

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

**19-8537**

IN THE

SUPREME COURT OF THE UNITED STATES

**ORIGINAL**

Susan Xiao-Ping Su — PETITIONER  
(Your Name)

vs.

United States of America — RESPONDENT(S)

FILED  
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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Ninth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Susan Xiao-Ping Su Pro Se  
(Your Name)

FCI-Dublin 5701 8th Street  
(Address)

Dublin CA 94568  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

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### QUESTION(S) PRESENTED

- A. whether the Ninth Circuit should sue sponte vacate or grant Certificate of Appealability (COA) to vacate mail/wire fraud conviction/sentence because indictment alleged certificate out of statute scope according to Cleveland - a jurisdictional error not subject to procedural default.
- B. whether COA shall be granted to vacate all counts conviction/sentence because petitioner is factual innocence and insufficient evidence for all counts violating due process of U.S. Const Amend. V.
- C. whether COA shall be issued to vacate restitution order because district court lack jurisdiction to impose from consequential/incidental loss, IAC constitutional violation of U.S. Const. Amend VI. and 18 U.S.C 3663 violation.

## 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:

## RELATED CASES

- U.S. v. Su No. 4:11-CR-00288-JST, U.S. District Court for the Northern District of California, Judgment entered 3/20/2019 & 10/31/2014.
- U.S. v. Su, No. 3:17-CV-02885-JST, U.S. District Court for the Northern District of California, Judgment entered 5/18/2018 & 3/20/2019.
- U.S. v. Su, No. 18-15978, U.S. Court of Appeals for the Ninth Circuit, Judgment entered 3/11/2020.
- U.S. v. Su, No. 14-10499, U.S. Court of Appeals for the Ninth Circuit, Judgment entered 12/07/2015
- U.S. v. Su, No. 15-8973, Supreme Court of the United States, Judgment entered, 5/16/2016.

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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**

For cases from **federal courts**:

The opinion of the United States court of appeals 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 United States district 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.

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.



## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 3/11/2020.

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

Constitutional Provisions: U.S. Const. Amend. V. in pertinent part:

No person shall be held ... nor be deprived of life, liberty or property without due process of law, ...

Statutory Provisions:

1. 18 USC § 1341; whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises ... for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal service ...
2. 18 USC § 1343; whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises transmits or cause to be transmitted by means of wire, radio communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice shall be fined ... or imprisoned not more than 20 years, or both.
3. 18 USC § 3231; the district ct of the United States shall have original jurisdiction exclusive of the ct of the state of all offenses against the law of the United States.
4. 18 USC § 3613(a)(1)(B)(i); The court in determining whether to order restitution under this section, shall consider ... (II) the financial resources of the defendant, the financial needs and earning ability of the defendant ... and such factors as the court deems appropriate.
5. 28 USC § 2255(a); A prisoner in custody under sentence of a court ...

Claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States or that the court was without jurisdiction to impose such sentence... may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) ... if the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him ... or correct the sentence as may appear appropriate.

6. F.R. Crim. P. 12(b)(2); A motion that the court lacks jurisdiction may be made at any time while the case is pending.

7. F.R. Civ. P. 12(h)(3); whenever it appears by suggestion of the parties, or otherwise that the court lacks jurisdiction, the Ct shall dismiss the action.

8. Rules of the Supreme Court, Rule 106) in pertinent part: the following... indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter... as to call for an exercise of the court's supervising power... (c) ... a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

## STATEMENT OF THE CASE

Susan Su is a Christian scientist, design engineer and educator. She graduated with Master of Science in Computer-Aided Mechanical Design from U.C. Davis and Ph.D. in Micro-Electro Mechanical System Design from U.C. Berkeley with multiple awards - American Association of University Women, National Science Foundation etc. She worked in Silicon Valley start up designing low power memory circuit; consulted NASA and California Micro Devices. After teaching 20+ undergraduate / graduate classes at local private / public universities; SFSU, SJSU and U.C. Extension, in 2008 she formed Tri-Valley University - the world first university implementing virtual class meeting technology with video/audio, power point presentation, white board, chat, poll & record functions.

In 2009, TVU submitted I-7 petition to SEVP at Dept. of Homeland Security in Washington D.C. to certify the school to issue I-20 to admitted international students. SEVP approved TVU's I-7 petition with SEVIS username / password to input TVU student information for I-20 in Feb 2010 after multiple case analysis, reviews, on-site inspection and adjudication. To be compliant with SEVP director's memo requirement on international F1 students, Dr. Su installed the class monitor system to monitor students' physical attendance so that a F1 student can take unlimited number of such classes each term.

Initially, one ICE agent had attention on TVU's I-7 entry of "30" in Item 22. "Average annual number of student" which was entered as the current term average of 2009 school year's actual student enrollment number as User Manual for Temporary Users of the SEVIS version 5.7, Page 25. The same ICE agent mistook the 30 students as SEVP approved school's allowed student enrolling number but found that TVU had 3000+ student SEVIS record in 2010. This fallacy was presented to grand jury to indict Dr. Su with 30+ counts

of federal violation of mail/wire fraud, visa fraud & conspiracy, alien harboring, false statement/document, unauthorized access of a government computer and money laundering. The specific charges are based on ICE's sting operation with 4 ICE agents mask as students enrolled in TVU; S.A. and K.D. on 7/27/2010, M.R. on 8/31/2010 and R.B. on 9/7/2010. About 2 months later, ICE agents called TVU office stating that these students were held at airport for forgetting their necessary visas and I-94 forms and asked Dr. Su to verify their student status. The 4 student registration I-20 entries (ct 5-8 & ct 16-19) together with the verification letter that Dr. Su sent over (ct 9-12) consisted the bulk of the wire fraud and visa fraud charges in the indictment. To collect direct evidence, one ICE agent came to TVU office to ask Dr. Su in person for verification. Dr. Su said that she remembered R.M. attending her lecture, who was a real TVU student taking ULSI class that Dr. Su lectured but reversing the first and last name of the fictitious student. Both government and court appointed defense attorney did not call TVU's real student R.M. to testify at trial. Government called 2 instructors in the "available instructor list" who agreed to teach, but have not taught class yet to testify and presented two class transfer agreement amendments with electronic signatures mailed after SEVP acceptance of the original ones with original signatures to convict Dr. Su on all counts for collecting student fee in exchange for I-20 without any classes while 50+ instructors taught 80+ classes at TVU with thousands of pages of class attendance record of students and voluminous class content material developed with 15 week of recorded class meeting, lecture notes, reading material, test and homeworks for each course. On 10/31/2014, the district court sentenced Dr. Su to 198 months in prison, 3 years supervised release, 5.6 million for forfeiture and \$1,015,795.64 overlapped restitution affirmed by the Ninth Circuit on 1/7/2016 with Certiorari

denied on 5/16/2016. On 5/15/2017, petitioner filed the pro se 2255 motion to vacate the sentence for constitutional and jurisdictional errors. Among many issues; petitioner raised the jurisdictional claim that mail/wire fraud were all on certificate allegation out of statute scope according to both Cleveland and McNally, and Restitution is unconstitutional out of limit of 18 USC 3663 and indictment. On 5/18/2018, the district court denied the 2255 motion and COA stating that "Su is procedurally barred from ... challenging the mail/wire fraud and visa fraud conviction because she failed to raise them in direct appeal and also fail to demonstrate cause and prejudice to overcome the procedural default." On 6/15/2018, petitioner filed a motion for reconsideration pointing out that jurisdictional claims can be raised anytime according to F.R. Crim.P. 12b(2), not subject to procedural default. and constitutional error can be raised 1st time in 2255 motion. On 3/20/2019, district court denied reconsideration. characterizing Cleveland error as jurisdictional element error as in Cotton. not depriving its jurisdiction, and that may be barred by procedural default."

Motion for COA and timely appeals were made to the Ninth Circuit pointing out when an indictment is colorless and legal impossible charging no offense at all. it is a jurisdictional error making the district court lack jurisdiction to impose sentence; and all counts shall be vacated for insufficient evidence in violation of due process of U.S. Const. Amend. V.; D.E.No. 7. 18 & 28; D.E.No. 4. 8 & 21. The Ninth Circuit denied COA with a Memorandum filed on 6/27/2019 and denied the appeal declining to extend COA to vacate all counts on 3/11/2020.

## REASONS FOR GRANTING THE PETITION

A. Mail/Wire fraud sentence shall be vacated *sua sponte* because the colorless and legal impossible indictment charged no offense at all with all counts on certificate allegation out of statute scope which are jurisdictional error, not subject to procedural default.

Counts 1-14 mail/wire fraud are all certificate allegations with count 1, 2, 13 & 14 on TVU's I-17 certification petition and count 3-12 on I-20 - Certificate of Eligibility for Nonimmigrant F-1 student Status. Supreme Court held in *Cleveland v. U.S.* 531 U.S. 1225 121 S.Ct. 365 148 L.Ed.2d 221 (2000) that "government licenses and certificates are not the 'property' of the government". Fraudulent scheme such as fraudulent attempt or fraudulent documents to obtain such certificate or license did not violate Title 18 USC 1341 & 1343. All I-20 Forms by definition are regulatory, not property for the meaning and requirement of mail/wire fraud. "Statute did not reach alleged false statement made in the application for the ... license" and "holding that license/certificate is 'property' within the meaning of 1341 would approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress". The indictment is charged no offense at all and is legally impossible one.

Additionally, Count 1-14 mail/wire fraud all alleged one scheme in Page 3-4. Paragraph 9-14 of Superseding Indictment; "Su and others caused TVU to submit a Form I-17 ... to SEVP in Washington D.C. These submission contained materially false representation ..." and "many of these SEVIS entries [for I-20 Form] contained materially false representation ..."; but "as a further part of the scheme to defraud, Su and others collected tuition and other payments from aliens in exchange for maintaining them in active F-1 status". The alleged misrepresentation were in Form I-17 and I-20, and were made to SEVP in Washington D.C.; but alleged property were

were "tuition and other payments from aliens" - students, the third party, not the defaulted party - SEUP in Washington D.C. Supreme Ct held in both McNally v. U.S. 483 U.S. 350 358-360 107 S.Ct. 287 L.Ed 2d 292 (1987) and Cleveland 2000 @ 15 that the scheme must have contemplated a deprivation of the property rights of the victim - the defrauded party - SEUP in Washington D.C, not any third party, the alien students. "It must show a loss of money or property from the Commonwealth itself... the government could not rely on evidence of the loss of property to another individual to support the conviction... In fact, the commission Hunt and Gray received were not the commonwealth's, government's money, A state officer does not violate 1341 if he chose an insurance agency who must share its commission with him"; McNally @ 360-61. So does Cleveland @ 15; "It does not suffice... that the objective of the fraud may become property in the recipient's hand; for purpose of the mail fraud statute - the thing obtained must be property in the hand of the victim" and "although a license may possibly be property in the hand of the licensee, no offense is committed under 1341 if the license is not property in the hands of the state". The indictment is therefore both colorless and legally impossible.

"If the offense charged in an indictment is colorless and legally impossible under the law there is no jurisdiction in a court to render judgment there on"; Gorder v. Johnston 87 F.2d 654 655 (9th Cir., 1937). "If the legislature clearly states that a threshold limitation on a statute's scope, [it] shall count as jurisdictional"; Arbaugh v. Y&H Corp. 546 U.S. 500 515 126 S.Ct. 1235 163 L.Ed 2d 1097 (2006). For "Congress has power to regulate the practice and procedural of Federal Court" and may exercise such power by "delegating to Supreme Court of the United States or other Federal



Courts". Indictment charged no federal crime at all "deprive the district court of jurisdiction because Congress's grant of jurisdiction to the district courts in criminal case extend only to offense against the laws of the U.S., see 18 USC 3231. If an indictment fails to charge such an offense, then a court has no basis for exercising jurisdiction"; U.S. v. McIntosh 704 F.3d 894 (11th Cir., 2013). "A federal court has jurisdiction to try criminal cases only when the information or indictment alleged a violation of a valid federal law"; U.S. v. Sade. 652 F.2d 1126, 1134 (1st Cir., 1981). "If an indictment does not charge a cognizable federal offense then a federal court lacks jurisdiction to try a defendant for violation of the offense"; U.S. v. Armstrong 951 F.2d 626 628 (5th Cir., 1992). And "a federal court lacks jurisdiction to enter a judgment of conviction when the indictment charges no offense under federal law"; U.S. v. Andrade 83 F.3d 729, 731 (5th Cir., 1996). District Court also did not have jurisdiction to impose sentence for conduct not an offense with the scope of the relevant statute, 28 USC 2255 (a). If the court finds that the judgment was rendered without jurisdiction, the court shall vacate and set the judgment aside and shall discharge the prisoners; 28 USC 2255 (b). "We are also required to raise *sua sponte* the issue of whether an indictment properly charges an offense since that represents a jurisdictional issue"; U.S. v. Seher 562 F.3d 1344 (11th Cir., 2009). The Court must *sua sponte* vacate the mail/wire fraud conviction and sentence; Fed. R. Crim. P. 12(b)(3). "A court lacking jurisdiction can not render judgment but must dismiss the case at any stage of the proceeds in which it becomes apparent that jurisdiction is lacking"; F. R. Crim. P. 12(b)(2); Fitzgerald v. Seaboard System Railroad. 760 F.2d 1249 (11th Cir., 1985). "Dismissal for lack of subject-matter jurisdiction... is proper when the claim is... foreclosed by prior decisions of this court"; Oneida Indian Nation of N.Y. v. County of Oneida 414 U.S. 1974. "when the district court acted without jurisdiction, an appellate court does not have the discretion

not to notice and correct the error. it must notice and correct the error; U.S. v. Tran 234 F.3d 798 (2nd Cir., 2000).

The appellate court affirmed district court's holding that indictment alleged certificate, charging no offense at all as "jurisdictional element" omission doesn't present a pure question of court's jurisdiction and subject to procedural default. District court also denied from procedural default even though direct appeal raised insufficient evidence claim. Ninth Circuit's affirmations conflict with the decision of another U.S. Court of Appeal of the 11th Circuit on the same important matter as in U.S. v. Peter 310 F.3d 709 715 (11th Cir., 2002), Rule 10(a). 11th Circuit held that "the indictment charged Peter with making misrepresentation in license application he mailed to a Florida State agency. Cleveland held that state issued licenses are not 'property' for purpose of mail fraud under 1341... Government affirmatively alleged a specific course of conduct that is outside the reach of the mail fraud statute. Peter's innocence of the charged offense appears from the very allegation made in the superceding information, not from the omission of an allegation requisite to liability. In this circumstance, that a district court lacks jurisdiction when an indictment alleges only a non-offense controls" and "The district court and the appeal court is obliged to automatically correct the judgment that the court never had power to enter." The 11th Circuit also distinguish claims that an indictment that alleged conduct was non-criminal which was a jurisdictional error from claims in indictment with omission such as missing elements which were not jurisdictional as in Cotton; U.S. v. Pearl. 288 Fed. Appx. 651 (11th Cir., 2008). "The Court's post-Cotton jurisprudence has refused to find that Cotton altered well established precedent, recognizing that the failure to allege a crime in violation of the law of the U.S. is a jurisdictional defect; for the Article III court's jurisdiction is only invoked when the conduct violating the law of U.S. 18 USC § 3231. Mayberry v. U.S. 156 Fed. Appx. 265 (11th Cir., 2005); U.S. v. McIntosh 704 F.3d 294 (11th Cir., 2013)

In addition, to convict a person and to deprive a person's freedom from conduct not violating the law of the U.S. is pro se due process violation of U.S. Const. Amend. V; *Collins v. Johnson*, S.Ct. 59 L Ed 1071 237 (1918). Both Jurisdictional and constitutional errors can be raised first time in 2255 motion, even not raised in direct appeal. "Procedural default shall not be applied to constitutional error." The distinction to be made for purpose of determining whether an argument is properly considered under 2255, then, is between constitutional or jurisdictional errors on the one hand, and mere terms of law on the other... A prisoner whose claim is based on a significant denial of a constitutional right... may invoke the protection embodied in 2255 even though he could have raised the point on appeal and there was no sufficient reasons for not doing so"; *Stone v. Powell* 428 U.S. 465, S.Ct. (1976); *Grimes v. U.S.* 607 F.2d (2nd Cir., 1979). "claim based upon constitutional error or on a lack of jurisdiction are not barred from being raised on collateral attack even though no direct appeal has been taken"; *Sinal v. Large* 332 U.S. 174 91 L Ed 1982 67 S. Ct. 1588 (1947); *U.S. v. Laschi Varo* 531 F.2d 659 (2nd Cir., 1976); *U.S. v. Careres* 745 F.2d 935 936 (5th Cir., 1984); *Gates v. U.S.* 515 F.2d 73 (7th Cir., 1975). Circuits' splits on this important matter whether constitutional error can be raised first time in 2255 motion also request the Supreme Court's supervising power; Rule 10(a).

Jurisdictional errors are not subject to procedural default; *U.S. v. Cotton* 535 U.S. 625 629-31 (2002); *McCoy v. U.S.* 266 F.3d 1245 (11th Cir, 2001). The Ninth Circuit affirmed procedural default to jurisdictional error which also conflicts with relevant decision of the Supreme Court, and departed from the accepted usual course of judicial proceedings that jurisdictional error can not be procedurally defaulted; all call for the exercise of this Court's supervising power; Rule 10(a)

B. Sentence from all counts conviction should be vacated for Petitioner is factual innocent and insufficient evidence for all counts.

Supreme court has "not resolved whether a prisoner may be entitled to habeas relief based on a free standing claim of actual/factual innocence"; *McQuigg in v. Perkins* 569 U.S. 383 392 (2013). It is an important question of federal law that has not been but should be settled by this court; Rule 10(c) TUV's class attendance record show that thousand students were attending TUV's classes, actually pursuing their course of study and in good standing student status; 8 CFR 214.2(f)(5)(i). Petitioner is factual/actual innocent of all counts charged crimes. Trial evidence is also insufficient to convict all counts; Opening Brief D.E. No. 28. Page 14-44.

The district court clearly errored to impose procedural default and characterized "Su's claim" as "simple questions of the legal sufficiency of the governments' evidence of one elements of the charged offense" - insufficient evidence to convict all counts; ECF 292, Page 7. line 15-16; for Petitioner raised the "insufficient evidence to all counts" claim at direct appeal; direct appeal Opening Brief. P. 35-36; U.S. v. Su 633 Fed. Appx. 635-36 n.1 (9th Cir., 2015). The claim is not procedurally defaulted. The district court apparently errored in its procedural ruling. To convict a person without sufficient evidence violated the due process right of U.S. Const. Amend. v. Petitioner obviously stated a valid claim of the denial of constitutional right. The appellate court clearly errored in denying COA for reviewing Petitioner's insufficient evidence claim; *Slack v. McDaniel* 529 U.S. 473 478 146 L Ed 2d 542 S. Ct. 1595 (2000). All counts also alleged conduct out of statute scope - jurisdictional error which the court shall vacate. *Sue sponte*; 28 USC 2255(b), F.R. Civ. R. 12(h)(13); F.R. Crim. P 12(b)(2). "A litigant generally may raise a federal court's lack of jurisdiction at any time... even initially at the highest appellate instance" - the supreme

Court; *Kontrick v. Ryan* 540 U.S. 443, 157 L. Ed. 2d 867, 124 S. Ct. 906 (2004). Specifically, visa fraud, its conspiracy and money laundering all based on nonimmigrant document I 20 out of statute scope of 1546(a); *U.S. v. Thomsen* 830 F.3d 1049, 1060-63 (9th Cir., 2016) which also genuinely made; *Martenev v. U.S.* 216 F.2d 760, 763 (10th Cir., 1954) (statute targets the "genuineness of its execution", not a misrepresentation of a factor authority); *McNally* 483 @ 36, *U.S. v. Carman* 577 F.2d 556, 567-68 (9th Cir., 1978), *U.S. v. Garrido* 713 F.3d 985, 998-99 (9th Cir., 2010), *U.S. v. Lake* 472 F.3d 1247, 1260-61 (10th Cir., 2007). Additionally, money laundering charged transaction before the completion of alleged underlying crime generating proceeding; *U.S. v. Lichtenberg* 309 Fed. Appx. 107, 109 (9th Cir., 2008), *U.S. v. Estacio* 64 F.3d 477, 481 (9th Cir., 1995). "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime". Alien harboring charged legal employment out of scope of 8 U.S.C. 1324(a)(1)(A)(iii), 8 CFR 214.2(f)(6)(i)(H). Congress Act 3/20/1952 Pub L. No. 282-283 66 Stat. 26, "employment including the usual and normal practices incident to employment shall not be deemed to constitute harboring"; *U.S. v. Morem* 561 F.2d 1321, 1332 (9th Cir., 1977). Trial evidence of document also constructively amended the indictment; *Stirone v. U.S.* 1960 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252. False statement/document are on student information out of statute scope; *U.S. v. Rodgers* 466 U.S. 475, 104 S. Ct. 1942, 1947, 80 L. Ed. 2d 492 (1984); *U.S. v. Facehini* 874 F.2d 638, 642 (9th Cir., 1989) ("More access to information is not enough to establish jurisdiction"). "Unauthorized access a government computer" cannot alleged authorized access out of statute scope, Dr. Sn is a SEVP certified DSO and students' access is authorized by the owner; Congress enacted CFAA... prohibits access "without authorization" to nonpublic government computers; H.R. Rep. 98-894 @ 691-92, 3695-97 (1984), S. Rep. No. 99-432 @ 2480 (1986) @ 2486. *U.S. v. Nosal* 676 F.3d 854, 863 (9th Cir., 2012) ("CFAA targets the unauthorized procurement or alteration of information, not its misuse or misappropriation".

C. Restitution shall be vacated because district court lack of jurisdiction to impose on consequential / incidental loss which is not in the indictment. Also. Defense attorney failed to oppose constituting IAC of U.S. Const Amend VI violation. and COA shall be issued.

28 USC 2255(a) provides that "a prisoner in custody under sentence of a Court ... claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States or that the court was without jurisdiction to impose such sentence ... may move the court ... to vacate, set aside or correct the sentence". The statutory text clearly provides that a prisoner in custody may move to "vacate the sentence", not to vacate just the "custody" but the entire sentence that "was imposed in violation of the Constitution or law of the U.S. or the court was without jurisdiction to impose". If restitution was ordered as part of sentence violating the constitution or law of the U.S. or without jurisdiction, the prisoner may attack such restitution order under 28 USC 2255(a), and the court shall vacate the restitution order; 28 USC 2255(b). The Ninth Circuit has interpreted this clear statutory provision as that 2255 motion must attack custody, can not attack restitution - part of the sentence, not part of custody; U.S. v. Thiele 314 F.3d 399 400 (9th Cir., 2000) ("2255 is available to prisoners claiming the right to be released from custody, claims for other types of relief, such as relief from a restitution order can not be brought in a 2255 motion."); and "Su's restitution challenge is a non-cognizable claim because it does not seek release from custody"; FCF 256 P.4 L18-19. 9th Circuit held in U.S. v. Bailey 599 F.3d 980 that "the text of 2254(a) permits a habeas petition to be entertained only on the ground that the petitioner is in custody in violation of the Constitution... which may explicitly require a nexus between the petitioner's claim and the unlawful nature of the custody". However, 2255 statute does not have such text of

"custody in violation of ..." instead the text clearly provides "the right to be released upon the ground that the "SENTENCE" was imposed in violation of the Constitution or laws of the U.S. or the Court was without jurisdiction to impose such sentence. At least, 2nd and 6th Circuit of appeal court hold conflicting views that "the restitution order is outside the limits of 18 USC 3663 can and should be remedied under 2255 collateral relief"; Weimberger v. U.S. 268 F.3d 346 (6th Cir., 2001) and "Gonzalez could have challengeed the revised restitution order in a 2255 motion"; Gonzalez v. U.S. 792 F.3d 232 (2nd Cir., 2015). In U.S. v. Anderson 235 F. Supp. 2d 877 884-85 (N.D. Ill. 2002), the district court vacated restitution in 2255 motion for counsel failed to object restitution orderred from "relevant conduct", but not "charged conduct".

COA shall be issued because "petitioner meets the modest COA standard where another circuit has reached a conflicting view"; *Lozada v. Deeds*, 498 U.S. 430 112 L Ed 956 111 S. Ct. 860 (1991) ("The fact that another circuit has decided the issue in a different manner, in other words, rendered a seemingly well-established issue debatable for purpose of meeting the Barefoot standard") Defense attorney's failure to raise the following issues at sentence and appeal without any factual reasons constitutes IAC violating U.S. Const. Amend VI.

Restitution was imposed violating 18 USC 3663 because the court did not consider defendant's inability to pay which has already been demonstrated and acknowledged by the district court; 18 USC 3663(a)(1)(B)(i)(II); U.S. v. Ramilo 986 F.2d 333 335 (9th Cir., 1993); U.S. v. Carrizaro 871 F.2d 809 810 (9th Cir., 1989). Additionally, restitution shall not be orderred for both PayPal and Total Merchant Services were not in Indictment. They're also consequential and incidental loss; U.S. v. Soblan 92 F.3d (9th Cir., 1996) PayPal and Total Merchant Services are not qualified "victim" defined by 18 USC 3663; U.S. v. Salcedo-Lopez 907 F.2d (9th Cir., 1990), U.S. v. Sharp 941

F.2d 811 (9th Cir., 1991) ("the district court's statutory authority to award restitution under the MURA is limited to award to victims of the offense of conviction"); U.S. v. Maurello 76 F.3d 1304 1313 (3rd Cir., 1996) ("... the loss to those who are not direct victims of the defendant's conduct, they are but distant and remote victims of such fraudulent conduct. It's not their loss which should provide the measure, but rather the direct victims of defendant's conduct"). The district court also lack jurisdiction to impose restitution for both PayPal and Total Merchant Services are not in the indictment; U.S. v. Castillo 530 120 S.Ct. 2096 (2000) ("District court did not have jurisdiction to enter a conviction or impose a sentence for an offense not charged in the indictment"); Hughey v. U.S. 495 U.S. 411 416-20 109 L Ed 2d 408 110 S.Ct. 1979 (1990); U.S. v. Johnson 536 Fed. Appx. 715 (9th Cir., 2013); U.S. v. Scott 250 F.3d 550 553 (7th Cir., 2001) ("Although [the conduct to order restitution] was surely 'relevant conduct', it was not 'charged conduct', so restitution... can not be awarded"); U.S. v. Menzo 137 F.3d 533, 537 (7th Cir., 1998) ("A restitution must directly relate to the crimes charged in the information"); U.S. v. Upton 91 F.3d 677 (5th Cir., 1997) ("No restitution was available to victims not named in the indictment"). Restitution to PayPal and Total Merchant Services is a sentence which the district court imposed without jurisdiction besides violating U.S. Const. Amend VI. and 18 USC 3663. which shall be properly vacated in the 2255 proceeding; 28 USC 2255(b). COA also shall be issued. The Ninth Circuit has entered a decision in conflict with the decision of another U.S. Court of appeal on the same important matter whether restitution can be attacked in a 2255 motion that <sup>all</sup> call for the exercise of the Supreme Court's supervisory power; Rule 10(a).



**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jusem Liao-Ping Su

Date: 4/15/2020

I, declare under the penalty of perjury the foregoing is true and I place this Petition in the prison mailing system with first-class stamp paid on 4/15/2020.

Jusem Liao-Ping Su