *Martin v. Perez*, 319 F.3d 799, 805 (6th Cir. 2003); *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002).

However, two federal circuits declared that prisoners cannot use this vehicle. In *Saccoccia's* case, the *McCarthan* decision prevents him from petitioning the district court. If *Saccoccia* was confined someplace else, he could file such a petition. This dichotomy appears unjust as the Third Circuit recently recognized. *Bruce v. Warden*, 868 F.3d 170, 180 (3d Cir. 2017)(recognizing that their petitioner received the opportunity to have his challenge adjudicated on the merits, but his co-defendant brother could not lodge a challenge because he was detained within the Eleventh Circuit). This could

also open the door to abuse because the government arbitrarily, and without any form of review provided to prisoners, chooses which judicial circuit to house prisoners. In Saccoccia's case, he was convicted in Rhode Island, but he is being detained in Florida.

It appears very simple: This Court needs to adjudicate the merits of *McCarthan* and determine whether the *writ of habeas corpus* has been *per se* suspended where this type of post-conviction change in statutory construction is defined by the Supreme Court. This Court must then side with the majority of the courts that recognize the savings clause for what it must be—an enabling provision that allows these types of cases to be adjudicated.

Certainly, the alternative solution propounded by the Eleventh Circuit to make their decision constitutional – which is for inmates to file their original petitions with this Court – as discussed below would require a change to how Supreme Court Rule 20 is administered.

If *McCarthan*'s jurisdictional proscription on 2241 petitions is correct because, as they state, the "Original Writ in the Supreme Court remains available," then Supreme Court Rule 20(4) unconstitutionally denies petitioners due process and constitutes a suspension of the *writ of habeas corpus* because this Court is the only forum -- rather than an extraordinary forum -- with jurisdiction to determine habeas corpus proceedings when an intervening Supreme Court decision renders the persons conduct non-criminal.

The Eleventh Circuit found that refusing to recognize the ability of prisoners to utilize the savings clause and file their petitions under 28 USC 2241 does not constitute a suspension of the *writ of habeas corpus* because prisoners can file original petitions with this Court. In other words, there is a remedy for prisoners: Petition the Supreme Court with habeas corpus filings addressing retroactive changes to statutory interpretation.

However, Supreme Court Rule 20(4) provides that this Court's habeas corpus jurisdiction is extraordinary, not ordinary. The Rule explains that when this Court denies a petition it is not an adjudication on the merits. Rather, the Rule states that prisoners can then file their claims in other

courts (presumably the district courts).

That all sounds fair. Certainly, this Court lacks the time to thoroughly review hundreds of petitions lodged by prisoners. Except in extraordinary cases, the district courts appear to be the place to hear such a case on the merits. When the district courts and this Court share original jurisdiction, no real reason exists to find that Rule 20's provisions are not appropriate.

However, we now have a portion of the United States where the only remedy for prisoners is to petition this Court. Indeed, the Eleventh Circuit pointed to habeas corpus not being suspended because review can be had through this Court. If *McCarthan* is correct, to enforce the retroactive nature of a new rule, there must be some form of *de novo* or plenary review.

But review is not on the merits under Rule 20. It's discretionary and extraordinary. For habeas corpus to have meaning, the reviewing court must review the case and make a fair and just decision based on the law. The “discretionary” and “without prejudice” provisions make it clear that the decision does not constitute an adjudication. Without an adjudication, the petition for habeas corpus has been suspended in contravention of Article 1, Section 9, because the review is not meaningful and may not require application of retroactive statutory interpretations.

Therefore, if *McCarthan* is indeed correct, then it is Rule 20 that appears unconstitutional and is a suspension of the *writ of habeas corpus* in cases such as *Saccoccia's* where the intervening statute is redefined as to its elements to prevent a merger problem.

So to make sure that *McCarthan* can be applied nationwide, this Court should declare Rule 20(4) unconstitutional and establish a process so that the habeas corpus proceedings filed pursuant to this Court's original jurisdiction – in cases where a retroactive change to statutory construction occurs – will be reviewed on the merits in a manner comporting with due process.

Petitioner reasonably demonstrates factual innocence on many, if not all, of his money laundering convictions and the use of those convictions to create a 660 year sentence based on conduct rendered non-criminal by this Court in *United States v. Santos*, 553 U.S. 507 (2008), and which were improperly merged from a RICO Conspiracy single count conviction, warranting this Court to issue a writ of habeas corpus pursuant to 28 USC 2241 and 28 U.S.C. § 2255(e)'s saving clause.

Because a prisoner must have a method to have his case reviewed where this Court changed the definitions of the elements of conviction – especially where that change occurred to prevent a merger problem as discussed in *Santos*, Petitioner's case presents extraordinary circumstances similar to *In re Troy Davis*, 557 U.S. 952 (2009) where this Court granted the Writ.

Specifically, following this Court's decision in *Santos*, Saccoccia appears to be factual innocent of many counts in his indictment and the merger-problem infested 660 year sentence imposed for laundering – achieved by evading the 20 year maximum for the RICO conspiracy count and issuing consecutive sentences of the statutory maximum for each and every conviction of 18 USC 1956 and 1957. These counts were alleged as overt acts of the conviction of RICO conspiracy, in violation of Title 18 U.S.C. § 1962(d), but punished as money laundering, in violation of Title 18 U.S.C. § 1956, as a result of misapplication of the money laundering statute and improper merger of 47 counts of money laundering, valued at about \$9.5 million and within the \$136 million RICO conspiracy count.

The improper merger of the money laundering counts with the RICO conspiracy count of conviction resulted in Saccoccia being prosecuted for conduct rendered non-criminal under *Santos*. The resulting 660 year sentence imposed was 640 years beyond the statutory maximum sentence authorized by Congress for the actual crime: RICO Conspiracy. Saccoccia's personal liberty is currently being unlawfully restrained pursuant to a void Judgment and Commitment Order rendered by the District Court for the District of Rhode Island.

Under the *Santos* procedure, the district court could have avoided the 660 year overkill sentence

by properly defining to the jury that it could only convict Saccoccia based on his “profits” not mere “gross receipts.” Saccoccia most likely would have been convicted of the RICO money laundering conspiracy count, and probably received a sentence of the statutory maximum of 20 years, and many if not all of the 18 USC 1956 and 1957 violations would not have resulted in convictions since, as the government admitted, they amounted to only 5 to 10% of the amounts purportedly laundered. Alternatively, the district court could have avoided the merger problem by sentencing Saccoccia concurrently since the main crime – RICO money laundering conspiracy – had a 20 year statutory maximum as did the wholly included money laundering convictions.

Because Petitioner presents a colorable claim of factual innocence, he is entitled to have this reviewed on the merits by this Court if it does not wish to overturn *McCarthan*.

The specific facts and background of this case are complicated and this Court should appoint counsel to fully develop and assist in amending this petition. The background facts and the law, as explained below, provide a more clear idea of why Saccoccia is entitled to relief are as follows:

On November 19, 1991, a grand jury in the District of Rhode Island charged Saccoccia in a 150 count indictment. Count one charged Saccoccia in violation of 18 U.S.C. § 1962(d)(RICO Conspiracy). The indictment further charged Saccoccia in 67 counts in violation of various currency transaction report statutes, 13 counts of money laundering in violation of 18 U.S.C. § 1956, 61 counts of financial transactions with criminally derived proceeds in violation of 18 U.S.C. § 1957, and 8 counts of violation of 18 U.S.C. § 1952(interstate and foreign travel in aid of racketeering). After four redactions to the indictment, all CTR counts, 25 of the §1957 violations, and four counts under §1952, were dismissed. All of the dismissed counts, as well as 49 of the 53 surviving counts were described and listed as overt acts of the RICO Conspiracy Count which were comprised of 2,132 bank wire transfers, with a total value of \$136,344,241.00. *Indictment* at page 14, ¶ 3; *see also* Exhibit 2, Appendix C to the *Indictment*, listing 2,132 bank wire transfers, of which 49 of said transactions, were also listed as

substantive money laundering counts. The government prosecuted Saccoccia at jury trial on a so-called *Fourth Superseding Indictment* that included one count of RICO Conspiracy, 18 U.S.C. § 1962(d). The alleged racketeering activity, included, among other predicate acts, money laundering of proceeds of alleged drug sales, 18 U.S.C. § 1956, 1957, and using travel and facilities in interstate commerce to promote the money laundering activities, 18 U.S.C. § 1952(a)(3). The indictment did not charge Saccoccia with violating any drug statute. The 53 substantive counts included 13 counts in violation of 18 U.S.C. § 1956(a)(2)(A), 36 counts in violation of 18 U.S.C. § 1957, and 4 counts in violation of 18 U.S.C. § 1952(a)(3). *See Indictment* at pages 15-22. The 13 counts in violation of § 1956, alleged monetary transactions of a total value of \$4,639,301.00, consisted of individual allegations of money laundering between \$120,000.00 (Count 133) to \$545,000.00 (Count 124). The 36 counts in violation of § 1957, alleged monetary transactions of total value of \$4,743,457, consisted of individual allegations of money laundering between \$18,142 (Count 56) to \$323,000 (Count 79). Many of the charged counts were comprised of multiple bank wire transfers. For example, Count 79, was comprised of three separate transactions totaling \$323,000. The total combined alleged monetary transactions representing the 13 and 36 substantive counts in violation of § 1956 and 1957 equaled \$9,382,758.00. These monetary transactions were included in and not in addition to the 2,132 financial transactions alleged as overt acts within the RICO count. The transactions totaled \$136,344,241. *See List of Bank Wire Transfers* issued by Citizens Bank. The indictment also charged forfeiture pursuant to the RICO count and 49 of the substantive counts in violation of § 1956 and 1957.

At trial, the government presented documentary evidence to the jury which correlated to Attachment C of the Indictment alleged by the RICO Count. The trial record established that the 49 substantive money laundering counts with a total value of \$9,382,758, were included in the amounts set forth by the RICO Count-- comprised of 2,132 bank wire transfers valued at the \$136 million alleged as Overt Acts to the conspiracy. Compare the forty nine (49) money laundering counts at Pages 15 – 22, to

the RICO allegation, Pages 1 – 14, of the indictment to the List of 2,132 bank wire transfers valued at \$136,344,241 issued by Citizens Bank, between January 1, 1990, through March 28, 1991. The offenses of the Government's version of the crime, in pertinent part, is as follows:

“From at least 1986, to November 19, 1991, Stephen A. Saccoccia...and associates, working in New York City, Los Angeles, Miami, and elsewhere, began to launder the proceeds of cocaine sales and return these proceeds to the Colombian money launderers. Part of Saccoccia's money laundering during 1988, and earlier 1989, was accomplished through the delivery by Saccoccia of millions of dollars to Aaron Sharir, (Sharir) a precious metals dealer and jewelry manufacturer, who would in turn, wire transfer these funds to other accounts at the direction of the money launderers”. (See *Presentence Investigation Report*, ¶ 11).

At trial, the Government produced two groups of witnesses. One group included two Colombian nationals: Raul Escobar and Juan Carlos Garcia. These witnesses established that Saccoccia charged the Colombian money launderers between 5-10% of the money received, hence establishing Saccoccia's “gross profit margin before cost of outsourcing the money.” The second group of witnesses presented, Barry Slomovits, Aharon Sharir, and Richard Gizzarelli, established “Saccoccia's cost” of 3-5%, for outsourcing the money, and thus established that Saccoccia earned a “net profit” of approximately 5%.” The evidence at trial clearly portrayed Saccoccia, not as the primary money launderer, but rather a worker making a commission. There was no evidence presented that Saccoccia retained the gross proceeds. See Government's version of the money laundering offense at *Presentence Investigation Report*, ¶ 11.

The jury rendered a general verdict on 54 counts, consisting of the RICO count verdict, Count 1, the 13 money laundering counts, under 18 U.S.C. § 1956, an additional 36 counts in violation of 18 U.S.C. § 1957, and 4 counts in violation of 18 U.S.C. § 1952. (See, jury verdict at Tr. 3/12/93, pages 4-6).

The district court did not ask the jury to determine if Saccoccia laundered \$136,344,231,

consisting of 2,132 bank wire transactions, as a consequence of his conviction under the RICO count. Similarly, the court never asked the jury to determine the amount of "net proceeds" of 49 of the 2,132 financial transactions, despite the evidence at trial establishing that Saccoccia's net profit was approximately \$500,000 based on the 49 money laundering counts under 18 U.S.C. § 1956 and 1957. Indeed, nowhere in the court's jury instruction, *see* tr. 3/11/93, at pages 1-66, did the court instruct the jury that net profits were to be the basis for conviction on the 49 substantive money laundering counts. The court, during its jury instruction, charged in part as follows: "Now, as you know Ladies and Gentlemen, this is a criminal prosecution for violations of the conspiracy provision of the *Racketeer Influence and Corrupt Organization* statute which is also known as the R.I.C.O. statute, and for violations of a number of money laundering statutes that first prohibits certain kinds of monetary transactions involving money derived from narcotics trafficking. Second, the statute that prohibits the transfer of money derived from unlawful activities to places outside the United States in order to conceal the ownership of the money and/or to promote narcotics trafficking, and third, a statute that prohibits travel in interstate commerce or the use of facilities in interstate commerce promote those types of prohibited transactions and transfers, that I have just mentioned". *See*, Instruction at page 7, lines 9-25, and page 8, lines 1-3.

The court explained, "The remaining counts charge the defendant with the various money-laundering violations that are described in those counts. Now those counts are grouped into three (3) categories based on the nature of the offense charged and the statute that was allegedly violated". *See* Instruction at page 8, lines 9-15. The court further stated, "The portion of the indictment labeled Counts 121 through 133 charges the Defendant with transferring money derived from unlawful activity to places outside the United States, with the intent to promote narcotics trafficking or for the purpose of concealing the source of ownership of the money in violation of § 1956(a)(2) of Title XVIII, and it also charges him with aiding and abetting others in doing so, in violation of Section 2 of Title XVIII." *See*

Instruction at page 14, lines 14-24).

Saccoccia made objections during sentencing in line with what is today known as *Santos* and called a "merger problem" by this Court. On May 10, 1993, the trial court heard arguments regarding numerous sentencing issues. *See*, Tr. 5/10/93, pages 57-67, and 85-94. Saccoccia's counsel claimed that the Government alleged, and the evidence established, that Saccoccia was a contractor for Mr. Arboleda and others, and Saccoccia was not charged or convicted of selling the drugs. On the other hand, Mr. Arboleda and others, were money launderers, running a cocaine enterprise and using others, like Saccoccia, to launder those funds, asserting that the evidence presented in trial showed Saccoccia to enter competitive bids to launder those funds, and that he charged a commission of 5%-15%, and that Saccoccia's share of those fees is a fair measure of his participation in the RICO enterprise". *See*, Tr. 5/10/93, at pages 57-67. As stated previously, the evidence presented to the jury at trial established that Saccoccia's share of those fees represented a net retention of no more than 5% of the gross value of the money.

Saccoccia's counsel argued that the jury's verdict of the RICO Conspiracy count did not constitute an endorsement in any fashion or particular figure, and that the way the Court gets to the \$137 million figure, alleged and listed under the RICO count, is based on relevant conduct, implying that a standard of proof, less than beyond a reasonable doubt, is unconstitutional. *See* Tr. 5/10/93, pages 85-94.

Counsel further noted that the jury's verdict on the substantive money laundering counts was less than \$10 million and that figure must be used in calculating USSG 2S1.1, not the \$137 million under the RICO count of conviction. Furthermore, counsel stated that the government did not meet its burden to the jury to establish that Saccoccia laundered \$137 million.

In summing up his argument, counsel stated:

"I believe Your Honor said it yourself on Monday, this is four ways of saying money-laundering. We can call it RICO. We can call it the Travel Act, you can call it anything you want; it is four ways of saying money-laundering plain and simple whether there is one count or two hundred counts. It's money laundering. It is one type of conduct. It's one crime. It's count manipulation to start throwing it under different types of statutes". *See* Tr. 5/12/93, at page 125, lines 7-16.

Counsel pointed out:

"Now, clearly and clearly which has been overlooked is that in that policy statement, if the money is aggregated and the money must be aggregated, as it has been here, then the indictment must be treated as one count. Whether it starts as three counts or fifty counts, when the money is aggregated to get one hundred and thirty-seven million dollars, then it's a one count indictment for the purpose of sentencing. And here, where the statutory maximum flies into force. The maximum penalty, the most severe penalty, provided by Congress is a twenty-year sentence". *See* Tr. 5/12/93, page 125, line 17, to page 126, line 4.

In arguing to the court that stacking counts of conviction in this case was unconstitutional, counsel pointed out one final factor:

"But the other interesting factor of that is once all of the money is aggravated into Count one and we use the money laundering there and the money is all in Count One, what do we use when we get to the other counts? Can we double count the money? The government doesn't tell you or even suggest how to do that. Do we double count the money in those other counts? It is already all in Count One. One hundred and thirty-seven million dollars, every dime is in there. The other counts add up to nine million. But that nine million is already in the one hundred and thirty-seven million". *See*, Tr. 5/12/93, at page 127, lines 8-22.

The district court adopted the Probation Department's recommendation that all counts be grouped under USSG 3D1.2(d) and that base offense Level 23, for money laundering under USSG 2S1.1, should be the starting point in calculating the adjusted total offense level for the RICO Conspiracy count (Count One) pursuant to USSG 2E1.1. The court, thereafter, added the following USSG enhancements to Count One: A three-level increase under 2S1.1(b)(1)(finding by preponderance the laundered funds were derived from drugs), a four-level increase under 3B1.1(a)(finding by preponderance Saccoccia's leadership role of the RICO Enterprise), a two-level increase for obstruction

of justice by preponderance, and lastly, a 13 level enhancement under 2S1.1(b)(2)(N) because of the non-jury factual finding that Saccoccia laundered \$136,344,231 in violation of the money laundering statute pursuant to his conviction on Count One and contained in 2,132 financial transactions, alleged as overt acts in support of the RICO Conspiracy. This calculation resulted in a total adjusted offense level of 45 under Count One. *See*, Presentence Investigation Report, ¶¶ 20-27, Exhibit 3, and Tr. 5/12/93, at page 147. In order to factually support the 13 level increase pursuant to USSG 2S1.1(b)(2)(N), the court utilized a preponderance of the evidence standard under a relevant conduct theory, and held "Saccoccia laundered \$136,344,241 in violation of 18 U.S.C. § 1956, based upon 2,132 financial transactions alleged as overt acts of the RICO Conspiracy count. *See* Tr. 5/12/93, at page 147, lines 9-15, and Exhibit 3, PSR at ¶ 23. This sum included the lesser amount of \$9,382,758 contained in and charged under the 49 substantive money laundering counts submitted to the jury. *See* Tr. 5/12/93, at pages 151-154. Because Level 43 of the sentencing guidelines required life imprisonment, the judge imposed consecutive sentencing on each count of the Indictment pursuant to USSG § 5G1.2(d).

On May 12, 1993, the court imposed a sentence based on the United States Sentencing Guidelines to the statutory maximum term of 20 years imprisonment on the RICO count, which was first in the succession of punishment. The Court thereafter, sentenced Petitioner consecutively to 260 years, upon the 13 counts of money laundering, followed consecutively by 360 years upon the 36 counts under 18 U.S.C. § 1957, and 20 years on the four counts of § 1952 violations. The court, thereafter, fined Saccoccia the maximum allowed by statute upon each count, and imposed a special assessment of \$50.00, based on each count. In the final phase of sentencing, the judge ordered Saccoccia to forfeit to the United States \$136,344,231 pursuant to the RICO count of conviction and held that \$9,382,758 was to be forfeited pursuant to the 49 substantive counts in violation of 18 U.S.C. § 1956 and 1957, and was included, and not additional to, the \$136,344,231, forfeited through the RICO count. *See* Tr. 5/12/93, at page 156, lines 12-16.

In *Santos*, this Court narrowed the scope of the money laundering statute by interpreting the term "proceeds" in 18 U.S.C. § 1956(a)(1), to mean the "net profits" of an illegal business rather than "gross receipts". Because Justice Stevens' concurring opinion provided the narrowest rule for which a majority agreed, it provides the majority holding. *Marks v. United States*, 430 U.S. 188,193 (1977). Accordingly, Justice Stevens' opinion may be limited to holding that "proceeds" means "profits" when there is no legislative history to the contrary. *Santos*, 553 U.S. At 523. The Supreme Court based its decision partly on the rule of lenity, which required ambiguous statutes to be interpreted in favor of the defendant. *Santos*, 553 U.S. At 514.

The focus of *Santos* was the fairness at sentencing, which was described by the plurality as avoiding "the merger problem" and by Justice Stevens in his concurring opinion as avoiding a "perverse" sentencing result. *Santos*, 553 U.S. at 515 (plurality decision) and 526 (J. Stevens, concurring). *Santos* concerned instances where a violation of one statute, without any additional conduct by a defendant, would constitute a violation of the money laundering statute. Such a result was found to create a "merger problem" or "perverse" sentencing result, where the money laundering statute would dramatically increase the sentence for crimes which had been "duly considered and appropriately punished elsewhere in the Criminal Code". *Santos*, 553 U.S. At 517, 526.

While the appellate courts have struggled to parse at the precise meaning of the Court's decision in *Santos*, it is generally construed to implicate three considerations: (a) Is there a merger problem? (b) Does the merger problem lead to a radically increased sentence above the statutory maximum? and (c) Does legislative history fail to show that Congress intended the increase?

Here, the merger problem between the RICO count and the 49 money laundering counts rest upon the indisputable fact that the sentencing court held, "Saccoccia laundered in violation of 18 U.S.C. § 1956, the sum of \$136,344,241.00, based upon 2,132 financial transactions of said sum, alleged as overt acts of the RICO Conspiracy count of conviction." See Tr. 5/12/93, at page 147, lines

9-15, and Presentence Report at ¶ 23.

Because a crime of money laundering can only be perpetrated and punished under the money laundering statute, the court merged the money laundering counts with the RICO count, in order to apply the Specific Offense Characteristics pursuant to the money laundering guidelines under USSG 2S1.1(b)(2)(N) to the 2,132 financial transactions.

As a result of improper merger and misapplication of the money laundering guidelines, the court, in essence, converted the financial transactions of the separate offense of RICO Conspiracy in violation of 18 U.S.C. § 1962(d) to "one count of money laundering" in violation of 18 U.S.C. § 1956, was punishable under USSG 2S1.1(b)(2)(N), pursuant to Saccoccia's conviction of the RICO count.

As to element (b), it is apparent that the merger problem lead to a radical increase of Saccoccia's sentence. The question is resolved affirmatively by a simple comparison between the Total Offense Level 45 of the RICO count which reflected the merger problem, and what that Total Offense Level would have been, absent the merger problem at Level 32.

As stated previously, the Judge concluded that the 2,132 financial transactions valued at \$136,344,241.00, represented proceeds of money laundering, and thereby increased the RICO calculation by 13 levels, from level 32 to Level 45, pursuant to USSG 2S1.1(b)(2)(N).

Because Level 43, or more, requires a "minimum mandatory life guideline sentence," the district court, purportedly pursuant to USSG 5G1.2(d), imposed consecutive sentences 640 years above the statutory 20 year maximum sentence upon Saccoccia for his RICO count of conviction, resulting in a 660 year sentence.

However, absent the 13 level enhancement, Saccoccia would have been sentenced only to 121-151 months, a sentence well below the 20 year sentence authorized by Congress for the RICO count.

With respect to element (c), at the time he committed his crime and was prosecuted, neither the RICO nor the money laundering statutes were supported by any legislative history to justify a radically

increased sentence of 660 years. Of course, this is precisely what the Supreme Court in *Santos* ultimately addressed.

Following *Santos*, Saccoccia appears to be factually innocent of laundering \$136 million in violations of 18 USC 1956 and 1956 because of the district court's misapplication and improper merger of said counts of conviction with the RICO conspiracy count.

Pursuant to *Santos*' statutory interpretation of the money laundering offenses to which Saccoccia was prosecuted, Saccoccia asserts that his conviction and sentencing for non-criminal conduct implicates the separation of powers principle. "It is only Congress, and not the courts, which can make conduct criminal." *Bousley v. United States*, 523 U.S. 614, 620-621(1998).

It is evident, that upon discharging the jury, the judge's subsequent findings as applied to the 49 money laundering counts as merged with the 2,132 financial transactions listed as overt acts of the RICO Conspiracy count, the conviction and sentence imposed violated *Santos*. This is so because Saccoccia was not charged by indictment with money laundering \$136 million contained in 2,132 Overt Acts in violation of 18 U.S.C. § 1956.

Moreover, the court failed to instruct the jury in that respect. Lastly, the jury's verdict rendered upon the RICO count did not constitute an endorsement in any fashion or particular figure. *See*, Tr. 3/12/93, at pages 4-6.

Therefore, Saccoccia's sentence, far above the 20 year statutory maximum, implicates the separation-of-powers principle. It is axiomatic, "the power to prescribe the punishments to impose upon those found guilty of [federal crimes] resides wholly with the Congress". *Whalen v. United States*, 445 U.S. 684, 689 (1980).

Here, the imposition of an erroneous sentence in violation of *Santos* resulted in a "mandatory minimum life sentence pursuant to the guidelines" which is analogous to a sentence implicated above the statutory maximum.

It cannot be disputed that only Congress has the authority to establish maximum and minimum penalties for a criminal offense. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“It is the legislature, not the Court, which is to define a crime, and ordain its punishment”).

In the case at bar, this is precisely what occurred. The court committed legal error in determining Saccoccia’s sentence, which resulted in a minimum mandatory guideline life sentence which transgressed upon the authority that Congress established and, effectively, erroneously sentenced Saccoccia to an aggravated crime. The resulting sentence, therefore, represents an unjustified loss of liberty. The fundamental character of that deprivation is confirmed by the Supreme Court’s holding in *Hicks v. Oklahoma*, 447 U.S. 343, 346-347 (1980), which held that a similar error under state law violated due process because “[t]he defendant*** has a substantial and legitimate expectation that he will be deprived of his liberty, only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one, that the Fourteenth Amendment preserves against arbitrary deprivation by the state”.

In *Santos*, 553 U.S. 507, 128 S. Ct 2020, 2031 (2008), Justice Stevens, who provided the fifth vote, was particularly concerned about the “perverse” result that would occur if the government were allowed “to treat the separate offenses of illegal gambling business in violation of § 1955, as a separate money laundering offense under § 1956.” According to Justice Stevens, that “perverse” result is tantamount to double jeopardy. *Id.* At 2032-33.

In *Santos*, Justice Steven’s concurring opinion, at 523, provided the narrowest rule for which a majority agreed, that it provides the majority holding that “proceeds” means “profits” when there is no legislative history to the contrary. .

This Court also reasoned that “proceeds” means “gross revenues” – “not profits” when the predicate offense involves the “sale of contraband and the operation of organized crime syndicates involving such sales”. *Id.* at 526. And that, as in this case, where the predicate offenses is not the sale of

drugs but “where violation of one statute,” in Saccoccia’s case-- RICO Conspiracy in violation of 18 U.S.C. § 1962(d)-- constitutes a violation of money laundering statute.

This result creates a “merger problem” or “perverse” sentencing result where the money laundering statute dramatically increased the sentence for crimes that had been “duly considered and appropriately punished elsewhere in the Criminal Code.” *Id.*, 553 U.S. at 515-26. For this reason, the Supreme Court applied “the rule of lenity”, which required ambiguous statutes to be interpreted in favor of the defendant. *Id.*, 553 U.S. At 514.

In Saccoccia’s case, the convicting court, throughout the trial, charging of the jury, and sentencing stage, used “gross receipts” rather than “net profits” or “net proceeds” valuation when applying the money laundering statutes’ sentencing governance under USSG § 2S1.1(b)(2) with that of the merged RICO conviction.

This legal error became pronounced when the court made a factual finding holding that “Saccoccia’s conviction of RICO Conspiracy automatically constituted the laundering of \$136,344,241 in violation of the money laundering statute.” This greater sum, of course, included the lesser sum contained in the 49 predicate counts of money laundering conviction.

ii.

Because of criminal conduct, with represents the “total unit of prosecution” was considered by the district court when imposing the statutory maximum penalty of 20 years on the RICO Count – first in a succession of punishment – the consecutive sentences totaling 640 years on the other counts of conviction constitute multiple punishment in violation of the double jeopardy clause of the Fifth Amendment.

Like *Santos*, Saccoccia’s conviction of RICO Conspiracy is a separate crime that depended on the facts presented at trial and on facts determined at sentencing which could be punished separate from

the predicate crimes of the conspiracy. *Salinas v. United States*, 522 U.S. 52 (1997). However, considering that the court made a “factual finding” that the RICO Conspiracy count of conviction automatically constituted a single money laundering crime of \$136,344,241, as a consequence of erroneously applying the money laundering statutory sentencing governance to the \$136,344,241 overt acts alleged in the RICO count, it follows that the \$9,372,757 alleged under the 49 money laundering counts, which are inclusive, and not additional to, the greater sum punished by the RICO count sentence, must be treated as lesser included, representing “one course” of conduct for the purpose of punishment. This is so because the amount of money laundered under those counts is already accounted for, and punished by the greater sum pursuant to the RICO count. *United States v. Universal CIT Credit Corp.*, 344 US 218, 225, 73 S Ct., 227 (1952). In *Universal*, this Court explained that consecutive punishment of predicate offenses is dependent upon whether an aggregate of criminal acts constitute a single course of conduct, and therefore, a single offense, which may not be capable of ascertainment, merely from bare allegations of an information and may have to award the trial of facts or, as in the case at bar, the facts determined by the court, in where the convicting court affixed the “total unit of prosecution” solely to the RICO count of conviction. *Id* at 231.

Here, the total unit of prosecution consists of the charged conduct of \$9,372,757, a valuation reflected by Saccoccia’s conviction of 49 money laundering counts. This sum, of course, is included and considered in the \$136,344,241 alleged through the 2,132 financial transactions, *i.e.*, overt acts of the RICO conspiracy count. The difference of \$126,971,484 reflects uncharged and dismissed conduct contained in the 2,132 overt acts.

Based on the facts of this case at the sentencing phase, it is beyond dispute that the court affixed the total unit of prosecution to the RICO count of conviction when it held Saccoccia laundered \$136,344,241 during the life of the RICO Conspiracy. There is also no question that the convicting court arrived at this decision by erroneously merging the 49 money laundering counts and applying the

§ 1956 money laundering statute to the RICO count in violation of *Santos*. See, i.e., Judicial Sentencing Findings at ¶¶ 52 through 56.

Based on the above, it is clear that Saccoccia laundered \$136,344,241 in violation of § 1956, which is reflected, and punishment limited, to the twenty (20) year statutory maximum prison sentence imposed under the RICO count. This is so because the convicting court imposed, first in a succession of punishments, the RICO sentence.

It should be noted that defense counsel preserved these claim at sentencing. Had the convicting court not thereafter demerged 49 money laundering counts and imposed consecutive sentences upon those counts, a multiple punishment violation would not have occurred.

To allow the judgment to stand on these counts with the incorrect definition of proceeds in place, in light of *Santos*, it is tantamount to double jeopardy, and is precisely the “perverse” sentencing result that Justice Stevens cautioned about in *Santos*, which is prohibited. See also, *North Carolina v. Pearce*, 395 US 711, 715 (1969).

Even if this Court disagrees that consecutive sentencing on the money laundering counts is prohibited under the Double Jeopardy Clause, the statutory maximum sentence imposed on Saccoccia for the RICO Count of conviction trumps the additional 640-year sentencing-guideline sentence imposed on said counts, and hence, consecutive sentencing of those counts is prohibited. See, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) Footnote 21). This is so, because when the court calculated Saccoccia’s sentence, it used the same set of facts without any additional evidence, attributing all charged and uncharged conduct exclusively to the RICO Count, in order to apply the money laundering guidelines.

In sum, Saccoccia’s total punishment for the crime he committed is limited to 20 years.

iii.

Following *Santos*, Saccoccia is factually innocent of the 36 counts alleging violations of 18

USC § 1957. A prevalent example of the convicting court's misapplication of the money laundering statute can be seen in the court's treatment of the thirty-six (36) counts of conviction of the 1957 violations. The alleged monetary transactions consisted of individual counts ranging from \$18,142.00, to \$204,129.00, with some of the counts oddly containing multiple wire transfers.

The total value of the transactions was \$4,743,457, which like the thirteen § 1956 money laundering counts, were listed and included in the 2,132 overt acts of the RICO count valued at \$136,344,241. At trial, the government produced two groups of witnesses, establishing that Saccoccia made a "net profit" of approximately five percent. This is because the evidence presented clearly portrayed Saccoccia not as a primary money launderer or a drug dealer, but rather as a worker.

Hence, with the possible exception of Count 67, the government failed to meet its burden of the § 1957 statutory element requirement that each count of conviction contained more than \$10,000 in net profit or net proceeds as required by *Santos*.

Indeed, had the jury been instructed to consider "profits" as "proceeds" instead of gross receipts, Saccoccia would have been found not guilty of at least 35, if not all 36 counts. Precedent in support of Saccoccia's claims is also found in *United States v. Marva Adorno-Molina*, 774 F. 3d. 116 (1st Cir. 2015) and *United States v. Lyons*, 740 F. 3d 702, 727 (1st Cir. 2014).

In *Adorno*, 774 F.3d at 118-24, the First Circuit, whose law should control if a district court reviewed this petition, joined other circuits that previously addressed *Santos*' improper merger claims of drug convictions with money laundering. That Court, concurring with the Second Circuit in *United States v. Quinones*, 635 F. 3d. 590, 600 (2nd Cir. 2011), held that "proceeds" under § 1956, are not limited to "profits" at least whereas here, the predicate offenses involved the sale of drugs.

Considering that Saccoccia was not charged or convicted of statutory drug violations and that the 49 money laundering counts, as merged with the RICO count of conviction, represented the underlying racketeering activity of the RICO Enterprise, the decision in *Adorno* differentiates and

implicitly supports Saccoccia's claims.

In *Lyons*, 740 F. 3d at 727-28, the defendant challenged the sufficiency of the evidence for his conviction of two counts of money laundering under § 1957, in light of, *Santos*. The First Circuit recognized that the word "proceeds" meant "profits" as to § 1957, as well as § 1956, prior to 2009, and that the definition of "proceeds" was undefined until the definition of "proceeds" was added to § 1956, in 2009. See, *Fraud Enforcement and Recovery Act of 2009*, Pub. L. No. 111-21, § 2, 123 Stat. 1617) in response to *Santos*.

The appeals court in *Lyons* also noted that the Government conceded that *Santos* was applicable to claims against § 1957 convictions.

The *Lyons* Court thereafter ruled that *Lyons*' claim failed because in order to convict, all the Government needed to prove was that "proceeds" of the particular bank wire transactions charged in the indictment were "profits" of a specific unlawful activity. *Id* at 728. The appeals court held that there was sufficient evidence at trial for such a finding.

Here, Saccoccia's case is easily distinguished from *Lyons*. Indeed, the facts of this case clearly show that the Government failed to meet its burden as to the element requirement to sustain a violation of § 1957, as the statute was written in 1990, when Saccoccia allegedly committed the crime.

Contrary to the defendant in *Lyons*, the Government failed to show that each bank wire transfer, charged in each count of the indictment, represented "profits" of more than \$10,000 of specified unlawful activity. (Rather, it conceded at trial that only 5% of the amount contained profits).

In Saccoccia's case, the specified unlawful activity was not profits he obtained from the sales of drugs as in *Marva Adorno-Molina*, 774 F. 3d 118 (1st Cir. 2015), but rather "net profits" -- commissions of approximately five percent (5%) of which he received pursuant to accepted bids from the primary money launderers who allegedly received the money initially from the drug dealers. Because of this, the Government failed to prove the statutory requirements considering the proper 1990 definition of

“proceeds” meaning profits.

However, assuming *arguendo*, this court did not consider the cost to Saccoccia for outsourcing the money, the Government still fails to meet its burden of proof. Because the evidence presented at trial established Saccoccia’s gross profit, before the cost of outsourcing the money received, is only ten percent. Hence, under such analysis, Saccoccia is actually innocent of every count in which each bank wire transfer is less than one hundred thousand dollars \$100,000 based on the Government’s own admissions. *See*, Exhibit 1, Indictment at Pages 15-19.

iv.

Saccoccia similarly is factually innocent of the 1956 money laundering counts. The question presented in *Santos*, 533 U.S. at 508 was whether the term *proceeds* in the federal money laundering statute meant “gross receipts” or “profits” when applying the statute. As stated throughout this petition, the legislative history at the time of Saccoccia’s prosecution and sentence was ambiguous.

The Supreme Court resolving the case in *Santos*, and affirming the Seventh Circuit’s proclamation that “proceeds” meant “net income”, *Santos v. United States*, 461 F. 3d 886 (7th Cir. 2006) narrowed the scope of the money laundering and applied the rule of lenity to the defendant, vacating his convictions for violating 18 USC 1956. This Court is required to apply *Santos* equally and grant Saccoccia the same relief as defendant *Santos*, based on the facts of the instant case. This is so, because following *Santos*, that the indictment, evidence presented in accord to the government’s version of the money laundering offenses and the judge’s jury instruction, collectively are insufficient to sustain Saccoccia’s money laundering convictions.

More importantly, the collective jury instructions and misstatement of the law implied to the jury (and the sentencing court) that the conduct was unlawful when it was not. A review of the Indictment at pages 19-20 at Exhibit 1, alleges that Saccoccia promoted the transfer of money to a place outside the United States at specified amounts in each count 121-133.

The Indictment did not allege Saccoccia's criminal conduct constituted 'net profits' within the meaning of Santos, nor did the indictment allege Saccoccia sold drugs as the underlying racketeering activity in violation of the law or that Saccoccia's criminal conduct constituted "not profits" or "net proceeds" from said transactions.

The evidence presented to the jury, consistent with the government's theory of the 1956 money laundering offenses, proved that Saccoccia was not the primary money launder but simply a sub-contractor who would bid on lots of cash to process and that his "net profit" was about 5%. *See, e.g.,* Exhibit 3, Presentence Investigation Report at paragraph 11 (based on government's version).

Finally, the court, providing pre-*Santos* jury instructions failed to instruct that a verdict must be based on "net profits" or "net proceeds" rather than "gross proceeds". *See, Jury Verdict Form and jury instructions, generally.*

Considering Congress quickly legislated an amendment to the money laundering statute in 2009 in direct response to *Santos*, amending the statute to specifically include the term 'gross receipts', it is undisputed, that Saccoccia was convicted and sentenced on the wrong pre-*Santos* premise of money laundering reasoning and, therefore, this Court must vacate his conviction and sentence imposed on counts 121-133. *Reiner v. United States*, 210 U.S. Dist. Lexis 44121 (D. Mass 2010) (citing 2009 money laundering Amendment).

This Court must allow Saccoccia to achieve justice when collectively errors of most fundamental character such as insufficient of notice, misapplication of the statute, incorrect definitions within jury instructions and disregard of the evidence presented have occurred in the case at bar where the proceeding itself was irregular and produced invalid conviction. *See, United States v. Morgan*, 346 U.S. 502, 511-12 (1954); *United States v. Michaud*, 925 F. 2d 37,39 (1st Cir. 1991).

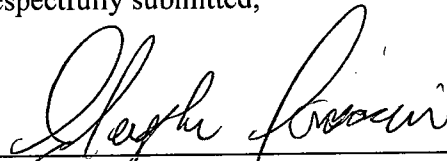
Indeed, Saccoccia notes that *Santos* involved a collateral attack on his conviction, not a direct appeal, alleging actual innocence based on use of the wrong definitions. There is no basis to

distinguish Saccoccia's case from *Santos* as to the confusion and prejudice that occurred when the Rhode Island court instructed a jury as to the incorrect definitions. It is unlikely that Saccoccia would be convicted if retried today using the correct jury instructions applicable to the offenses as the purportedly occurred during 1991.

CONCLUSION

The petition for a writ of habeas corpus should be granted; or, in the alternative, the case transferred to the appropriate United States District Court for resolution on the merits.

Respectfully submitted,



Stephen Saccoccia, Reg. 02596-070
United States Penitentiary – Coleman
PO Box 1033
Coleman, FL 33521

VERIFICATION PURSUANT TO 28 USC 1746

I, Stephen Saccoccia, verify pursuant to 28 USC 1746 that the foregoing Petition for Writ of Habeas Corpus is true and correct to the best of my knowledge, information, and belief (28 USC 1746).



Stephen Saccoccia