IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. '08 - CV - 02005
(To be supplied by the court)

Eugene H. Mathison, Applicant,

v.

Ron Wiley, Warden, Respondent.
(Name of warden, superintendent, jailer, or other custodian)

APPLICATION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

A. PARTIES

1. Eugene H. Mathison, #07835-073, P. O. Box 5000, Florence, CO 81226-5000
(Applicant's name, prisoner identification number, and complete mailing address)

2. Ron Wiley, P. O. Box 8500, Florence, CO 81226-8500
(Respondent's name and complete mailing address)

3. If you are not confined in a prison, jail, or other correctional facility, explain how you are in custody:

N/a

4. If you are confined in a prison, jail, or other correctional facility but the named respondent is not the warden, superintendent, or jailer at the prison, jail, or correctional facility in which you are confined, explain how the respondent is your custodian:

(Rev. 9/02/04)

ATTACHMENT 1

B. NATURE OF THE CASE

BRIEFLY state the background of your case. If more space is needed to describe the nature of the case, use extra paper to complete this section. The additional allegations regarding the nature of the case should be labeled "B. NATURE OF THE CASE."

This action arises over the fact that I am factually, actually and legally innocent of the charges of money laundering pursuant to 18 USC §§ 1956 and 1957. I was charged with operating a relatively small Ponzi scheme in 96-40048 (D.S.D.) and with "Counts 32 through 37 ... [of] transfer[ing] between accounts and the withdrawal by a monetary instrument, that is a check in the amount listed below, which involved the **proceeds** of specified unlawful activities," and in counts 51 and 52 with violating 18 USC § 1957, and in Counts 53 through 59 with "the withdrawal by a monetary instrument, that is a check in the amount listed below, which involved the **proceeds** of specified unlawful activities." Pursuant to United States v Santos, 553 US —, —, 170 L Ed 2d 912, 926, "'proceeds' means 'profits' when there is no legislative history to the contrary."

The Court's ruling is a "substantive statutory holding," which is always retroactively applicable; however, due to the limitations imposed by the AEDPA I cannot bring the claim of my factual and legal innocence via 28 USC § 2255. I am forced to bring it under 28 USC § 2241. (See Bousley v United States, 523 US 614, 621-623)

C. CLAIMS

State concisely every claim that you wish to assert in this action. For each claim, specify the right that allegedly has been violated and state all supporting facts that you consider important. You do not need to cite specific cases to support your claim(s). If you need additional space to describe any claim or to assert additional claims, use extra paper to continue the claim or to assert the additional claims. Identify clearly any additional pages that you attach to this form.

CAUTION: In order to proceed in federal court, you ordinarily must exhaust administrative and/or state remedies for each claim that is asserted in this action.

1. Have you exhausted administrative and/or state remedies for each claim asserted in this action? ___ Yes XX No (CHECK ONE)

2. If you answered "No" to question 1., list the claims for which you have not exhausted administrative and/or state remedies and explain why: Not applicable

3. Claim One: Factual and legal innocence "may be reviewed in [§ 2241] collateral proceeding if ... probably innocent." (Bousley, 523 US at 623) Legal innocence can be proved.

A. Supporting facts:

(See Memorandum of Law for supporting facts)

B. Explain the steps you have taken to exhaust administrative and/or state remedies for this claim (attach proof of exhaustion, if available):

No applicable.

4. Claim Two: _____

A. Supporting Facts:

B. Explain the steps you have taken to exhaust administrative and/or state remedies for this claim (attach proof of exhaustion, if available):

5. Claim Three: _____

A. Supporting facts:

B. Explain the steps you have taken to exhaust administrative and/or state remedies for this claim (attach proof of exhaustion, if available):

D. PRIOR APPLICATIONS

1. Have you filed any prior action in federal court in which you raised or could have raised the claims raised in this action? ___ Yes XX No (CHECK ONE)
(I filed a prior § 2241 in this Court but Santos was not decided yet. That § 2241 was denied and is now before the Supreme Court.)
2. If you answered "Yes" to question 1., give the following information for each prior federal court action challenging the execution of your sentence.

A. Name and location of court: _____

B. Case number: _____

C. Type of proceeding: _____

D. List the claims raised: _____

E. Were the claims in this action actually asserted in the prior action? ___ Yes ___ No (CHECK ONE)

F. Were the claims in this action available to be asserted in the prior action? ___ Yes ___ No (CHECK ONE)

G. Date and result (attach a copy of the decision if available): _____

E. REQUEST FOR RELIEF

I request the following relief:

Immediate release as I have already served more than twice the sentence justified by the convictions which survive Santos.

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I am the applicant in this action, that I have read this application, and that the information in this application is true and correct. *See* 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed on August 30, 2008
(Date)


(Applicant's Original Signature)

Eugene H. Mathison
#07835-073 (Summit)
Federal Prison Camp
P. O. Box 5000
Florence, CO 81226-5000

'08 - CV - 02005

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

EUGENE H. MATHISON, Petitioner,

v

RON WILEY, Warden, Respondent.

Case No. _____

MEMORANDUM OF LAW IN SUPPORT OF § 2241 PETITION

COMES NOW, Petitioner (hereinafter referred to variously as "I," "me," "my," "Petitioner," and/or "Mathison") appearing pro se, who respectfully brings his Memorandum of Law before this Honorable Court.*

JURISDICTION TO CONSIDER PETITION

Title 28 USC § 2255(e) states:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

The 10th Circuit Court of Appeals has interpreted this to bar, except "in extremely limited circumstances," (Caravelho v Pugh, 177 F3d 1177, 1178 (10th Cir 1999)), the use of a § 2241 petition used to "determin[e] the validity of a judgment," adding that "§ 2241 'is not an additional, alternative, or supplemental remedy, to the relief afforded by motion in the sentencing court under § 2255.' Williams v United States, 323 F.2d 672, 673 (10th Cir.1963)." (Id.) The Court there cited both Triestman v United States, 124 F3d 361, 276 (2nd Cir 1997) and In re Dorsainvil, 119 F3d 245, 251 (3rd Cir 1997), in support of the fact that § 2241 was not authorized as an end run around AEDPA's limitation on second or successive motions, which require COA approval.

I have filed a prior § 2255 motion in the instant case. (Mathison v United States, Case No. 00-4055 (D.S.D.)) However, "the sentencing court refuse[d] to consider the § 2255 altogether." (Caravelho, 177 F3d at 1178 (10th Cir 1999)) This

* I respectfully pray the Court applies Haines v Kerner, 404 US 519, 520-21, to my pro se petition. The Court is respectfully advised that the typewriters at the FPC here in Florence do not, except for one of them, type in 10-point, nor do they, any of them, double-space. I respectfully pray the Court will excuse the fact that I must use 12 point and 1½ spacing.

is not the reason for asserting that § 2255 is inadequate or ineffective to test the legality of my detention, however. It has been recognized that a "substantive statutory holding" which defines more precisely the meaning of words in the laws Congress enacts changes that meaning to the date of enactment. (See, e.g., United States v Shelton, 848 F2d 1485, 1489 (10th Cir 1988) ("a statute cannot 'mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards.' [Strauss v United States,] 516 F.2d [980,] 983 [(7th Cir 1975)].")

This is very much like the case of Ratslaf v United States, 510 US —, 126 L Ed 2d 615, where the Court held that the term "willful" was defined as an element the government needed to prove for conviction under 31 USC § 5322(a). In United States v Dashney, 52 F3d 298, 299 (10th Cir 1995), the Court said:

> "Indeed, Ratslaf is 'a substantive non-constitutional decision concerning the reach of a federal statute,' Shelton, 848 F.2d at 1489. Our retroactivity analysis, thus, differs 'from the situation set forth in Teague— ... retroactive application of new rules of criminal procedure.' ...
>
> "What Ratslaf did was articulate the substantive elements which the government must prove to convict a person charged under §§ 5322(a) and 5324(3). That is, it explained what conduct is criminalized. This is a substantive change in the law **mandating retroactivity** .... [Emphasis added]
>
> "Surely, if a defendant's 'conviction and punishment are for an act that the law does not make criminal, there can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "presents exceptional circumstances" that justify collateral relief under § 2255.' Davis, 417 U.S. at 346." (Brackets deleted.)

Well, in the instant circumstances, post-AEDPA, and the restrictions on filing second or successive § 2255 motion under § 2255(f) and 28 USC § 2244, it would certainly appear that I am not "a prisoner who is **authorized** to apply for relief pursuant to" § 2255. (28 USC § 2255(e) (emphasis added.) As with Ratslaf, and also with Bailey v United States, 516 US 137, so also with United States v Santos, 553 US —, 170 L Ed 2d 912, 926, the Court made a "substantive statutory holding" which has resulted in the illegality of my detention for the past seven years with more than six remaining. The Santos Court defined the word "proceeds." The plurality decision, joined by Justice Stevens, said that "'proceeds' means 'profits' when there is no legislative history to the contrary."

Just as many courts held that § 2255 was "inadequate or ineffective" to challenge erroneous 18 USC § 924(c) "use" convictions following Bailey, this Court must hold that § 2255 is inadequate or ineffective to test the legality of my detention for the next six and a half years, else this "defendant[']s] conviction and punishment are for an act that the law does not make criminal ... [and] there can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances' that justify collateral relief." (Dashney, 52 F3d at 299) But, I'm not "**authorized**" to ap-

ply for relief by motion under § 2255. Hence, subject to the same tests as set forth in Bousley v United States, 523 US 614, 623, relief via habeas corpus must be provided:

> "Petitioner's claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error in his plea colloquy 'has probably resulted in the conviction of one who is actually innocent.' Murray v Carrier, supra, [477 US] at 496 .... To establish innocence, petitioner must demonstrate that, '"in light of all the evidence,"' '"it is more likely than not that no reasonable juror would have convicted him.' Schlup v Delo, 513 US 298, 327-328."

In Bailey v United States, 516 US 137, 144-145, the Court said:

> "We start, as we must, with the language of the statute.... The word 'use' in the statute must be given its 'ordinary or natural' meaning, a meaning variously defined as 'to convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.' ...
> "Looking past the word 'use' itself, we read § 924(c)(1) with the assumption that Congress intended each of its terms to have meaning. 'Judges should hesitate to treat as surplusage statutory terms in any setting ...' Ratslaf v United States, 510 US 135, 140-141." (Brackets omitted.)

Applying these principles to Congress' use in § 2255(e) of the word "authorized," one cannot escape that Congress meant something by that word. The word "authorize" is defined as:

> "To empower; to give a right or authority to act. To endow with authority or effective legal power, warrant or right.... To permit a thing to be done in the future. It has a mandatory effect or meaning, implying a direction to act.
> "'Authorized' is sometimes construed as equivalent to 'permitted'; or 'directed', or to similar mandatory language. Possessed of authority; that is, possessed of legal or rightful power, the synonym of which is 'competency.'" ("Black's Law Dictionary")

"Webster's II Dictionary" defines it as "To give authority or power to. 2. To approve or permit." Hence, what is it that gives "authority," or grants "power to" "apply for relief by motion pursuant to this [§ 2255] section"? Section 2255 includes numerous limits to a prisoner's authority to apply for relief via motion under that statute. (1) The prisoner must be in custody. (2) The grounds must be either that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction ..., or that the sentence was in excess of the maximum authorized by law ...," etc. (§ 2255(a)) There is a limitation to filing. Section 2255(f) lists four starting points for that one-year limitation. (§ 2255(f)) Subsection (h) removes authority to file a second or successive motion without COA approval pursuant to 28 USC § 2244. Giving the word "authorized" its natural or usual meaning, could one possibly say that I would be "authorized" to apply for relief following Santos via § 2255? No!

The courts often focus only on the last part of § 2255(e), that § 2255 must be "inadequate or ineffective to test the legality of his detention." I've yet to see any decision in this Court or any other which doesn't ignore the first part of that paragraph with respect to "authorized to apply." In Wofford v Scott, 177 F3d 1236, 1240-41 (11th Cir 1999), that court dealt with the use of § 2241 after a prisoner was no longer "authorized to apply for relief by motion pursuant" to § 2255. They reviewed the history of the bill, going back to "S.Rep. No. 1526, 80th Cong., 2nd Sess., at 2 (1948)." Then they noted the change in the final bill as set forth in the "revision of the Judicial Code ... embodied in H. R. 3214." They noted that there was a difference from the "practicable" wording in S. 20, then observed: "Unfortunately, we have found nothing in the legislative history explaining why the relevant language was changed **or what the new language means**." (Id., at 1241, emphasis added.) After considering all the pros and cons, however, they adopted the Seventh Circuit's decision in Davenport:

> "We think the Seventh Circuit's Davenport approach is better reasoned than those of other circuits, and its rule has the advantage of being specific. We adopt it insofar as it comports with the following holding: The savings clause of § 2255 applies to a claim when: 1) that claim is based upon a retroactively applicable Supreme Court decison; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistant offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal or first § 2255 motion."

Clearly, § 2255 does not "authorize[] [me] to apply for relief pursuant to [that] section." Hence, it is presumed—giving Congress' choice of the word in the statute—that I have the right to apply for relief via habeas corpus. But, even beyond this, § 2255 is obviously "inadequate or ineffective to test the legality of [my] detention" because of Congress' requirement in § 2244 that a second or successive petition needs COA approval and its jurisdiction to grant approval is extremely limited. Substantive statutory holdings—which by their nature are "**mandat[orily] retroactiv[e]**," (Dashney, 52 F3d at 299 (10th Cir 1995))—cannot be raised in a § 2255, even in the face of "a complete miscarriage of justice." (Id.)

In Davis v United States, 417 US 333, 346, the Court observed:

> "This is not to say, however, that every asserted error of law can be raised on a § 2255 motion.... We suggested that the appropriate inquiry was whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether 'it presents exceptional circumstances where the need for a remedy afforded by the writ of habeas corpus is apparent.' [Hill v United States, 368 US] at 428." (Brackets and ellipsis deleted.)

In the back of 41 L Ed 2d, at 1207, under "Construction—28 USCS § 2255," the Court noted that "[t]he Supreme Court said that 28 USCS § 2255 does not cover the entire field of remedies .... [and that] § 2255 was enacted to meet practical difficulties in the administration of federal habeas corpus jurisdiction; and that **there was no purpose in enacting 28 USCS § 2255 to impinge upon prisoners' rights of collateral attack upon their convictions.**" (Emphasis added) There can be no serious question that forcing me to spend an additional six and one-half years for a crime I did not commit—**on top of the seven additional years I have already served**—would be a "fundamental miscarriage of justice" of the highest degree. Section 2255 is simply not configured to deal with the nature of a subsequent "substantive statutory holding" which makes the offense one was charged and convicted on invalid. I am not "authorized to apply for relief by motion pursuant to" § 2255. It is not up to the task of providing me the relief to which, following Santos, I am entitled. No convoluted definition of the words "inadequate" or "ineffective" can circumvent the grant of relief to me if I meet the test the Bousley Court set for proving actual, factual and legal innocence. Therefore, it is my contention that I have met the tests for this Court to hold that § 2255 is neither 'adequate' nor 'effective' "to test the legality of [my] detention." Nor am I authorized to apply for relief via § 2255, hence, I am not precluded from applying for relief via habeas corpus. This Court has the jurisdiction pursuant to 28 USC §§ 2241 and 2243 to adjudicate my petition and grant me the requested relief. I would urge that this Honorable Court do as the Wofford court did in adopting the three-prong test in Davenport for deciding whether or not to allow access to § 2241 under these circumstances set forth below.

In Wofford v Scott, 177 F3d at 1240 (11th Cir 1999), that court noted that even though they understood the terms "inadequate" and "ineffective" as an indication that "the new language ... is broader than the old 'practicable' problems language," "the question is not free from doubt." In Sustache-Rivera v United States, 221 F3d 8, 16 (1st Cir 2000), that court observed that "Congress did not speak to this issue[—that of "whether § 2255's use of the terms 'inadequate or ineffective'" justifies use of § 2241 habeas corpus—], and there is little case-law on point." In Reyes-Requena v United States, 243 F3d 893, 902 (5th Cir 2001), that court said that "the Supreme Court has not provided much guidance as to the factors that must be satisfied for a petitioner to file under habeas corpus provisions such as § 2241."

Well, that may be true, however, they did recently urge this upon the courts: "This Court has interpreted that congressional silence—along with the statute's **command** to dispose of habeas petitions 'as law and justice require,' 28 U.S.C.

§ 2243—as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations." (Danforth v Minnesota, 552 US —, —, 169 L Ed 2d 859, 870) Would that not strongly suggest that this Honorable Court follow the long line of decisions underscoring the value of habeas corpus in correcting "fundamental miscarriages of justice"?

In Fay v Noia, 372 US 391, 399-400, the Court had this to say about habeas corpus:

> "We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus ad subjiciendum, in Anglo-American jurisprudence: 'the most celebrated writ in the English Law.' 3 Blackstone Commentaries 129. It is a writ antecedent to statute, and throwing its root deep into the genius of our common law. It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy **in all cases of illegal restraint of confinement.** It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I.' Secretary of State for Home Affairs v O'Brien, 1922 AC 603, 609 (HL). Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art 1, § 9, cl. 2, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c 20, § 14, 1 Stat 81, 82, habeas corpus was early confirmed by Chief Justice John Marshall to be 'a great constitutional privilege.' Ex Parte Bollman and Swartwout (US) 4 Cranch 75, 95, 2 L Ed 554, 561. Only two terms ago this Court had occasion to reaffirm the high place of the writ in our jurisprudence: 'We repeat what has been so truly said of the federal writ' "there is no higher duty than to maintain it unimpaired,"' Bowen v Johnston, 306 US 19, 26,... and unsuspended, save in cases specified in our Constitution." (Emphasis added)

In Dorsainvil, 119 F3d at 248 (3rd Cir 1997), that court said:

> "[He] argues that if his claim that he has been convicted and imprisoned for conduct that is not criminal cannot be heard by the district court, then § 2255 as amended by the AEDPA is unconstitutional as a violation of the Due process Clause of the Fifth Amendment or the Suspension Clause of Article 1, section 9 of the Constitution. Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, **we would be faced with a thorny constitutional issue....** We need not consider the litany of potential alternatives, because we conclude that, under narrow circumstances, a petitioner in Dorsainvil's uncommon situation may resort to the writ of habeas corpus under 28 U.S.C. § 2241." (Emphasis added.)

The Dorsainvil court appears to have done just as the Supreme Court urged in Danforth, they "adjust[ed] the scope of the writ in accordance with equitable and prudential considerations." They followed "the statute's **command** to dispose of habeas petitions 'as law and justice require,' 28 U.S.C. § 2243." This Honorable Court should do no less for I am in exactly the same "uncommon situation" as was Dorsainvil.

SANTOS INVALIDATED PETITIONER'S CONVICTION UNDER MONEY LAUNDERING

The legal basis for Petitioner's claim that he is being detained in violation of the law is set in United States v Santos, 553 US —, —, 170 L Ed 2d 912. The specific findings which invalidate my conviction and sentence for violation of 18 USC § 1956(a)(1)(A)(i) and § 1956(a)(1)(B)(i) include the following:

> "The federal money-laundering statute does not define 'proceeds.' When a term is undefined, we give it its ordinary meaning. Asgrow Seed Co. v Winterboer, 513 U.S. 179, 187 .... 'Proceeds' can mean either 'receipts' or 'profits.' Both meanings are accepted, and have long been accepted, in ordinary usage. See e.g., 12 Oxford English Dictionary 544 (2nd ed. 1989); Random House Dictionary of the English Language 1542 (2nd ed. 1987); Webster's New International Dictionary 1972 (2nd ed. 1957) (hereinafter Webster's 2d). The government contends that dictionaries generally prefer the 'receipts' definition over the 'profits' definition, but any preference is too slight for us to conclude that 'receipts' is the **primary** meaning of 'proceeds.'
>
> "'Proceeds,' moreover, has not acquired a common meaning in the provisions of the Federal Criminal code. Most leave the term undefined. See, e.g., 18 U.S.C. § 1963; 21 U.S.C. § 853. Recognizing the word's inherent ambiguity, Congress has defined 'proceeds' in various criminal provisions, but sometimes has defined it to mean 'receipts' and sometimes 'profits.' Compare 18 U.S.C. § 2339C(e)(3) (2000 ed., Supp. V) (receipts), § 981(a)(2)(A) (200 ed.) (same), with § 981(a)(2)(B) (profits)....
>
> [W]e consider 'proceeds' not in isolation but as it is used in the federal money-laundering statute.... The word appears repeatedly throughout the statute, but all of those appearances leave the ambiguity intact. Section 1956(a) itself, for instance, makes sense under either definition: one can engage in a financial transaction with either receipts or profits of a crime; one can intend to promote the carrying on of a crime with either its receipts or its profits; and one can try to conceal the nature, location, etc., of either receipts or profits. The same is true of all the other provisions of this legislation in which the term 'proceeds' is used. They make sense under either definition." (Id., 170 L Ed 2d at 918-919)

> "Justice Frankfurter, writing for the Court in another case, said the following: 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' Bell v United States, 349 U.S. 81, 83 ....
>
> "If 'proceeds' means 'profits,' one could say that the statute is aimed at the distinctive danger that arises from leaving in criminal hands the yield of a crime. A rational Congress could surely have decided that the risk of leaveraging one criminal activity into the next poses a greater threat to society than the mere payment of crime-related expenses and justifies the money-laundering statute's harsh penalties." (Id., 170 L Ed at 921)

> "We think it appropriate to add a word concerning the **stare decisis** effect of Justice Stevens' opinion. Since his vote is necessary to our judgment, and since his opinion rests upon the narrower ground, the Court's holding is limited accordingly.... But the narrowness of his ground consists of finding that 'proceeds' means 'profits' when there is no legislative history to the contrary." (Id., 170 L Ed 2d at 926)

In Santos, the Court affirmed the Seventh Circuit's decision to vacate the money-laundering convictions and sentences of both Santos and his co-defendant. While the Santos Court did not address the provisions or attempt to define the word "proceeds" in 18 USC § 1957, the same definition would obviously apply, as "proceeds" is used in the statute. In 18 USC § 1957, under (f) definitions, the statute says: "(2) the term 'criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense." Subsection (a) of § 1957 says:

> "Whoever, in any circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in **criminally derived property** that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b)." (Subsection (d), referred to in (a) does not alter this term.)

Hence, the task is to prove that the alleged "attempt[] to conduct such financial transaction which in fact involves the proceeds of specified unlawful activity— (A)(i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in a violation of section 7201 or 7206, of the Internal Revenue Code of 1986 [26 USCS § 7201 or 7206]; or (B) knowing that the transaction is designed in whole or part—(i) to conceal or disguise the nature, the location, the source, the owership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced ...," must involve proof that the "proceeds" were "profits" from the specified unlawful activity. Failure to prove that beyond a reasonable doubt must result in a not guilty verdict.

I aver that the convictions for money-laundering, both under 18 USC § 1956 and its subsections and under § 1957 and its subsections are invalid and void. I raised objection to the money-laundering convictions in my uncounseled direct appeal. I called attention to the Sentencing Commission's Report to Congress:

> "When the commission first drafted the sentencing guidelines, it assumed the guidelines would be used in organized crime cases, and therefore set the penalties very high. However, as soon as prosecutors figured out that the penalties were much higher than those for other crimes, they began to pursue money laundering charges in a broad array of cases." (As quoted from page 61 of CLR 1566)

The Eighth Circuit completely ignored all of my issues and caselaw on the impropriety of money-laundering, **never even mentioned the issue!** (See United States v Mathison, 157 F3d, 541 (8th Cir 1998)) Yet, two months later they considered that same Report in United States v Woods, 159 F3d 1132, 1134-36 (8th Cir 1998), dismissing the charges or reducing the severity of the sentence pursuant to Koon v United States, 518 US 81. Noteworthy are comments from both the plurality

and the dissenting opinion of Justice Breyer call attention to the very issue I raised in my uncounseled direct appeal. (Note my § 2255 motion in 00-cv-4055, pages 46-49 reciting cases and issues pertaining to the impropriety of money-laundering charges in a case such as mine.) Justice Scalia's plurality opinion, 170 L Ed 2d at 922, states:

> "The Government suggests no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime. Interpreting 'proceeds' to mean 'profits' eliminates the merger problem.... More generally, a criminal who enters into a transaction paying the expenses of his illegal activity cannot possibly violate the money-laundering statute, because by definition profits consist of what remains after expenses are paid."

Justice Breyer said much the same at 170 L Ed 2d 529:

> "Like the plurality, I doubt that Congress intended the money laundering statute automatically to cover financial transactions that constitute an essential part of a different underlying crime....
>
> "It is difficult to understand why Congress would have intended the Government to possess this punishment-transforming power. Perhaps for this reason, the Tenth Circuit has written that 'Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior "specified unlawful activity."' United States v Edgmon, 952 F.2d 1206, 1214 (1991). And, in 1997, the United States Sentencing Commission told Congress that it agreed with the Department of Justice that 'money laundering cannot be properly charged for "merged" transactions that are part of the underlying crime.'"

This issue, presented in my uncounseled direct appeal and ignored by the Eighth Circuit in its entirety—even though the attorney-prepared appeal briefs of my three co-defendants adopted it as part of their own arguments—challenged the very thing that the Sentencing Commission objected to, that the Department of Justice agreed to, which Congress said it was concerned about, and which many courts have observed calls for either invalidating money-laudering convictions or reducing the sentence under Koon, and which both the plurality and dissenting Justice Breyer agree on, is a travesty! In my case, this elevated my sentence, under any application of the Sentencing Guidelines and law, from five to twenty years! Now, we all find out the whole thing is bogus because no attempt was made to charge that the transactions were from profits, no testimony was given that the transactions were from profits and the Eighth Circuit was mute on the subject. (See Sentencing Transcript at 698 to approx 750, testimony of IRS SA James Robertson; § 2255 motion in 00-cv-4055, at 50-55.)

In Bousley the Court, though it was dealing with a § 2241 construed as a § 2255, admitted that such a decision as Bailey—and by extention, Santos—was

not subject to the Teague retroactivity prohibition. (523 US at 621-621.) It is noteworthy that although Justice Rehnquist cited Davis for the proposition that "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct ... [and those which] carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal,'" he said that Bousley's "claim is not Teague-barred." (Id., at 621) In other words, it's not just a question of whether the "conduct ... [lies] 'beyond the power of the criminal law,'" that wasn't the question in Bailey. Congress obviously had the power to legislate against the "use" of a weapon in relation to another crime. So too, it has the power to legislate and criminalize the use of profits derived from specified unlawful activity to promote other crimes and further the ones from which the profits are derived. But, like in Bailey, so also in Santos, it was what Congress meant when it enacted the legislation. If it was presumed—incorrectly in my case, as it turned out—that all that was necessary for proving that § 1956(a)(1)(A)(i) or (ii) were violated is that "if the transaction is specified unlawful activity at the beginning, then that could be charged as money laundering," (TT, 96-40048 (D.S.D.), page 722, lines 19-24), then the conviction is invalid. Not only was there not a single attempt made to show that there was an intent to commit money laundering—an essential element in both §§ 1956 and 1957—there was absolutely no attempt to demonstrate that the source of the funds from which the transfer was made were "profits." Just like in Bailey, failure to prove "use" equates to failure to prove "profits." The conviction on all money-laundering counts is invalid, **void!**

Absent the money laundering charges, I was proven—ignoring for the moment the fact that the Government withheld a plethora of material, exculpatory Brady evidence which would have destroyed the essential element of intent—guilty of violations of 18 USC §§ 1341 and 1343, along with conspiracy to violate both. Each of these statutes has a maximum penalty of five years. The U.S.S.G. in use at the time, § 2F1.1, prescribed a BOL of 6, plus 11 (subsection (b)(1)(L) for loss of between $800,000 and $1,499,999.99; mine was alleged to be $1.31 million), for a total BOL of 17. Authorized inhancements included (b)(2), 2 levels, (b)(6)(C), 2 levels. This brings the BOl to 21. In Criminal History Category II, that called for a Guideline range of 41 to 51 months. **I received 246 months!** I've served just under 12 years already, with about six and one-half yet to go with good conduct credits. Presuming the highest Guideline range of 51 months, with good conduct credits that equates to less than 45 months. That means that I have served already more than seven years longer than my legitimate conviction would warrant! This Honorable Court can't reverse the past, but it can correct the future.

The Bousley Court specified that in order for one to challenge via collateral means a conviction based upon an obsolete understanding of what the legislature's words meant, one must "demonstrate that, '"in light of all the evidence,"' 'it is more likely than not that no reasonable juror would have convicted him.' Schlup v Delo, 513 US 298, 327-328 ...." (Bousley, 523 US at 623) Hence, my task is to make this fact evident.

Noteworthy is the wording of the Counts alleging money-laundering:

"COUNTS 32 THROUGH 37

"Between on or about the dates listed below, in the District of South Dakota, defendant Eugene H. Mathison did knowingly and willfully conduct and attempt to conduct a financial transaction affecting interstate commerce, to-wit, the transfer between accounts and the withdrawal by monetary instrument, that is a check in the amount listed below, which involved the **proceeds** of specified unlawful activities, that is mail fraud in violation of 18 United States Code Section 1341, (1) with the intent to promote the carrying on of specified unlawful activity, to wit: mail fraud in violation of 18 United States Code Section 1341, and (2) knowing that the transactions were designed, in whole or in part, to conceal and disguise the nature, location, source, ownership and control of the **proceeds** of that specified unlawful activity, and that while conducting and attempting to conduct such financial transaction, that is the monetary instruments, checks, in the amounts set forth below:... represented the **proceeds** of some form of unlawful activity, all in violation of Title 18 United States Code Sections 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i)." (Emphasis added)

"COUNTS 51 THROUGH 52

"On or about the dates listed below, in the District of South Dakota and elsewhere, defendants and co-conspirators, Eugene H. Mathison, Robert E. Holmes, Perry Gobel and Dean G. Chambers, did knowlingly engage or attempt to engage in monetary trasactions, affecting interstate commerce, in **criminally derived property** [defined in § 1957(f)(2) as "property constituting, or derived from, proceeds obtained from a criminal offense"] of a value greater that $10,000.00, that is, the deposit, withdrawal, transfer, and exchange of monetary instrument and funds in the amounts listed below, such property having been derived from specified unlawful activities, that is mail fraud in violation of Title 18 United States Code Section 1341 and wire fraud in violation of 18 United States Code Section 1343 as charged in this Superseding Indictment,... all in violation of Title 18 United States Code Section 1957.

"COUNTS 53 THROUGH 59

"On or about the dates listed below, in the District of South Dakota, defendants and co-conspirators, Eugene H. Mathison, Robert E. Holmes, Perry Gobel and Dean G. Chambers, did knowingly and willfully conduct a financial transaction affecting interstate commerce, to-wit, the withdrawal by a monetary instrument, that is a check in the amount listed below, which involved the proceeds of specified unlawful activities, that is mail fraud in violation of 18 United States Code Section 1341, (1) with the intent to promote the carrying on of specified unlawful activity, to wit:

mail fraud in violation of 18 United States Code Section 1341, and (2) knowing that the transactions were designed, in whole or in part, to conceal and disguise the nature, location, source, ownership and control of the **proceeds** of that specified unlawful activity, and that while conducting and attempting to conduct such financial transaction, that is the monetary instruments, checks, in the amounts set forth below:... represented the **proceeds** of some form of unlawful activity, that is mail fraud, all in violation of 18 United States Code Section 1956(a)(1)(A)(i) and 1956 (a)(1)(B)(i).

"COUNTS 60 THROUGH 61

"On or about the dates listed below, in the District of South Dakota, defendants and co-conspirators, Eugene H. Mathison, Robert E. Holmes, Perry Gobel and Dean G. Chambers, did knowingly and willfully conduct a financial transaction affecting interstate commerce, to-wit, the movement of funds by wire, that is a wire transfer in the amount listed below, which involved the **proceeds** of specified unlawful activities, that is mail fraud in violation of 18 United States Code Section 1341, (1) with the intent to promote the carrying on of specified unlawful activity, to wit: mail fraud in violation of 18 United States Code Section 1341, and (2) knowing that the transactions were designed, in whole or in part, to disguise the nature, location, source, ownership and control of the **proceeds** of that specified unlawful activity, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction, that is the wire transfers, in the amounts set forth below:... represented the **proceeds** of some form of unlawful actifity, that is mail fraud, all in violation of 18 United States Code Section 1956(a)(1)-(A)(i) and 1956(a)(1)(B)(i)." (Emphasis added)

In these 17 Counts alleging money-laundering, the word "**proceeds**" appears eight times, and the words "**criminally derived property**," defined as "**proceeds**," appears once. But, nowhere is there even the suggestion that these transfers described originated from "**profits**" derived from the SUA—not once! In the testimony of IRS SA James Robertson, the government agent-witness who testified concerning how the Government supported its charges of money-laundering (TT at pages approximately 698 to 750), his explanation to the jury as to all that was necessary to support the charge of money-laundering was "if the transaction is specified unlawful activity at the beginning, then that could be charged as money laundering"! (TT at page 722, lines 19-24)

Note in this connection what the plurality opinion states:

"The 'proceeds of specified unlawful activity' are the proceeds from conduct sufficient to prove **one** predicate offense. Thus, to establish the proceeds element under the 'profits' interpretation, **the prosecution needs to show only that a single instance of specified unlawful activity was profitable and gave rise to the money involved in a charged transaction.** And the government, of course, can select the instances for which the profitability is clearest." (Santos, 170 L Ed 2d at 924) (emphasis added.)

But, not even one instance of any attempt to demonstrate that the funds alleged to have been transferred in violation of the money-laundering statute

were derived from "profits" was asserted, neither in the Indictment, nor by the Government's witnesses, nor by the AUSAs in opening statements or closing arguments, nor at sentencing—**not even one** "single instance of specified unlawful activity was [alleged] to be profitable"! (Santos, 170 L ed 2d at 924)

Absent this the Government failed "to establish the proceeds **element** under the 'profits' interpretation." Unquestionably, "'"in light of all the evidence,"' 'it is more likely than not that no reasonable juror would have convicted [me]." (Bousley, 523 US at 623) In Schlup v Delo, 513 US 298, 320-323, the Court said:

> "Justice Powell's plurality opinion [in Kuhlmann v Wilson, 477 US 436, 452] expressly noted that there are 'limited circumstances under which the interests of the prisoner ... outweigh the countervailing interests served by according finality to the prior judgment.' ...
>
> "In subsequent cases, we have consistently reaffirmed the existance and importance of the exception for fundamental miscarriages of justice....
>
> "To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence. In Kuhlmann, for example, Justice Powell concluded that a prisoner retains an overriding 'interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated....' 477 US, at 452 ....
>
> "Explicity tying the miscarriage of justice exception to innocence thus accomodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case,' Carrier, 477 US, at 496 ....
>
> "Then, in Sawyer, the Court examined the miscarriage of justice exception as applied to a petitioner who claimed he was 'actually innocent of the death penalty.' In that opinion, the Court struggled to define 'actual innocence' in the context of a petitioner's claim that his death sentence was inappropriate. The Court concluded that such actual innocence 'must focus on those elements which render a defendant eligible for the death penalty.' 505 US, at 347 .... However, in addition to defining what it means to be 'innocent' of the death penalty, the Court departed from Carrier's use of 'probably' and adopted a more exacting standard of proof to govern these claims: The Court held that a habeas petitioner 'must show by **clear and convincing evidence** that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.' 505 US, at 336 ...."

The Schlup Court's decision above is still good law, even post-AEDPA. Among the more recent decisions based upon Schlup are those of Bousley, 523 US at 623, and Dretke v Haley, 541 US 386, 393. (See, also, Spears v Mullin, 343 F3d 1215, 1255, n. 33) ("he has not shown he is actually innocent of first-degree murder as that exception would require, See Schlup v Delo, 513 U.S. 298, 321"); Phillips v Ferguson, 182 F3d 769, 774 (10th Cir 1999) ("we conclude that Phillips has not presented us with evidence of actual innocence establishing that 'it is more likely than not that no reasonable juror would have convicted him ... Schlup ...")

If the Court finds that the Davenport standard, as adopted by the Wofford court is appropriate, then the three factors which weigh on this Court's decision are these: "(1) [T]hat the claim is based upon a retroactively applicable Supreme Court decision ...." May the Court please note that this does not require that the Supreme Court makes the decision retroactive, just that it be retroactively applicable. The case of Dashney, 52 F3d at 299 (10th Cir 1995) says that "a substantive change in the law [is] **mandat[orialy retroactiv[e]**." (Emphasis added) (See also, United States v Barnhardt, 93 F3d 706, 709 (10th Cir 1996) ("substantive changes in the law ... apply retroactively.") Hence both the Ratslaf decision and the Bailey decisions of the Supreme Court explaining what the laws required the government to prove, have been held to be retroactive. The Santos decision is no less retroactively applicable.

"(2) [T]he holding of the Supreme Court decision establishes that the petitioner was convicted for a nonexistant offense ...." (Wofford, 177 F3d at 1244) When the Santos Court affirmed the Senventh Circuit's decision, they held that "the Government will have to prove the profitability." (Id., 170 L Ed 2d at 924) As the facts within amply demonstrate, that never happened in the instant case.

"(3) [C]ircuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion." In this respect, I will cite two recent cases, one in the Tenth Circuit and the other in the Eighth Circuit. First, in this Circuit, United States v Lawrence, 405 F3d 888, 900-901 (10th Cir 2005):

> "Lawrence asserts that the government only showed he used money he received from Medicare to pay ordinary business costs.... Using the proceeds from the fraudulent scheme in this manner is sufficient to carry on the fraud for purposes of the money laundering charges at issue."

In United States v Bala, 489 F3d 334, 342 (8th Cir 2007) they said:

> "Counts 5-12 charged that defendants conducted specific financial transactions using the proceeds of an illegal gambling business for the purpose of promoting that business and concealing their unlawful activity, all in violation of the federal money laundering statutes, 18 U.S.C. §§ 1956(a)(1)(A)(i) and (B)(i) .... A money laundering charge requires proof of a financial transaction involving the proceeds of 'specified unlawful activity' .... The government persuaded the district court that the entire $99 million of account wagers were the proceeds of RSI's illegal gambling business."

Indeed, (3) is satisfied as to my knowledge no court except the Seventh Circuit in the Santos case decided that "'proceeds' ... mean[s] net income, as opposed to gross income." (Santos v United States, 461 F3d 886, 887-888 (7th Cir 2006) (citing United States v Scialabba, 282 F3d 475 (7th Cir 2002).) However, even

these decisions were long after I was tried, convicted, appealed and filed my § 2255 (which "the sentencing court refuse[d] to consider altogether."—Caravelho, 177 F3d at 1178 (10th Cir 1999)) Furthermore, the investment group partnership involved, which the government alleged was a Ponzi scheme, had no net profits. If it did, I would perhaps—were I really operating a scam—have used the profits to pay my withholding taxes before I was charged (in 96-cr-90122 (D.S.D)) with tax evasion. Listening to the lies the Government presented, it is preposterous to believe I wouldn't have syphoned off $51,000 to prevent being found guilty of tax evasion out of the $1.31 million I allegedly defrauded. No reasonable juror could have found that I used the net profits of the alleged Ponzi scheme to make transfers for the purpose of carrying on the SUA alleged! **It never happened!** There never were any net profits.

Having met all of the tests necessary for this Court to proceed to do as the Danforth Court recently urged, that is to "adjust the scope of the writ in accordance with equitable and prudential considerations," and follow "the statute's **command** to dispose of [my] habeas petition[] 'as law and justice require,' 28 U.S.C. § 2243,"* I respectfully pray the Court will order the Respondent to show cause why the writ should not be issued and I be freed immediately, having already served approximately eight years (99 months) longer than the Guidelines prescribed for the underlying alleged offenses of violations of 18 USC §§ 371, 1341, and 1343. (* Danforth, 169 L Ed 2d at 870) (emphasis added.)

WHEREFORE, I respectfully pray the Court will grant the relief requested and apply the command in 28 USC § 2243, followed by an issuance of the writ with all due expediency, and for such other and further relief as the Court deems just and equitable.

By executing this petition this 30th day of August, 2008, I declare that the statements herein are true under penalty of perjury pursuant to 28 USC § 1746.

Eugene H. Mathison, Petitioner