

No. \_\_\_\_\_

19-7155

ORIGINAL

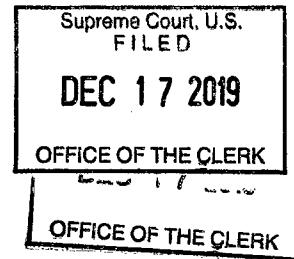
IN THE

SUPREME COURT OF THE UNITED STATES

Russell DeFreitas — PETITIONER  
(Your Name)

vs.

Gregory A. Kizziah, Warden — RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI

Russell DeFreitas, 64347-053 (1-B-109)

(Your Name)

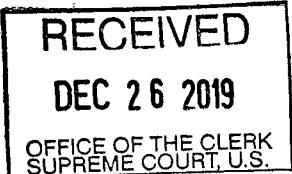
330 Federal Way, P.O. Box 3000

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Pine Knot, Kentucky 42635-3000

(City, State, Zip Code)

(Phone Number)



## QUESTION(S) PRESENTED

### First Question:

Whether Sixth Circuit's precedent supersedes and adoption of district court's arbitrary abuse of authority, prohibits petitioner's 28 USC 2241's statutory and/or procedural constitutional **actual innocence issue(s) merits claimed** isn't writ issuance permitted, because Supreme Court's decisions never reviewed or decidedly ruled on those **particular** issue'(s) merits use or applicability on 2241's vehicle ?

### Second Question:

Whether district court's Article III improperly sentenced petitioner's **actual innocence absence**, in violation of statutory and procedural 5,6,14 amendments constitution demandingly requires, a unanimous jury's verdict finding any statutory charging elements and/or facts which he's charged and violated before guilty finding, and is double jeopardy prohibited retrial by accepted-impeached verdict finding ?

### Third Question:

Whether trial and sentencing counsel'(s) cause not objection and demanding for, after district court's accepted finding, absence non-unanimous jury's verdict finding any statutory charging element(s) and/or fact(s) before or at sentencing and requiring petitioner's actual innocence discharge with prejudice, is prejudicial 5,6,14 amendment's ineffectiveness ?

### Fourth Question:

Whether appellate counsel's cause not raising or arguing, including trial counsel'(s) ineffectiveness objection and demanding for, absence unanimous jury's verdict finding any statutory charging element(s) and/or fact(s), on direct appeal is prejudicial 5,6,14 amendment's ineffectiveness ?

## **LIST OF PARTIES**

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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### OTHER

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**

**For cases from federal courts:**

The opinion of the United States court of appeals appears at Appendix C 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 United States district court appears at Appendix E to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

**For cases from state courts:**

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

**1.**

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 10, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals 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. § 1254(1).

For cases from **state courts**:

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**

Fifth Amendment

Sixth Amendment

Fourteenth Amendment

18 USC 2332f(a)(2)(A)(B)(C)(D)(E)

18 USC 844(i)(n)

18 USC 3551

18 USC 32(a)(2)

18 USC 37(a)(2)(b)(1)(2)

18 USC 1992(a)(4)(B)(C)((1)(2)

18 USC 1992(a)(8)(c)(1)(2)

18 USC 3142(j)

28 USC 2255

28 USC 2241

Fed. App.R. 3

Fed. App.R. 4

Fed. App.R. 31(c)

Fed. Crim.R. 11(b)(1)(G)

Fed. Crim.R. 11(b)(1)(O)

Fed. Crim.R. 31(a)

## STATEMENT OF THE CASE

On June 28, 2007, the Southern-Eastern District Federal Grand Jury of New York returned and alleged a six (6) Count indictment charging against and petitioner's conduct violating statutory charging elemetn(s) and/or fact(s), in summary, combined as:

### Count 1's:

"... did knowingly and intentionally conspire to unlawfully delivery, place, discharge and detonate an explosive and other lethal device in ... with intent to cause death, serious bodily injury and extensive destruction ... was likely to result in major economic loss, in ...."

### Count 2's:

".... maliciously damage and destroy, by means of fire and explosives, a building and other real property used in interstate and foreign commerce ...."

### Count 3's:

"... proximity to, and otherwise make and cause to be made inworkable and unuseable, an aircraft in the special aircraft jurisdiction .... and civil aircraft used, operated and employed in interstate commerce, overseas and foreign a air commerce, and parts and other materials used and intended to be used in connection with operation of such making and causing be made were likely to endanger the safety of such aircraft....." by

### Count 4's:

"... use a device, substance and weapon to destroy and seriously damage the facilities of an airport serving international civil aviation .... and disrupt the service... at said ....."

### Count 5's:

".... near a terminal, structure, supply and facility used in the operation of, and in support of the operation of a mass transportation vehicle, to wit: fuel tanks, pipelines, and buildings at ...."

### Count 6's:

".... without lawful authority and permission surveil, photographed, video, diagram and otherwise collect information with intent to plan and assist in planning an act described in (Counts 1-5) ...." at John F. Kennedy

("JFK") airport.

See, Petitioner's ("Petr's") Exhibit ("Ex.") "F" (Federal Indictment) attached to certiorari ("cert.").

On July 11, 2007, by petitioner's and through trial counsel's, Mr. Len Kamdang's ("Mr. Kamdang or Ineffective Assistance of Counsel ("IAC")), plea of "not guilty" to statutory charging criminal element(s) and/or fact(s) in criminal docket ("R.") 11, New York case number 1:07-cr-00543-DLI ("dkt"). On June 30, 2010, the petitioner proceeded to and jury's sworn, as empaneled, and with assistance of Mr. Kamdang's representation at, jury trial. dkt R. 349. On August 2, 2010, without trial counsel's, Mr. Kamdang's, objections to and demand at-for, petitioner's jury verdict questionable unanimity and absence finding violation of any statutory statutory, as instructed, charging element(s) and/or fact(s), only of petitioner's guilt as charged by indictment. On that same date, again, without counsel's objection or demand, the New York district court had, as petitioner's requested, the jury polled, accepted its finding guilt, and the jury verdict filed and made part of the record. dkt 426. See, Petr's. Ex. "G" (Jury Foreperson's 1 Signature Confirmation Verdict Finding) attached to Cert. On March 7, 2011, without sentencing counsel's, Ms Mildred M. Whalen's ("Ms. Whalen or IAC"), objection and demanding petitioner's discharge, with prejudice, since in with and absence unanimity in and jury's verdict finding any statutory charging element(s) and/or fact(s), which unauthorized New York district court's, Dora L. Irizarry's ("New York court"), sentencing petitioner as to Count 1's life-sentence and Count(s) 2-6's twenty (20) years as to each count run concurrently to each other and concurrently with Count 1. See, Petr's. Ex. "H"

(Judgment of commitment ("JOC") dkt. R. 525) attached to Cert.

On March 11, 2011, after petitioner's timely appeal filed, was court-appointed appellate counsel's, Mr. Darrel B. Field's ("Mr. Fields or appellate IAC"), representation failed to raise or argue on, trial and sentencing IAC and absence unanimity jury's verdict finding any statutory charging element(s) and/or fact(s) on, direct appeal and Second Circuit's affirmed judgment of conviction and sentence. US v. Kadir, Nur, DeFreitas(2 Cir. 2013), 718 F.3d 115; dkt. R. 528; 705. On July 30, 2018, with petitioner's alleged "actual innocence", filed a 2255's claiming, innocence not yet discovered, tolling one (1) year limitations, so and until discovery of record documentation (jury's verdict form) proof can be claimed, dkt. R. 735. On August 13, 2018, that New York court's ruling, as determined, ordered and judgment denied petitioner's 2255 on any merits and prohibiting a certificate of appealability ("COA") of any substantial showing or denial of constitutional violation or right to be issued or appealed thereby, in case number 1:18-cv-04338-DLI. After nearly almost five (5) years of appeal affirmed convictions and sentences exhausted, on November 21, 2018 petitioner <sup>at and</sup> only first-handedly became awareness or knowledgeable, of, and understanding after his requested to, as received by, New York Clerk's Office ".... a full and complete copy of his docket sheet", and its documentation by jury's verdict absence finding any unanimity or statutory charging element(s) and/or fact(s) which petitioner's allegedly violated and his actual innocence thereby proven, dkt. R. 736. On March 19, 2018, after petitioner's filed, in pro se, as raised, and argued by 28 USC 2241 ("2241") within Southern-Eastern

District Court, Ms. Karen K. Caldwell ("London-Kentucky court"), by case number 6:19-cv-00077-KKC, with alleged and, as supporting, documentation for the procedural and/or statutory constitutional right violation of, including by trial, sentencing, and of appellate counsel'(s) deficient **caused** performance representation, ineffectiveness for not raising or arguing at trial or sentencing and, or including upon, direct appeal's absence unanimity of and jury's verdict finding any statutory charging element(s) and/or fact(s) which petitioner's conduct allegedly charged, as violated, and convicted. With petitioner's right(s) and issue(s) of well-established violated, for relief claimed, on April 10, 2019 London-Kentucky court denied 2241 petition's relief:

"... explain(ing) that a (2241) prisoner can only proceed in this manner if he can demonstrate that an intervening change in statutory law establishes his actual **innocence** .... claims that are only appropriate on direct appeal and in a 2255 motion."

See, Petr's. Ex. "E" (Memorandum Opinion and Order/Judgment) attached to Cert.

On April 22, 2019, petitioner filed his timely appeal. See, Petr's. Ex. "D" (2241's Docket Statement) attached to Cert. On July 18, 2019, petitioner's filed, with an 30 days extention granted, of, Merit Brief and its Independent/Joint Appendix for Sixth Circuit's review and determination. See, Petr's. Ex. "A" (Sixth Circuit's Docket) attached to Cert. With clarity and no change of issue(s) within question to-of London-Kentucky court's, this petitioner's clairified, as exploited, and well-defined tuned his - within Sixth Circuit's - issue(s) determination as Question(s) Presented by Briefing Form. See, Petr's. Ex.. "B" (Sixth circuit Briefing Form Question(s)) attached to Cert. Without government's factual, as

articulatable or, and arguable rejection, and including Sixth Circuit's ignored issuance by petitioner's timely motion for Fed. App. R. 31(c)'s order, response to petitioner's meritorious issue(s) on appeal, on October 10, 2019, this Sixth Circuit arbitrarily denied petitioner's 2241 relief claimed. See, Petr's. Ex. "A" (Sixth Circuit's Opinion/Judgment) attached to Cert. This Sixth Circuit's partly adoption and, also with a twist of two unique precedential valued circumstances, ie., use of four (4) qualification condistions to and/or by a "...narrow subset of sentencing claims not relevant here.." for only, not shown inadequate or ineffective, use of 2241's "**actual innocence**", conclusion of district court's ruling, as gorunds presented as passing upon, and determination of merits for denial of 2241's facts and legality is misplaced. For instance, so as Sixth circuit's opinion indicates petitioner "...DeFreita's 2241 petition challenges his convictions and not the execution of his sentence..." at p.3, which this factual inconsistency with London-Kentucky court's undisputed challenge fact states: "...DeFreitas is challenging the validity of his criminal convictions and corresponding sentenc." at p. 2. Although, petitioner's 2241 petition, including Sixth circuit's timely 2241's denial appeal, exhaustion and this Supreme Court's certiorari is and always has challenged his convictions and sentences upon his actual innocence by his actual innocence by those issue(s) presented.

Specifically, what the Sixth Circuit's declined to say or decided by opinion, in supporting of, and precedential case law values, as entails, to and prohibiting petitioner's granting 2241, is because trial, sentencing, and appellate counsel'(s) ineffectiveness challenged objection and demand for absence unanimity and jury's

verdict finding any statutory charging element(s) and/or fact(s) which he's allegedly charged and violated, isn't a valid excuse for actual innocence claimed of thereof issue(s) recognized by or is a new procedural rule of law and/or interpretation of statutory constitutional right violated, or as interpreted, and identified by Supreme court's ruling by decision opinion or by congressional 2241's retroactivity relief claimed. Instead, after petitioner's, timely direct appeal and 2255's exhaustion, discovery of his **actual innocence** by documentation - district and Sixth Circuit'(s) suggestion should've raised meritorious issue(s) on direct appeal or in a 2255 motion; not 2241 petition. This certiorari follows for discretionary review and, hopefully voted, eventually accepted by Supreme Court's jurisdiction over on the merits of the issue(s) of this case claimed for 2241's retroactivity relief, respectfully. See, Ex. "I" (Sixth Circuit's Mandate) attached to Cert.

## REASONS FOR GRANTING THE PETITION

As the Sixth circuit's split decision with and adoption of district court'(s) belief, as ruling(s), concluded and opinioned, that relief of petitioner's 2241 meritorious issue(s) could've or should've been addressed either on a direct appeal or in a 2255's vehicle, not identifying petitioner's actual innocence right(s) claimed, by, and its Circuit's precedent prohibits statutory and constitutional rule, including its four-prong requirement condition(s) granting, of law 2241, compare. Parker v. Matthews (2012), 567 US 37(8), citing Renico v. Lett(2010), 559 US 766, with and rule of law granting 2241. Jones v. Cunningham(1963), 371 US 236, 238(1,2), fn. 3. This Supreme Court's well-establishes what congressional's interpretation and intentions of law criminalizes, penalizing is, and use of vehicle platform for raising violation of those issue(s) of right(s), compare. Dickerson v. US(2000), 530 US 428, 437, citing Carlisle v. US(1996), 517 US 416, 426, including without exception s of actual innocence issue(s) that excuse any procedural defaults or substantive, as statutory, constitutional right(s) waivers, with McQuiggin v. Perkins(2013), 569 US 383(6), citing Bousley v. US(1998), 523 US 614, 622, and issue(s) affected by trial or sentencing, Trevino v. Thaler(2013), 569 US 413, 429(6) and, or appellate counsel'(s) deficiency performance, as caused for, and prejudiced from, if not but for counsel'(s) error, the outcome would've been different by, ineffectiveness on direct appeal by 2241. Martinez v. Ryan(2012), 566 US 1 (9), construed in light of Evitts v. Lucey(1987), 469 US 387. This Sixth Circuit and district court'(s) questions supreme precedent. But however, petitioner **must**

demonstrated, as shown, and evidence proven by an independent constitutional claim caused by that counsel'(s) ineffectiveness which prejudiced that proceeding, compare. McQuiggin v. Perkins, supra. Petitioner's classic and independent constitutional issue of question, by counsel'(s) caused ineffectiveness, is: absence unanimity and jury's verdict finding any statutory charging element(s) and/or fact(s) which petitioner's conduct is allegedly charged and violated. Of course, the law and facts require for petitioner's defending himself against, the indictment must contain all the essential elements of the crime charged. Russell v. US(1961), 369 US 749. The facts and law by indictment was met within petitioner's case. In the instant case, petitioner's plea of "not guilty" to, like any statutory charging, crime(s) is constitutionally presumed innocence, compare. Brookhardt v. Janis (1966), 384 US 1,7, by 18 USC 3142(j) until guilt of element(s) is proven and that plea prohibits any entrapment. Matthews v. US(1988), 485 US 58. However, on August 2, 2010, during and after petitioner's jury returned verdict absence, without trial counsel's objection to and demanding for, a unanimous of twelve (12), not just one (1) foreperson's, finding any statutory charging element(s) and/or fact(s) which his conduct allegedly charge and violated, herein Statement of Case and Facts. A jury's verdict must be unanimous, as defined by twelve as rule of, not statutory enacted, law right finding as its confirmation signed of unquestionable secures guilt, Blakley v. Washington(2004), 542 US 296,302; Koon v. Phoenix M.L. Ins.(1881), 104 US 106; Humphries v. District of Columbia(1899), 174 uS 190, and erases any presumption of innocence. Sullivan v.

v. Louisiana(1993),508 US 275,277, citing Coffin v. US(1895),156 US 432. In the instant case, petitioner's jury verdict was not unanimous. See, Petr's. Ex. " "(Foreperson's Verdict Finding) attached to Cert. But before a jury's verdict to be validly unanimous of guilt, it must find and contain, without any questioning, all the statutory charging element(s) and/or fact(s) which the accused's conduct allegedly charge and violated, beyond a reasonable doubt by its verdict, compare. Blakley, supra; Needle v. US(1999),527 US 1; Gaudin v. US(1993),515 US 506; McCoy v. North Carolina(1990),494 US 443; Apprendi v. New Jersey(2000),530 US 466, with likely accused's known by and court's accepted plea of guilty securing all element(s) and/or fact(s) of crime charged. Libretti v. US(1995),516 US 29. That is explanation why and since, like [a] filed guilty plea, a jury only speaks through its filed, not transcripts of, its element(s) and/or fact(s) is found unanimously by its verdict. Yeager v. US(2009),557 US 110,121, which an accepted by its absenced impeached element(s) verdict, jeopardy attaches, compare. US v. Love(6 Cir. 1979),597 F.2d 81, with Terry v. Potter(6 Cir. 1997),111 F.3d 454, citing Saylor v. Cornelius(6 Cir. 1988),845 F.2d 1401, by US v. Scott(1978),437 US 82. In petitioner's case, he exercised, as inovked, his right to have a fair and impartial trial, and including, by jury's verdict findings, compare. Duncan v. Louisiana(1968),391 US 145, with Blakley-Apprendi, supra. In fact, in petitioner's case the factual record evidence demonstrates and proves foreperson's, not jury's, verdict findings wasn't unanimous and it demonstrates absence the spoken, as court's accepted, jury's verdict finding any statutory charging petitioner's conduct of element(s) and/or factual circumstances allegedly charged and violated, is highly

constitutional and substantively prejudicial, as manipulatively, to petitioner's defense right, compare. Blakley-Apprendi, supra, to a fair and impartial trial by jury's and its verdict findings. Alleyene v. US(2013),570 US 99. To that constitutional prejudicial effect, this prejudice not only extends to, but including petitioner's actual and presumption of "not guilty" plea innocence, in Janis-Matthews, supra, and unquestionably absence or fails constitutional mustard right(s) of whether or not petitioner's unanimous jury's verdict finding consider, as deciding, and determination concluded his conduct committed or violated what, if any, statutory charging element(s) and, not just only of charge, or factual, before guilty finding, issue(s) by its unspoken, as accepted, with double jeopardy attached, to its filed recorded verdict. Yeager-Saylor, supra. Moreover, petitioner's conduct can, and only can be, violated (and government's burden of proof) the statutory charging element(s) and/or factual circumstances of, not just charge itself, charged and as defined. Richardson v. US (1999),526 US 813. And but, however, without petitioner's charging "not guilty" plea presumption of innocence secured guilty element(s) and/or fact(s) charged by jury's verdict finding his conduct violated the law, it raises reasonable and questionable doubt, with uncertainty, to petitioner's actual innocence plea defense, compare. Bousley v. US(1998),523 US 614, with In re Winship(1970),397 US 358, and Blakley-Alleyne, supra. And finally, of course, since to petitioner's prejudice, by court's accepted, absence unanimity of and jury's verdict finding any statutory charging element(s) or fact(s) which his conduct violated, questions how or what procedure and

substantive, as statutory, right determines and prohibits any court's Article III jurisdiction, when that verdict absence or silent element(s) or factual findings, authorizing any sentence upon petitioner, compare. Blakley, supra at US 306("... that the judge's authority to sentence drives wholly from the jury verdict..."), with Harris v. US(11 Cir. 1998),149 F.3d 1304,1307, fn. 4(court's lacked 851 authority to enhance sentence). In petitioner's case, the record demonstrates, as absence, unanimity and jury's verdict findings unauthorizing any sentence by law, respectfully. See, Petitioner's Question two. And absence unanimity of and jury's verdict findings record court's acceptance is prejudicial to petitioner's actual innocence and that is caused by trial and sentencing, including appellate, counsel'(s) deficient performance caused by failure objection to and demanding for, after trial and before sentencing and evidence already on direct appeal record reversal thereof, ineffectiveness by petitioner's actual innocence discharge with prejudice. Lafler v. Cooper(2012),566 US 156; Missouri v. Frye(2012),566 US 134; Martinez v. Ryan(2012),566 US 1; Evitts v. Lucey(1987),469 US 378; Douglas v. California(1963),372 US 353. See, Petitioner's Question(s) Three and Four, respectfully. This petitioner's actual innocence right to a fair and impartial trial, including its verdict determination, by jury's finding has been denied by trial, sentencing, and including appellate, counsel'(s) deficient performance caused, except but for that unreasonable error, the outcome of the proceeding would've been different and prejudiced petitioner's discharge with prejudice, respectfully.....

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

X. D'Freitas

Date: December 17, 2019