

No. 20-7640

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

Nicholis C. Garner PETITIONER
(Your Name)

vs.

U.S.A. RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Nicholis Corey Garner # 10971-028
(Your Name)

FBI-1, Oakdale, Unit, E-1., PoBox 5000
(Address)

Oakdale, LA 71463
(City, State, Zip Code)

None
(Phone Number)

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QUESTIONS PRESENTED FOR REVIEW

Was Counsel constitutionally ineffective when he failed to challenge the search of Petitioner's vehicle in violation of Petitioner's Fourth Amendment Right against illegal searches and seizures.

Was plea obtained in violation of Petitioner's due process ?
Was Petitioner's guilty plea entered voluntary ? Did the district court error when it failed to personally address Petitioner in open court and determine that the plea did not result from force, threats, or promises ?

Counsel advised Petitioner to enter into an open plea, which Petitioner received 240 months because of the advise of counsel. Was Counsel constitutionally ineffective for advising Petitioner to not accept the plea agreement in this case, which was for 188 months ?

Was Counsel constitutionally ineffective for failing to object to the number of victims in the Presentence Report before sentencing, and also failed to object that the presentence report failed to provide the district court with sufficient information to order restitution ? The probation officer in this case failed to recommend any amount of restitution. The probation officer also failed to identify which of the 425 victims suffered an actual loss for sentencing purposes.

Was Counsel constitutionally ineffective for failing to raise the number of victims in the Presentence Report on direct appeal, and also the restitution amount that was ordered in this case ?

Was Counsel constitutionally ineffective for failing to raise the Leadership enhancement on direct appeal ?

Was Counsel ineffective for failing to challenge the illegal search of Petitioner's email account ? In violation of his Fourth Amendment Right againts illegal searchs and seizures.

Did the court's below commit reversable err denying Petitioner's § 2255 motion without conducting an evidentiary hearing to resolve the factual disputes violating Petitioner's due process rights ?

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>CASES</u>	<u>INDEX OF AUTHORITIES</u>	<u>PAGE NUMBER</u>
<u>Machibroda v. United States</u> , 368 U. S. 487 (1962).		7
<u>United States v. Valentine</u> , 488 F.3d 325 (6th Cir. 2006)		8,19
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<u>Martin v. Indiana State Police</u> , 537 F. Supp. 2d 974 (S.D. Ind. (2008).		11
<u>Arizona v. Hicks</u> , 480 U. S. 321, (1987).		12
<u>United States v. Smith</u> , 510 F.3d 641 (6th Cir. 2007).		13
<u>United States v. Haynes</u> , 301 F.3d 669 (6th Cir. 2002).		13
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<u>Kemmelman v. Morrison</u> , 477 U. S. 365 (1986).		14
<u>Wong Sun v. United States</u> , 371 U. S. 471 (1983).		15
<u>Strickland v. Washington</u> , 466 U. S. 668 (1984).		15
<u>Pola v. United States</u> , 778 F.3d 525 (6th Cir. 2015).		18
<u>Smith v. United States</u> , 348 F.3d 545 (6th Cir. 2003).		18,19
<u>Lafler v. Cooper</u> , 566 U. S. 156 (2012).		19
<u>United States v. Stubblefield</u> , 682 F.3d 502 (6th Cir. 2012).		22,24,25
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<u>STATUTES</u>		
28 U.S.C. § 1251(1)		1
18 U.S.C. § 3664(a)		2
United States Sentencing Guidelines (2014). 2B1.1		2
Fed. R. Crim. P. 32(i)(3)(B)		2
28 U.S.C. § 2255		3
Fed. R. Crim. P. 11(b)(2)		4

Petitioner, Nicholis Corey Garner, prays that this Honorable Court will issue a writ of certiorari to review the orders, responses, rearraignment hearing transcripts and the Judgment of the United States Court of Appeals for the Sixth Circuit, and all proceedings below.

INDEX TO APPENDICIES

APPENDIX A Order denying COA from the Sixth Circuit Court of Appeals, Case No. 20-5220, November 25, 2020, attached hereto in support.

APPENDIX B Petition for Rehearing - Extension of Time attached hereto in support.

APPENDIX C Order Sixth Circuit denying Motion for Extension of Time to file Petition for Rehearing attached hereto in support.

APPENDIX D Response in Opposition to Petitioner's Motion for Certificate of Appealability by Government attached hereto in support.

APPENDIX E Order Adopting Report and Recommendation denying Petitioner's Section 2255 motion attached hereto in support.

APPENDIX F Rearraignment Hearing Transcripts attached hereto in support.

APPENDIX G Report and Recommendation of the Magistrate Report attached hereto in support.

II.
JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 25, 2020. The jurisdiction is invoked under 28 U.S.C. § 1251 (1).

III.
CONSTITUTIONAL PROVISIONS, FEDERAL RULES OF CRIMINAL PROCEDURE, UNITED STATES SENTENCING GUIDELINES, AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

"No person shall be ... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment of the United States Consitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and charge of the accusation; ... and have the assistance of counsel for his defense."

3. The Fourth Amendment of the United States Constitution provides:

"The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no ~~warrant~~ shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched or things to be seized."

4. The statutes involved and under review are, Title 18, United States Code § 3664(a) Procedure for issuance and enforcement of

order of restitution,"which provides: For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report or in a separate report, as the court may direct, information for the court to exercise its discretion in fashioning a restitution order."

"(d)(1) under Title 18, United States Code § 3664 provides: upon request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of amounts subject to restitution."

5. The statute involved and under review are, **Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 11(b)(2)**, which states: "Ensuring that a plea is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)".

6. The statute involved and under review are, **Title 18, United States Code, Federal Rules of Criminal Procedure 32(i)(3)(B)**, which states: "At sentencing the court must - for any disputed portion of the presentence report or other controverted matter - rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing or because the court will not consider the matter in sentencing."

7. The United States Sentencing Guidelines under the review are, (2014), **U.S.S.G. 2B1.1(b)(A)(i) Actual loss - "Actual loss"** means the reasonable foreseeable pecuniary harm that resulted from the offense. **(iii) Pecuniary Harm - "Pecuniary Harm"** means harm that is monetary or otherwise is readily measureable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm. **(iv) Reasonable Foreseeable Pecuniary Harm - For purposes of this**

guideline, "reasonable foreseeable pecuniary harm" means pecuniary harm that defendant knew of under the circumstances, reasonably should have known, was a potential result of the offense.

8. The statute under which Petitioner sought habeas corpus relief was 28 U.S.C. § 2255 which states in pertinent part:

§ 2255 Federal custody; remedies on motion attacking sentence, and conviction.

A prisoner in custody under sentence of a court established by Act of Congress 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 is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct sentence.

Unless the motion and files and records of the case conclusively show that prisoner is entitled to no relief, the court shall cause notice to be served upon the United States attorney, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions of law with respect thereto.

IV.
STATEMENT OF THE CASE

On March 12, 2013, a federal grand jury for the Eastern District of Kentucky, Lexington Division returned a Nine (9) count indictment charging Petitioner and other co-defendants with charges of Conspiracy to Commit Wire Fraud. See 18 United States Code, Section 1349; 18 U.S.C. § 1343. (Doc. # 152).

On December 4, 2013, Petitioner pleaded guilty to the Conspiracy charge without a plea agreement. (Doc. 333). In June 2014, prior to sentencing Petitioner moved pro se to withdraw his guilty plea. (Doc. # 413).

The district court denied Petitioner's request to withdraw the plea and sentenced Petitioner on February 2, 2015, to a term of 240 months imprisonment and ordered to pay \$ 1,807,517.06 in restitution. (Docs. # 443, 591, 594, and 772).

During the guilty plea colloquy in this case the district court made no effort whatsoever to determine if the plea did not result from force, threats, or promises, in violation of **Federal Rules of Criminal Procedure 11(b)(2)**. See Guilty Plea Transcripts attached hereto as Appendix F.

The district court failed to conduct a full direct voluntariness examination in open court, thereby compromising one of the Rule 11's "core concerns" and undermined the validity of the guilty plea.

V.

A. COURSE OF PROCEEDINGS IN THE SECTION 2255 CASE BEFORE THIS COURT

On April 13, 2018, Petitioner filed a motion to vacate, set aside or correct sentence and/or conviction pursuant to 28 U.S.C. § 2255 challenging the constitutionality of the conviction and sentence. Petitioner raised an issue. (Ground # 1 in his 2255 motion that his attorney was ineffective for failing to assure

Petitioner had a full and complete understanding and knowledge of the offered plea to secure an involuntary rejection of a favorable sentence as presented within the contents of that agreement offered to serve 188 months); Petitioner raised an issue. (Ground # 4 in his § 2255 motion that his attorney was ineffective for failing to challenge the search and seizure of his vehicle without a warrant or probable cause to do so in violation of his Fourth Amendment Right against illegal searches and seizures); Petitioner raised an issue. (Ground # 7 in his § 2255 motion Illegal Search of his Email Account without a warrant or probable cause to do so in violation of Petitioner's Fourth Amendment Right against illegal searches and seizures); Petitioner raised an issue concerning Rule 11 violation. (Ground # 8 in his § 2255 motion that his attorney coerced Petitioner to plead guilty, and district court failed to determine if plea did not result from force, threats, or promises); Petitioner raised an issue. (Ground # 12 & 13 in his § 2255 motion that his attorney in the district court failed to make an objection in the PSR before sentencing when it came to identifying the number of victims being identified, and the restitution amount, which the probation officer failed to identify the number of victims, and failed to recommend any restitution in this case); Petitioner raised an issue. (Ground # 6 & 15 in his § 2255 motion that his Appellant attorney failed to raise that the probation officer failed to identify the number of victims in the PSR, and failed to recommend any amount of restitution in this case); Petitioner raised an issue. (Ground # 14 in his § 2255 motion Appellant attorney failed to raise leadership enhancement on direct appeal).

On March 17, 2018, the Magistrate Judge Ordered the Government to respond to 882 motion to vacate within 40 days. Petitioner had 30 days to reply. See Order Magistrate (Doc. #: 884).

On May 29, 2018, the Government filed a response to Petiti-

oner's motion to vacate. See Government's Response (Doc. # 898).

On July 3, 2018, Petitioner filed a relpy to Government's response. See Petitioner's Relpy See (Doc. # 903).

On July 9, 2018, Petitioner filed a Sur-Relpy to Government's Response with photos of inside of his vehicle. See (Doc. 904).

On November 5, 2018, Petitioner filed a Motion for Evidentiary Hearing. See (Doc. # 920).

On November 5, 2018, Petitioner filed Motion for Discovery attachments: # 1 Exhibit 1, # 2 Interrogatories to A. Stephens. See (Doc. # 904).

On April 30, 2019, Magistrate issued a Report & Recommendation to deny Petitioner's § 2255 motion. See (Doc. # 963).

On May 20, 2019, Petitioner filed his objections to Report and Recommendations. See (Doc. # 971).

On January 28, 2020, district court filed an order adopting Report and Recommendations denying Petitioner's § 2255 motion. See (Doc. # 1002). See also Appendix E district court's order Adopting Report and Recommendation attached hereto in suuport.

On November 25, 2020, the United States Court of Appeals for the Sixth Circuit delivered its opinion affirming the district courts denial of Petitioner's 28 U.S.C. § 2255 motion without evidentiary hearing to resolve the factual disputes.

VI.

EXISTENCE OF JURISDICTION BELOW

Petitioner was indicted and convicted in the United States

Court for the District Court for the Eastern District of Kentucky, Lexington Division, for Conspiracy to Commit Wire Fraud, under 18 U.S.C. § 1349; 18 U.S.C. § 1343. A § 2255 motion was appropriately made in the convicting court and subsequently denied on January 28, 2020. See Appendix E attached hereto in support. A timely notice of appeal was filed to the United States Court of Appeals for the Sixth Circuit.

VII.

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

1. The Sixth Circuit erred when it found that Petitioner did not make a substantial showing that his attorney coerced him into pleading guilty. The Sixth Circuit improperly applied the law in Petitioner's case according to the Machibroda Court because Petitioner submitted declarations that contained a narrative of events that took place outside the courtroom on December 4, 2013, there was a meeting before Petitioner took the plea, which during this meeting Petitioner's attorney coerced Petitioner to plead guilty at this meeting. There were witnesses who were present at this meeting that witnessed the conversation between Petitioner, and his attorney which the record in this case could cast no real light. See Machibroda v. United States, 368 U. S. 487, 494, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962). In Machibroda, the Court determined that the district court could neither rely on files and records of the trial court nor personal knowledge which the record therefore could cast no real light because of occurrences outside the courtroom. See Motion To Vacate (Doc. 882 # 20, Declarations Exhibit # 3-3(A) - 3(C)).

2. The Petitioner asserts he was coerced into pleading guilty at this meeting on December 4, 2013, by his attorney. Petitioner submitted declarations of what took place at this meeting, and also provided the district court with the declaration from the witness who witnessed the conversation. See United States

Valentine, 488 F.3d 325, 333 (6th Cir. 2006). The record in this case could cast no real light because the meeting took place outside the courtroom. See also 28 U.S.C. § 2255(b).

3. The Sixth Circuit opinion erred affirming district's court's denial of Petitioner's 28 U.S.C. § 2255. Petitioner asserts that the plea colloquy failed to satisfy the Rule 11 proceeding. See Sixth Circuit Order Appendix A Page # 3. Which states: "The district court denied this claim after quoting Garner's plea colloquy, in which the district court explained the indictment, Garner's rights his, potential sentence, and the like, ensure that Garner understood the ramifications of his guilty plea".

4. Petitioner contends that the district court failed to conduct a full and direct voluntariness examination in open court, pursuant to **Federal Rule Criminal Procedure 11(b)(2)**, through direct interrogation. Specifically addressing Petitioner in open court to determine if the plea did not result from force, threats, or promises. The Supreme Court has similarly expressed the importance of direct interrogation by the district court judge in determining whether to accept the defendant's guilty plea:

To the extent that the district judge exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty pleas voluntariness, but also facilitates that determination in any subsequent post-conviction proceeding based upon a plea was involuntary. Both of these goals are undermined in properation to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. McCarthy v. United States, 394 U. . 459, 467, 22 L. Ed. 418 89 S. Ct. 1166 (1969).

5. In United States v. Martinez-Molina, 64 F.3d 719, 734 (1st Cir. 1995)(The court held however, that the guilty pleas

of two defendants did not meet the test of Fed. R. Crim. P. 11, because the district court failed to conduct a full and direct voluntariness examination in open court, thereby compromising one of the Rule 11's "core concerns" and undermining the validity of the guilty plea).

6. Because guilty pleas amount not only to an admission of culpable conduct but also to a waiver of constitutional rights, the government may not obtain a plea by actual or threatening physical harm or by mental coercion overbearing the will of the defendant. Brady v. United States, 379 U. S. 742, 748-50, 90 S. Ct. 1465, 25 L. Ed. 2d 747 (1970). To this end, a district court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). Fed. R. Crim. P. 11(b)(2).

7. The district court in this case made no effort whatsoever to determine if the plea did not result from force, threats, or promises in this case before he accepted Petitioner's plea. See Rearrangement Hearing Transcripts Appendix E attached hereto in support. Therefore, the district court violated the Rule 11(b)(2), hearing.

8. Petitioner would not have pleaded guilty if counsel had not coerced Petitioner into pleaded guilty. See Hill v. Lockhart, 474 U. S. 52 , 60 (1985). Petitioner in this case would have insisted on going to trial had he not been coerced into pleading to the open plea.

9. The Sixth Circuit Court's erred affirming the denial of Petitioner's § 2255 motion where the district court failed to conduct an evidentiary hearing to resolve the factual disputes, which if true, warrants habeas relief and the record did not "conclusively show" that he could not establish facts warranting relief under § 2255, which entitled Petitioner to

a hearing. See 28 U.S.C. § 2255(b). See also Sixth Circuit Appendix A Page # 3. Sixth Circuit stated: "the letter cited above, in which counsel explained the naked guilty plea and its implications". Petitioner argues that the letter from counsel should have no bearing on the Rule 11 proceeding as the Sixth Circuit suggest because the district court is required to question Petitioner in open court and determine that the plea did not result from force, threats, or promises in this case before it accepted the plea. See Fed. R. Crim. P. 11(b)(2).

VIII.

ARGUMENT AMPLIFYING REASONS FOR GRANTING WRIT FOURTH AMENDMENT VIOLATION OF UNITED STATES CONSTITUTION ILLEGAL SEARCH AND SEIZURE

1. Petitioner's Fourth claim, Petitioner was arrested on September 15, 2012, during a traffic stop, after Indiana State Police arrested Petitioner for speeding. During this traffic stop it was discovered that Petitioner and another occupant had outstanding arrest warrants from the Secret Service of United States. Petitioner and occupant was immediately arrested and both was placed in patrol vehicles. Petitioner's vehicle was driven to another location by Indiana State police, and immediately searched. The Secret Service was called to the scene during the search of Petitioner's vehicle. Petitioner or occupant could not gain access to the vehicle because Petitioner and occupant had been placed in custody in patrol vehicles.

2. On September 15, 2012, the day of Petitioner's arrest, Indiana State Police seized Petitioner's vehicle and filed a Criminal Complaint for Forfeiture in Indiana State court. Secret Service searched Petitioner's vehicle without probable cause and a warrant to do so which Secret Service needed in this particular case because the Secret Service seized a (ledger), over \$ 41,000.00 in U. S. Currency, a Evolis Pebble Printer, and a brief case. The (ledger) was seized and searched without a warrant, and used as evidence in Petitioner's case.

3. There was an In Rem proceeding pending in the State court of Indiana during the time the Secret Service seized Petitioner's property from out of his vehicle. The State court of Indiana was the first and only court to assume jurisdiction over the res, which Indiana court may maintain and exercise that jurisdiction to the exclusion to the federal court. See Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 195 55 S. Ct. 386, 390 79 L. Ed. 850 (1935) The Secret Service in this case unlawfully turned over Petitioner's property to federal authorities in the Eastern District of Kentucky, Lexington Division. To legally transfer seized property, Indiana Code "requires a motion be filed by the prosecuting attorney, and an order from the court to transfer the property." Martin v. Indiana State Police, 537 F. Supp. 2d 974, 987 (S. D. Ind. 2008).

4. Petitioner 's attorney never challenged the search or seizure of Petitioner's vehicle. Counsel also failed to challenge the search and seizure of the (ledger) that was seized and searched. It was found by a State court that Petitioner's vehicle was unlawfully seized in violation of his Fourth Amendment Rights. Petitioner provided the district court with the evidence. The State court of Indiana ordered to return Petitioner's vehicle to its rightful owner. See Motion to Vacate § 2255 (Doc. # 882 # 6 Exhibit # 5 Forfeiture Complaint State of Indiana, # 7 Exhibit # 6 Judgment in Favor of Defendants). The State of Indiana stated: "After consideration of the evidence submitted by way of exhibit(s) and/or testimony, the Court finds by greater weight of the evidence that insufficient evidence was presented to conclude that the 2005 Nissan Maxima was knowingly used to facilitate the transportation of instruments and equipment to obtain stolen property in excess of \$ 100.00, or any crime in Indiana". Therefore, counsel was Constitutionally ineffective for failing to challenge the search and seizure of Petitioner's vehicle.

5. The government's justification for counsel's failure to

pursue this issue concerning the seizure of the (ledger) was the "incriminating ledger" was found in plain view in this case. See Government's Response to Petitioner's § 2255 motion (Doc. # 898 Pg. # 12 Id. # 7854). The government states; "incriminating ledger ... found in plain view". See also Counsel's Affidavit to Petitioner's § 2255 (Doc. # 898-1 Pg. # 3 Pg. Id. # 7865 Paragraph # 6). Counsel stated: "Contrary to Mr. Garner's assertion, counsel looked at the stop determine there was probable cause for the same and that as a result of Mr. Garner's own sloppy activities by having left fruit and tools of his criminal behavior in plain view subject him to a lawful search and seizure of his vehicle".

6. Counsel was Constitutionally ineffective for failing to pursue this issue because of his misinterpretation of the law, under the plain view doctrine namely, the requirement that the nature of the article be immediately apparent to police. See Arizona v. Hicks, 480 U. S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). The "incriminating nature" of a piece of property is only immediately apparent when police officers have probable cause to believe that property may be evidence of a crime. Immediately apparent means these officers looked at the (ledger) "without touching" the (ledger). The district court in this case gives a description of the (ledger) as a "black leather notebook". See district court's Memorandum Opinion Order (Doc. # 558 Pg. # 28 Pg. Id. # 3167). The district court states: "In the car with him and Holley, were many items but most damning the black leather notebook".

7. Petitioner's attorney had a duty under the United States Constitution to effectively represent Petitioner in this case, but failed to do so because of his misinterpretation of the law under the plain view doctrine. The warrantless seizure of the (ledger) was unconstitutional under the plain view doctrine, and the "black leather notebook" was closed which had to be moved and read in order for its incriminating nature to be determined,

which the required a warrant to search and seize . The search and seizure violated Petitioner's Fourth Amendment Rights against illegal searches and seizures.

8. The government misinterprets the law surrounding the alleged inventory search of Petitioner's vehicle, because it was found by the State court of Indiana whom had jurisdiction over the seizure of the vehicle that the vehicle was unlawfully seized. See Government's Response § 2255 (Doc. 898 Pg. # 11 Pg. Id. # 7848)("It is settled law that police may conduct a inventory search of an automobile that is being impounded without running afoul the Fourth Amendment. United States v Smith, 510 F.3d 641, 650 (6th Cir. 2007)."

9. The law in support of the government's argument is misplaced concerning this alleged inventory search. In the Smith case the government cites, the facts of that case is distinguishable from that of Petitioner's case. The officers were aware of Smith's use of his vehicles in his drug trafficking activities, and because the had information indicating Smith stored cocaine at his residence, there was a "fair probability" that contraband -- in this case, the cocaine referenced by the tipster -- See Smith 510 F.3d 650 would be found in the pontiac.

10. According to the Indiana State court judgment, the Indiana State Police had no information or evidence that suggested the vehilce in question conatined any contraband. See United States v. Haynes, 301 F.3d 669, 678 (6th Cir. 2002); United States v. Edwards, 242 F.3d 928, 939 (10th Cir. 2001). In both cases Haynes and Edwards officers had no information of evidence that suggested the vehicle in question contained contraband. therefore, the Indiana State did not have probable cause to seize and search Petitioner's vehicle, the warrantless inventory search was illegal. The Petitioner in this case has never asserted that his attorney failed to investigate the allegedly illegal search and seizure as the Sixth Circuit suggested in its

order. See Sixth Circuit Order Appendix A Page # 3. Petitioner contends that the seizure was unlawful according to the State court's judgment that was provided as evidence in this case, therefore, the warrantless inventory search was illegal in this case.

11. The Sixth Circuit alleges the district court denied Petitioner's claim because he could not show how he was prejudiced by counsel failing to pursue this issue concerning the search and seizure of his vehicle. See Sixth Circuit Order Appendix A Page # 3. The Petitioner could show that he was prejudiced by counsel's performance because the (Ledger) that was seized and searched in this case was used as evidence. See district court's Memorandum Opinion (Doc. # 558 Pg. # 17-18 Pg. Id. # 3156). The district court stated: "Agent Lowe used the ledger as a starting point for his calculation of loss. He explained on cross-examination that the ledger "is the only complete record that we have" the ledger which could be verified in large part, in an amount of 1,301,132.32 over the course of 138 days". See Counsel's Affidavit § 2255 (Doc. # 898-1 Pg. # 4 Pg. Id. # 7866 Paragraph # 9). Counsel states: The Infamous ledger was found in the vehicle to which Mr. Garner had in his possession in Indiana. The ledger provided a detailed confession of Mr. Garner and his associates unlawful transactions violating the basic mail and wire fraud statute".

12. Petitioner received a victim enhancement from the use of the ledger. See Petitioner's PSR Page # 34 Objection No. 9. six-levels. Petitioner's guideline range with the use of the ledger is 36, guideline range is 292-365. The victim enhancement for six-levels would have reduced Petitioner's sentence to offense level 30. Petitioner had a Criminal History Score V. Petitioner's guideline range without the use of the ledger that was illegally seized and searched without a warrant should have been 151-188 months. See Kemmelman v. Morrison, 477 U. S. 365, (1986). Absent excludable evidence specifically the (ledger) in this case

Petitioner can prove that counsel was Constitutionally ineffective for failing to challenge the seizure and search of Petitioner's vehicle, and the seizure and search of the (ledger), therefore, Petitioner was prejudiced by counsel's performance.

13. Petitioner asserted that the district court's decision is debatable among jurist of reason because Petitioner's vehicle was unlawfully seized and searched in without probable cause to do so in violation of his Fourth Amendment Right against illegal searches and seizures. Therefore, the (ledger) came from Petitioner's vehicle as a product of fruit from a poisonous tree, and should be suppressed. See Wong Sun v. United States, 371 U. S. 471, (1983).

WHETHER SIXTH CIRCUIT ERRED WHEN IT DENIED COA WHEN IT CAME TO COUNSEL'S ADVICE SURROUNDING THE PLEA AGREEMENT THAT WAS OFFERED

1. Petitioner's first claim as it relates to the plea agreement that was offered in this case, which he maintains that his attorney was Constitutionally ineffective when he failed to assure that Petitioner had a full and complete understanding and knowledge of the plea offered to secure an involuntary and intelligent rejection of a favorable sentence as presented in the contents of the offered agreement. This letter in which the Sixth Circuit relies in support does not explain if counsel in fact determine whether Petitioner's attorney had fully informed Petitioner of the nature and contents of that agreement. See Sixth Circuit Order Appendix A Page # 2. The Sixth Circuit erred because the letter from counsel does not undermine Petitioner's claim.

2. Petitioner contends that his attorney was Constitutionally ineffective. Such claims are guided by the now familiar two-element test set forth by Supreme Court in Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 674 104 S. Ct. 2052 (1984).

First, a petitioner must prove that counsel's performance was deficient, which counsel made errors so serious that counsel was not functioning as counsel guaranteed the defendant by the Sixth Amendment. Id. at 687. The Court explained that to establish deficient performance a petitioner must identify acts that were outside the wide range of professional competent assistance. Id. at 690.

3. Second, a petitioner must show that counsel's performance prejudiced petitioner. A petitioner may establish prejudice by counsel's errors were so serious as to deprive defendant of a fair trial. The Supreme Court has applied this test to evaluate the performance of attorney's representing guilty plea defendant's with special attention to the second element: The second element, or prejudice, requirement ... focuses on whether counsel's constitutionally affected the outcome of the plea process. In, other words, in order to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U. S. 52, 59 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985).

4. With respect to the first prong under Strickland, the Petitioner's attorney advised Petitioner not to execute the plea agreement that was offered in this case. See Reply Brief on COA. Case No. 20-5220 (Page. # 8 Exhibit # 1 Letter from Counsel Page # 2 of **said** Letter). Counsel stated: "I would, in fact, advise you not to execute the plea agreement".

5. With respect to the second element, or prejudice requirement under Hill v. Lockhart, supra. Petitioner in this case would not have taken the (open plea), and would have insisted on entering the (formal plea) with the government to serve 188 months. The Petitioner did not enter into the (formal plea) with the government because counsel advised Petitioner not to

execute that agreement. Petitioner took an (open plea) because counsel advised Petitioner to, which Petitioner received 240 months, which is 60 months higher than the (formal plea) rejected.

6. The Sixth Circuit erred when it relied on the letter from counsel to support Petitioner's denial of his COA. See Sixth Circuit Order Appendix A Page # 2-3. Sixth Circuit states: "In the letter, counsel explained why he believed that the government's offer - which likely carried the statutory maximum sentence of 240 months" According to the government's response on COA. See Response of United States in Opposition to COA. See Appendix D Page # 5. Government states: " Moreover, Garner,"declined to enter the offered plea agreement, because the agreement contemplated "the statutory maximum sentence of twenty years". This statement from the government undermines the letter from counsel which the Sixth Circuit relied on to deny Petitioner's COA. The government stated "the agreement contemplated the statutory maximum sentence of twenty years". Contemplated means - consider thoughtfully. The government in this case never offered a plea agreement for the statutory maximum sentence of twenty years. There is no plea agreement filed in the record in this case.

7. The government in this case is attempting to obfuscate Petitioner's claim that the plea agreement that was offered was for 188 months, according to their response "the agreement contemplated the statutory maximum sentence of twenty years". Petitioner submitted a Affidavit in his § 2255, which the government nor counsel denies. Petitioner's claim that the plea offered in this case was a plea agreement to serve 188 months imprisonment. See Motion to Vacate (Doc. # 882 # 18 Dec Exhibit # 1 Ground # ONE Plea Agreement). Petitioner stated: "Mr. Stephens advised me on all occasions (at least three times) that is his professional opinion was for me not to accept the formal agreement to serve 188 months; Mr. Stephens advised me

that in his professional opinion was to take an (open plea) an argue at sentencing because the government was not correct on their sentencing calculations.

Mr. Stephens advised me that if I take an (open plea) that there is no way I could get over 160 months. I asked Mr. Stephens what my base level offense, Mr. Stephens advised me that he did not know what my base level offense was this created a conflict between Mr. Stephens and I" See Pola v. United States, 778 F.3d 525, 535 (6th Cir. 2015)(requiring a hearing based on the record and affidavit); Smith v. United States, 348 F.3d 545, 553 (6th Cir. 2003)(In a system dominated by the sentencing guidelines, we do not see how sentence exposure can be fully explained without completely exploring the ranges of penalties under likely guideline scoring scenarios, given the information available to defendant and his lawyer at the time. See United States v. Day, 969 F.2d 39, 43 (3rd Cir. 1992)(observing that "the Sentencing Guidelines have become a critical, and in many cases, dominant facet of federal criminal proceedings such that familiarity with the structure and basic content of the Guidelines (including the definition and implications of career offender status) has become a necessity who seek to give effective representation). The criminal defendant has a right to this information just as he is entitled to the benefit of his attorney's superior experience and training in criminal law). Petitioner's attorney was therefore Constitutionally ineffective when he failed to provide Petitioner with sufficient information to allow Petitioner to make an informed decision whether or not to take the (open plea) in this case. Counsel at the time he advised Petitioner to take the (open plea), he could not inform Petitioner of what his guidelines would be if Petitioner decided to take an (open plea).

8. The Petitioner's attorney did respond to Petitioner's § 2255 in a affidavit, which counsel does not deny Petitioner's claim that the plea agreement offered in this case was a plea agreement for 188 months. Petitioner's attorney affidavit, which

conclusory does not address the fact that counsel advised Petitioner not to execute the plea agreement and why according to his letter. See Reply Brief on COA. Case No. 20-5220 (Page # 8 Exhibit # 1 Letter from Counsel Page # 2 of said Letter). Counsel stated: "I would, in fact, advise you not execute the plea agreement". See Counsel's Affidavit in Response to Petitioner's § 2255 (Doc. # 898-1 Pg. # 1 Pg. Id. 7863). Counsel states: "Mr. Garner essentially alleged that affiant failed to assure that Defendant had a full understanding and knowledge to the plea offered to ... secure an involuntary (sic) and intelligent rejection of a favorable sentence as presented in the context of the offered plea agreement".

9. Counsel was Constitutionally ineffective, which in his affidavit counsel does not discuss the amount of time that was offered in the plea agreement or even discuss that counsel fully informed Petitioner the nature and contents of the plea agreement that was offered in this case. See Smith v. United States, 348 F.3d 545, 552-53 (6th Cir. 2003). A hearing in this case was still necessary in order to determine whether Petitioner's attorney had fully informed him of the nature of the plea agreement. The Sixth Circuit erred in this case, it should have at least remanded this case back to the district court to hold an evidentiary hearing to determine the factual issues surrounding the plea offer because there was no plea agreement filed in this case, and the government contemplated a plea agreement for twenty years. See 28 U.S.C. § 2255(b). The files and records fail to show the Petitioner was entitled to no relief. See Valentine v. United States, 488 F.3d 325, 333 (6th Cir. 2007).

10. Finally, a reasonable jurist would debate the Sixth Circuit's decision to deny the COA because the plea agreement that was offered in this case was for a term of 188 months in imprisonment. Petitioner received a 240 month sentence. See Lafler v. Cooper, 566 U. S. 156, 132 S. Ct. 182, (2012).

ISSUE

COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN HE FAILED TO RAISE
VICTIM ENHANCEMENT ON DIRECT APPEAL, LEADERSHIP ENHANCEMENT,
AND THE IMPOSITION OF RESTITUION ON DIRECT APPEAL
WHETHER THE SIXTH CIRCUIT ERRED WHEN IT DENIED COA

1. Petitioner objects to the Sixth Circuit's denial of his COA when it comes to claims 6, 14, and 15. See Sixth Circuit's Order Appendix A Page # 4. In, Petitioner's Sixth claim, Petitioner asserts that his attorney failed to raise this issue when it came to the restitution portion of his sentence as requested by Petitioner, and counsel was Contitutionally ineff-
etive for failing to raise this issue. The Sixth Circuit erred when it overlooked this issue in the record. Petitioner's attorney in the district court objected to the entry of restit-
ution on the grounds that the requirements of the Manadatory Victims Restitution Act (MVRA), had totally been ignored. See Counsel's Affidavit in Response to § 2255 (Doc. 898-2 (Page. # 5 Pg. Id. # 7873). Counsel stated: " Affiant specifica-
lly objected to the entry of a restitution order on the basis that the requirements of 18 U.S.C. § 3664 had been ignored:

Additionally, the statue does require the court to -- one other thing, judge, about the losses, is the way I read the statue, and I am looking specifically at section 3664, it anticipates that the probation officer actually creates a report, and that is to be supplied, information is to be supplied, by the U. S. Attorneys Office and then provided to the U.S. - U.S. Probation Office, and it says they are to submit a report with a complete accounting.

Now, I don't think what we have what we have here is a complete accounting.

We have a chart here that proports to have an accounting, but there are 202 instances where there is some documenta-

tion provided, and I only found actual supporting documentation from the actual victims for 32 victims.

The 32 victims total amount is like \$ 94,657.00 so I don't think it necessarily meets that".

2. The Sixth Circuit relied on the "thoroughness of the district court's proceedings realated to" this issue. Garner, 2020 WL 430809, at * 7". Which the Sixth Circuit erred when it relied on the district court's opinion rather the the presentence investigation report. Had the Sixth Circuit reviewed the presentence report it would have found that the probation officer in this case never recommneded any amount of restitution. See Sealed Presentence Investigation Report (Doc. # 628 Filed February 18, 2015, Page 30 of PSR, Paragraph # 116 Restitution). The district court in this case abused its discretion when it ordered \$1,807,517.06 in restitution without any information in the presentence report. See Fed. R. Crim. P. 32(c)(1)(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

3. Petitioner objects to the Sixth Circuit's order because prejudice can be shown. See Sixth Circuit's Order Appendix A Page # 4. The Petitioner in this case received an 18 level enhancement for the actual loss amount in this case. According to Petitioner's attorney affidavit and the evidence in this case only 32 victims suffered an actual loss total amount \$ 94,657.00 which this amount would have reduced Petitioner's offense level under U.S.S.G. 2B1.1, to 8 levels more than 70,000 less than 200,000. The victim adjustment should have been level 2. The Guidelines range should have been level 22. Criminal History Score V. The Guidelines range should of been (77-96 months).

4. Petitioner objects to the Sixth Circuit's order because the Sixth Circuit and the district court continue to obfuscate Petitioner's claim regarding his sentence when it comes to the loss amount, and his ineffective assistance of counsel on direct appeal. See Sixth Circuit Order Appendix A Page # 4. Sixth Circuit stated: "Counsel did raise an argument about the related issue of the district court's calculation of loss which this court affirmed. Id."

Counsel was ineffective on direct appeal because had he raise the issue that the presentence report never recommended 2.8 million in restitution to support the Petitioner sentence the Sixth Circuit would have been able to review this sentencing error in the presentence report had counsel raise this issue.

The district court ultimately issued 1.8 million in restitution which the presentence report never recommended this amount for restitution. The evidence revealed that only 32 victims provided supporting documentation that suffered a pecuniary loss under the sentencing guidelines. See United States v. Stubblefield, 682 F.3d 502, 510 (6th Cir. 2012) (Whether a person is a victim under the guidelines for six-level increase if the offense involved 250 or more victims. A victim is a person who sustained any part of the actual loss. U.S.S.G. 2B1.1 cmt. n. 1 Actual loss is the reasonable foreseeable pecuniary harm that resulted from the offense. U.S.S.G. 2B1.1 cmt. n. 3(A)(i)).

The evidence revealed only 32 victims suffered an actual loss for sentencing purposes with an actual loss amount for restitution for \$96,657.00. None of this information is included in the Petitioner's presentence report. Counsel was ineffective on direct appeal when he failed to raise the issue **concerning** the probation officer for failing to identify the number of victims for sentencing purposes and the restitution portion of his sentence.

The Petitioner in this case received a six-level victim enhancement when the evidence revealed on 32 victims suffered a actual loss, which the Petitioner should have received two-level

adjustment for 32 victims.

5. The victims in this case had never been identified. The government in this case never provided the probation officer with a list of victims and amounts subject to restitution so that the probation officer can seek confirmation of these amounts from identified victims. Restitution can only be imposed to the extent that the victims of a crime are actually identified. See United States v. Catoggio, 326 F.3d 323, 328 (2nd Cir. 2003) See also 18 U.S.C. 3663(c)(1)(B)(specifying that the (MVRA) applies when an identifiable victim or victims has suffered a physical injury or pecuniary loss. This requires the probation officer to obtain a list of victims and amounts subject to restitution and seek confirmation of these amounts from identified victims. See 18 U.S.C. § 3664(d)(1)-(2).

6. Petitioner objects to Sixth Circuit's order regarding the fourteenth and fifteenth claims. See Sixth Circuit's Order Appendix A Page # 4. Petitioner's attorney was Constitutionally ineffective for failing to raise both sentencing enhancements. The district court denied these claims, because even if those enhancements had not been applied, it would not have have reduced his advisory guideline range under the Guidelines below the statutory maximum sentence Garner received. See Garner, 2019 WL 7899167, at *6 n.3.

The Sixth Circuit overlooked the record in this case as both enhancements would have reduced Petitioner's sentence below the statutory sentence of 240 months the Petitioner received.

Had the Sixth Circuit reviewed the record in this case specifically the presentence report it would have found that the Petitioner's offense level was a 36, the guideline range was 292-365. The victim enhancement for six-levels would have reduced the Petitioner's sentence to an offense level of 30. Petitioner's guideline range should have been 151-188 months, with the six-level enhancement excluded it would have reduced Petitioner's statutory maximum sentence of 240-months Petitioner received.

7. The Sixth Circuit erred when it denied COA stating that the leadership enhancement would not have reduced Petitioner's sentence. See Sixth Circuit's Order Appendix A Page # 4. Had the Sixth Circuit reviewed the record in this case specifically the presentence report it would have found that Petitioner's offense level was a 36, the guideline range was 292-365. The victim enhancement for six-levels would have reduced Petitioner's offense level 30. Petitioner's guideline range should of been 151-188, months, with the six-level enhancement excluded it would have reduced Petitioner's sentence below the statutory maximum sentence of 240-months. With the one-level for leadership enhancement it would have reduced Petitioner's sentence to 140-175, months, well below the statutory maximum sentence Petitioner received. Therefore, the Sixth Circuit erred when it concluded that counsel was not Constitutionally ineffective on direct appeal because counsel was ineffective when he failed to raise these two enhancements on direct appeal. Petitioner was prejudiced by counsel's performance. A reasonable jurist would debate the victim enhancement because the probation officer failed to identify which victim suffered a pecuniary loss under the guidelines. See United States v. Stubblefield, supra.

ISSUE

**COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE PRESENTENCE REPORT ON THE GROUNDS THAT PROBATION OFFICER FAILED TO IDENTIFY WHICH VICTIM SUFFERED A PECUNIARY LOSS BEFORE SENTENCING FOR SENTENCING PURPOSES AND COUNSEL FAILED TO RAISE AN OBJECTION THAT THE REPORT NEVER RECOMMENDED ANY RESTITUTION
WHETHER SIXTH CIRCUIT ERRED WHEN IT DENIED COA ON THESE CLAIMS**

1. Petitioner objects to Sixth Circuit's Order regarding his twelfth and thirteenth claim against counsel for being

Constitutionally ineffective for failing to make the appropriate objections during the presentence investigation phase. Counsel failed to object to the presentence investigation report before sentencing specifically objecting that the probation officer failed to identify the number of victims that suffered a pecuniary loss for sentencing purposes, and those victims amounts subject to restitution.

2. Counsel's performance was deficient under the circumstances because Petitioner made an objection, but not the appropriate objection that should have been made by counsel. See Sealed Presentence Report (Doc. # 628 Objection No. 9, and probation officers response). Counsel should have further objected to the response of the probation officer because the probation officer failed to identify which of the 425 victims suffered a pecuniary loss under the guidelines. See United States v. Stubblefield, 628 F.3d 502, 510 (6th Cir. 2012) (whether a person is a victim under the guidelines for a six-level increase if the offense involved 250 or more victims. A victim is a person who sustained any part of actual loss. U.S.S.G. 2B1.1 cmt. n. 1. Actual loss is the reasonable foreseeable pecuniary harm that resulted from the offense. U.S.S.G. 2B1.1 cmy. n. 3(A)(i)).

3. Counsel was also Constitutionally ineffective when he failed to make an objection to the presentence report because it never recommended any restitution in this case. See Fed. R. Crim. P. 32(c)(1)(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report with sufficient information for the court to order restitution. The victims in this case has never been identified by the probation officer. See Government's Response to Petitioner's § 2255 (Doc. # 898 Pg. # 13 Pg. Id. # 7855). Government states: "Agent Lowe further explained how these records demonstrated that more than 512 separate victims had wired money and lost money as part of the scheme, even though

he was unable to speak directly with all of them". Petitioner argues the issue with this case is the district court failed to order the Probation Office to conduct a full investigation when it came to the restitution, and identifying these victims that suffered an actual loss for sentencing purposes, and the restitution **portion** of Petitioner's sentence. The government acknowledges the district court's failure to order the Probation Office to conduct a full investigation when it came to the restitution. See Government's Response to Petitioner's § 2255 (Doc. # 898 Pg. # 14 Pg. Id. # 7856). Government states: "Lyons did raise with the district court its failure to require the Probation Office to follow 18 U.S.C. § 3664 by conducting a full investigation and offering sufficient information on restitution".

4. Mr. Lyons did not represent Petitioner during the pre-sentence investigation phase of Petitioner's case. Which Mr. Lyons objection that he raised proves that counsel that represented Petitioner during the presentence investigation phase was Constitutionally ineffective for failing to raise the objection that the district court is required to order the Probation Office to conduct a full investigation and offer sufficient information on restitution. Restitution can only be imposed to the extent that the victims of a crime are actually identified. See United States v. Catoggio, 326 F.3d 323, 328 (2nd Cir. 2003). See also 18 U.S.C. 3663(c)(1)(B) (Specifying that the (MVRA) applies when an identifiable victim or victims has suffered a physical injury or pecuniary loss. This requires the probation officer to obtain a list of the victims and amounts subject to restitution and seek confirmation of these amounts for identified victims. See 18 U.S.C. § 3664(d)(1)-(2).

5. Petitioner was prejudiced by counsel's performance. Had counsel made the appropriate objections at the appropriate time the outcome of Petitioner's case would have been different.

The record in this case will speak for itself. The victims had never been identified for sentencing purposes under the guidelines, and there is no information in the Petitioner's presentence report to support the amount of restitution that was ordered in this case, which the district court ordered 1.8 million in restitution without any information in the presentence report to support this amount. **See** Sealed Presentence Report (Doc. # 628 Filed February 18, 2015, Page # 30 of PSR, Paragraph # 116 Restitution). Probation Office never recommended any restitution in this case. Petitioner was sentenced on the basis of inaccurate information in violation of his due process because of counsel's failure to raise the proper objections at the appropriate time. At the restitution hearing in this case which was held on April 20, 2015, it was revealed that only 32 victims suffered an actual loss total amount \$ 94,657.00. None of this information is included in the Petitioner's PSR when it comes to these 32 victims actual loss amount \$ 94,657.00.

6. Prejudice can be shown by counsel's performance. **See** Mr. Lyons Affidavit to Petitioner § 2255 (Doc. 898-2 Pg. # 5 Pg. Id. # 7873). Counsel states: "I only found actual supporting documentation from the actual victims for 32 victims. The 32 victims total amount is like \$ 94,657.00". This amount would have changed Petitioner's guidelines range to 8 levels enhancement for more than 70,000 less than 200,000. The victim enhancement would have been two-levels instead of six-levels. the guideline range should have been level 22 offense. Criminal History Score V. The guidelines range should have been 77-96 months.

ISSUE

COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO CHALLENGE THE ILLEGAL SEARCH OF PETITIONER'S EMAIL ACCOUNT IN VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHT AGAINST ILLEGAL SEARCHES. WHETHER THE SIXTH CIRCUIT ERRED WHEN IT DENIED COA ON THIS CLAIM

1. Petitioner objects to Sixth Circuit's order regarding Petitioner's seventh claim. Counsel was Constitutionally ineffective for failing to challenge the search of his email account, without probable cause and a warrant to do so. See Sixth Circuit's order Appendix A Page # 3.

This search violated Petitioner's Fourth Amendment right of the United States Constitution against illegal searches and seizures which provides:

"The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched or things to be seized".

Petitioner contends that there was never a warrant filed in this case. Therefore, Counsel was Constitutionally ineffective for failing to challenge the search of Petitioner's email account damiya22@rocketmail.com.

2. Petitioner objects to Sixth Circuit's order because Petitioner can show prejudice. See Sixth Circuit's Order Appendix A Page # 3. Counsel was Constitutionally ineffective for failing to object to the transactions that was used in the email account damiya22@rocketmail.com for sentencing purposes. Those transactions in the email account contained an incomplete record of transactions, and could not be used for sentencing purposes.

3. There was never a presentence investigation performed

concerning the email account damiya22@rocketmail.com to identify what kind of loss this was under the definitions of the guidelines. These losses were verified by Agent Lowe, and not the probation office. See district court's Memorandum Opinion & Order (Doc. # 558 Pg. 14 Pg. Id. # 3153). district court stated: "Agent Lowe identified and verified approximately 1.2 million in domestic transactions in 614 days".

4. The PSR in this case does mention the Conspiracy started August 26, 2010, thru September 15, 2012, but only uses the ledger to calculate the loss in the PSR. The PSR does not mention the email account, but the district court used Agent Lowe's testimony regarding the email account to sentence the Petitioner violating Petitioner's due process. See district court's Memorandum Opinion & Order (Doc. # 558 Pg. # 14 Pg. Id. # 3153). district court stated: "Agent Lowe testified about an email account outside of the Conspiracy August 26, 2010 thru April 2012". These transactions that was contained in the email account was used to calculate Petitioner's sentence, but the PSR does not list the transactions that was inside the email account or the email account damiya22@rocketmail.com, that is associated with those transactions form August 26, 2010 thru April 2012. The PSR does not identify what kind of losses these transactions were under the definitions of the guidelines. See (2014) Guidelines. U.S.S.G. 2B1.1(b)(1(A)(i). Actual loss defined - Actual loss means the reasonable foreseeable harm that resulted from the offense. (ii) Intended loss defined - Intended loss means the pecuniary harm that the defendant purposely sought to inflict; includes intended pecuniary harm that would have been impossible or unlikely to occur. (iii) Pecuniary Harm - means harm that is measured in money. Accordingly pecuniary harm does not include emotional distress, harm to reputation or other economic harm.

5. Petitioner's attorney was Constitutionally ineffective when he failed to make an objection on the basis that the transaction could not be used for sentencing purposes under the 2014 Guidelines. Counsel's performance prejudiced the Petitioner. Counsel's failure to investigate, and make timely objections that these losses were not verified by the probation department as an actual loss prejudiced the Petitioner. These losses that were used to determine the Petitioner's sentence in the email account from August 26, 2010 thru April 2012, were not mentioned in the probation officer's report, but the probation officer still used these same dates that was mentioned in the email account.

Had the probation officer conducted a presentence investigation it would have been found that these dates and transactions in the email account could not be used for sentencing purposes because the records in the email account was an incomplete record of transactions, and could not be considered an actual loss for sentencing purposes. Had counsel raised this objection the government would not have been able to use the 614 days 2.1 million in transactions outside of the ledger to sentence the Petitioner. Agent Lowe identified these losses not the probation officer in this case.

**THE SIXTH CIRCUIT ERRED AFFIRMING THE DENIAL OF PETITIONER'S
§ 2255 MOTION WHERE THE DISTRICT COURT FAILED TO GRANT MOTION FOR
DISCOVERY AND PRODUCTION OF DOCUMENTS PURSUANT TO RULE 6
GOVERNING § 2255 PROCEEDINGS AND EVIDENTIARY HEARING**

1. Petitioner in this case requested discovery and included a proposed set of interrogatories. The district court erred without requiring counsel to respond. **See** 28 U.S.C. § 2246 which states: "On application for a writ of habeas corpus, evidence may be taken orally or deposition, or in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits".

2. Petitioner's attorney did file an affidavit under the § 2255 proceedings which answers to these interrogatories would have provide the Petitioner with the necessary proof to support Petitioner's claim of ineffective assistance of counsel. **See** Motion for Discovery (Doc. # 921 Interrogatories to A. Stephens). These interrogatories Petitioner seeked to be answered were related to the this alleged inventory search of his vehicle. **See** Government's Response to Petitioner's § 2255 motion (Doc. # 898 Pgs. # 11-12 Pg. Id. # 7853-54). Government stated: "Thus, the incriminating evidence against Garner that was found during a valid inventory search, even though it was not conducted pursuant to a warrant, was admissible and not subject to suppression. Futhermore, although nothing in the record discusses the procedures for the inventory search that was conducted".

Mr. Stephens Affidavit (Doc. # 898-1 Pg. # 3 Pg. Id # 7865). Counsel stated: " Contrary to Mr. Garner's assertion, counsel looked at the stop determined there was probable cause for the same and as a result of Mr. Garner's own sloppy activites by having left fruit and tools of his criminal behavior in plain view subject him to a lawful search and seizure of his vehicle".

3. Petitioner in this case provided the district court with the judgment from the State court of Indiana. The State court determined that the Plaintiff's provided insufficient evidence to conclude that the 2005 Nissan Maxima was knowingly used to facilitate the transportation of instruments and equipment to obtain stolen property in excess of \$ 100.00, or any crime in Indiana. See Motion for Discovery (Doc. # 921 Exhibit # 1 Judgment State court of Indian). The district court in this case therefore erred when it failed to have counsel answer the interrogatories pursuant to 28 U.S.C. § 2246, to prove Petitioner's ineffective assistance of counsel claim.


4. Petitioner also requested an evidentiary hearing in his § 2255 proceedings. See Motion for Evidentiary Hearing (Doc. # 920 Pg. # 2). Petitioner stated: The government did respond also see (R. 898 P. 11-12 Id. # 7853-54 which they conceded that this search "was not conducted" pursuant to a warrant." Furthermore although "nothing in the record" discusses the procedures for the inventory search that was conducted. " The Petitioner does not understand why the government did not request for an evidentiary hearing to be held to clear up this issue."

5. The district court erred when it failed to conduct an evidentiary hearing pursuant to 28 U.S.C. § 2255(b). The Petitioner's files and records of the case fail to conclusively show that Petitioner is entitled to no relief. The government has conceded that there is "nothing in the record" that discusses the procedures for this alleged inventory search. The record in this case needed further development that would have entitled Petitioner to the relief that he was seeking concerning this alleged inventory search. The Sixth Circuit therefore erred when it affirmed the district court's denial of Petitioner's evidentiary hearing motion.

CONCLUSION

Petitioner, Nicholis Corey Garner, has been deprived of basic fundamental rights guaranteed by the Fourth, Fifth, and the Sixth of the United States Constitution and seeks relief in this Court to restore those rights. Based on the arguments and authorities presented herein. Petitioner's guilty plea was sustained in violation of his due process, and the district court in this case made no effort whatsoever to determine if the plea did not result from force, threats, or promises in violation of Fed. R. Crim. P. 11(b)(2). Petitioner's attorney coerced Petitioner into pleading guilty in this case. Petitioner was deprived of his right to effective assistance of counsel in the district court and appellant court. Petitioner prays this Court will issue a writ of certiorari and reverse the judgment of the Sixth Circuit Court of Appeals. 1

Respectfully submitted on this 23rd day of February 2021.


Nicholis Corey Garner # 10971-028
F.C.I. Oakdale 1
P. O. Box 5000
Oakdale, LA 71463

1 If this Court elects not to address the issues presented in this petition at this time, it is requested that the writ issue and the matter be remanded to the Sixth Circuit of Appeals for reconsideration in light of this Court's opinion in McCarthy v. United States, Brady, Hill, Wong Sun, procedures set forth under the Mandatory Victims Restitution Act (MVRA) 18 U.S.C § 3664(a).