

IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM 2021

CASE NO. \_\_\_\_\_

SERGE FRANCOIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

---

MOTION TO PROCEED ON PETITION  
FOR WRIT OF CERTIORARI (REVISED)  
IN FORMA PAUPERIS

MOTION TO PROCEED ON PETITION FOR WRIT OF CERTIORARI  
*IN FORMA PAUPERIS*

Petitioner Serge Francois, through undersigned CJA counsel, moves the Court pursuant to Rule 39 of the Rules of the United States Supreme Court, for leave to proceed *In Forma Pauperis* on this Petition for Writ of Certiorari, Revised to comply with page length. As good grounds in support of this motion Petitioner states:

**Confirmation of Appointment as CJA Appellate Counsel for Serge Francois**

Confirmation of appointment as counsel on direct appeal for Mr. Francois is documented by attaching the following at the end of this motion: three pages from the docket sheet for the Eleventh Circuit Court of Appeals, Appeal No. 18-11165, reflecting that on May 3, 2018, the Eleventh Circuit appointed undersigned counsel to represent Serge Francois for purposes of his direct appeal.

As demonstrated by the foregoing document, Mr. Francois was found to be indigent in the district court in April of 2018, and he has been represented on appeal by undersigned counsel continuously since May 3, 2018.

### **Factual and Procedural Background**

The record reflects that Mr. Francois and five codefendants were indicted in the Southern District Florida and charged with numerous counts of healthcare insurance fraud and money laundering. Serge Francois and one other defendant, Patrick Tonge, proceeded to a jury trial on a 48-count Fourth Superseding Indictment. Following a lengthy trial, the jury returned a verdict finding them both guilty.

Mr. Francois was sentenced to prison for a total of 204 months (17 years). He is presently incarcerated at Yazoo City FCI Low, with a presumptive release date in the year 2031. Mr. Francios was a licensed pharmacist. This case involved compounded medications each costing thousands of dollars, sent to military service members (and their families members) who were covered by the TRICARE federal military health insurance program through the Department of Defense. The losses to the government in this case were claimed to be over \$31 million dollars.

Mr. Francois' financial status has not improved since he has been incarcerated over the past several years.

### **Meritorious Issues Raised in the Petition**

The Petition that is filed on behalf of Mr. Francois presents two meritorious questions for this Court's review, including matters that require this Court to exercise its supervisory power over a decision of the Eleventh Circuit that departs from essential requirements of law in that it erroneously affirmed convictions for allegedly lying on pharmacy recredentialing forms. The answers he provided were truthful, but the questions were poorly written and failed to give definitions for the information that was requested. Throughout trial the government made comments and innuendos to make the truthful answers appear to be intentionally untruthful. There was no hidden agenda.

Also, over defense objection the court permitted a government "expert" to testify about pharmacy practices and procedures that were not enacted until after the alleged offenses occurred, thus resulting in convictions that violate Ex Post Facto prohibition in the Constitution, Article 1, Section 9, Clause 3, and Fifth Amendment Due Process.

Accordingly, for the foregoing reasons, Petitioner Serge Francois respectfully prays that this Honorable Court will grant this motion and will allow him to proceed

before this Court on Petition for Writ of Certiorari *In Forma Pauperis* through his CJA-appointed counsel.

Respectfully submitted,

/s/ Sheryl J. Lowenthal

SHERYL J. LOWENTHAL

CJA Counsel on Appeal

for SERGE FRANCOIS

9130 S. Dadeland Boulevard

Suite 1511

Miami, Florida 33156-7851

Phone: 305-670-3360

The Florida Bar No. 163475

E-Mail: [sjlowenthal@appeals.net](mailto:sjlowenthal@appeals.net)

North Florida Office: 221 East Government Street  
Pensacola, Florida 32502-6018 Ph: 850-912-6710

The body of this motion contains no more than 566 words

Dated: June 12, 2022

Originally Filed on April 28, 2022

**Attachment**

**Copy of relevant pages of the docket**

**Eleventh Circuit Court of Appeals  
Case No. 18-11165**

**Appointing CJA Appellate Counsel  
May 3, 2018**

IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM 2021

CASE NO. \_\_\_\_\_

SERGE FRANCOIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

---

**MOTION TO PROCEED ON PETITION  
FOR WRIT OF CERTIORARI  
IN FORMA PAUPERIS**

MOTION TO PROCEED ON PETITION FOR WRIT OF CERTIORARI  
*IN FORMA PAUPERIS*

Petitioner Serge Francois, through undersigned CJA counsel, moves the Court pursuant to Rule 39 of the Rules of the United States Supreme Court, for leave to proceed *In Forma Pauperis* on this Petition for Writ of Certiorari. As good grounds in support of this motion Petitioner states:

**Confirmation of Appointment as CJA Appellate Counsel for Serge Francois**

Confirmation of appointment as counsel on direct appeal for Mr. Francois is documented by attaching the following at the end of this motion: three pages from the docket sheet for the Eleventh Circuit Court of Appeals, Appeal No. 18-11165, reflecting that on May 3, 2018, the Eleventh Circuit appointed undersigned counsel to represent Serge Francois for purposes of his direct appeal.

As demonstrated by the foregoing document, Mr. Francois was found to be indigent in the district court in April of 2018, and he has been represented on appeal by undersigned counsel continuously since May 3, 2018.

### **Factual and Procedural Background**

The record reflects that Mr. Francois and five codefendants were indicted in the Southern District Florida and charged with numerous counts of healthcare insurance fraud and money laundering. Serge Francois and one other defendant, Patrick Tonge, proceeded to a jury trial on a 48-count Fourth Superseding Indictment. Following a lengthy trial, the jury returned a verdict finding them both guilty.

Mr. Francois was sentenced to prison for a total of 204 months (17 years). He is presently incarcerated at Yazoo City FCI Low, with a presumptive release date in the year 2031. Mr. Francios was a licensed pharmacist. This case involved compounded medications each costing thousands of dollars, sent to military service members (and their families members) who were covered by the TRICARE federal military health insurance program through the Department of Defense. The losses to the government in this case were claimed to be over \$31 million dollars.

Mr. Francois' financial status has not improved since he has been incarcerated over the past several years.

### **Meritorious Issues Raised in the Petition**

The Petition that is filed on behalf of Mr. Francois presents two meritorious questions for this Court's review, including matters that require this Court to exercise its supervisory power over a decision of the Eleventh Circuit that departs from essential requirements of law in that it erroneously affirmed convictions for allegedly lying on pharmacy recredentialing forms. The answers he provided were truthful, but the questions were poorly written and failed to give definitions for the information that was requested. Throughout trial the government made comments and innuendos to make the truthful answers appear to be intentionally untruthful. There was no hidden agenda.

Also, over defense objection the court permitted a government "expert" to testify about pharmacy practices and procedures that were not enacted until after the alleged offenses occurred, thus resulting in convictions that violate Ex Post Facto prohibition in the Constitution, Article 1, Section 9, Clause 3, and Fifth Amendment Due Process.

Accordingly, for the foregoing reasons, Petitioner Serge Francois respectfully prays that this Honorable Court will grant this motion and will allow him to proceed



before this Court on Petition for Writ of Certiorari *In Forma Pauperis* through his CJA-appointed counsel.

Respectfully submitted,

/s/ Sheryl J. Lowenthal

SHERYL J. LOWENTHAL

CJA Counsel on Appeal

for SERGE FRANCOIS

9130 S. Dadeland Boulevard

Suite 1511

Miami, Florida 33156-7851

Phone: 305-670-3360

The Florida Bar No. 163475

E-Mail: [sjlowenthal@appeals.net](mailto:sjlowenthal@appeals.net)

North Florida Office: 221 East Government Street  
Pensacola, Florida 32502-6018 Ph: 850-912-6710

The body of this motion contains no more than 5609 words

Dated: April 28, 2022

**Attachment**

**Copy of relevant pages of the docket**

**Eleventh Circuit Court of Appeals  
Case No. 18-11165**

**Appointing CJA Appellate Counsel  
May 3, 2018**

**General Docket**  
**United States Court of Appeals for the Eleventh Circuit**

**Court of Appeals Docket #:** 18-11165  
**USA v. Patrick Tonge**  
**Appeal From:** Southern District of Florida  
**Fee Status:** IFP Granted

**Docketed:** 03/23/2018  
**Termed:** 11/22/2021

**Case Type Information:**

- 1) Criminal
- 2) Direct Criminal
- 3) -

**Originating Court Information:**

**District:** 113C-1 : 1:16-cr-20399-DPG-2  
**Court Reporter:** Patricia Diaz  
**Court Reporter:** Yvette Hernandez  
**Court Reporter:** Diane Peede  
**Court Reporter:** Glenda Powers  
**Court Reporter:** Unknown Reporter  
**Court Reporter:** Jill M. Wells  
**Sentencing Judge:** Darrin P. Gayles, U.S. District Judge  
**Date Filed:** 05/31/2016  
**Date NOA Filed:**  
 03/22/2018

**Prior Cases:**

None

**Current Cases:**

	<b>Lead</b>	<b>Member</b>	<b>Start</b>	<b>End</b>
Multi-Appeal	18-11165	<u>18-11167</u>	03/23/2018	

UNITED STATES OF AMERICA

Plaintiff - Appellee

Nicole D. Mariani  
 Direct: 305-961-9285  
 [COR LD NTC US Attorney]  
 U.S. Attorney Service - SFL  
 99 NE 4TH ST 5TH FL  
 MIAMI, FL 33132-2111

Jonathan Colan  
 Direct: 305-961-9383  
 [COR NTC US Attorney]  
 U.S. Attorney Service - SFL  
 RM 525  
 99 NE 4TH ST 5TH FL  
 MIAMI, FL 33132-2111

Emily M. Smachetti  
 [COR NTC US Attorney]  
 U.S. Attorney's Office  
 Firm: 305-961-9003  
 99 NE 4TH ST  
 MIAMI, FL 33132

U.S. Attorney Service - Southern District of Florida  
 [NTC US Attorney]  
 U.S. Attorney Service - SFL  
 99 NE 4TH ST 5TH FL  
 MIAMI, FL 33132-2111

versus

PATRICK TONGE (Federal Prisoner: 14179-104)

Defendant - Appellant

Keith Wayne Upson  
 Direct: 239-330-7551  
 [COR LD NTC CJA Appointment - CA]

The Upson Law Group PC  
Firm: 239-330-7551  
2335 STANFORD CT STE 503  
NAPLES, FL 34112

Patrick Tonge  
[NTC Not Applicable]  
FCI Jesup - Inmate Legal Mail  
2680 HWY 301 S  
JESUP, GA 31599


SERGE FRANCOIS (Federal Prisoner: 56938-004)


Defendant - Appellant


Sheryl Joyce Lowenthal  
Direct: 305-670-3360  
[COR LD NTC CJA Appointment - DC]  
Law Offices of Sheryl Lowenthal  
Firm: 305-670-3360  
9130 S DADELAND BLVD STE 1511  
MIAMI, FL 33156-7851





Francois, Court Reporter: Glenda Powers, Proceeding Type and Date: Trial 08/31/2017. [Entered: 04/30/2018 03:43 PM]


04/30/2018 ☐  2 pg, 128.17 KB Patrick Tonge has NOT made satisfactory financial arrangements for transcripts as to court reporter Diane Peede. Financial Arrangements due to be made with the Court Reporter within 14 days from the date of this deficiency letter. [Entered: 04/30/2018 03:30 PM]

05/03/2018 ☐  2 pg, 18.02 KB CJA appointment issued by this court to Attorney Sheryl Joyce Lowenthal for Appellant Serge Francois. [Entered: 05/10/2018 01:40 PM]


05/04/2018 ☐  1 pg, 68.17 KB TRANSCRIPT INFORMATION FORM SUBMITTED by Attorney Sheryl Joyce Lowenthal for Appellant Serge Francois. Transcript(s) ordered. (ECF: Sheryl Lowenthal) [Entered: 05/04/2018 01:13 PM]


05/04/2018 ☐  1 pg, 69.99 KB TRANSCRIPT ORDER FORM for Appellant Serge Francois.--[Edited 05/04/2018 by ECM] (ECF: Sheryl Lowenthal) [Entered: 05/04/2018 01:17 PM]


05/04/2018 ☐  1 pg, 69.65 KB TRANSCRIPT ORDER FORM as to Appellant Serge Francois.--[Edited 05/04/2018 by ECM] (ECF: Sheryl Lowenthal) [Entered: 05/04/2018 01:17 PM]


05/04/2018 ☐  1 pg, 69.74 KB TRANSCRIPT ORDER FORM as to Appellant Serge Francois. - Edited to correct event used.--[Edited 05/04/2018 by ECM] (ECF: Sheryl Lowenthal) [Entered: 05/04/2018 01:19 PM]


05/08/2018 ☐ TRANSCRIPTS FILED. Transcript Order: Court Reporter: Diane Peede, Filer: Patrick Tonge , Dt. all Trans. Filed: 05/08/2018, Proceeding Type and Date: Sentencing 03/09/2018.--[Edited 06/05/2018 by GBF] [Entered: 05/10/2018 02:02 PM]

05/09/2018 ☐  1 pg, 89.4 KB Court Reporter Acknowledgment filed. Transcript Order: Yvette Hernandez, 04/04/2018, Patrick Tonge, Pre-Trial Proceedings 06/12/2017. [Entered: 05/10/2018 02:17 PM]


05/09/2018 ☐  1 pg, 92.89 KB Court Reporter Acknowledgment filed. Transcript Order: Patricia Diaz, 04/04/2018, Patrick Tonge, Trial 08/17/2017 , voir dire 08/08/2017 , Trial 08/23/2017 , Trial 09/05/2017 , Trial 08/31/2017. [Entered: 05/10/2018 02:21 PM]


05/11/2018 ☐  2 pg, 181.18 KB has NOT made satisfactory financial arrangements for transcripts as to court reporter. Financial Arrangements due to be made with the Court Reporter within 14 days from the date of this deficiency letter. [Entered: 06/05/2018 09:28 AM]


05/16/2018 ☐  8 pg, 83.72 KB MOTION to withdraw as counsel filed by Attorney Manuel Lazaro Casabielle for Appellant Patrick Tonge. Opposition to Motion is Unknown [8459004-1] (ECF: Manuel Casabielle) [Entered: 05/16/2018 06:31 PM]


06/04/2018 ☐  1 pg, 94.66 KB TRANSCRIPTS FILED. Transcript Order: Court Reporter: Yvette Hernandez, Filer: Patrick Tonge, Dt. all Trans. Filed: 06/04/2018, Proceeding Type and Date: Pre-Trial Proceedings 06/12/2017. [Entered: 06/05/2018 09:40 AM]


06/06/2018 ☐ TRANSCRIPTS FILED. Transcript Order: Court Reporter: Patricia Diaz, Filer: Patrick Tonge, Dt. all Trans. Filed: 06/06/2018, Proceeding Type and Date: voir dire 08/08/2017 , Trial 08/17/2017 , Trial 08/31/2017 , Trial 09/05/2017 , Trial 08/23/2017 ; Transcript Order: Court Reporter: Patricia Diaz, Filer: Serge Francois, Dt. all Trans. Filed: 07/06/2018, Proceeding Type and Date: Plea Hearing 07/26/2017 , Trial 08/08/2017 - 09/05/2017. [Entered: 07/10/2018 08:30 AM]


06/06/2018 ☐  1 pg, 165.05 KB Court Reporter Acknowledgment filed. Transcript Order: Glenda Powers, 04/25/2018, Patrick Tonge, Trial 08/31/2017. [Entered: 07/10/2018 08:35 AM]


06/11/2018 ☐  1 pg, 167.62 KB TRANSCRIPTS FILED. Transcript Order: Court Reporter: Glenda Powers, Filer: Serge Francois, Dt. all Trans. Filed: 06/11/2018, Proceeding Type and Date: Trial 08/31/2017. [Entered: 07/10/2018 08:40 AM]


07/09/2018 ☐  3 pg, 61.96 KB APPT-1 letter filed as to Patrick Tonge. Appellant wants court appointed counsel - IFP form was not included. [Entered: 07/10/2018 08:14 AM]

07/09/2018 ☐  3 pg, 61.96 KB MOTION for appointment of counsel filed by Appellant Patrick Tonge. Opposition to Motion is Unknown [8504934-1] [Entered: 07/10/2018 08:21 AM]

10/19/2018 ☐  4 pg, 131.79 KB ORDER: Motion to withdraw as counsel filed by Manuel Lazaro Casabielle is GRANTED. [8459004-2]; Motion for appointment of counsel filed by Appellant Patrick Tonge is GRANTED. [8504934-2]. BBM [Entered: 10/19/2018 07:56 AM]

11/15/2018 ☐  2 pg, 41.13 KB ORDER: the court appoints Keith Upson as counsel for the appellant Patrick Tonge. SM [Entered: 11/15/2018 12:41 PM]

11/15/2018 ☐  2 pg, 17.88 KB CJA appointment issued by this court to Attorney Keith Wayne Upson for Appellant Patrick Tonge. [Entered: 11/15/2018 01:23 PM]

11/15/2018 ☐  1 pg, 15.63 KB Briefing Notice issued to Appellants Serge Francois and Patrick Tonge. The appellant's brief is due on or before 12/26/2018. The appendix is due no later than 7 days from the filing of the appellant's brief. [Entered: 11/15/2018 02:37 PM]

11/20/2018 Removed from case: Attorney Michael Caruso for Appellant Serge Francois in 18-11165. [Entered: