No.: 19-6049

IN THE

UNITED STATES SUPREME COURT

1 First Street, N. E.
Washington, DC 20543

LAWRENCE T. TYLER

Petitioner / Appellant

v.

UNITED STATES OF AMERICA

Appellee / Respondent

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit
And The Houston District Court For The Southern District Of Texas – Houston Division

PETITION FOR WRIT OF CERTIORARI
OF THE DENIAL OF CERTIFICATE OF APPEALABILITY
AND OF THE DENIAL OF MOTION TO CONVERT TO
A WRIT OF ERROR CORAM NOBIS

LAWRENCE T. TYLER, Pro Se
A # 029 692 445 / BOP # 73142-279
Folkston ICE Processing Center
3026 Hwy. 252 East
Post Office Box # 248
Folkston, GA 31357

THIS CASE IS ENTITLED TO PREFERENCE

QUESTIONS PRESENTED FOR REVIEW

Whether a Certificate-Of-Appealability should be granted for the following Claims/Issues :

1, Whether fact of an Actual Loss Amount, which sets the maximum pecuniary criminal sentence **for which there is no prescribed statutory range,** is a fact that must be found beyond a reasonable doubt.

2, Whether Judicial fact-finding, **by a preponderance of the evidence,** which carries Collateral consequences such as deportation, and **increases the pecuniary criminal sentence for which there is no prescribe statutory range**, impedes the Six Amendment's Jury trial guarantees, conflicts with the 6th Circuit's and relevant decision of this Supreme Court.

3, Whether my conviction should be vacated due to the fact that I was convicted with tinted evidence obtained unlawfully from my unabandon office, by the government, admittedly without a search-and-seizure-warrant, thus conflicting with the relevant decision of this Supreme Court and the IV Amendment.

4, Whether **Counsels were ineffective** for ignoring my explicit instructions to investigate and raise my much more substantive and meritorious issues without any legitimate strategic purpose. If so, **does this establish sufficient cause and prejudice to overcome all procedure bar**, for not raising said issues at trial, and on direct appeal.

5, Whether the disposition of **my issues should be converted from a habeas to a Writ-Of-Carom-Nobis** due to the fact that my habeas litigation outlived my sentence, and there are still ongoing pecuniary and collateral consequences such as deportation being inflicted on me, by the conviction and judgment, after sentence is complete, terminate and or expires.

PARTIES TO PROCEEDING:

All parties **do not** appear in the case caption of 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 :

Petitioner
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V.

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V.

Defendant / Person Of Interest
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V.

Defendant
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PRAYER

The petitioner, Lawrence T. Tyler, (Hereinafter "Tyler") respectfully prays that a Writ Of Certiorari be granted to review the judgment and opinion of the United States Court of Appeals For The Fifth Circuit issued on August 6, 2019 And The Houston District Court For The Southern District Of Texas – Houston Division (See Appendix A).

OPINIONS BELOW

The Opinion of the United States Court Of Appeals appears at Appendix A to the petition and is unpublished. The Opinion of the United States District Court appears at Appendix B and D to the petition (Appendix D contains the Magistrate Judge's Amended-Memorandum-And-Recommendation, which was adopted by the District Court.)

JURISDICTION

The date on which the United States Court of Appeals decided my case was August 6, 2019 (See Appendix A). A timely petition for rehearing was denied by the United States Fifth Circuit Court Of Appeals on the following date: August 6, 2019, and a copy of the order denying rehearing appears at Appendix A.

This petition is filed within ninety days after entry of the judgment. See Sup. Ct. R. 13.1. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). This Petition is timely submited from the final Judgment Document filed August 6, 2019, in The United States Court Of Appeals at New Orleans, LA 70130. (See Appendix E).

BASIS OF FEDERAL JURISDICTION IN THE APPELLATE COURT

The District Court had jurisdiction of this case pursuant to 18 U.S.C. Section 3231 because Petitioner was charged with an offense against the laws of the United States. The Court Of Appeals had Jurisdiction over the appeal pursuant to 28 U.S.C. Section 1291 and 18 U.S.C. Section 3742, which gave the Court Of Appeals jurisdiction over all final decisions and sentences of The District Court Of The United States.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was brought originally as a federal criminal prosecution. The District Court therefore had original Jurisdiction pursuant to 18 U.S.C. Section 3231. The Petitioner subsequently file a 28 U.S.C. Section 2255 Motion in the District Court, which was denied alongside a Certificate-Of-Appealability (COA). The Petitioner then appealed the denial of the COA to the Fifth-Circuit-Court-Of-Appeals which was also denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Authorities involved

Six Amendment of the United States Constitution

IV Amendment of the United States Constitution

Article III of the United States Constitution

Federal Statutes Involved

28 U.S.C. Section 2255

Rules Involved

Rule 36 Of Fed. Crim. P.

R. Crim P. 41(e)

R. 43 Fed. Crim. P.

STATEMENT OF THE CASE

I was convicted in a jury trial with the use of tinted evidence obtained unlawfully by the government admittedly with out a search warrant (from my unabandon office). Both Trial and Appellate Counsels failed to investigate nor raise this tinted evidence usage issue, at trial or on direct appeal. I insisted that the issue be investigated and raised at trial and on direct appeal.

At trial the government did not request a special verdict for the Actual Loss Amount. Therefore as a Matter Of Law, the Loss Amount defaulted to $0.00 Total Loss. This $0.00 Total Loss Amount is clearly stated On the Criminal Judgment Sheet. (Attached as Appendix H). After Sentencing the District Court then went on a Judicial Fact-finding mission alleging Actual Loss by a preponderance of the evidence in this Criminal Case, to Justify its pecuniary criminal sentence. No Actual Or intended Loss Amount was found by the Jury, nor admitted by myself. As a matter of fact I objected to any alleged Loss Amount in the Presentencing Investigation Report (PSR).

On Direct Appeal I attempted to file a Pro Se supplemental brief raising all of my issues for which I requested my direct appeal. In spite of my assistance and explicit instructions to Counsel that my issues be raise, my instructions were ignored and counsels failed to raise my issues, without any explanation of prior warning. The Fifth-Circuit-Court-Of-Appeals rejected my Pro Se Motion and my supplemental brief stating that "only your lawyer can file motion and other documents". See Appendix G. Few days later the one and only "insufficiency of the evidence" argument that appellate counsel raised was denied by the Fifth-Circuit and the direct appeal concluded. Counsel filed a petition for a writ of certiorari on the Insufficiency-of-evidence issue. It was denied by this court.(See Appendix F.)

I then filed a 28 U.S.C. Section 2255 motion (See Appendix I, Docket # 1 Filed date 7-5-16) stating all of my issues (including my ineffective assistance of counsel issue) and explaining to the district court how it was not my fault that the issues were not raised on appeal. I explained that the Lawyer that was appointed to me by the district court simply ignored all of my instructions to raise my issues (without communicating her intent to me, nor giving me any warning so that I can fire her and proceed

Pro Se). The District Court adopted the magistrate Judge's Amended Recommendations (See Appendix C and D). I filed my objections to the Magistrate Judge's Amended Recommendations which is sealed by the District Court. (See Appendix I Docket entry # 54).) On September 28, 2018, the District Court entered a Final Judgment denying my 28 U.S.C. Section 2255 Motion with prejudice. (See Appendix B). The District Court further ordered that a Certificate Of Appealability is denied on all of my claims. (See Appendix B). I appealed the denial of a COA to the Fifth-Circuit, which was denied after raising valid, debatable issues and making a substantial showing of the denial of my constitutional right. Additionally, because the Conviction and Judgment still negatively affects me post incarceration, I also filed a Motion to convert my habeas issues to a writ of Coram nobes, if the matter was not decided before my sentence expires. Both my appeals of the denial of the COA and my motion to convert were denied by the fifth-circuit-court-of-appeals (See Appendix A). I then petitioned the Fifth Circuit for a rehearing en banc which was denied (See Appendix E) I now appeal this decision to this Court.

REQUEST FOR LIBERAL CONSIDERATION

I have no legal experience nor legal training, and lack the sophistication and knowledge of learned Counsel. Thus, I humbly asks that this Honorable Court liberally construe my request, motions, and Petition, in accordance with the Supreme Court's statement in Haines v. Kerner, 404 U.S. 91972), which holds that a Pro se litigant's filings should be held to a less stringent standard than formal papers submitted by attorneys. I ask for liberal consideration despite failure to cite proper legal authority, confusion of legal authority, confusion of legal theories, poor syntax and sentence construction. See Boag v. Macdougall, 454 U.S. 265 (1982). I am **incarcerated/detained** for the past several years at the following institution/facility D. Ray James Correctional Facility/Folkston ICE Processing Center which is located at 3026 Hwy. 252 East, Folkston, Georgia 31537 and I am proceeding in forma pauperis.

REASONS FOR GRANTING THE WRIT

My petition for writ of certiorari should be granted because the issues I present meets the requirements for the issuance of a Certificate Of Appealibility (COA).

This Court should grant certiorari because I present a question of constitutional Jury Trial Guarantees regarding pecuniary sentence (in a criminal Jury trial) premised on alleged Actual Loss Amount found solely by the Judge by a preponderance of the evidence, in absentia **after** trial and sentencing. This question was decided by the lower court in a way that conflicts with the six Circuit's decision and with relevant decisions of this Supreme Court. In Southern Union Company v. United States, this Court noted that under some statutes the amount of a fine **"is the amount the defendant's gain or the Victim's loss.".** This Court then concluded, **"in such case requiring Juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement Apprendi's 'animating principle':"** In this instant case the **Actual** Loss Amount determines the restitution/fine's maximum and therefore **must** be found beyond a reasonable doubt, for the **"preservation of the Jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.".** This Court continued that **"[i]n stating Apprendi's rule, we have never distinguished one form of punishment from another, instead, our decision broadly prohibit judicial fact-finding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]' terms that each undeniably embrace fines.",** and pecuniary criminal sentence such as restitution Awards. In this instant case the **maximum** criminal pecuniary sentence is increased with the increase of the **Actual** Loss Amount. And as such must be found beyond a reasonable doubt. Additionally, restitution award can not be based on **Intended** Loss Amount; it must be based on the Legal **Actual** Loss Amount.

This court should grant certiorari because the issues I present to this court and to both the District Court and the Fifth-Circuit-Appeals-Court were **sidestepped** by the lower court and never addressed leaving me with absolutely no legal remedy, which is a fundamental miscarriage of justice, and for all

essential purpose is tantamount to denial of my access to the court.

This Court should grant certiorari due to Counsel's ineffectiveness; I was convicted with evidence obtained unlawfully by the government, **admittedly** without a search warrant from my unabandon office. Counsels were ineffective for their failure to follow my explicit instructions to investigate and or raise the use of tinted evidence at my trial that was obtained admittedly without a search-warrant without any legitimate strategic purpose. Counsels were ineffective for failing to follow my explicit instructions and not raising **any** of my obvious, more meritorious, and more substantive issues at trial and on direct appeal. This ineffectiveness of Counsels creates sufficient **cause and prejudice** to overcome any procedural bar for not raising said issues on direct appeal.

Certiorari should be granted because it would be a fundamental miscarriage of justice, if the disposition of my issues/claims are not converted from a habeas claim to a Coram Nobis because my issues/claims were **sidestepped** by the lower court but the conviction and sentence still continue to have adverse post-sentence-consequences against me.

ANY FACT OTHER THAN THE FACT OF A PRIOR CONVICTION, WHICH CARRIES PECUNIARY CRIMINAL SENTENCING CONSEQUENCES FOR WHICH THERE IS NO PRESCRIBED PECUNIARY-SENTENCING-STATUTORY-RANGE, (AND OR CARRIES COLLATERAL CONSEQUENCES SUCH AS DEPORTATION) IS A FACT THAT MUST BE FOUND BEYOND A REASONABLE DOUBT.

The MJ ***analysis is incomplete*** regarding my restitution issue. The MJ completely ***sidestepped*** my constitutional Jury-Trial-Guarantees violations issue. There was no special verdict in my case.

SPECIAL VERDICT (The Letter-Of-The-Law)

The MJ argued in the (R&R) that "'Apprendi/Alleyne' requires proof beyond a reasonable doubt of facts that increases the statutory **minimum and maximum** sentence..". (See Appendix D) **This analysis is incomplete.** (See Appendix J). This Court's precedent case law of **Southern Union Company v. United States still apply in this instant case.** (See Appendix J). The MJ argues that the "Apprendi/Alleyne' case do not apply to guidelines calculations that [...] falls within the statutory range." (See Appendix D). The statutory range is indeed specific for the imprisonment and supervided

release. Nevertheless, **the statute does not specify a statutory** range for a pecuniary Criminal Sentence such as Restitution Award; except that it **must** be based on **The Actual Loss Amount tied to the counts of conviction.** Therefore **the Actual Loss Amount becomes the statutory maximum for pecuniary Criminal Sentence and must be found beyond a reasonable doubt.** The MJ argues that "In United States v. Collins, 774 F 3d 256, 265-66 (5th Cir. 2014), the Fifth-Circuit made it clear that the type of complaints Tyler raises apply only when a defendant's sentence is increased above the statutory maximum." (See Appendix D). However, the convicted statutes do not provide a statutory range for the pecuniary criminal sentence (Restitution-Award); except that it must be based on the Actual Loss Amount, thus making the Loss Amount the statutory maximum. To increase the Loss Amount by a preponderance of the evidence in a Jury Trial, is tantamount to increasing the maximum pecuniary sentence. The legal precedent is clearly established when **"Southern Union Company contended that based on the Jury's verdict and the District Court's instructions to the Jury, the only violation the Jury necessarily found was for one day.".** See Southern Union Company v. United States 567 U.S.--, 132 S Ct.--, 183L Ed 2d 323 U.S. LEXIS 4662 [No 11-94]. I likewise contend that based on the Jury's verdict and the District Court's instructions to the Jury, and the $0.00 Total Loss Amount clearly stated on the criminal judgment sheet, the Total Loss Amount the Jury necessarily found was for **$0.00. The Letter-Of-The-Law "reserves to the Jury the determination of facts that warrant punishment for specific statutory offense.".** ICE 555 U.S. , at

170, 129 S. Ct. 711, 172 Led 2d 517. This include pecuniary criminal sentence and collateral civil consequences such as deportation[1]. "Where a Jury's verdict is ambiguous, a sentence imposed for a conviction on a count charging violation of multiple statutes or provision of statutes may not exceed the lowest of the potentially applicable maximum". The provision in this instant case is the loss amount. If it's a provision/fact that warrant punishment then determination of said facts is reserved to the Jury.

1 The Plain and Unambiguous languish of the statute mandate removal for convicted facts only.

JUDICIAL FACT-FINDING IN ABSENTIA, AFTER TRIAL AND SENTENCING, BY A PREPONDERANCE OF THE EVIDENCE WHICH CARRIES COLLATERAL CONSEQUENCES SUCH AS DEPORTATION, AND INCREASES THE PECUNIARY CRIMINAL SENTENCE FOR WHICH THERE IS NO PRESCRIBED STATUTORY-RANGE,

1, IMPEDES THE SIX AMENDMENT'S JURY-TRIAL GUARANTEES;
2, CONFLICTS WITH RULE 36 OF THE FEDERAL CRIMINAL PROCEDURE;
3, CONFLICTS WITH SIX CIRCUIT-COURT'S DECISION;
4, AND CONFLICTS WITH THIS SUPREME COURT'S RELEVANT DECISION.

SPECIAL VERDICT (The Spirit Of The Law)

In the Southern Union case each day of violation carries pecuniary punishment. In the instant case every dollar of Actual Loss Amount carries pecuniary punishment not prescribed by the statute of conviction as well as collateral civil consequence of deportation if greater than $10,000. In the Southern Union Case the pecuniary punishment is restricted by the number of days of violation. In my case the pecuniary sentence is indeed restricted by the Actual Loss Amount. The Spirit-Of-The-Law that the Southern Union Company case embodies is that, **"[...]if the government seeks punishment reflecting culpability [... for more than one day or (in my case greater than $0.00 Actual Loss Amount)] then it, the government MUST also seek a special verdict.** See also United States v. Dale 178 F.3d 429 (6th Cir. 1999). Because The Fifth-Circuit's decision in this matter conflicts with the 6th Circuit's decision in Dale and also conflicts with this Court's Relevant Decision in Southern Union Company V. United States Certiorari should be granted.

The Magistrate Judge argued in the Judge's (R&R) that "Tyler's complaint about restitution payment schedule are not proper grounds for either a 2255 motion, or a motion seeking modification of the Judgment. Such complaints at their most generic, must first be made at administrative remedies with the Bureau Of Prisons, and then in a 2241 petition filed in the District of confinement. United States v. Diggs, 578 F. 3d 318, 319 (5th Cir. 2009). Tyler has not exhausted his administrative remedies with respect to this claim, and he is not incarcerated in this district. As such, as argued by the Government, his generic complaints about any restitution payment schedule are not cognizable in this case. As Tyler's complaint that the Schedule of Payment in the Judgment are unconstitutional because they are impermissible garnishment on his future wages, again, such a claim should have been raised by Tyler in his direct appeal." See Magistrate Judge's Amended (R&R). (Appendix J).

I explicitly instructed Counsel to brief these and my other substantive issues on direct appeal. But **Counsel failed to follow my explicit instructions without any strategic purpose whatsoever.** As argued by the Magistrate Judge Counsel's failure to raise the issues can and should suffice as **cause**

and prejudice to overcome any procedure bar for not raising this and **my plain-error constitutional claim that restitution cannot be based on intended Loss Amount**. The Magistrate Judge's **analysis is yet still incomplete** because the MJ **sidestepped** my Plain-error constitutional claim that facts that increases pecuniary sentence such aas restitution **for which there is no prescribed statutory sentencing range, must be found beyond a reasonable doubt.** Additionally, restitution award cannot be based on **intended** Loss Amount. The MJ only addressed the payment schedule issue and sidesteped the rest of constitutional issues. The $1,238,823.85 restitution ordered by the District Court cannot be based on intended loss because the only Loss Amount adopted by the district court is an alleged $2,458,144.32 **intended** Loss Amount stated in the Presentence Investigation Report to which I objected. The Actual Loss Amount tied to the counts of conviction is $0.00 See Appendix D It is well setteled that Restitution Award can only encompass the actual Loss that's resulted from the offense for which I was convicted..

Statements inserted in the Magistrate Judge's (R&R) such as "[...] restitution in the amount of $1,238,823.85, **which represented the amount actually paid by medicare and medicaid [...]" are not binding upon Tyler and does not control the oral sentence because it was not established at trial nor at sentencing, nor admitted by Petitioner.** Rule 36 of the Fed. Crim P. allows the court to fix the written Judgment to conform with the oral Judgment at any time. But **the Court cannot change the oral judgment nor change the Actual Loss Amount after Trial nor after Sentencing** in absentia to legitimize an otherwise erroneous restitution award. . Rule 43 Fed R. Crim P., holds that, I, Tyler, **must** be present at every stage of the trial and sentencing proceeding and my oral sentence must be consistant with my written judgment See Barton v. United States. In this instant case there is no Actual LossAmount proven beyond a reasonable doubt, nor admitted by me, that the District Court can use to legitimize ordering any criminal pecuniary sentence (restitution award). "The District Court can award restitution to the victim of the offense, but the restitution-award can encompass only **actual** loss that

resulted from the offense for which the defendant was convicted.". United States v. Maturin 488 F. 3d 657, 660-61 (5th Cir. 2007).

The Magistrate Judge argue that "Given that 'Total Loss' amount was prefaced on a requirement that did not apply to Tyler's advisory sentence advisory sentence was calculated under the Guidelines.". First of all, the Guidelines do not call for restitution award based on **intended** loss. Secondly, the Total Loss Amount is clearly stated on the Criminal Judgment Sheet as $0.00 Total Loss. Thirdly, because the the Actual loss amount increases the pecuniary sentence, **if any amount greater than the $0.00 is to be used, then it must be found beyond a reasonable doubt.** Lastly, let's examine the actual letter of the Preface in a asterisk (*) which states : " Finding for the total losses are required under Chapter 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.". The literal interpretation of the prefaced comment **does not** invalidate the $0.00 Total Loss Amount. It merely state that the Loss Amount **does not have to be found.** Just because the Loss Amount does not have to be found , does not change, nor invalidate the fact that it was found to be $0.00 See Appendix H. The Asterisk comment only mandate that Total Amount of Losses are required for the listed chapters and time. It does not invalidate the fact that the Loss Amount was found to be $0.00 Total Loss (**As-A-Matter-Of-Law).**

MY CONVICTION MUST BE VACATED BECAUSE I WAS CONVICTED WITH THE GOVERNMENT'S USE OF EVIDENCE OBTAINED UNLAWFULLY, FROM MY UNABANDONED OFFICE, ADMITTEDLY WITHOUT A SEARCH WARRANT.

The Magistrate Judge, hence forth refer to as "MJ", completely ***sidestepped*** my above claim/issue in the MJ's Amended-Memorandum-And-Recommendation, hence forth refered to as "R&R". stating as follow: "As For Tyler's complaint about Kuniansky's failure to investigate and challenge the search warrant, Kuniansky states in his affidavit, and Tyler does not deny, that there was no search warrant. There was therefore, no search warrant for Kuniansky to investigate.". See (R&R Page 19 Appendix D) This MJ's rewording ***sidestepped*** and ***misrepresents*** this issue. The real issue at bar is that **my**

conviction must be vacated because I was convicted with the use of tinted evidence at my trial, obtained unlawfully by the government *admittedly* without a search-warrant; and that counsels were ineffective in failing to follow my explicit instructions to investigate and/or raise this issue at trial and or on direct appeal. The MJ stated in the R&R that "[...] there was no search warrant, [...]". The government admitted that they did not have a search-and-seizure-warrant for the unlawful search and seizure of evidence from my unabandon office, evidence that was presented to the Jury at my trial to obtain a conviction against me. This Court has unequivocally mandated that the need to preserve the individual's right of privacy against governmental intrusion often requires that this right takes precedence over constabutary duties that must and should be done. It may offend many people that under the United States system of criminal justice the criminal goes free when the constable blunders but such is the law of the land. The clamor for law and order in the United States is well-fonded, but to suppose for one minute that the desired result can be achieved by diluting established rights is to commit a mistake of the highest order. The MJ made no additional comment and or recommendation in her R&R regarding this issue. The MJ's ruling conflicts with the relevant decision of this Court.

United States v. Colbert, 474 F. 2d 174 (5th Cir. 1973)(en bank), is the case law the United States used as an example in its response few years ago regarding the United States allegation that my Office was abandon. I agree that the Colbert case is in fact a good example of abandonment of property. In the Colbert case the defendants denied any knowledge or ownership about the briefcases, when asked by the police officers; and walked away from the suitcases. Clearly in the Colbert case the defendants abandoned those suitcases. Honorable Judges of this Court, the situation is totally different in this instant case. First of all, my office lease had not yet expired nor was I legally evicted from my office when the government conducted it's unlawful search and seizure, admittedly without a search-and -seizure warrant, seizing property, documents, papers, inventory, and other evidence from my office All of which was presented to the Jury at my trial, to convict me. I **never** at any given point told the

landlord that I was abandoning the property; **nor did I authorize the Landlord to let the agents into my secured and locked office space.** Unlike the Colbert case, **I never disowned the property.** As a matter of fact **I kept my business name and sign, about 15 feet long on the property.** Clearly my privacy was invaded by this unlawful search. In the Colbert case cited by the United States, the Court held that those whose privacy was invaded by a search had standing to object to it under the exclusionary rule in Fed. R. Crim. P. 41(e). The defendants in the Colbert case had no standing to complain of a search or seizure of a property they had **voluntarily abandoned.** Honorable Judges, **I did not abandon my leased office space. Both Trial and Appellate Counsels' failure to investigate and raise the use of the tinted evidence obtained admittedly without a search-and-seizure-warrant amount to ineffective assistance of counsel. The tinted evidence was presented to my Jury, (without-Trial Counsel's objection), causing my conviction. Appellate Counsel failed to raise this issue on direct appeal in spite of my explicit instructions for her to do so. Therefore this petition must be granted.** I never disclaim any ownership or possesory interest in the office space. Therefore I had a reasonable expectation of privacy in the office space. All of the tinted evidence, fruit of the unlawful search-and-seizure were presented to the Jury, at my trial. (Case 4:12-cr-00774 Document 258 Filed in TXSD on 10/21/14 Pages #77 to 100). I had no intent to voluntarily abandon my office. I did not tell the landlord or anyone else that I intented to voluntarily abandon my office space. I kept my inventory, document, papers, property, and office furniture securely locked up in my lease space. I had no intent of abandoning any of it; nor did I have any intent to relinquish my privacy interest in my leased officce space, (as the government purported). Mr. Azimpoor, a government witness, and property manager of the leased office space in question, was not even the original person/manager I contracted the lease agreement with. Though he and agent Kelly says "[...] it looked abandon.", (case 4:12-cr-00774 Document 258 filed in TXDC on 10/21/14 Page # 79 of 227), and the office space was "approximately a thousand square feet.". The truth of the matter is **that I was never**

legally evicted from the leased office space prior the search. My office space was never abandon and the lease office space was actually about 350 square feet. If Mr. Azimpoor knew so much about the property and the lease, as he claimed, he would not be giving false information about the property. The square footage information is on the very lease agreement that he claimed to know so much about, (Case 4:12-cr-00774 Document 258 filed in TXSD on 10/21/14 Page 73 of 227 Line # 8.). The government, both Trial and Appellate Counsels in their sworn affidavit, admitted that **"there was no search warrant".** The MJ and the District Judge did not dispute this fact. For reasons mentioned above the MJ's analysis of this issue is incomplete, and did not address the actual issue at bar. Therefore this petition should be granted.

COUNSELS WERE INEFFECTIVE FOR IGNORING MY EXPLICIT INSTRUCTIONS TO : 1, INVESTIGATE *USE OF EVIDENCE OBTAINED WITHOUT SEARCH-WARRANT AT TRIAL* AND 2, RAISE MY MUCH MORE SUBSTANTIVE AND MERITORIOUS ISSUES *WITHOUT ANY LEGITIMATE, TACTICAL, NOR STRATEGIC PURPOSE.*

The MJ argued in the R&R that Appellate Counsel's failure to raise an issue on appeal may suffice as "'cause' for procedure bar default [...]". It is not refuted that I repeatedly insisted that counsels raise all of my substantive, and much more meritorious issues at my trial, and on my direct appeal, but Counsel ignored my explicit instructions to raise all of said issues (including the use of evidence obtained from my office unlawfully, without a search-and-seizure-warrant). This should suffice as sufficient **cause** to overcome the procedural default. Counsel's action is tantamount to the denial of my appeals right. Counsel did not communicate to me her intention to not brief any of my issues so that I can present my issues Pro Se. Counsels' above actions violates the objective standard of reasonableness standard in Strickland v. Washington. In The U. S. Supreme Court case of Ernest C. Roe, Warden, vs. Lucio Flores-Ortega 528 U.S. 470, 476-77, 120 S. Ct. 1029, 1034, 145 L Ed 2d 985 (2000) **when counsel disregard specific instructions from a convicted defendant to file a notice of appeal, counsel acted in a manner that is professionally unreasonable.** id. At 477 120 S. Ct. at 1035. In this instant case counsels failed to follow my explicit instructions to raise all of my much more

substantive and much more meritorious issues *for no strategic purpose whatsoever* . In an opinion by Justice O'Connor, expressing the unanimous view of the court as to holding 2 below, and otherwise joined by Rehnquest, Ch. J. and Scalia, Kenned, Thomas, and Breyer, jj., it was held that Strickland v. Washington 1984 466 US 668, 80 L Ed 2d 674, 104 S Ct. 2052, provide a proper framework for evaluating a claim that Counsel was constitutionally ineffective for failing to file a notice of appeal, as, among other matters, (1) Counsel had a constitutionally impose duty to consult the criminal defendant only when there was reason to think that (a) a rational defendant would have wanted to appeal, **or (b) a particular defendant reasonably demonstrated to counsel that he was interested in appealing; [I repeatedly instructed Appellate Counsel to brief all of my issues, including the use of evidence obtained unlawfully, admittedly without a search-and-seizure-warrant issue]. (2) the defendant was required to demonstrate that there was a reasonable probability that, but for Counsel's deficient failure to consult with him about an appeal the defendant would have timely appealed. If this court appointed Lawyer had told me that she had no intention of briefing *any* of my issues, then I would have terminated Counsel's representation and briefed all of my much more substantive and meritorious issues myself / Pro Se.** Counsel refused to brief *any* of my issues, for no strategic purpose and with no prior warning. I was not even given the opportunity and time, to review and approve the appellate brief prior to submission, as I requested and instructed. The United States argued several years ago that Counsel does not have to raise all non frivolous issues, Justice Souler joined by Stevens and Gainsburg, JJ., expressed the view that **(1) a lawyer has a duty to consult with a client about the choice to appeal almost always in those criminal cases in which a plea of guilty had not obviously waived any claim of error, and (2) the failure to do that in the cases at hand violates the objective reasonableness standard in Strickland v. Washington.** (also See Roe v. Flores-Ortega 528 U.S. 470, 476-77, 120 S. Ct. 1029, 1034m 145 L Ed 985 (2000). Counsel never consulted with me of my choice to appeal said issues. She simply ignored my instructions, waited until

the last minute, and submitted a frivolous issue that appeared to be a rushed first draft, filled with typo.

I repeatedly informed both Trial and Appellate Counsels that I was never provided any search-and-seizure-warrant, for the search and seizure of evidence that was presented to the Jury at my trial to convict me. I requested that Counsels investigate whether there was in fact a valid search-and-seizure-warrant for the search and seizure conducted at my unabandon office. I told Counsels if there was no search-and-seizure-warrant then Counsels should raise the use of tinted evidence obtained unlawfullywithout a search warrant. **When counsels were not responsive and ignored my instructions, I wrote a letter to the Trial Court (which is docketed), informing the court that I was *never* provided with a search warrant and I was *never* Mirandize upon my arrest and interrogation by the F.B.I..**

> Appellate Counsel Yolande Evette Jarmon argues in her Sealed Affidavit as follow :
> "In Jones v. Barnes, 453 U.S. 745 (1983), the United States Supreme Court opined that appellate counsel assigned to prosecute an appeal for a criminal conviction does not have a constitutional duty to raise every non frivolous issue requested by a defendant. An indigent defendant has noconstitutional right to compel appointed counsel to press non frivolous points requested by the client, ifcounsel, as a matter of professional judgment, decides not to present those points. Jones v. Barnes, 463 U.S. 745 (1983).".

In spite of the fact that "an appellate attorney is not required to argue every conceivable issue on appeal" Appellate Counsel Jarmon is still ineffective in this instant case. See Stallings v. United States 536 F. 3d 624, 627 (7th Cir. 2008). In assessing whether Appellate Counsel is ineffective for failing to present my much more substantive and dispositive issues, this honorable Court must first look to see if Counsel missed a **significant and obvious issue.** Counsel ignored my explicit instructions to raise my significant, substantive, and dispositive issues *for no legitimate strategic purpose whatsoever.* This include the issue of the use of tinted evidence obtained unlawfully from my unabandoned office **admittedly** without a search-and-seizure-warrant. This significant and dispositive U.S. Supreme Court Fourth Amendment precedent issue was also obvious to Counsel because I explicitly instructed Counsel to raise said issue on direct appeal (along with my other substantive issues). I wrote and provided Counsel with my legal argument on this and my other significant and substantive issues.

This Court must compare my significant and obvious, issues that were neglected and ignored by counsel, to the insufficiency-of-the-evidence argument actually raised by Counsel. The comparison will prove that my arguments were clearly stronger than Counsel's. My arguments/issues does not take away from Counsel's. There is no legitimate strategic reason that can possibly justify a professional judgment call for ignoring my explicit instruction to raise my issues, without timely communicating her intentions to me in advance (so that I can fire her and present my issues Pro Se).

There is a reasonable probability that the ignored issues and arguments would have alter the outcome of the appeal had it been raised. There is **no tactical or strategic** reason to justify Appellate Counsel's failure to raise my more significant, and obvious issues that I explicitly instructed her to raise on direct appeal. "[A] reasonable attorney has an obligation to research relevant facts and law, or make an informed decision that certain avenue will not prove fruitful. So meritorious arguments [such as the use of tinted evidence obtained unlawfully, from my unabandoned office, admittedly without a search-and-seizure-warrant, to convict me], based on direct controlling precedent should be discovered and brought to the court's attention.". United States v. Williamson, 183 F 3d 458, 463 (5th Circuit). The law is clear that Attorney Jarmon need not raise every non-frivolous issue on appeal. In spite of this fact, "When an attorney fails to raise an important, obvious defense without any imaginable strategic or tactical reason for the omissions, [especially when Counsel was instructed to raise the issue] the performance falls below the standard of proficient representation that the Constitution demands". Prou v. United States 199 F. 3d 37, 48 (1st Cir. 1999). Also See Beltran v. Cockrell 294 F. 3d 730 (5th Circuit 2002) "ineffective assistance when Attorney failed to use exculpatory evidence related to an eyewitness identification". **There is a "reasonable probability" the omitted claims/issues would have "alter the outcome" of my Direct Appeal.** See Stallings v. United States 536 F. 3d 624, (7th Cir. 2008). The issue of using evidence obtained unlawfully to convict me, would have reverse the conviction. **"when appellate counsel omits (without legitimate strategic purpose) 'a significant and obvious issue' we**

will deem his performance deficient (Gray, 800 F. 2d at 646, Hollenback 987 F. 2d at 1275), and **when that omitted issue 'may have resulted in a new trial, we will deem the lack of effective assistance prejudicial** (Gray, 800 F. 2d at 646)" See Gray v. Greer, 800 F, 2d 644, 646 (7th Cir. 1986). Appellate Counsel's (insufficiency-of-the-evidence) argument is clearly weak, hence the Fifth-Circuit Court of Appeals affirmed the District Courts decision. In fact "the hallmark of effective appellate advocacy is the process of winnowing out weaker arguments on appeal and focussing on those more likely to prevail.". Smith v. Murray, U.S. 527, 536, 106 S. Ct. 2661, 91 L. 2d 434 (19886)(quoting Barnes, 463 U.S. At 751-52). My ignored issues/claims are clearly stronger than the one (insufficiency-of-the-evidence) argument presented by Appellate Counsel Jarmon. The U.S. Supreme Court has made it very clear that **"when the ignored issues are clearly stronger than those presented [then] the presumption of effective assistance of Counsel be overcome.".** See Smith v. Robbins, 528 U.S. 259. also See Monzo v. Edwards, 281 F. 3d 458, 579 (6th Cir. 2002). In this instant case my ignored issues/claims, including those mentioned throughout this petition are clearly stronger then counsel's one and only insufficiency-of-the-evidence argument. Therefore, Counsel is ineffective.

"CAUSE AND PREJUDICE" TO OVERCOME ALL PROCEDURAL BAR, FOR NOT RAISING SAID ISSUES AT TRIAL NOR ON DIRECT APPEAL.

Counsels acted in a manner that is professionally unreasonable, because Counsels disregarded my explicit instructions to investigate *the use of tinted evidence at trial,* and disregarded my explicit instructions to raise my much more substantive and much more meritorious issues at trial and/or on direct appeal, **prejudice is presumed on said issues.** Also see Roe v. Flores-Ortega. In this instant case, I gave Counsels explicit instructions to raise my much more substantive and meritorious issues, and Counsels simply failed to do as I instructed, **without any legitimate strategic purpose.** I even went as far as writing the complete legal arguments for the issues citing case laws and forwarding copies to Counsel and to the Fifth-Circuit-Court-Of-Appeals; but counsel still failed to raise any of my issues in the appellate brief to the Appeals Court. The Fifth-Circuit-Court-Of-Appeals told me that

"only your attorney can file motion or other documents on your behalf. Your documents are being forwarded to your attorney for whatever action she deems necessary.". See Appendix G. Counsel still did not raise any of my issues. My issues/claims are cognizable under my 28 U.S.C. Section 2255 Motion because I have shown cause and prejudice to overcome any procedural default for not raising said issues at trial and or on direct appeal. My Fourth and Six Amendment claims of trial and sentencing error are still cognizable in my 2255 Motion. The MJ agreed with the Government that my "[...] claims are procedurally barred from post conviction review because [I] did not raise the claims in [my] direct appeal [...]". There is of course generally a requirement that claims be raised on direct appeal as argued by the United States and the MJ in the R&R, but in the instant case where this-Court-Appointed-Appellate-Counsel failed to present said claims as I instructed, **they are still cognizable.**

> The MJ argues : "When claims of constitutional or jurisdictional import are not raised on direct appeal, the claims are procedural defaulted and can only be considered in a 2255 proceeding if a movant can show cause for his failure to raise his claims, and actual prejudice resulting from the alleged error. United States v. Placeete, 81 F. 3d 555, 558 (5th Cir.) Jurisdictional issues for the first time on collateral review must show both cause for his procedural default and actual pre judice due to such error [...].".

I have demonstrated both cause and prejudice. The MJ argues that "Appellate Counsel's failure to raise an issue on appeal may suffice as **'cause'** for a procedural default if it can be shown that counsel was 'ineffective for failing to raise the claim.' Murray v. Carrier, 477 U.S. 478, 488 (1986)('Ineffective assistance of Counsel, then is cause for a procedural default').". I submit that failure of Counsel to follow my instructions to raise any of my much more substantive and meritorious claims/issues, *without any legitimate purpose,* and without consulting me regarding my right to raise these issues violates the objective reasonable standard in Strickland v. Washington. In the U. S. Supreme Court case of Ernest C. **Roe**, Warden, Petitioner vs. Lucio **Flores-Ortega** 523 U.S. 470, 476-77, 120 S Ct. 1029, 1034, 145 L Ed 2d 985 (2000), **When counsel disregarded specific instructions from a convicted defendant to file a notice of appeal, counsel acted in a manner that is professionally unreasonable** id at 477 120 S. Ct. at 1035. **In this instant case Counsels' failure to follow my**

explicit instructions for no legitimate strategic purpose is representation that is professionally unreasonable. My issue/claim (use of tinted evidence obtained unlawfully from my unabandon office, admittedly without a search-and-seizure-warrant) would **"have resulted in a reversal of the conviction."** thus demonstrating the requisite **prejudice** on said claim. (citing Mason, 97 F. 893). See also Winters v. Miller, 274 F. 3d 1161, 1167.

I am subjected to a pecuniary criminal sentence (restitution-award) in the amount of $1,238,823.85 that violates the Six Amendment's Jury-Trial-Guarantees, violates the 6th Circuit's decision, and the relevant precedent decision of this U.S. Supreme Court. **Prejudice is presumed** on said claims because my Trial and Appellate acted in a manner that is professionally unreasonable, by disregarding my explicit instructions to raise this and my other substantive issue, that I identified. Also see Ernest C Roe, Warden vs. Lucio Flores-Ortega 528 U.S. 470, 476-77,120S. Ct.1029, 1034(2000). I have shown both **cause and prejudice** to overcome default.

The MJ quoted Trial Counsel Kuniansky in the R&R stating : "Although the expert was prepared to testify several critical documents had not been signed by Mr. Tyler or the patients, he was also prepared to testify several were. I did not think it aided the defense to call a witness to the stand to testify that Mr. Tyler was only 'a little bit pregnant'.".This statement is misleading and inaccurate. Trial Lawyer Richard Kuniansky failed to call my crucial witnesses for no tactical or legitimate reason (including the **1,** my delivery drivers who show up at the court on trial day, **2,** Lead-Investigator-Special-Agent John Moody working with the FBI, who violated my constitutional rights, and was arrested and convicted for among other things *solicitation of prostitution* **resulting in his job termination** during my trial. **3,** Billing and Coding Expert Witness, **4,** Jury Consultant, **5,** Hand Writing expert).

Based on my personal conversation with the handwriting expert, his expert testimony was in fact favorable to my case. The true reason the hand writing expert and the other expert did not show up was because Richard Kuniansky took my earmark cash for said experts, and **simply did not pay them**, when he should have, leaving me to **"Hang At Trial"** just like Kuniansky said. See Seal Affidavit/ Civil Docket for case 4:16-cv-0213, docket entry# 48, filed date 6/27/18. It is hard to imagine how my white Trial Lawyer Richard Kuniansky who makes comments such as **"even a monkey can do that"** towards me when he gives me his black client instructions could possibly provide me with effective representation (***If* He Thinks I am a Monkey).** See My Affidavit mentioned above.

CERTIORARI SHOULD BE GRANTED BECAUSE MY ISSUES SHOULD BE CONVERTED FROM A HABEAS TO A WRIT-OF-CAROM-NOBIS SHOULD MY HABEAS LITIGATION OUTLIVED MY SENTENCE AND THERE ARE ONGOING COLLATERAL AND PECUNIARY-SENTENCING CONSEQUENCES BEEN INFLICTED ON ME BY THE CONVICTION AND JUDGMENT AFTER SENTENCE TERMINATE, SUSPEND, OR END; AND BECAUSE THE JUDGMENT AND CONVICTION ARE CONSTITUTIONALLY INVALID.

This court should grant Certiorari because I continue to suffer from the following ongoing adverse consequences even when my sentence is suspended, terminated, or ended :

Deportation / Double incarceration

As a consequence of my unconstitutional conviction and judgment due to the fundamental error previously briefed, I continue to suffer further adverse consequences including *deportation*[2] *charge ICE Detention*/double incarceration. My conviction/judgment are invalid for reasons mentioned supra.

Substantial Monetary Penalties

Additionally, as a consequence of my invalid and illegal conviction and judgment due to the fundamental constitutional errors previously briefed, I will continue to suffer from further adverse consequences of **Moneytary Penalties in the amount of $1,238,823.85.** See Document 214 Filed in TXSD on 08/29/2014 Page # 6 of 7, Case 4:12-cr-00774. (attached as Appendix H). I am an Indigent Inmate/Detainee with no means of making this unconstitutional payment order. Clearly this order which is tantamont to economic slivery is enough of a present adverse consequences for Petitioner that there is a "cause or controversy" under Article III of the United States Constitution.

Professional License

As a direct consequence of my unconstitutional conviction, I am barred from acquiring and or renewing my Professional Licenses (that I have held in the past) upon which I depend on to earn a living. I will continue to suffer from these adverse consequences after my sentence ends, suspends, or

2 Section 237 (a) (2) (iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101 (a) (43) (M) of the Act, a law relating to an offense that (I) involve fraud or deceit in which the loss to the victim or victims exceeds $10,000; or you have been convicted of an aggravated felony as defined in section 101 (a) (43) (U) of the Act, a law relating to an attempt or conspiracy to commit an offense described in section 101 (a) (43) (M) of the Act.

(1)"correct errors for which there was no remedy available at the trial," and (2) "where sound reasons exist for failing to seek relief earlier." United States v. Stoneman, 870 F. 2d 102, 106 (3d Cir. 1989).

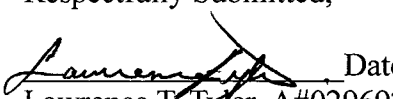
Evidence That The Sentence Has Been Served

I was sentence to Ct(s) 1.2.4.5-10 60 months custody of BOP as to Count 1 72 months custody of BOP for each remaining counts to run concurently for a total of 72 months. See Document 214, page 3 of 7, Case 4:12-cr-00774 filed in TXSD on 8/29/2014. I completed the criminal incarceration ordered and I am currently detained by Immigration And Custom Enforcement. **Habeas Claims are still cognizable throughout supervised release.** The Supervised release ordered by the Sentencing Court is indeed part of the Sentence. Therefore throughout my **active** supervise release time frame all of my habeas claims/issues are still cognizable under my 28 U.S.C. Section 2255 Habeas Motion. Nevertheless, it is worth noting that the Sentencing Court ordered that supervised release would be terminated, if I am deported. See sentencing transcripts Case 4:12-cr-00774. In the event that supervised release do become inactive (making my habeas claims/issues moot), I respectfully request that the disposition of my habeas claims be converted to a Writ Of Error Coram Nobis.

CONCLUSION

I have shown that the issues satisfy the Certificate Of Appealability (COA) requirements enunciated in Barefoot and Slack. For the foregoing reasons, I prays that this Honorable Court grant Certiorari, to review the judgment of the Fifth-Circuit-Court-Of-Appeals and the Houston-District Court For The Southern District Of Texas – Houston Division, in this case, so that justice delayed does **not** become justice denied. Notwithstanding all of my legal arguments, I am innocent and I was wrongfully convicted.

Respectfully Submitted,



Date: September 17, 2019

Lawrence T. Tyler A#029692445/BOP#73142-279
"without prejudice" UCC1-308
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