No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

FREYA D. PEARSON
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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II. QUESTIONS PRESENTED

1. Does a defendant have a Constitutional Right to Effective Counsel from beginning to end, while in their Direct Appeal? And if that defendant has not waived their right to Counsel in their Direct Appeal, then whether a defendant has a right to be notified if the Appellate Court receives a request from Counsel to withdraw, so that the defendant may object?

2. Does the unilateral broad interpretation of 26 U.S.C. 7201 allow the Appellate Courts to exceed the authority granted to the IRS by Congress, by allowing the IRS to assess a tax, without issuing a Notice of Deficiency in "7201" criminal cases, and does that Broad interpretation cause a judicially created exemption for the government to prove a tax deficiency? And, For the purposes of 26 USC 7201, If the IRS's practice for non-filers, is to consider them having filed a return owing $0 in taxes, with a $0 deficiency, can the gov still assess a tax deficiency from some other source, in contradiction to the IRS's $0 deficiency, without the IRS actually issuing a Notice of Deficiency to assess a tax above $0?

3. Does the requirement by the Appellate Court, that a Defendant challenge an Ineffective Assistance claim and/or Prosecutorial Misconduct claim in collateral review, where collateral review is the first place a Defendant can present a challenge to their conviction, making the initial-review collateral proceeding a defendants "one and only appeal" as to those claims, justify an exception to the Constitutional rule that there is no right to counsel in collateral proceedings? And, does the defendant have a Right to Counsel in that initial-review collateral proceeding?

4. When the Government amends the 18 USC 1343 Wire Fraud Statute, to use a "Fraud By Omission" alone standard; are acts to conceal, and/or duty to speak, required elements under this amended use, and is the government required to allege those amended elements in the indictment, and at trial? And since the use of §1343 has been altered from the Statute and model instruction requirements, should there be a Jury Instruction for the amended "By Omission" alone standard?

5. Is the Eighth Circuit imposing an improper and more stringent Certificate of Appealability (COA) standard that contravenes this Court's precedent?

LIST OF PARTIES AND RELATED CASES

PARTIES

Freya D. Pearson- Petitioner (Pro Se)

United states of America (Respondent)

RELATED CASES

United states of America v. Freya D. Pearson- No. 14-00306-01-CR-W-BP
Western District of Missouri
Judgment entered-October 16, 2017

United states of America v. Freya D. Pearson- No. 17-1438
Eighth Circuit Court of Appeals
Judgment entered- May 06, 2019

Freya D. Pearson v. United states of America- No. 20-000985-CV-W-BP
Western District of Missouri
Judgment entered- June 10, 2021

Freya D. Pearson v. United states of America- No. 21-2609
Eighth Circuit Court of Appeals
Judgment entered-January 03, 2022

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22. Maynard v. Cartwright, 486 U.S. 356, 361, 108 S. Ct. 1853, 1857-58, 100 L. Ed. 2D 372 (1988)

23. LaSalle, 437 U.S. at 317, 98 S. Ct. at 2368

OPINIONS BELOW

United states of America v. Freya D. Pearson- No. 17-1438
Eighth Circuit Court of Appeals
Judgment entered- May 06, 2019
UNPUBLISHED- Appendix D

Freya D. Pearson v. United states of America- No. 20-000985-CV-W-BP
Western District of Missouri
Judgment entered- June 10, 2021
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Freya D. Pearson v. United states of America- No. 21-2609
Eighth Circuit Court of Appeals,
Judgment entered-January 03, 2022
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Freya D. Pearson v. United states of America- No. 21-2609
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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Court of Appeals denied rehearing March 16, 2022. This petition is being filed within 90 days after judgment, pursuant to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. DISTRICT COURT PROCEEDINGS

1. Petitioner was charged in the District Court with three counts of Wire Fraud (By Omission), four Counts of Money Laundering, one count of Tax Evasion, and one count of False Statements. The Governments scheme to defraud was "Pearson materially omitted to disclose to Wilson that she would use the money to gamble and for her own personal expenses."

2. The alleged victim (Ms. Wilson) testified some length at trial, but she stated that she did not remember much of what happened in 2010. On examination, Ms. Wilson had the following exchange with the Gov: (TR pg 312, line 13):

AUSA- Q- If Freya Pearson had told you she was going to use your money to gamble and buy things or herself, would you have signed those papers?

Ms. Wilson- A- No, No way.

Whether Ms. Wilson would have signed, had she known more, is not the issue, the issue is that she "did" freely sign. ("How the original parties and their successors conducted themselves in relation to the agreement is instructive in our determination of what must have been intended."). The issue is also whether or not anything was concealed from Ms. Wilson, because the Indicted charge was "Wire Fraud By Omission", which requires "acts to conceal". The evidence reflects that Ms. Wilson participated in the behavior that the AUSA alleges was omitted from her. The prosecutor said, that, had Ms. Wilson known what I would do with the money, she

would not have lent it, i.e. "fraud by omission". But, "After" Ms. Wilson sent the first wire, Ms. Wilson and I **both** flew to Las Vegas for 9 days, and went **gambling and shopping**, and then we returned, went to a few local casinos, and Ms. Wilson then sent 2 more wires. The Gov makes allegations of what I did with the money, but ignores the documented fact, that Ms. Wilson was there with me, while I was doing most of it, which negates their Theory of "Fraud By Omission". There was nothing concealed from Ms. Wilson, and although the Prosecutor repeatedly says that there were "acts of concealment", she never actually says what they are, she just says "many".

3. Counts 1-8 and Counts 9 were separate, and should have been severed. However, when I asked for severance, the government Lied to the Court, and accused me of making a statement, that I never made. There was no evidence that the statement was true, it was simply made up by the AUSA to manipulate a favorable ruling in the severance argument. This False statement was relied on by the Magistrate Judge, and my claim in my §2255 regarding this matter was not adjudicated.

4. I was convicted of Tax Evasion, and there were **NO** acts of evasion in the indictment, or presented at trial, and the CJA Attorney did not present a defense for Tax Evasion. Also, I was charged with "failing to make a return" which is not a Statutory offense.

5. The Government presented two different trials in one, by being allowed to have one theory of liability for the funds for counts 1-8, and a different theory of liability for those same funds for count 9.

6. The Government tampered with the only black juror in the entire jury pool after the jury was selected. I should have had a new Jury pool.

7. I was convicted on all of the counts, and was sentenced to 5 years, and 3 yrs supervised release.

II. APPELLATE AND POST- CONVICTION PROCEEDINGS

8. On direct appeal, The Appellate Court allowed my Counsel to withdraw (January 2018), Without, notifying me that I was no longer represented by Counsel, and while my appeal was still pending. They forced me to proceed Pro Se. I did not waive my Right to Counsel, they took it. They ruled on my Appeal May 2019.

9. I raised several arguments regarding Ineffective Assistance of Counsel, and Prosecutorial Misconduct, and they were taken as part of the Direct Appeal after I was Pro Se. The Appellate Court Affirmed my convictions, and stated that the Ineffective Assistance and Prosecutorial Misconduct claims were better raised in collateral proceedings. Those claims were not adjudicated in my Direct Appeal, where I presented them.

10. The Appellate Court Affirmed my convictions on arguments that the government had not presented in Trial.

11. I filed a Petition for a Writ of Habeas Corpus on December 14, 2020, pursuant to 28 U.S.C. §2255. The Petition asserted Ineffective-Assistance-of-Counsel, Prosecutorial Misconduct claims, and additional Constitutional claims.

12. I argued in my §2255 that I had a Constitutional Right to Counsel in my Direct Appeal. The District Court stated that it had no authority to adjudicate this claim.

13. The other issue is that the interest **income** the government accused me of receiving **from** the corporation Recidivism At Work (RAW) in Count 9, was $287.32 for 2010, (according to bank

statements) and I have more than enough write-offs to **not** have a tax deficiency. The income cant be $287.32 in count 9 and different in counts 1-8, in the same trial, both dealing with "RAW", using the same funds. Please take note, that I have not received ONE notice from the IRS prior to trial regarding a tax deficiency, or any tax concern for 2010, and that is **not** standard procedure.

14. The District Court dismissed my §2255 Petition without a hearing, finding that some of my claims did not warrant relief, and refusing to adjudicate the other claims. The District Court refused to adjudicate any Prosecutorial Misconduct claims. Most of my § 2255 claims were not adjudicated at all.

III. REASONS FOR GRANTING THE WRIT

Without reaching the merits of most of my Constitutional claims, and without conducting an evidentiary hearing, the District Court abused its discretion, by drawing conclusions not supported by the record, misstating facts, basing decisions off of uncharged offenses, failed to adjudicate **all** of my claims, and ruled that the motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (which was based upon Ineffective Assistance of Counsel and Prosecutorial Misconduct) was denied. The District Court denied my COA. The Appellate Court denied my COA Appeal and rehearing without explanation.

Question 2- TAX DEFICIENCY for §7201

There was **NO** Tax deficiency in my case. However, the fact that the Court Appointed Trial Attorney Failed: to **#1-** Have an accountant prepare a tax return with my business write-offs for 2010, to see if a Tax was in fact owed, **#2-** Make sure that the Gov has produced evidence to solidify their allegation that Taxes were in fact owed, **#3-** or To request my IRS file; is proof of his ineffectiveness.

The issue of determining a Tax Deficiency is exceptionally important and warrants the highest level of review. The AUSA's are incentivized in a §7201 Tax Evasion case to "allow the IRS to be an information gathering agency for them, by allowing the IRS to configure and assess a tax deficiency against the defendant, without issuing a Notice of Deficiency (as Required for the IRS by Congress, before assessing a tax), thereby preserving maximum flexibility for the AUSA to assert whatever deficiency arguments it wants at trial, pretending that they themselves arrived at a Deficiency amount. Since the IRS was allowed to be an information gathering Agency for the AUSA, (argued in my §2255 but my claim was not adjudicated) the AUSA simply used all of the information collected and calculated by the IRS, without actually determining a deficiency herself. It was not the AUSA who determined the deficiency in my case, it was the IRS that determined the deficiency amount. In 2013 the IRS issued a Notice of Deficiency to an 11 year old address (2001), that was NOT the last known address in my tax file, (signaling the **need** to issue the Notice), because it was Assessing a Tax against me (2013 NOD was in Discovery). The IRS failed to properly issue the Notice. If the IRS felt that it needed to issue a Notice of Deficiency because they were assessing a Tax, then how can the Lower Courts allow the AUSA to use the IRS's Tax Assessment in a criminal trial, as their own, when the IRS Failed to complete the process, to complete its Tax assessment, in order to determine a Deficiency, a

process required by Law for them to do. This case is a good example of the IRS's patterned practice of attempting to insulate itself from taxpayer challenge, when they fail to follow the proper procedures to determine a Deficiency, here, with the help of the AUSA.

This practice affects the Defendants Rights, and carries over into the civil side, when a defendant, turned Petitioner, files an Appeal in Tax Court, after the IRS does send a "proper" Notice Of Deficiency. Then the IRS takes the position, that although it never previously assessed a Tax through a Deficiency Notice, that you now cannot dispute that Tax, because of the conviction. 26 U.S. Code § 7803 says the taxpayer has a Right to challenge the IRS's determination, however, with the method being used here, a taxpayer is not free to challenge the IRS determinations, because it says the conviction Estops it. This is not the first time that relatively insignificant legal workarounds soared into far more significant infringements on Taxpayers' Rights, that spill over into other Courts.

So in essence, since the law requires the IRS to perform certain procedures, such as issuing a "NOD" BEFORE assessing a tax, the AUSA, simply had the IRS assess the tax, and then presented a Tax Deficiency as if she had done that herself, **after** the IRS failed to complete the Legally required process. This is evident by the fact that ALL of the numbers presented in my case by the AUSA, were the EXACT numbers that the IRS presented in its "improper" Notice of Deficiency from 2013. I was indicted in 2014. The IRS is being allowed to assess a tax, and provide a deficiency amount to the US Attorney for her to use in my criminal case, without issuing the proper deficiency notice that allows them to do so. In §7201 cases, the IRS seems to be allowed to go through the back door, to do something that it failed to do through the front. This practice robs the defendant of their Right to

Appeal the Tax Deficiency later in Tax Court, and enables the AUSA to side step the deficiency requirement in §7201 cases.

Another issue arises in this process. The IRS has a "Practice" of processing un-filed returns, as if the taxpayer filed a return with a tax owed at $0. This issue needs to be addressed, because of the practicing patterns and procedures of the IRS, in "processing" these non-Filer tax returns resulting in a Tax Deficiency owing at $0. This IRS practice tends to generate a conflicting argument regarding Tax Deficiencies in §7201 criminal cases, where the IRS is the collector of Tax, their involvement in a criminal trial when it comes to §7201 is substantial, and the government takes an opposing position. The fact that §7201 requires a Tax Deficiency is an issue for the government, when the IRS treats Non-filers as having filed a return with a Tax Deficiency owing at $0, and to ignore this IRS practice and procedure, you might as well settle the accused's fate and reduce the trial itself to a mere formality, in which the AUSA can say there is a Tax Deficiency, when the IRS (the collector of Tax) says there is **None**. And there continues to be no Tax Deficiency, until the IRS assesses a Tax, through the required process, by using a Notice of Deficiency.

The AUSA and IRS hold enough advantages over Defendants already, and there is no basis for allowing the agency to circumvent the Notice of Deficiency requirement for the IRS to assess a tax, by falsely stating that the AUSA did. This is a Circuit wide problem regarding determining a Deficiency amount required for a 26 USC 7201 charge. 26 U.S. Code § 7803 spells out a Taxpayers Rights, but this practice tramples all over them.

Questions 1&3- RIGHT TO COUNSEL

"The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Gideon v. Wainwright, 372 U. S. 335, 344 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. See, e.g., Powell v. Alabama, 287 U. S. 45, 68–69 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence")."

The District Court stated in its rejection of the "Denial of Counsel" claim in my § 2255, "Ultimately, these details – while relevant – are not the basis for the Court's rejection of this ground for relief. The Court denies relief simply because it is not empowered to second-guess the Court of Appeals' decisions, or to declare that its decisions are incorrect." Clearly, this claim has NOT been adjudicated. However, The District Court cannot "deny or reject relief" for a claim, that it has determined that it has NO authority to adjudicate on the merits. I did not waive my Right to Counsel in my Direct Appeal, I was not even notified of the withdrawal request, the Appellate Court errored. Counsel simply asked to withdraw, nothing more. The Eighth Circuit ignored this issue in my COA Appeal.

I begged the Appellate court to substitute a new appointed counsel, but the court refused, requiring me to proceed through the first appeal Pro Se. This was a denial of my Right to counsel on Direct Appeal.

"(Douglas v. California, 372 U.S. 353 (1963); Evitts v. Lucey, 469 U.S. 387 (1985). Though the defendant was appointed an attorney at the outset and his actions caused this attorney to withdraw, he never requested an opportunity to proceed pro se, so he did not waive his right to counsel."

The Eighth Circuit's decision to deny Counsel is flawed, because I was entitled to Counsel in my Direct appeal, and I did not waive that Right. "Koenig v. North Dakota, 755 F.3d 636 (8th Cir. 2014) The state court decision that the defendant was not entitled to appointed counsel on direct appeal was clearly contrary to established Supreme Court jurisprudence. The fact that the defendant engaged in manipulative conduct did not disentitle him to counsel." "Douglas v. California, 372 U.S. 353 (1963), decided the same day as Gideon v. Wainwright, 372 U.S. 335 (1961), the Supreme Court held that the right to the assistance of counsel at state expense applied to defendants on a first level of appeal, extending Gideon to the first stage of appeal."

Not only were meritorious grounds missing from my appeal, but Oral Arguments, as well as Rehearing en banc were the next steps that I needed an Attorney's help in. Without Counsel in my Appeal, my trial claims, trial-ineffectiveness and prosecutorial misconduct claims are not being heard.

In the Eighth Circuit's Appellate Affirmation(2019) they stated: "This court declines to consider Pearson's ineffective-assistance and prosecutorial-misconduct claims on direct appeal. See United States v. Ramirez-hernandez, 449 F.3d 824, 826-27 (8th Cir. 2006) (ineffective-assistance claims are usually best litigated in 28 U.S.C. §2255 proceedings, where record can be properly developed); Dakota Indus., Inc. v. Dakota Sportswear, Inc., 988 F.2d 61, 63 (8th Cir. 1993) ("Generally, an appellate court cannot consider evidence that was not contained in the record below.")".

Although my claims were submitted in my Direct Appeal, the Court declined to hear them, which ***required*** me to submit them in my §2255 proceedings. There are two issues with this, the first, Pro Se defendants are at a disadvantage, and by deliberately requiring movement of trial ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the Appellate Court significantly diminished my ability to obtain relief. Two, It is within the context of this practice that counsel's ineffectiveness and the AUSA's misconduct will not be reviewed by a **Higher Court**, it will be sent back to the original Court, where it was ignored in the first place. Now, the District Court is denying them, and the Appellate Court is refusing to hear them, **"again"**, this time by denying my COA, these Constitutional claims are COMPLETELY EVADING REVIEW. My issue is not just with my lawyers' competence" but with the Court's systemic failure to provide continual legal representation to defendants who cannot afford it, when it is their fundamental Right to have it.

If I am being denied the ability to have my claims adjudicated in my Direct Appeal, a Higher Court, then I should be entitled to Counsel in the Collateral proceedings that will address these claims, since it is the first time that I will be allowed to present them. It is my "one and only appeal" as to those claims. Requiring a defendant to present her claim of ineffective assistance of trial counsel and/or prosecutorial misconduct in the initial-review collateral proceeding, undertaken without counsel, is not sufficient to ensure that proper consideration is given to substantial claims. Pro Se defendants just aren't qualified.

My CJA Attorney stated, "I have to watch what I do to the Prosecutor so as to not affect my future cases", when asked about not addressing Prosecutorial Misconduct. Then followed with an email, when I had an issue with not being notified about an extension, that stated, "I do not need your permission to extend a courtesy to someone that I have to work with for the rest of my career". Because of his fear of

his future cases and his career, he attributed the government's withholding of exculpatory evidence, fraud upon the court, suborning perjury, and other misconduct to an honest mistake, that doesn't require repercussions, rather than ask for judicial intervention. You may choose to ignore one of those statements, but combined they set a dangerous pattern of disloyalty for any defense attorney to be allowed to take, and still be considered loyal to his **indigent** client. When CJA Attorneys worry that prosecutors may retaliate against their future cases, they are no longer acting with their clients' best interests in mind.

This issue affected both my trial and Direct Appeal, because he was the Trial and Appellate Attorney, and since he had this fear, he did not present meritorious arguments in my trial or Direct Appeal, if they would negatively affect the Gov. Then the Appellate Court simply allowed him to withdraw, and forced me to proceed Pro Se. His ineffectiveness caused me to use my Direct Appeal in a way that exhausted the process, but was not beneficial, because Counsel was afraid to upset the Gov. Then when I repeatedly asked for new counsel, I was denied. Counsel is needed throughout the entire Direct Appeal, to identify all of the Ineffective representation as well as Prosecutorial Misconduct and other Constitutional claims and issues that come with Appeal, because Pro Se defendants rarely know how to properly identify when their Constitutional Rights have been violated. Counsel is also needed in case a Rehearing En Banc petition is needed, which is part of the Direct Appeal process, of which I, a Pro Se person, did **NOT** know at the time, and missed that opportunity.

Question 4- FRAUD "BY OMISSION" NEEDS A JURY INSTRUCTION:

The District Court found that a false representation is a required element of a federal fraud offense and that the indictment failed to allege any express misrepresentation in "US v Steffen". The District Court

further held "absent a statutory, fiduciary, or independent disclosure duty, mere silence (nondisclosure) is insufficient to state a fraud claim. (8th Cir Affirmed)". There are only a couple cases, that have criminally charged a "By Omission" standard alone of 18 U.S.C. 1343, they did not make it pass the indictment stage, and in the Eighth Circuit only "Steffan". The ONLY reason that I made it pass the indictment stage, was because my attorney was Ineffective, and did not ask for the Indictment to be dismissed. What I read in other Cases was, when Prosecutors charged a "By Omission" standard of §1343 they also alleged a "Misrepresentation" as well. They did not just Charge a "By Omission" standard alone. So, there was no case precedent and NO Jury Instruction for this type of charge. The Eighth Circuit mentioned that there may need to be a Jury Instruction, in "Steffen", but since "Steffen" was dismissed at the indictment stage, there was no Jury Instruction created for the "By Omission" standard. If Prosecutors are going to Trial on a "By Omission" standard **alone** of §1343, which alters the §1343 Statute, then there needs to be a Jury Instruction. Because §1343 Wire Fraud Statute, has a Misrepresentation element, and the "By Omission" standard alone has additional elements, and no misrepresentation element.

In my case, there was no "Misrepresentation" allegation charged in the indictment. In my case, not only should there have been a "By Omission" Jury instruction, but what alterations the District Court did provide in an instruction, were kind of an after thought, because the Court did not require the AUSA to argue and prove these altered **elements** to the jury **at trial**, nor did the Court call them elements. Mainly because the Eighth Circuit has YET to define what is required for the "By Omission" standard alone. Although the Eighth Circuit decided in "Steffen", that a Jury instruction may be needed, they won't even consider the issue debatable for the purposes of a COA to address the issue. So the District Courts lack a uniform decision to follow from the Circuit. The District Courts are not requiring the

additional elements to be proven at trial, or even calling them elements, for the "By Omission" standard alone, and they should be.

In reading §1343 cases, the Appellate Courts take the position, that although they may agree with the defendant, regarding the "by omission' standard, they are still affirming convictions under the "By Omission" alone standard, because, this issue is not being raised by Counsel in the District Courts, and because of that, the Appellate Courts are saying that the issue was not "Plain Error". They say it was not Plain Error, because the Court followed the Circuits Jury Instruction for 18 U.S.C. 1343 Wire Fraud, even though that instruction did not have the "By Omission" (alone) standard in it, nor does that instruction have the added elements. The use of this "By Omission" standard alters the §1343 Statute, but has no Jury instruction. Here is a "By Omission" case with this issue of Jury instruction, "Although the jury in this case was not instructed on the need for a duty to disclose, we affirm the wire fraud convictions nonetheless because the omission was not reversible plain error." (US V Shields, D.C. No. 5:12-cr-00410-RMW-1). The District Courts follow the Model Instructions, but there is no controlling case law stating that there needs to be a duty to disclose or active concealment in order to convict for wire fraud where a material omission was involved. Thus, the error is not "clear and obvious."

This is a very important issue that needs to be addressed, regarding the "By Omission" Standard of 18 U.S.C. 1343 Wire Fraud. The "By Omission" standard adds two elements, a duty to disclose, and/or acts to conceal, and because these are now elements, they need to be proven at trial, and not just added to a Jury Instruction at the end of trial, which was the case here. There is an old idiom that says: "the devil is in the details." It generally means that although something may seem simple, the details are complicated and likely to cause problems, as is the case here. A hearing was needed on this matter.

The scheme to defraud alleged in my indictment did not match the elements in the §1343 Wire Fraud Statute. "If the proof at trial fails to show a scheme to defraud as that term is used in the federal fraud statutes, insufficient evidence exists to uphold a conviction. U.S. v. McNeive, 536 F.2d 1245, 1252 (8th Cir.1976). US (Appellee), v. David F. BROWN, Tore T. DeBella, Richard A. Reizen, Robert F. Ehrling, Defendants-Appellants. No. 93-4063." This is a Circuit wide problem, and the result of not addressing this, will be the AUSA's benefiting from creating their own Statute without guidelines. I needed Counsels help.

Question 5- HELD TO A MORE STRINGENT STANDARD IN COA APPEAL

Panel rehearing denial of my COA, which overlooked or misapprehended the COA points of law, was inappropriate. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (citing Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). The Supreme Court reiterated in Buck v. Davis that the COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis." 137 S. Ct. 759, 773 (2017). Courts undertaking a COA inquiry should "ask only if the District Court's decision was debatable." Id. at 774 (quoting Miller-El, 537 U.S. at 348) (internal quotation marks omitted).

The bar is a low one, and yet I am being held to a more stringent standard than is required: "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id. (alteration in original) (quoting Miller-El, 537 U.S. at 338) (internal quotation marks omitted). "[M]eritorious appeals are a subset of those in which a certificate should issue, . . . not the full universe of such cases." Jordan, 135 S. Ct. at 2651 (Sotomayor, J., dissenting from the denial of certiorari) (alteration in original) (quoting

Thomas v. United States, 328 F.3d 305, 308 (7th Cir. 2003)) (internal quotation marks omitted). Three members of the Supreme Court have indicated that a disagreement among judges as to a habeas claim, in the case under review or in the instant case, an analogous case, "alone might be thought to indicate that reasonable minds could differ—had differed—on the resolution" of the claim. See Jordan v. Fisher, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari) (emphasis in original)."

The failure of my CJA Attorney to: have a Tax Return completed, to determine if a deficiency existed on a Tax Evasion charge; allow NO evidence to be submitted on Count 9 ; allow the IRS to use its Summons powers for HUD's evidence in Count 9; ignore the two different theories of liability for the same funds, in the same trial; miss all of the Jury instruction issues, is a blatant display of his Ineffectiveness, and are debatable issues. He even told the Judge, that he gets constructive amendment and variance mixed up, and yet NO ONE questioned his attempt to argue those very things to the Appellate Court in my Appeal. These issues are debatable for a COA.

The Courts seems to have an issue with calling CJA Attorneys and Federal Defenders, Ineffective. The Appellate Courts expect Attorneys to know, what Pro Se litigants don't, so they are not given a pass for missing meritorious arguments, but, the **Indigent** Defendant is penalized for the Attorneys failures. So, when my CJA Attorney tells the Judge in Court, that he confuses the difference between "A Constructive Amendment" and a "Variance", that should alert the Court that there is an issue that needs to be addressed. Then that same Attorney tells the Court, that he cannot answer questions from the Court, regarding his OWN objection, without the aid of notes, that he cannot find. Then Attorney Speaking to the Judge at the Instruction phase: (Trans IV 608/ 7-13)

MR. JOHNSTON: "Forgive me, Your Honor, **my client raised another issue**. To the extent that the Court -- let me say it this way. In the Steffen case, we also believe that an act of concealment is an element of the indictment under the Steffen case. And therefore, if we're proceeding under the other fraud, fraud by omission, that that should be charged, as well."

The Court was on "Notice", that Counsel was struggling with the knowledge necessary for his clients defense, and should have intervened.

NEXT

Here (Count 9), the Indictment alleges, that I made three very specifically identified false statements between March, 2010, and February 14, 2011, to the Weston Housing Authority: "1) that she had only $60 in bank accounts, when in fact, on February 14, 2011, she had at least $3,200 in bank accounts controlled by her; 2) that she lived in Kansas City, Missouri, when in fact, she moved to the St. Louis metropolitan area; and 3) that she had no other income, when in fact she received interest income from her Bank of America RAW savings account number 5535." (Doc. 1, ¶¶ 13-16; 23-24; Doc. 93, p. 40). Yet, the Appellate Court AND the District Court both affirmed stating:

APPELLATE: "However, funds from the nonprofit-linked accounts were essentially converted to personal use, and should have been disclosed."

DISTRICT IN 2255: "Her application also failed to accurately reflect her financial condition in that it omitted assets(including the corporation's bank accounts) that were available to or controlled by her."

I was charged with making a false statement, 18 U.S.C. 1001 (A)(2), and nothing more. That's like charging me with Burglary, but convicting me for Armed Robbery. I have been convicted for a crime, that I was NOT charged with. If the Government wanted to submit a theory to the jury that I "concealed a material fact from a governmental agency" under 18 U.S.C. §1001(a)(1) (See Eighth Circuit Manual of Model Jury Instructions, 6.18.1001A), then it should have charged me as such in the indictment. Omitting information from the re-certification, is **NOT** relevant to my charged offense.

What matters is, whether or not I made **a False Statement**, and there was NO evidence submitted to the Jury proving that I did. The District Court has abused its discretion, because, it's adverse decision is contrary to my actual charges. "United States v. Salamanca, 990 F.2d 629 (D.C.Cir. 1993) The sufficiency of the evidence warrants particular scrutiny when the evidence strongly indicates that a defendant is guilty of a crime other than that for which he was convicted, but for which he was not charged. Under such circumstances, a trier of fact, particularly a jury, may convict a defendant of a crime for which there is insufficient evidence to vindicate its judgment that the defendant is blameworthy. Compelling evidence that a defendant is guilty of some crime is not, however, a cognizable reason for finding a defendant guilty of another crime. Here, the evidence was insufficient to support a conviction of aiding and abetting the assault. At most, the defendant was an accessory after the fact, or committed misprision". The Jury did, as the District Judge did in the §2255, and the Appellate Court did in it's Affirmation, finding me guilty of a crime "different" than the crime that I was actually charged.

The Courts ignored two Elements of 18 U.S.C. 1001 (A)(2), "Materiality", and a "False Statement". The importance of the Evidence actually being submitted on the charged offense to the Jury is so they can determine "Materiality". There were 3 False statements I am alleged of making in the HUD document. "Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999) Though there is no explicit materiality element set forth in the mail fraud, wire fraud and bank fraud statutes, this element is implicit in the concept of fraud. Thus, the government must prove that any misrepresentation involved in a mail, wire or bank fraud prosecution relates to a material fact. This issue, pursuant to United States v. Gaudin, must be submitted to the jury."

The First False statement, requires the Prosecutor to prove, that I had more than $60 in my Bank Of America account. The Prosecutor **DID NOT** submit my personal Bank Of America bank statement to the Jury, for them to make a "Materiality" determination. No other Bank Statement could have been submitted, because the statement in the HUD re-certification document that the Prosecutor relied on for the False Statement said, $60 in Bank Of America, and asked for my personal information.

The Second False statement allegation was irrelevant, because the HUD Director conceded, that the Question of "Where do you Live" was never asked of me in the HUD re-certification. Nor did the Prosecutor show where that Question appeared ANYWHERE in the record.

The Third False statement, requires the Prosecutor to prove, 1-That I received Interest Income, and 2-the amount of Interest Income that she is alleging that I received. The Prosecutor DID NOT present 1 document to the Jury, from the 5535 account, that she alleges that I received interest income from, failing to prove that the 5535 account actually received any Interest income, nor was ANY document

submitted to the Jury proving that I received **any** interest income at all from the 5535 account. The Prosecutor has YET, to provide to me, the Jury, or the Court, with how much the amount of interest is, that she is alleging the 5535 account had, for me to have received. A Materiality determination was impossible.

No reasonable Jury could have satisfied the "Materiality" Element of 18 U.S.C. 1001 (A)(2), without the Prosecutor presenting them the evidence. This is way more than a sufficiency of the evidence challenge, because the Prosecutor failed to submit **any** evidence, in order to fulfill her obligation, to satisfy ALL Elements of the charged Offense. Which meant the Jury could not deliberate on all Elements of the charged offense as required. I did not argue that the evidence was insufficient, I argued that NONE was submitted on the charged offense to support the allegations in the indictment.

Moreover, I DID NOT fill out the HUD form at issue here, the Housing Director did, as the EVIDENCE and her testimony REFLECTS. This is not up for interpretation by the Jury, The testimony, of the Housing Director Cindy Neely-White stated that **SHE** filled out and submitted the form, **NOT me**. I have been convicted for making false statements, in a form that I did NOT fill out, and the Director testified that she did **not** remember any of our conversations, so the form is the only source for Count 9. A conviction cannot stand under these circumstances for a false statement charge, where I neither filled out, nor submitted the document to HUD. **This is a Miscarriage of Justice**.

INNOCENCE ARGUMENT

I am innocent of all charges, and this claim is unadjudicated.

GROUND 2-ALTER EGO ARGUMENT

The Court refused to adjudicate this issue from my §2255. NOR did the Prosecutor address this issue in her reply. This issue affected my whole trial because without the AUSA being held to this requirement, it allowed her to side step the Statute requirements for proving her case. She failed to show that I personally had liability or received ANY funds as required by statute. Not one Wire was sent to me personally. The Government considered RAW, a legal corporation for Count 9, but not Counts 1-8, in the same trial. It was imperative that the Prosecutor present an alter ego argument to the Court. The Prosecutor can't have it both ways, RAW is a corporation for some Counts, but not others, **in the same trial**.

GROUND 4- SEVERANCE ARGUMENT

The Prosecutor committed "Fraud Upon the Court", and failed to address this claim in her reply. The important FACT, that she LIED to the Court in the severance argument, and MADE UP the statement that the Judge relied on, to keep the counts joined, is being ignored. Because, the Magistrate Judge stated, "Contrary to defendants argument, the Court finds that the Governments assertion in it's response that defendant falsely represented to Ms. Wilson and Law Enforcement that she was a "Successful Businesswoman" and that her receipt of benefits belies this representation is not contrary to the theory of fraud set forth in the indictment." Which FLAT OUT says, that she relied on the LIE that Prosecutor Mahoney told her, and ONLY the LIE to deny my severance request. The AUSA lying to the Court **to obtain a favorable ruling**, infected my whole trial, because it affected my Right to testify. **Nowhere in evidence does that statement exist.**

GROUND 11- 18 U.S.C 1957 VOID-FOR-VAGUENESS

The District Court addressed Money Laundering being void-for-vagueness as a whole, but failed to address my actual argument. I **did not** argue that the Statute should be void as a whole, I argued about the way it was used in MY case exceeded Congress's intent. My Argument as to the way the AUSA's use of 18 U.S.C. 1957, in relation to **my case**, exceeds Congress's intent for the Statute. Congress did not intend for a citizen to be subjected to serving 20 yrs in prison, for transferring money from a savings account to a checking account, two linked accounts, same named accounts, same bank, without something more, under a Money Laundering Statute. Congress did not intend such a result. United States v. Gilliam, 975 F.2d 1050, 1055-56 (4th Cir. 1992), "In evaluating a criminal statute under the void for vagueness doctrine, the Supreme Court has established a two part test, stating first that " [a] penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903 (1983). Second, the criminal offense must be described "in a manner that does not encourage arbitrary and discriminatory enforcement." Id. Moreover, "vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." Maynard v. Cartwright, 486 U.S. 356, 361, 108 S. Ct. 1853, 1857-58, 100 L. Ed. 2D 372 (1988).

The Court failed to administer both prongs of this Supreme Court test, in my case. I argued that the way this Statute was applied in my case, was Un-Constitutional, and was arbitrarily enforced. The second prong, is of particular interest here, as Gilliam states, "The criminal offense must be described 'in a manner that does not encourage arbitrary and discriminatory enforcement". In my case, the AUSA

simply described in the indictment, the transfer of money from a savings account to a checking account of two linked accounts, same name, same bank, and nothing more; it doesn't get much more arbitrary than that. This **IS** a Money LAUNDERING Statute.

GROUND-13-TAX EVASION (lesser-included offense)

Where there is a disputed issue of fact as to the existence of an affirmative Commission in addition to the omission to pay taxes when due, a defendant indicted for a violation of 26 U.S.C. 7201, making a willful attempt to evade taxes a Felony, is **ENTITLED** to a lesser-included offense charge based on 26 U.S.C. 7203, making a willful failure to pay taxes when due is a misdemeanor. My indictment did not allege the requisite felony behavior. The ONLY accusation was a "Failure to make a return", and no acts to evade a tax, which is insufficient for the Felony charge. Section §7201 makes it a crime to attempt, "in any manner," to evade or defeat tax. In order to prove the evasion of assessment and/or payment of tax, the government **must show** that an individual **acted** purposely to avoid assessment of their true tax liability or to **hide assets**. Simply failing to "make" a tax return **does not** meet the "affirmative act" requirement, and it was the only behavior alleged in the indictment. There was no allegation of evading in the indictment or at trial.

GROUND-14- TAX EVASION CHARGED NOT A STATUTORY VIOLATION

The Government alleged no behavior in the indictment that falls under the Statutory requirements for 26 U.S.C. 7201, of which I was convicted. The Government stated "Well knowing the foregoing facts and failing to "make" an income tax return on or before April 15, 2011, as required by law, …." There

is no Federal Statute under §7201, that requires me to "make" a return by a certain date, it requires the "filing" of one, of which I was not accused of failing to do. The jury charge permitted a conviction for conduct not within the reach of §7201. I was convicted of behavior that did not violate any Statute.

GROUND 25 JURY TAMPERING & BATSON ISSUE

The Supreme Court in (Remmer v. United States, 347 U.S. 227 (1954)), held "that jury tampering in criminal cases are presumptively prejudicial," "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. (P. 347 U. S. 229)." Meaning that the party faced with allegations of jury tampering, bears the burden to prove, that there is no reasonable possibility that the tampering affected the impartiality of the jury. The Prosecutor gave NO argument whatsoever in her reply brief regarding how I was not harmed by the illegal contact. The Judge simply shifted the Burden to me. The Judge was REQUIRED to make the AUSA show that I was not harmed, instead the Judge discussed the steps that occurred after the tampering, but nothing about how I was not harmed. A new Jury pool should have been selected.

GROUND 39-IMPROPER STATEMENTS TO THE JURY

This issue was not adjudicated on the merits.

GROUND 49-CUMULATIVE EFFECT (HARMLESS ERROR)

Needs further review. There was an abuse of discretion to determine that **no** errors were made.

GROUND 17-IRS LACKED AUTHORITY TO TESTIFY FOR HUD

Not only should Count 9 be reversed, because the District Court Lacked Jurisdiction for a trial, but my Attorney should have requested for all evidence collected by the IRS, to have been suppressed, regarding Count 9, A HUD matter. It tainted my whole trial. There were only 2 people that testified in front of the Grand Jury, and neither one of them, had the authority or Jurisdiction to testify for HUD in Count 9. So, no evidence for Count 9 was presented to the Grand Jury **in order to give the District Court Jurisdiction over the matter**, or to be considered for a lawful Probable Cause determination.

An **information-gathering** agency, is what the IRS became for HUD in Count 9. "the Supreme Court in LaSalle provided two examples of institutional bad faith which could not be condoned: a delay in a recommendation of prosecution to the Justice Department in order to acquire additional information for use at trial, and issuance of the summons for the purposes of gathering information for the use of other agencies. 437 U.S. at 317, 98 S. Ct. at 2368." Which was clearly the case here, IRS Agent Brittain violated the law and my Rights, by using her Summons Authority for HUD, in Count 9, and then testifying for HUD. The Agent also perjured herself in the process. The Failure of HUD to show up to present a case to the Grand Jury in Count 9 for a Probable Cause determination, Barred the Government from issuing an Indictment on that Count. The IRS exceeded the authority Granted to them by Congress, Count 9 had **nothing** to do with the IRS.

GROUND 12- TWO CONFLICTING THEORIES OF LIABILITY FOR THE SAME FUNDS

The government cannot accuse me in Count 9 of lying about receiving interest **income** from "RAW", (which was $287.32 for the whole year of 2010), then argue the opposite, and say that I have a tax liability for more than the interest amount, for grounds 1-8, **in the same trial**. If the government is alleging that I received interest **income** "from" RAW of $287.32 in 2010 (to aid her argument for count 9), then I cannot also be liable for a higher tax liability, for the purposes of grounds 1-8 **only**, **in the same trial,** for more than that interest amount. She considered RAW a legal corporation for Count 9, but not Counts 1-8. This also bolsters my Alter Ego argument. The Government has consistently changed its theory of liability throughout the case. Prosecutor Mahoney did not want Count 9 Severed from grounds 1-8, she went through great lengths to keep them joined (Fraud upon the Court), so she is stuck with "one" theory of liability, to be made, when referencing my liability for the same funds. It is impossible to determine which theory was used. The truth is, you can't pick one theory now, my whole trial was tainted with these two conflicting theories of liability for the same funds. **The Government was allowed to operate as if they had two trials in one, one trial for Counts 1-8, and another for Count 9, arguing conflicting theories, accusing opposing amounts for income, etc.** I was Prejudiced.

JURY INSTRUCTION ISSUES: PLAIN ERROR & INEFFECTIVE ASSISTANCE

1. Instruction 20-22- The Wire Fraud instruction is missing "in and affecting Interstate Commerce" as an element of wire fraud. This is Jurisdictional.

2. Instruction No. 2 for Counts 4-7- the Court Erroneously Instructed the Jury, the following, "Two, The monetary transaction was in property of a value greater than $10,000 derived from specified unlawful activity, in this case, **bank fraud**;" This should have said "**Wire Fraud**", as I was NOT charged with "bank Fraud". Although Judge Phillips states at the bottom of Instruction 2, "If there is any difference between what I just told you, and what I tell you in the instructions I give you at the end of the trial, the instructions given at the end of the trial must govern you", she then contradicts that, and says in Instruction 9 the following, "You must of course continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions, and ignore others, because all are important." These are two conflicting instructions, where instruction 9 seems to cancel with the earlier instruction at the bottom of instruction 2, and the Jury should not have to figure out which instruction is right. My Attorney should have objected to this erroneous Instruction. The Jury was told that the "specified unlawful activity" was required to be two different activities, when there could not have been a choice, because I was only charged with one, "wire fraud".

3. Instruction 32-Count 8- The Judge states, "Various schemes, subterfuges, and devices may be resorted to, in an attempt to evade or defeat a tax. The one alleged in the indictment is that the defendant failed to "**file**" a return for the year 2010, and to pay any taxes owed for money received from Marva Wilson." However, this is **NOT** what the indictment alleged at all, the government ONLY alleged in the indictment the following, "Failing to **make** a Return". The Gov did not allege the additional step of "Failing to File" one, as the Judge said. Nor were there any acts to evade. This instruction was erroneous. This is also one of my grounds with the "§7201" conviction, that "failing to **make** a return" is not a statutory offense under 26 USC 7201, so this instruction was NOT harmless.

The Court should not be misstating facts about what the indictment stated, to the Jury in the closing instructions. The words "make" and "file" are NOT synonymous, they DO NOT mean even close to the same things, in ANY dictionary.

4. Instruction 35- Count 9- The Court allowed the Prosecutor to give the Jury a date range. However, the Indictment actually limited that range to a particular date of 2-14-11, the date the HUD Re-certification form was completed, since this was the actual document, that the Prosecutor provided, as the source of the false statements. My Attorney should have objected to a range, because the HUD form was the central and only document as the source of the False Statements. It allowed the Jury to convict if it felt that something was False in that range, as opposed to the date of the HUD re-certification, which was the subject of the False statements alleged in the indictment.

5. In Count 9 Jury Instruction- The Judge told the Jury, To convict, if one of three statements were considered False. This was what she said, "If you have a reasonable doubt that the defendant knowingly and intentionally made the statement that she had only $60.00 in bank accounts;" However, The HUD re-certification document that the Prosecutor has accused me of lying in, stated $60 in Bank Of America specifically, **not** in Bank Accounts. My Attorney should have objected to this instruction, because the AUSA never presented a Bank Of America Bank Statement. These errors are describing an element, and can only be harmless if it is clear beyond a reasonable doubt, that a rational jury would have found me guilty absent the error. However, these errors are Statutory, and cannot be overcome.

CONCLUSION

The District Court in my case allowed the AUSA to get away with much Misconduct at trial. The District Court gave the AUSA a certain leeway, that she was not entitled to, and that violated my Rights. The District Court stated at the Jury Instruction meeting: (Trans IV 605/ 8-13)

> THE COURT: So I need to go back and read this issue again. If the fourth element is not -- if I decide that the Steffen case does not apply because this is not fraud by silence and, therefore, don't give the fourth element, would it still be your request to use the language "omitting material facts" rather than the language proposed by the government?
>
> "Okay. Thank you. I have read the Steffen case and the case cited by the government and, as outlined in the Steffen case, believe that the scheme to defraud can be accomplished or charged through both **concealment and nondisclosure**. I do believe that this case constitutes **fraud by concealment**. The evidence in the case -- the evidence that I've heard today establishes that the government has sufficient evidence to proceed on the concealment issue. I don't see any support for the statement that, then, that is a essentially fourth element in wire fraud under the case or under the model instructions or any of the cases cited in Steffen. So for those reasons, your motion will be overruled. Or your objection, excuse me, will be overruled. " (Transcript-Volume IV 608, 14-25 / 609, 1).

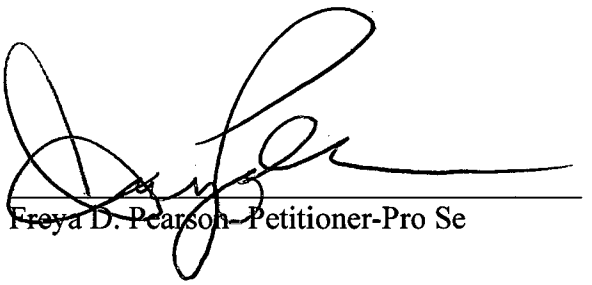
First, how did the Judge miss the fourth element, the Eighth Circuit was clear in US v Steffan that there must be an act to conceal, and/or a duty to speak, I thought those were called elements, and the 18 USC 1343 Statute does not have those elements. The problem here is, that this was a determination for the Jury to make, not the Judge. My indictment was clear, it only charged "Fraud By Omission" as the scheme to defraud. However, because the AUSA was allowed to try the case beyond the charges in the indictment, the Court felt the need to clarify at the end, instead of stopping the AUSA from constructively amending the indictment throughout the trial. The Judge should not have been able to determine how to proceed, when the indictment already limited the AUSA to the "By Omission" scheme to defraud, and the Eighth Circuit already determined that under that scheme, it required active concealment, and/or duty to speak. I need Counsels help in explaining these issues in Legal terms. I was charged with "Wire Fraud By Omission" only, but the evidence at trial expanded what the Jury could convict me on, from what the Grand Jury brought back indictment for. I desperately needed Counsels help in my Direct Appeal, And these §2255 Proceedings.

I struggle here to not only identify the Constitutional, Trial, Ineffective, Prosecutorial claims, but, to properly explain how I am due relief, and, with the Procedures and Processes required. An Attorney's help was imperative in my §2255. Being denied Counsel in my Direct Appeal turned the process into a mere formality, where no real issues were presented, but the remedy exhausted, then I was abandoned to fight alone. I need help. There are Constitutional violations in my case, that I struggle to present, I get confused.

Petitioner respectfully requests that this Court grant Certiorari and set the case for briefing and argument to settle these important questions, to Grant the relief that you see fit, to summarily reverse

the decision below and remand with directions to issue a COA, Appoint Counsel, and allow my 28 U.S.C. 2255 to be resubmitted with Counsels help.

Respectfully submitted,



Freya D. Pearson- Petitioner-Pro Se