No. 18-9150

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

PETER VICTOR AYIKA — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

PETER VICTOR AYIKA, Pro se
(Your Name)
Federal Register NO. 33042-280
FCI LA TUNA, P. O. BOX 3000
(Address)

ANTHONY, TX/NM 88021
(City, State, Zip Code)

NOT APPLICABLE (N/A)
(Phone Number)

QUESTION(S) PRESENTED

[1] Whether a certificate of Appealability (COA) should issue to pursue the Sixth Amendment claim on appeal where petitioner's rights to Sixth Amendment constitutional right to effective assistance of counsel was denied when counsel was ineffective in failing to move to dismiss the indictment for violation of the Statutory and constitutional Speedy Trial Act (STA).

[2] Whether a COA should issue to pursue Speedy Trial Act (STA) claims on appeal where petitioner's rights to statutory and constitutional Speedy trial were denied when more than thirty(30) days of the STA Section 3161(b)'s time limit was exceeded before the indictment was returned in this case.

[3] Whether, under the Rule of this Honorable Court, the Court of Appeals erred when it denied COA based on expressed view that claims presented in direct appeals for the first time and never raised in the district court are foreclosed, and therefore, preclude issuance of a COA.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

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[X] is unpublished.

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

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[X] is unpublished.

[ ] For cases from **state courts**: [Not Applicable (N/A)]

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

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

The opinion of the _____ court appears at Appendix _____ to the petition and is

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

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was October 10, 2018.

[ ] No petition for rehearing was timely filed in my case. [N/A]

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 9, 2019, and a copy of the order denying rehearing appears at Appendix D.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including MAY 21, 2019 (date) on MARCH 22, 2019 (date) in Application No. A. (attached)

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[-] For cases from **state courts:** [Not Applicable]

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[1] Sixth Amendment Right to Speedy Trial:

"In all criminal prosecution, the accused shall enjoy the right to a Speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

[2] Sixth Amendment Right to Effective Assistance of Counsel:

"In all criminal prosecution, the accused shall enjoy the right ....effective Assistance of Counsel for his defense".

[3] The Fourth Amendment protects the right of the people to be secure in their persons, ... against unreasonable searches and seizures, shall not be violated. Under the Fourth Amendment, a warrantless arrest by a law officer is reasonable where there is probable cause to believe that a criminal offense has been or is being committed. The Fourth Amendment is not violated by warrantless arrest where there was probable cause for the arrest. Devenpeck v. Alford, 543 U.S. 146, 153, 160 L.Ed 2d 537 (2004).

[4] Title 18, United States Code Section 3161(b) of the Speedy Trial Act:

" Any information or indictment charging an individual with the commission of an offense shall be filed within thirty(30) days from the date on which such individual was arrested or served with a summons in connection with such charges ".

[5] Title 18, United States Code, Section 3162(a)(1) of the Speedy Trial Act:

" If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by Section 3161(b)[18 U.S.C. §3161(b)] as extended by section 3161(h) of this chapter [18 U.S.C. § 3161(h)], such charge against that individual contained in such complaint shall be dismissed or otherwise dropped ".

STATEMENT OF THE CASE

This case stemmed from a 2007 joint Federal investigation, conducted by the Federal Bureau of Investigation (FBI), Department of Health and Human Services, the Drug Enforcement Agency (DEA), the Texas Attorney General and the Medicaid Fraud Controlled Unit, in connection with petitioner's pharmacy practice in which there were allegations that petitioner was using his position as a pharmacist to sell Listed Chemicals and hydrocodones (a prescription controlled substance) to various addicted individuals (which hereinafter form basis for "the drug case"), and also was submitting false claims to Medicaid and various private federal insurance programs for prescription drugs that were not being filled or dispensed (which hereinafter form basis for "the fraud case"). As part of the initial investigation, the Special F.B.I. Agent, Shanna Beaulieu, and other law enforcement personnel from the above mentioned agencies interviewed more than ten (10) beneficiaries of Medicaid and the Federal Employees of Health Care Benefit programs. They also supoened bank records associated with petitioner and Continental pharmacy which petitioner owned and operated. Following the conclusion of the joint investigation and using the information gattered from her direct personal knowledge during the course of the investigation in culminating of approximately two-year long investigation and from information obtained from various law enforcement officers, investigators and auditors from the above mentioned agencies, the F.B.I Special Agent, Shanna Beaulieu, on March 4, 2009, returned an eight-count indictment charging petitioner with drug offenses violation (the drug case) alleging unlawful possession and selling of prescription controlled substances (the hydrocodones) and methamphetamine precursors (the pseudoephedrine) in violation of Section 841, Title 21 United States Code docketed in the drug case criminal case Number: Ep-09-CR-0660-FM in the district court.

On or about March 10, 2009, the FBI Special Agent, Beaulieu, filed 116-page affidavit [ECF NO. 397 & 399] in support of search and seizure warrant application stating the underlying circumstances from which conclusion would be reached that petitioner was engaged in health care fraud in violation of Section 1347, Title 18 of the United States Code. The information in the affidavit, in its totality, provides substantial basis to rely upon to establish probable cause to believe that a crime is being committed on the premises to be searched. In pertinent part, the affidavit states: "...Based upon facts and Circumstances detailed herein, there is probable cause to believe evidence of criminal violations, specifically, violation of: Title 18 U.S.C. § 287, False claim; Title 18 U.S.C. §1035, False Statement Related To Health Care Fraud Matters; Title 18 U.S.C. §1341, Mail Fraud; Title 18 U.S.C. §1343, Wire Fraud; Title 18 U.S.C. §1347, Healthcare Fraud; Title 21 U.S.C. § 849 & §841, Conspiracy To Distribute, Namely Hydrocodone; Title U.S.C. § 841, Attempted possession with intent to Manufacture Methamphetamine; Title 21 U.S.C. § 841, Possession of a Listed Chemical Knowing the Listed Chemical will be used to Manufacture a Controlled Substance, which constitute the the drug case. See the "affidavit" marked as **APPENDIX F** attached hereto at page 2 to 3.

On March 11, 2009, petitioner was arrested and at the same time seized the following assets of the petitioner in connection of the health care fraud scheme:

(1) $1,056,040.00 from petitioner's bank in UBA bank
(2) $176,038.00from petitioner's seven(7) bank accounts at Bank of America.
(3) $233,052.00 from the petitioner's bank account at JP Morgan Chase Bank.
(4) $50.908.00 from petitioner's bank account at Wells Fargo Bank.
(5) $11,191.00 in cash located at Continental Pharmacy.
(6) $37,264 in cash from the petitioner's residence.
(7) 2006 Toyota sequola
(8) 2006 Honda Odyssey
(9) Residence located at 7216 Desert Jewel Dr. El Paso, Texas.

See page 4-5 of the Detension order issued after his arrest, filled in the district court, cause number EP-09-CR-0660-FM.

On August 24, 2011, a grand jury returned a three-count indictment charging petitioner with one count of Health Care Fraud in violation of 18 U.S.C. § 1347, count One; one count of Mail Fraud in violation of 18 U.S.C. § 1341, count Two; and one count of Wire Fraud in violation of 18 U.S.C. § 1343, count Three; all three charges form the bases for the "fraud case". [ECF NO. 1].

On August 16, 2017, petitioner, by counsel filed his motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. [ECF NO. 271].

On December 5, 2017, the district court denied § 2255 motion and consequently denied a COA. See the district court's memorandum opinion and order marked as **APPENDIX B** and attached hereto.

On April 17, 2018, petitioner seeks permission from the Court of Appeals to initiate appellate review of the district court's denial of a COA.

On October 10, 2018, the Court improperly denied a COA on procedural grounds concluding that "on direct appeal, this Court rejected the Speedy Trial Act (STA)'s claim as well as the ineffective of assistance of counsel claim based on the alleged STA violation citing the case: United States v. Ayika, 837 F.3d 460, 464-65(5th Cir. 2016). And the Court further states that Ayika's ineffective assistance of counsel claim is therefore foreclosed to the extend he relies on the STA. See the Court of Appeals Decision denying a COA marked as **APPENDIX A** attached hereto.

On November 19, 2018, petitioner files motion for reconsideration of the denial of a COA motion because petitioner respectfully disagree with the Court's ruling on this accord. On the direct appeal at issue, as pro se, the STA claim was raised for the first time and was never before addressed in the district court below, but the appellate panel looked at the STA claim anyway for clear error, which is impermissible review becausse appellate Court may not review issues or claims that were never raised in the district court and are presented in the appellate Court for the first time, Such a review is invalid and void. The appellate panel that undertook such review in the direct appeal erred as such the STA claim and the ineffective assistance of counsel claims are not foreclosed. Because the STA claim and ineffective assistance of counsel claim reviewed in the direct appeal are invalidated, a review on the merits of the COA petition is warranted to issue a COA.

On December 3, 2018, Court denied COA without a statement of the reason for the denial, and in the light of petitioner's reasons that STA claim and ineffective assistance of counsel claims are not foreclosed. Instead those claims are viable and meritorious claims and a COA should issue to appeal the district court erroneous ruling on §2255 motion.
On December 14, 2018, petitioner moves for rehearing on the merits of the claims raised for issuance of a COA.
On January 9, 2019, the Deputy Clerk of the Court issued an order stating that the time for filing an en banc rehearing has expired, and therefore, the Court is taking no action on the petition set forth . See the Deputy Clerk's letter correspondence marked as **APPENDIX D** and hereto attached.
On January 15, 2019, petitioner seeks for a reconsideration of the Deputy Clerk's order that stated the Court is not taking no action in petitioner's rehearing motion because the time for filing rehearing has expired. Petitioner argued that the time for a filing of a petition for rehearing under Fed. R. App. P. 40 was timely because the petition was filed before the time expired. Pursuant to Fed. R. App. P. 40(a), a petition for rehearing may be filed within 14 days after entry of judgment. Petitioner placed his petition for rehearing in the prison's mailbox on December 14, 2018 following the Court's order of December 3, 2018, which indicates that the petitioner's motion for rehearing was filed within the 14-day period permitted under Fed. R. App. P.40 under the mailbox rule. The mailbox rule states that the petition is deemed filed when it is placed in prison mailbox. See Houston v. Lack, 487 U.S. 266, 101 L.Ed 2d 245 (1998)(holding that a pro se prison's notice of appeal held filed for the purpose of time limit under Rule 40 of Fed. R. App. P. at the moment of delivery to prison authorities for mailing to the Court). Petitioner's motion for rehearing contained a certificate of service indicating that he served the motion for rehearing on the respondent by placing it on the prison's mailbox on December 14, 2018 to be mailed to clerk of the Court. Petitioner's motion would be held filed when he placed it in the prison mail system for mailing to the Fifth Circuit Court of Appeals on December 14,2018. See Causey v. Cain, 450 F.3d 601, 603-07 (5th Cir. 2006)(applying mailbox rule in determining timeliness of federal habeas petition).

Accordingly, petitioner motion for rehearing was timely. The deputy clerk abuse its discretion in denying rehearing consideration where it failed to forward petitioner's motion for rehearing reconsideration to the judges of the Court in order to decide the issuance of COA on the merits of the issues raised in the petition. By so doing, petitioner is denied a due process of the appellate procedure. Soffar v. Dretke, 368 F.3d 441 (5th Cir. 2004).

On January 31, 2009, in response to petitioner's petition for rehearing reconsideration, the deputy clerk issued an order stating that it is not taking any action on petitioner's rehearing reconsideration, and as such petitioner's argument that his COA rehearing petition was timely filed was not addressed and abandoned, thus, leaving the COA petition in abeyance. See the Deputy Clerk's letter correspondence marked as **APPENDIX E** attached hereto.

On Febuary 20, 2019, because petitioner filed a timely notice of appeal from the order denying the §2255 motion and COA, and because petitioner made a substantial showing of the denial of a constitutional right necessary to obtain a COA under §2253(c)(2), petitioner filed an appeal in the Court of appeals for a review of the district court adverse judgment on his §2255 motion.

On February 27, 2019, the deputy clerk of the Court of appeal issued an order stating that it is not taking any action on petitioner's appeal. Therefore, this petition for a writ of certiorari follows seeking for a review of the court of appeals' denial of COA and after further consideration order the issuance of a COA.

REASONS FOR GRANTING THE PETITION

Petitioner is entitled to a COA as such the petition for a certiorari should be granted to pursue the claims of the denial of petitioner's constitutional right to Sixth Amendment right to effective assistance of counsel and the claim of denial of petitioner's right to statutory and constitutional Speedy Trial Act (STA).

The STA claim stemmed from the fact that petitioner was charged with the health care fraud offense in a 116-page probable-cause-affidavit returned on March 10, 2009 and was arrested on March 11, 2009. Then, thereafter on August 24, 2011, a grand jury indictment for health care fraud was returned. More than twenty nine (29) months after petitioner was arrested on March 11, 2009, petitioner was indicted for committing health care fraud. Thus, because health care fraud indictment was returned more than thirty (30) days of Section 3161(b)'s time limit, it required dismissal of the indictment pursuant to § 3162(a)(1) for violation of § 3161(b) of the Speedy Trial Act.

The ineffective assistance of counsel claim stemmed from the fact that trial counsel failed to move to dismiss the health care fraud indictment for statutory and constitutional speedy trial violation on the basis that petitioner was not indicted within the thirty (30) days after his arrest on March 11, 2009. The district court ruling on the STA claim and ineffective assistance of counsel claims incorrectly concluded that there was neither speedy trial violation nor ineffective assistance of counsel. In reaching its conclusion, district court determined that petitioner was not arrested for fraud case on March 11, 2009 arrest, instead petitioner was arrested for drug case only, and therefore, petitioner cannot rely on March 11, 2009 arrest date to show fraud case speedy trial violation, and for that matter, petitioner was under investigation for health care fraud at the time of the initial arrest on March 11, 2009. See the district court's memorandum opinion and order marked as **Appendix B** and attached hereto. The district court clearly erred in its ruling that there was neither STA violation nor ineffective assistance of counsel. And also district court clearly erred in its ruling that the arrest for fraud case was not rested on the initial March 11, 2009 arrest date.

When petitioner initiated the COA motion, the Court of Appeals denied the initial COA petition on procedural grounds without reaching the petitioner's underlying federal constitutional claims concluding that the STA claim and ineffective assistance of counsel claim have been reviewed on direct appeal and rejected, and therefore, foreclosed. The court of Appeals was incorrect in its procedural ruling. The STA claim and the ineffective assistance claim were presented for the first time on direct appeal and were never raised in the district court. It is well settled precedent in the Court of Appeals that argument or issues not presented in the district court shall not be considered for the first time on appeal. In this regard, therefore, the Court of Appeals may not review these claims that were not raised in the district court and were presented in appellate court for the first time. The procedural ruling was wrong and improper and to use it in denying a COA works against justice. The Court of Appeals abuse its discretion in denying a COA motion on that basis.

Therefore, the issues presented here for review is to determine:

(1) Whether there were Statutory and Constitutional Speedy trial violations which constitute the denial of petitioner's rights to Speedy Trial Act.(STA).

To review the issue of the STA violation, it is necessary to determine whether March 11, 2009 arrest date was also the arrest date for health care fraud case; and whether the record indicates that authorities were still investigating petitioner for health care fraud at the time of the March 11, 2009 arrest.

(2) Whether counsel was ineffective in failing to move to dismiss indictment for Speedy Trial Act (STA) violation.

(3) Whether, under the Rule of this Honorable Court, the Court of Appeals erred when it denied COA based on expressed view that claims presented in the direct appeal for the first time and were never raised in the district court are foreclosed, and therefore, precludes issuance of a COA.

[1] WHETHER THERE WERE STATUTORY AND CONSTITUTIONAL SPEEDY TRIAL VIOLATIONS

On March 10, 2009, probable-cause-affidavit alleged that petitioner violated among other offenses, Section 1347, Title 18 of the United States Code, the health care fraud offense.

On March 11, 2009, a day after the affidavit was filed, petitioner was arrested in connection with the charge.

On August 24, 2011, petitioner was indicted by a grand jury for violation of 18 U.S.C. § 1347, the health care fraud offense, which is the same statutory Section 1347, Title 18, United States Code which was cited in the probable-cause-affidavit filed on March 10; 2009. The indictment returned more than 29 months after petitioner was charged with commission of federal offense and arrested upon such complaint was clearly returned more than thirty(30) days of §3161(b)'s time limit requiring dismissal of the indictment pursuant to § 3162(a)(1) for such § §3161(b) violation. The thirty-day requirement applies to an indictment issued in connection with federal criminal offense for which defendant was arrested. United States v. Molina, 535 Fed Appx 417 (5th Cir 2013). The clear mandate of 18 U.S.C. §3162(a)(1) requires dismissal of only charge contained in the original complaint or in the original accusatory instrument. United States v Bailey, 111 F.3d 1229 (5th Cir 1997)(quoting United States v Rice, 431 Fed Appx 289 (5th Cir 2001) which as here, the affidavit of probable cause in support for search and seizure warrant application was the initial accusatory instrument in this instant case on which petitioner was accused for violation of health care fraud offense. See page 2 of the Affidavit. Thus, because the health care offense indictment was untimely as more than thirty days had elapsed between the initial arrest and the health care fraud indictment, it requires dismissal for violation of petitioner's statutory right to a Speedy trial under the Speedy Trial Act, which support claim that counsel was ineffective for failing to move to dismiss the indictment for Speedy Trial Act violation.

Furthermore, the preindictment delay of more than 29 months also constituted a violation of petitioner's Sixth Amendment right to a Speedy Trial and yet the defense counsel failed to raise that petitioner had been denied a Speedy trial in violation of the Sixth Amendment. The protection of the Sixth Amendment right to Speedy trial is activated only when a criminal prosecution has begun and extends only to those persons who have been accused in the course of the prosecution. Dillingham v. United States, 423 U.S. 64, 46 L.Ed 2d 205, 96 S.Ct 303 (1975).

An accusation has generally been considered to include the actual restraints imposed by arrest and holding to answer a criminal charge, Id Dillingham, supra. Thus, the 29 month-delay between petitioner's arrest and indictment in this instant case violates petitioner's Sixth Amendment Constitutional rights to a Speedy trial, requiring dismissal of the indictment for unnecessary prosecutorial delay. The district court denies petitioner's habeas relief concluding that there was neither Speedy Trial Act violation nor Sixth Amendment Speedy trial violation. Petitioner submits that district court erred in concluding that there was neither Speedy Trial Act violation nor Sixth Amendment Speedy trial violation. Nonetheless, an overview of the Speedy trial claim, upon the relevant law and record, in this case clearly support claim that petitioner's Statutory right and the Sixth Amendment constitutional right to a Speedy trial were violated. The district court's adjudication of the Speedy trial claims is unreasonably wrong, thus debatable as such there is a practical certainity that the jurists of the reason would disagree with the district court's resolution of the petitioner's constitutional claims, and therefore, would find the district court's ruling debatable or wrong, Slack v. McDaniel, 529 U.S. 473, 484 (2007). The record reflects that there was approximately 29 months delay between the time when the indictment was returned and petitioner's arrest in connection with health care offense. On its face, the 30-day requirement was exceeded which is clear violation of Speedy Trial Act, §3161(b). Furthermore, the constitutional right to a Speedy attaches when a person is arrested. Dillingham, 423 U.S. 64, 46 L.Ed 2d 205 (1975). Thus, the 29-month delay between petitioner's

arrest and indictment violates petitioner's Sixth Amendment Constitutional right to a Speedy Trial, requiring dismissal of the indictment for unnecessary prosecutiorial delay.

The record is inconclusive as to the reason for the delay between arrest and indictment. At very least, there is some question as to whether the government diligently pursued petitioner from arrest to indictment. United States v. Velazquez, 749 F.3d 161 (3rd Circ. 2013). Based on these substances, there is practical certainity that jurist of the reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and therefore, would find it debatable whether district court was correct in its Speedy trial ruling. Slack v. McDaniel, 529 U.S. 484 (2007). The 29-month delay between petitioner's arrest and indictment denied petitioner a Speedy trial in violation of the Statutory and Constitutional Speedy Trial Act, and the indictment should have been dismissed on the grounds that petitioner had been denied a Speedy trial under Sixth Amendment. Id Velazquez, supra. The protection of the Sixth Amendment is activated only when a crimininal prosecution has begun and extends only to those persons who have been accused in the course of that prosecution. Dillingham v. United States, 423 U.S. 64, 46, L.Ed 2d 205, 96 S.Ct 303(1975). Thus, the 29-month delay between petitioner's arrest and indictment violates petitioner's right to Statutory and Constitutional rights to a Speedy trial for unnecessary delay in asserting that district court abuse its discretion in denying petitioner's §2255 motion. Henceforth, petitioner urges this Honorable Court to issue a COA in order to appeal the district court ruling, where it was clear to anyone that petitioner was denied a constitutional right guarantee by Sixth Amendment's Speedy trial of United States Constitution.

WHETHER MARCH 2009 ARREST WAS THE ARREST DATE FOR HEALTH CARE FRAUD AS WELL

The district court ruling on STA claim incorrectly determined that there was neither statutory nor constitutional Speedy trial violation. In reaching its conclusion, district court determined that petitioner was not arrested in the fraud case on March 11, 2009 arrest, instead he was arrested for drug case only, and therefore, petitioner cannot rely on March 11, 2009 arrest date to show a violation of Speedy trial for the fraud case. See the district court Memorandum opinion and order marked as **APPENDIX B** and attached hereto.

In other words, the district court determines that March 11, 2009 arrest was not for fraud case because: (1) March 11, 2009 arrest was for drug case only for which arrest warrant was issued. (2) An arrest warrant to arrest petitioner for fraud case had not been issued at the time of March 11, 2009 arrest, therefore, fraud case was not included in the March 11, 2009 arrest, and (3), the fraud case was undergoing investigation at that time of March 11, 2009 arrest. The district court determination in these regards are unpersuasive and are clearly unreasonable and wrong.

However, petitioner submits that the initial March 11, 2009 arrest was also for fraud case as well because the Special FBI Agent's constructed affidavit, upon sworn allegation, established probable cause that petitioner committed health care fraud in violation of Section 1347, Title 18, United States Code. Johnson v. Norcross, 565 Fed. Appx 287 (5th Cir. 2014), and the drug case underlying the March 11, 2009 arrest was reasonably related to fraud case. United States v. Nixon, 634 F.2d 306 (5th Cir. 1981), henceforth, the initial arrest would have started the critical period for fraud case trial. United States v. Cabral, 475 F.2d 715 (1st Cir. 1973). Furthermore, the affidavit does not demonstrate that petitioner was charged (or for that matter booked for health care fraud investigation but rather was charged with specific offense of healthcare defrauding and there was probable cause to make a constitutional arrest for the fraud case on March 11, 2009 based on existence of the probable cause. Barnett v. United States, 384 F.2d 848 (5th Cir. 1967).

The principal facts under consideration involved the related drug crime and health care fraud crime by reason of the fact that they might have been charged on a given set of facts stemming from 2007 joint federal investigation and their commissions had occurred in the same locality and at the same relevant time period.
An undisputed evidence shows that law enforcement officer had before the arrest marshalled facts sufficient in her professional judgment to charge petitioner with two specific offenses, namely the drug and health care fraud offense in a sworn affidavit before a magistrate alleging violation of these two crimes.The drug offense underlying the initial March 11, 2009 arrest was based on the same given set of facts arising out of the accusatory probable-cause-affidavit that also charged health care offense and both crimes were committed in the same locality and within the same relevant time period, thus, making the two crimes reasonably interrelated. United States v. Nixon, 634 F.2d 306 (5th Cir. 1981). An arrest warrant was issued for drug case but not for fraud case for which probable cause existed and petitioner was arrested on March 11, 2009.

The district court and the government take the position that the initial arrest of petitioner on March 11, 2009 was for drug crime only on the basis that arrest warrant has been issued for drug offense and not for health care fraud crime. However, petitioner takes the position that the initial March 11, 2009 arrest also was for the health care fraud crime for which probable cause existed for arrest at the time of the March 11, 2009 arrest. Whether an arrest on health care fraud is valid depends upon whether at the moment the arrest was made, the drug crime underlying the arrest and health care fraud crime were reasonably related. Id.

There are two settings identified in which a warrantless arrest could be constitutionally valid and lawful when two or more charges are found against a person. Vance v. Nunnery, 137 F.3d 270 (5th Cir. 1998). First, in cases where probable cause exists or present. Second, in cases where the two offenses being committed are reasonably related. Petitioner submits that the facts of this case place March 11, 2009 arrest in this category because there was probable cause to arrest petitioner for health care fraud; also the drug case and the fraud case are reasonably related.

I. PROBABLE CAUSE EXISTED:

In this instant case, petitioner submits that March 11, 2009 arrest also constituted arrest of petitioner for health care fraud offense because probable cause existed at the time of the arrest. United States v Antone, 753 F.2d 1301 (5th Cir 1985). If probable cause to arrest petitioner for health care fraud offense existed at the time of March 11, 2009 arrest, then there is without doubt reasonable grounds to believe that there was arrest of petitioner for health care fraud as well on March 11, 2009. Draper v United States, 358 U.S. 307, 3 L.Ed 2d 327 (1958)(holding that arrest is lawful if the arresting officer had probable cause within the meaning of the Fourth Amendment which authorizes arrests upon probable cause and reasonable grounds). Thus, to arrest petitioner for health care fraud violation, without warrant, a probable cause is required to arrest petitioner. United States v. Adams, 1995 U.S. Appx. LEXIS 42534 (5th Cir. 1995).

The Special F.B.I. Agent's affidavit for search and seizure warrant application clearly provided a substantial basis for Magistrate finding of probable cause that petitioner committed health care fraud to issue search warrant. United States v. Brown, 941 F.2d 1300 (5th Cir. 1991). Accordingly, the facts set forth in the affidavit provide sufficient facts relied upon to establish probable cause to believe that health care fraud offense is being commited or has been committed and petitioner committed it. See the affidavit at page 2, marked as **APPENDIX F** and attached hereto. Thus, probable cause existed for petitioner's arrest on health care fraud charge. United States v. Rabon, 872 F.2d 589 (5th Cir. 1989). Therefore, there was a valid arrest of the petitioner for health care fraud on the initial March 11, 2009 arrest.

II. THE TWO ALLEGED CRIMES ARE RELATED:

Notwithstanding the existence of probable cause to arrest petitioner for health care fraud, the drug case and the fraud case are reasonably related by virtue of the facts that the two crimes stemmed from set of facts derived from 2007 joint federal investigation and both the drug case and the fraud case are charged on the same accusatory probable-cause-affidavit from which facts are relied upon to issue

search warrant. Thus, on the sum basis of the facts of the investigation and affidavit, it is foreseeably true to reach a conclusion that the drug case and the fraud case are sufficiently related. United States v. Nixon, 634 F.2d 306 (5th Cir. 1981). See also United States v. DeTienne, 468 F.2d 151 (7th Cir. 1972). In United States v. Nixon, Supra, the Fifth Circuit Court held that: "...If the crime for which a defendant is ultimately prosecuted is but a part of or really glides the charge underlying his initial arrest and different accusatory dates between them are not reasonably explicable, the initial arrest may well mark the Speedy trial provision's applicability as to prosecution for all the interrelated offenses". Because the drug case and the fraud case are reasonably related, the March 11, 2009 drug case's arrest also constitute the arrest date for the fraud case. Id.

In United States v. Atkinson, 450 F.2d 835 (5th Cir. 1971), the Fifth Circuit Court held: "...We want it well understood that when a crime under which the arrest is made and the crime for which probable cause exists are in some fashion related, there is no question but there is valid arrest". See also Mills v. Wainwright, 415 F.2d 787 (5th Cir. 1969). Because probable cause existed at the time of the arrest for fraud case arrest and the drug case and the fraud case are reasonably related, there was a valid arrest of petitioner for health care fraud crime on March 11, 2009 arrest as well. United States v. Rabon, 872 F.2d 589 (5th Cir. 1989). See also United States v. Watson, 423 U.S. 411, 46 L.Ed 2d 598 (1976)(held that Fourth Amendment does not require a warrant for an arrest made on a probable cause, thus held, that Fourth Amendment is not violated by warrantless arrest where there is probable cause for the arrest). Therefore, March 11, 2009 arrest constituted a valid arrest of well established law for the health care fraud offense for which probable cause existed for arrest. Henceforth, the Speedy trial claim for fraud case crystalized at the time of the initial arrest on March 11, 2009. United States v. Cabral, 475 F.2d 715 (1st Cir. 1973).

The district court in attempt to invalidate health care fraud arrest on March 11, 2009, and to support its ruling that petitioner was not arrested on March 11, 2009 for healthcare fraud case, stated in its memorandum opinion and order: "...Notwithstanding the fact

the search warrant affidavit indicates authorities were investigating Ayika for healthcare fraud, he was not arrested on the fraud case prior to his indictment on 2011...". See the district Court memorandum opinion and order, [ECF NO. 400], marked as APPENDIX B and attached hereto, at page 11-12. The government, however, did not raise this argument. To the extent the district court asserted that government was investigating petitioner for healthcare fraud case, it is incorrect. In this instant case, petitioner was charged with a specific offense statute, the §1347 healthcare fraud, and there was probable cause to arrest petitioner for commission of that offense. Thus, the arrest was valid and so was constitutionally lawful. Barnett v. United States, 354 F.2d 848(5th Cir. 1967). The district court imprecise statement that authorities were investigating petitioner at the moment of the March 11, 2009 arrest will not invalidate that arrest for healthcare fraud offense. In Barnett, supra, the Fifth Circuit held that where a valid legal basis relied upon to arrest and detain exists, the use by the jailer of an imprecise term, "for investigation", to describe the basis for arrest and detention will not invalidate the arrest and detention in view of finding of probable cause. id at 856. The arrest based on constitutional probable cause for §1347 healthcare violation did not become unconstitutional because authorities were investigating petitioner for healthcare offense charged in the affidavit. Furthermore, the district court, in support of its ruling, that petitioner was not arrested in March 11, 2009 for health care fraud stated that: "... Special Agent Beaulieu also testified that Ayika's arrest on March 11, 2009 was for drug case and not for health care fraud, wire fraud or mail fraud...". The district court ruling is incorrect. The fifth Circuit, in United State v. Saunders, 476 F.2d 5 (5th Cir. 1973) has held that when an arrest was made which is properly supported by probable cause for certain offenses, neither an objective reliance of existence of other offense for arrest of defendant nor verbal announcement of wrong offense by enforcement officer vitiates the arrest or affect the result. Thus, Agent, Beaulieu's testimony that petitioner's arrest on March 11, 2009 was not for health care fraud did not change the

validity of fraud case arrest of petitioner on March 11, 2009 for which probable cause existed for arrest of the petitioner. Thus, district court's ruling that petitioner was not arrested for fraud case on March 11, 2009 was unreasonably wrong. Petitioner was arrested for health care fraud as well on March 11, 2009 he was arrested because the drug case underlying March 11, 2009 arrest is related to health care fraud case for which probable cause to arrest existed, therefore, there was a legal and valid health care fraud arrest on March 11, 2009 as well, which support claim that petitioner's right to Speedy trial under the Statutory and Sixth Amendment Speedy trial has been denied. Dillingham v. United States,423 U. S. 64 (1975) where 29 months had elapsed after his arrest to return the fraud case indictment.

[2] WHETHER COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO DISMISS INDICTMENT FOR SPEEDY TRIAL ACT VIOLATION

On March 10, 2009, a probable-cause-affidavit, filed in this case, alleged that petitioner violated, among other offenses, Section 1347, Title 18 of the United States Code; the health care fraud offense.

On March 11, 2009, a day after the affidavit was filed, petitioner was arrested in connection with the charges alleged in the affidavit. On August 24, 2011, an indictment was returned charging the health care fraud offense, § 1347, the same offense charged in the affidavit of probable cause.

Pursuant to Sec. 3161(b) of the Speedy Trial Act, an indictment charging individual with commission of an offense shall be filed within thirty days from the date on which such individual was arrested in connection with such charges against him. See 18 U.S.C. § 3161(b). And 18 U.S.C. § 3162(a)(1) provides in part that if no indictment is filed within the time limit as required by § 3161(b) such charges against that individual in such complaint shall be dismissed. See 18 U.S.C. § 3162(a)(1).

Affidavit filed on March 10, 2009 alleged that there was probable cause to believe that petitioner has committed health care fraud in violation of Sec 1347. On March 11, 2009, petitioner was arrested in connection with the charges in the probable cause affidavit. Ultimately, the health care fraud offense, § 1347, among other charges in the probable cause affidavit formed the basis for the March 11, 2009 arrest.

On August 24, 2011, petitioner was indicted by a grand jury for violation of 18 U.S.C. §1347, the health care fraud offense, which is the same statutory Section 1347, Title 18 of United States Code which was cited in the probable cause affidavit filed on March 10, 2009. The indictment returned more than 29 months after petitioner was charged with commission of federal offense and arrested upon such charge was clearly returned more than thirty(30) days of §3161(b)'s time limit requiring dismissal of the indictment pursuant

to §3162(a)(1) for §3161(b) violation. The 30-day requirement applies to an indictment issued in connection with criminal charges for which defendant was arrested. United States v. Molina, 535 Fed Appx 417 (5th Cir 2013). The clear mandates of §3162(a)(1) requires dismissal of only charge contained in the original accusatory instrument. United States v Bailey, 11 F.3d 1229(5th Cir 1997)(quoting United States v Rice, 431 Fed Appx. 289(5th Cir 2001). Thus, because the health care offense returned was untimely as more than thirty days had elapsed between the initial arrest and the fraud indictment requiring dismissal, petitioner submits that the indictment should have been dismissed, United States v Mathurin, 690 F.3d 1236(11th Cir. 2012). See also United States v. Martinez-Espinosa, 299 F.3d 414(5th Cir 2002), and defense counsel was ineffective for failing to move for dismissal of the indictment for statutory and constitutional Speedy trial violation. United States v. Palomba, 31 F.3d 1450(9th Cir 1994) and Dillingham v United States, 423 U.S. 64, 46 L.Ed 2d 205 (1975).

Defense counsel failure to identify the delay between the probable cause affidavits' charges, the arrest and the issuance of indictment fell below an objective standard of reasonableness and it prejudiced petitioner. Strickland v Washington, 466 U.S. 668, 104 S. Ct 2055 (1984). Under a plain reading of § 3161(b), an indictment must have been filed within 30-day from that arrest on March 11, 2009. However, the indictment was not issued until August 24, 2011. Thus, it was apparent at the time petitioner was indicted that the pre-indictment delay violated § 3161(b). Under the circumstance, counsel should have moved to dismiss the indictment based on the apparent violation of § 3161(b). Defense counsel's failure to dismiss the health care fraud indictment for violation of §3161(b) fell below an objective standard of reasonableness. Id Strickland, supra. Had counsel sought dismissal of the indictment for Speedy Trial Act violation, the district court should have dismissed the indictment because dismissal is mandatory when the arrest-indictment delay exceeds the 30-day time limitation as required by § 3161(b). United States v. Velasquez, 890 F.2d 717 (5th Cir 1989). See also United States v Martinez-Espinosa, 299 F.3d 414 (5th Cir 2002). Failure of counsel to pursue for dismisal as a result of Speedy Trial Act violation undermines the confidence in the outcome of this

case, because, quite frankly, but for counsels deficient performance, the result of the proceeding should have been different in that the district court should have dismissed the health care fraud indictment with prejudice against reprosecution because the delay of 29 months to return indictment after arrest is enormous, serious and severe delay which is measured as violation of Speedy Trial Act that warrant dismissal with prejudice and sufficient alone by itself to bar reprosecution. See United States v. Stayton, 791 F.2d 17 (2nd Cir. 1986). The record reflects that there was approximately 29 months delay between the time of petitioner's arrest and return of indictment for health care fraud and defense counsel did not diligently pursue to dismiss indictment; on its face, petitioner was denied effective assistance of counsel guarantee by Sixth Amendment of United States Constitution. Strickland v. Washington, supra. District Court's determination that there was no ineffective assistance of counsel was erroneous and unreasonable. Because petitioner's rights under the Statutory and Constitutional Speedy trial were violated and defense counsel failed to move to dismiss the indictment on the apparent violation, accordingly, the indictment must be dismissed. United States v. Palomba, 31 F.3d 1456 (9th Cir. 1994). Petitioner is entitled to redress on appeal, henceforth, entitled to a COA where petitioner has established that he is entitled to relief on the merits of his claims, Buxton v Collins, 925 F.2d 816 (5th Cir. 1991), and has shown that he was denied a constitutional right to effective assistance of counsel quarantee by the Sixth Amendment, Cook v. Lynaugh, 821 F.2d 1072 (5th Cir 1987). Therefore petitioner, respectfully urge this Honorable Court to grant a COA to appeal the district court's ruling.

[3] WHETHER THE COURT OF APPEALS ERRED WHEN IT DENIED COA BASED ON EXPRESSED VIEW THAT CLAIMS PRESENTED IN THE DIRECT APPEAL FOR THE FIRST TIME AND WERE NEVER RAISED IN THE DISTRICT COURT ARE FORECLOSED, AND THEREFORE, PRECLUDES ISSUANCE OF A COA.

This petition for a certiorari arises in a matter regarding the denial of a COA on incorrect grounds that STA claim and ineffective assistance of counsel claim were reviewed on direct appeal and rejected by Court of Appeals, and therefore, foreclosed. Petitioner respectfully disagree with the court's determination and conclusion. Petitioner as a pro se presented the STA claim for the first time and was never before raised in the district court below relying on ineffective assistance of counsel claim. The appellate court instead to decline review of the claims looked at the claims for clear error, which is impermissible because appellate court may not review issues or claims that were not raised in the district court and are presented in the appellate court for the first time, Stephens v. Zant, 716 F.2d 276 (5th Cir. 1983). In such circumstances, the appellate court may consider the issues only in exceptional cases where it is necessary to prevent grave miscarriage of justice or preserve the integrity of justice proceeding. id. Suffice to say that this is not such a case presented here, so appellate court should have properly decline the STA claim review. Needless to say, the STA claim review is at best flawed and invalid. The STA claim raised for the first time on appeal and was never presented in the district court is not subject to plain error review. The appellate panel erred in undertaking such review. The practice and procedure providing jurisdiction to Court of Appeals require that issues or claims of the district court's decisions be subject for further review for clear error in appellate courts. But as here, the STA claim has not been looked at by district court, and therefore, is not subject to appellate review. It is long well settled law in the Fifth Circuit that argument not presented in the district court shall not be considered for the first time on appeal. See Stephen v. Zant, supra. See also Cobb v. Wainwright, 666 F.2d 966 (5th Cir. 1982). In Funk v. Stryker, 631 F.3d 777 (5th Cir. 2011), the Fifth Cir. Court of Appeals has held that the Court lacked appellate jurisdiction to consider the claims raised by Stryker for

the first time on appeal because the claim was not before the district court, therefore, the Court is foreclosed from considering the claim. Fifth Circuit Court has generally held that it will not consider an argument not raised in the district court and presented for the first time on appeal. See Burciago v. Deutch Bank, 871 F.3d 380(5th Cir 2017) (held that the scope of appellate review is limited to matters presented to the district court; argument not raised in the district court cannot be asserted for the first time on appeal unless such review is necessary to prevent a miscarriage of justice). See Campbell v. LeBlanc, 694 Fed. Appx 275(5th Cir.2017)(Court held that as a general rule, this court does not review issues raised for the first time on appeal). See Arrington v. Smith, 2017 U.S. App. LEXIS 17738(5th Cir 2017)(held that issues 1 and 2 were not raised in the district court so we do not consider them here quoting Johnson v. Quarterman,483 F.3d 278(5th Cir 2007)). See United States v. Hopkins, 318 Fed Appx 297(5th Cir 2009)(the Court held that the issue of ineffective assistance was not raised in the district court and was not addressed, we decline to consider the claim..Hopkins is not precluded from raising the merits of his ineffective assistance claim in a timely §2255 motion).
Following the well settled procedure, which restricts 5th Circuit to a review of issues or claims presented to district court, it would of course be inappropriate and improper for the appellate court to consider the STA claim for the first time and was not before the district court. The panel should have declined to consider the STA claim because the STA claim that has not been presented in the district court shall not be considered for the first time on appeal. See Sterling Fin. Group v. Hammer, 393 F.3d 1223,1226(11th Cir 2004). Because appellate panel undertook impermissible STA claim review and ineffective assistance review where it should'nt, they are discarded and void. Notwithstanding undertaking an impermissible review, the appellate panel also caused an omission of a crucial "affidavit" record-evidence required to aid the decisional process of the STA claim and ineffective assistance claim by denying a Motion to Supplement the Record on Appeal (ROA) with a crucial 116-page affidavit record that also was never been filed in district court's docket by

prosecution. See the appellate Court's opinion footnote NO.28 in United States v. Ayika, 837 F.3d 460 (5th Cir 2016)(stating: "...Furthermore, Ayika motion for reconsideration of the Clerk's order denying his motion to supplement ROA with...affidavit supporting a search and seizure warrant ...is denied".)

Thus, the ROA before the panel was devoid of the affidavit evidence required to permit the panel to make a fair evaluation of the STA claim when it undertook to review the STA claim. Furthermore, issues raised for the first time on appeal that involve factual determination that could have been resolved in district court generally do not rise to the level of plain error review. Robertson v Plano City, 70 F.3d 21, 23 (5th Cir. 1995). A determination of petitioner's STA violation would require resolution of the factual issues leading to alleged STA violation which are contained in the 116-page affidavit. Rejecting the 116-page affidavit as part of the ROA otherwise rejected admission of valuable evidence required to decide merits of the claims. Supreme Court in Singleton v. Wulff, 428 U.S. 106(1976) has held that a federal appellate courts generally do not consider issues which have not been presented to the district court. The Supreme Court explained that this is essential in order that parties may have the opportunity to offer evidence they believe relevant to the issues. This being so injustice was more likely to be caused than avoided by deciding issues without defendant having had an opportunity to be heard in the district court. In rejecting the 116-page affidavit as part of ROA, the appellate panel took the position that the 116-page affidavit is not part of the district court record.

The 116-page affidavit is a crucial record required to permit the panel to make a fair evaluation of STA claim and ineffective assistance claim. Indeed, the 116-page affidavit is necessary and valuable record required to aid in the decisional process of the STA claim and the ineffective assistance claim. Had the 116-page affidavit record was allowed to become part of the ROA for review, petitioner should have prevailed on STA claim and ineffective of assistance claim because the panel should have found a STA violation which support claim that counsel was ineffective and consequently dismissed the indictment with prejudice to reprosecution. In the absence of the 116-page affidavit, the STA claim and ineffective assistance claim review would be without merits as the required evidence-record needed to determine the merits

of the claims is lacking. Because the presence of the 116-page affidavit indeed sensibly establish evidence in the record showing STA violation and denial of effective assistance of counsel, its rejection as part of the review record and couple with the impermissible review by the panel were clear error that actually cause a manifest injustice. The error was plain and affected petitioner's substantial right and also affected the fairness of the proceeding in the district court and the Court of Appeals. Thus, the outcome of the panel decision (i.e. the rejection of the 116-page affidavit as part of the ROA and undertaking an impermissible review of the claim) amount to miscarriage of justice that seriously affect the fairness, integrity and public reputation of the judicial proceedings. United States v. Olano, 507 U.S. 725(1993).Because the STA claim and the ineffective assistance of counsel claim were not presented in the district court and were raised in the appellate court for the first time, those claims were not proper before Court of Appeals, therefore, the court of appeals procedurally erred by finding that the STA claim and the ineffective assistance of counsel claim has been reviewed in the direct appeal and foreclosed. The review to grant a COA is limitted to the grounds upon which district court's ruliings were sought and had. The Court of Appeals, disregarding its own rule and standard of practice, entertained an issue that was not mentioned at all in the district court and was mentioned only in direct appeal brief without any development in the district court. See Cone v. Bell, 556 U.S. 449 (2008). Because government did not raise the procedural default in the district court, the Fifth Circuit denial of a COA rests on erroneous premises and must therefore be vacated since there is no record that district court denied those claims on procedural grounds. Baker v. Estella, 711 F.2d 44 (5th Cir. 1983). In addition, because the reviewed STA claim and ineffective assistance of counsel claim in direct appeal are impermissible and therefore invalidated under the rule of Court of Appeals and under the rule of this Honorable Court which provide that such claims presented in direct appeal for the first time are not reviewable where they were not raised in district court, the review is therefore void as such those claims are not procedurally barred or foreclosed in § 2255 motion for that matter.

Nothwithstanding the procedural default, petitioner urges that this Honorable Court should reach the merits of petitioner's claims to avoid a fundamental miscarriage of justice where petitioner has shown by clear and convicing evidence that no reasonable jurist would have concluded that: (1) petitioner's constitutional right was not violated by counsel's ineffective assistance, (2) or conclude that petitioner's rights to statutory and constitutional speedy trial were not violated for that matter. Jenkins v. Hutton, 135 S. Ct 1769 (2017).

Above all, there are very strong reasons for granting certiorari in this matter. Most importantly, fundamental rights are at stake. The Sixth Amendment rights have been seriously violated and undermined. The Court of Appeals unreasonably applied procedurally default in denying petitioner's claim of ineffective assistance of counsel claim and the STA claim. The application of a procedural default rule that would prevent petitioner from presenting a valid claim especially when the claim is one of effective assistance of counsel that is bedrock principle of our justice system is of a serious concern. Ayestas v. Davis, 200 L.Ed 2d 376 (2007). The district court and the Court of Appeals denial of Sixth Amendment claims in light of its merits has led to practical problems and abuse and rendered their decisions unconstitutionally wrong. Further, the district court and Court of Appeals denial of Sixth Amendment is inconsistence with other Sixth Amendment cases, notably the Strickland case. Having recognize the importance of following precedent, it is important that Supreme Court should review the questions involved to determine whether district court and the Court of Appeals' decisions were contrary to or inolved an unreasonable application of clearly established federal law in light of Strickland. Sexton v. Beaudreaux, 138 S.Ct 2555(2018).

CONCLUSION

Because petitioner's rights to statutory and constitutional speedy trial were violated and because it is obvious and clear to anyone that petitioner's constitutional right to effective assistance of counsel was denied by counsel's ineffective assistance, petitioner urges that this Honorable Court should reach the merits of the claims raised in this petition and after further consideration grant informa pauperis, grant certiorari and vacate the judgment of Court of Appeals and remand the case with instruction to issue a COA to petitioner to appeal the district court adverse ruling on the § 2255 motion.

The petition for a writ of certiorari should be granted.

Respectfully resubmitted,

Peter V. Ayala

Date: APRIL 15, 2019