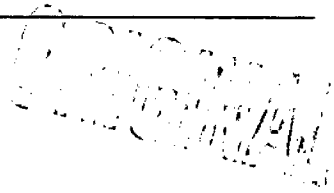
NO. 23-7573

IN THE

SUPREME COURT OF THE UNITED STATES



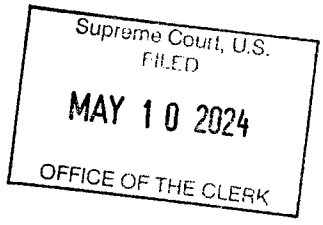
Ryan Edward Offineer

Petitioner

V.

United States of America

Respondant



On Petition for Writ of Certiorari to the

United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1) Do additional restrictions, such as Strickland, imposed in the standard collateral attack waiver that are not specifically stated anywhere in Mr. Offineer's plea agreement violate contract laws as established in decisions like Santobello v. New York, 404 U.S. 257, 262-263 (1971) and Garza v. Idaho, 139 S. Ct. 738 (2019)? Does the collateral attack waiver in the plea agreement create a conflict of interest between defense counsel and Mr. Offineer?

2) Did the appellate court rule contrary to 28 U.S.C. § 2255(b)(2) and the equal protection clause that Mr. Offineer had waived his constitutional right of access to the courts when he signed the plea agreement despite the impediment to this right occurring before he signed the plea agreement? Did the impediment to a law library negate Mr. Offineer's right to knowingly and willingly enter into the plea agreement and to provide for his own defense?

3) Was defense counsel ineffective in developing and explaining viable defensive strategies to Mr. Offineer before advising him to plead guilty?

4) Was defense counsel ineffective by relying on Riley v. California, 134 S. Ct. 2473, 2482 (2014) to argue for the suppression of evidence obtained from the warrantless computer search? Did the appellate court incorrectly rule that because the warrants authorized the agents to search for evidence of CEM, they were authorized to search Mr. Offineer's computers without a specific warrant for them?

5) Did the appellate court issue a ruling contradictory to Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) and Slack v. McDaniel, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 542 (2000) in stating that Mr. Offineer's pleadings are too conclusory and impermissibly vague?

6) Is the appellate court's ruling that defense counsel was correct to deny Mr. Offineer an appeal because that appeal would have been "meritless" and "futile" in contradiction to established precedents and the presumption-of-prejudice principle?

7) Was defense counsel ineffective in accepting the disparate terms of Mr. Offineer's

7) plea agreement as described by 18 U.S.C. § 3582(c)(2)? Was the district court's acceptance of Mr. Offineer's plea contrary to the law as established under 18 U.S.C. § 3582(c)(2)? Is Mr. Offineer's sentence contrary to the Eight Amendment's narrow proportionality principle, his right to equality, and equal protection under the law?

8) Was defense counsel ineffective by failing to remove information concerning Count I, specifically the listing of 2 victims, because that count was dropped as part of the plea agreement? Is Mr. Offineer now unfairly burdened in trying to have that information corrected through the B.O.P.'s "administrative remedy" process which does not allow him to have legal representation? Is the PSR fundamentally flawed, unfair, and unjust because inaccurate information may not be removed even after being found incorrect?

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REASONS FOR GRANTING THE WRIT (cont.)

ing the Validity of Plea Agreements Containing Provisions Not Specifically Stated in the Plea and Several Contradictory Rulings Concerning Ineffective Assistance Claims. Specifically, If the Collateral Attack Waiver Creates a Conflict of Interest Between the Defendant and Counsel and If the Impediment to a Law Library Prevented the Defendant from Knowingly and Willingly Entering the Plea Agreement. The Ineffective Assistance of Counsel Claim Centers Around Counsel's Failure to Appeal, Failure to Inform, and Failure to Properly Investigate Defensive Strategies and the Existence of Disparate Sentences Among Defendants Convicted of Similar Crimes. The Lower Courts Ruling Regarding the Conclusory and Vague Pleadings Made by the Defendant is in Contention with Current Supreme Court Precedent. The Ineffective Assistance of Counsel Claim also Involves Defense Counsel's Failure to Correct Errors in the Defendant's PSR.

CONCLUSION

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ryan Edward Offineer, respectfully requests the issuance of a writ of certiorari to review the judgement of the United States Court of Appeals for the Tenth Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is published at 2024 U.S. App. LEXIS 298 (10th Cir. 2024), and is reproduced at Petitioner "Appendix A".

JURISDICTION

The Tenth Circuit entered judgement in January 5, 2024. See Petitioner "Appendix A". This Court's Jurisdiction is invokedunder 28 U.S.C. § 1254.

FEDERAL RULE INVOLVED

Federal Rules of Criminal Procedure 11(c) and 11(e)(1)(C)

Fed. R. Crim. P. 11(c): Plea Agreement Procedure

"(1) In General. An attorney for the government and the defendant's attorney, or when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the goverment will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence of sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)."

STATEMENT OF THE CASE

Mr. Offineer was indicted on one count of 18 U.S.C. § 2251(a), one count of 18 U.S.C. § 2252(a)(4)(B), and one count of 18 U.S.C. § 2252(b)(2). Mr. Offineer filed a motion to suppress statements he made after invoking his Miranda rights, a motion to suppress the evidence obtained from the search of his vehicle, and a motion to suppress evidence obtained from the warrantless search of his personal computers. Ultimately, the district court suppressed his statements made during the interrogation, but allowed the evidence obtained from his vehicle and his computers to stand. Subsequently, Mr. Offineer plead guilty to the counts of §§ 2252(a)(4)(B) and 2252(b)(2) with the count of § 2251(a) dropped as part of the plea. Mr. Offineer was sentenced to 120 months in custody, 15 years of supervised release, and was ordered to pay $8,500 in restitution. Mr. Offineer filed a § 2255 motion based on ineffective assistance of counsel, which was denied in district court. The district court declined to issue a ceritificate of appealability (C.O.A.) and Mr. Offineer filed an appeal to the Tenth Circuit, which also declined to issue a C.O.A.

I. THE CONTESTED VALIDITY OF THE PLEA AGREEMENT

The Tenth Circuit in this case has issued a ruling that is contradictory to established Supreme Court doctrine regarding the waiver of appellate rights contained in Mr. Offineer's plea agreement. Mr. Offineer could not express his concerns to the court until after sentencing when he had gained access to a law library to aid him in declaring the validity of the plea agreement continues to be a contested factual issue. Mr. Offineer has repeatedly raised these issues in district court (see Petitioner's Memorandum Brief in Support of an Evidentiary Hearing (Petitioner "Appendix B") and Petitioner's Reply (Petitioner "Appendix B") contrary to the appellate court's statement that he has not raised this issue before. Mr. Offineer continues to aver his guilt or innocence was not an issue because he was simply following counsel's instructions in order to mitigate his sentence. The Supreme Court continues to hold plea agreements in the same standard as contracts with the main objective being the protection of rights and liabilities of both parties that results in certainty and predictability of that contract (see Santobello v. New York, 404 U.S. 257, 262-263 (1971)). An Appeal waiver does not bar claims outside it's scope because "...although the analogy may not hold in all respects, plea bargains are essentially contracts" (Puckett v. U.S., 566 U.S. 129, 137, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)). Furthermore, the Supreme Court has held "Most fundamentally, courts agree that defendant's retain the right to challenge whether the waiver itself is valid and enforceable - for example on the grounds that it was unknowing or involuntary" (Garza v. Idaho, 139 S. Ct. 738 (2019)). Additional restrictions that govern in-

effective assistance of counsel claims, such as Strickland v. Washington, as well as a host of other cases are not found in Mr. Offineer's plea agreement. Such laws and cases are well known to law practicioners, but it is unreasonable for those outside of lawyers to be aware of those laws and cases without having been specifically advised of them. The record clearly shows Mr. Offineer was not made aware of these additional restrictions at any point during the plea hearing or when reading the plea. Mr. Offineer has been prejudiced in a very distinctive way: the strong presumption that his counsel was reasonable and advised Mr. Offineer of these additional restrictions. The plea in question in this case is based upon omissions of fact and law in which counsel advised Mr. Offineer to enter into that plea through his signature. This is akin to a hidden provision in the plea, which, in all regards to contract law, make this particular plea agreement invalid because of the fraudulent tactic used to secure the plea. This fraudulent, hidden, and extrinsic provision of this plea agreement was only discovered by Mr. Offineer after he plead guilty and only after he discovered his right to adequate representation was denied. Defense counsel's advice to enter into this plea creates an extrinsic ineffective assistance of counsel claim, a conflict of interest. Most state BAR associations have stated informal opinions that collateral attack waivers are wrong and create conflicts of interest between counsel and client. In U.S. v. Kentucky State BAR Ass., No.: 20013-SC-270 KB (KY 2014), the Kentucky Supreme Court stated that collateral attack waivers "create a non-waivable conflict of interest between the defendant and his attorney..." and that these waivers are an "ethical breach" by defense counsel. In Cuyler v. Sullivan, 466 U.S. 335, 350 (1980) the Supreme Court stated that if petitioners can show that defense counsel operated under a conflict of interest, the petitioner is NOT required to show he was prejudiced, that counsel's errors didin fact change the outcome of the proceedings. The waiver in Mr. Offineer's plea agreement has, in fact, created a miscarriage of justice because it's enforcement has resulted in ineffective assistance of counsel due to the conflict of interest as stated above and because of the fraudulent, hidden, and extrinsic provisions as explained above, making it "otherwise unlawful" (see Hahn, 359 F.3d at 1327). The government commits fraud during the contract negotiation when it places a provision in the plea agreement it knows will create a conflict of interest between defense counsel and the defendant. A collateral attack waiver creates that conflict of interest by making the advice of defense counsel to enter this plea agreement unethical through the imposiition of a waiver preventing Mr. Offineer from later challenging his counsel's advice or from bringing forth constitutional rights violations, such as the denial of access to the courts. These stated facts of law render the waiver not controlling. The enforcement of the waiver results in a miscarriage of justice because of the resulting "...

ineffective assistance of counsel in connection with the negotiation of [the] waiver [making] the waiver...otherwise unlawful..." (Han, 359 F.3d at 1327) due to the aforementioned fraudulent, hidden, and extrinsic provisions contained within it. The appellate court's Order incorrectly ruled that Mr. Offineer had not identified a serious error that"...affects the fairness, integrity, or reputatuion..." of the court and that "The district court correctly dismessed as waived Offineer's substantive claims...": Mr. Offineer has repeatedly stated the fraudulent, hidden, and extrinsic hidden provisions of the plea agreement and defense counsel's refusal to follow his instructions to negotiate a more favorable plea are the errors that continue to affect the fairness, integrity, and reputation of the court. Mr. Offineer avers the Tenth Circuit also erred when it stated the district court correctly dismissed these claims when the district court made no such ruling on those claims at all. Fed. R. Crim. P. 11(c) states: "An attorney for the Government and defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement.", which makes clear that the negotiation is meant to be a back-and-forth effort to reach a satisfactory result, not only for the government, but also for Mr. Offineer. Mr. Offineer specifically instructed defense counsel to negotiate a more favorable plea, but counsel ignored his explicit instructions and refused to negotiate with the government on his behalf, a claim never denied by defense counsel. In Fisher v. Gibson, 282 F.3d 1283 (10th Cir. 2012) the court ruled that the "Sixth Amendment right to effective assistance of counsel extends specifically to the negotiation and consideration of plea offers." It appears as though the court has contradicted itself with the Gibson ruling and the ruling made in Mr. Offineer's case.

II. Impediment to the Guaranteed Right of Access to the Courts/Law Library

Mr. Offineer's fundamental right of access to the courts should not be overlooked and set aside by the appellate court because he made the mistake of including this claim with his ineffective assistance claim. This is an obvious mistake made by a pro se petitioner and is possibly the kind of mistake the courts should provide some leniency with. Mr. Offineer was denied this right before he signed the collateral attack waiver. This claim deserves further proceedings to determine the merits of the claim and to ensure the fairness and reputation of the courts. The denial of a law library has prevented Mr. Offineer from entering the plea knowingly and has negated his ability to make informed decisions about his case. 28 U.S.C. § 2255(b)(2) states that a hinderance to a law library is a clear violation of Mr. Offineer's constitutional rights. The Supreme Court has long held that "The fundamental right of access to the courts require prison authorities to assist inmates in the preparation and filing of meaning-

ful legal papers by providing prisoners with adequate law libraries..." (Lewis v. Casey, 518 U.S. 343, 346, 116 S. Ct. 2174). Had Mr. Offineer had access to a law library while in Muskogee County Jail, there is a reasonable chance the defensive strategies he has discussed throughout his § 2255 motion could have been brought to defense counsel's attention and possibly changed the outcome of the proceedings. At the least, had Mr. Offineer's rights not been impeded by the state, it is reasonable to presume the time and expense associated with his appellate proceedings could have been avoided. The Supreme Court has held in Bounds V. Smith, 97 S. Ct. 1491, 52 L. Ed. 2d 72, 430 U.S. 817 with "...the importance of the writ of habeas corpus in our constitutional scheme, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed" (quoting Johnson v. Avery, 393 U.S. 483, 495, 21 L. Ed. 2d 718, 89 S. Ct. 747). And in Gilmore v. Lynch, 319 F. Supp. 105 (1970) the Court held "Reasonable access to the courts is a constitutional imperative which has been held to prevail against a variety of state interests. Similarly, the right under equal protection clause of the indigent and uneducated prisoner to the tools necessary to receive adequate hearings in the courts has received special reinforcement by the federal courts in recent decades. The initial burden of persuading a judge that an evidentiary hearing is necessary lies with the prisoner...It encompasses all the means a defendant or petitioner might require to get a fair hearing from the judicary on all charges brought against him...". Mr. Offineer's plea cannot be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless he received real notice of the true nature of the charges against him, the first and most recognized requirement of due process. Mr. Offineer has been denied his due process rights by being denied access to a law library while in custody at Muskogee County Jail. Mr. Offineer maintains that during the eight months he was detained in Muskogee County, there were no calls by staff to sign-up for access to a law library, there was no signage that might have brought about the realization that Mr. Offineer had a right to access a law library to help him with his case.

III. Defense Counsel's Failure to Investigate

Defense counsel stated that although Mr. Offineer's actions did not meet the jurisdictional elements to be charged under Count I (§ 2251(a)), there was no defense to counter these allegations because "nearly all sex offenders are found guilty". Defense counsel has not denied saying this in any of the subsequent pleadings. Defense counsel failed to provide effective assistance in this instance because he developed no strategies to defend Mr. Offineer against Count I, which prejudiced Mr. Offineer with essentially no representation and made the acceptance of the government's only plea offer a foregone conclusion when the motions to suppress were denied. A bench trial, a con-

ditional plea, or a motion to review the jurisdictional elements of Count I could have allowed the court to review the evidence to determine whether any rational tier of fact could have found the elements of the charged crime beyond a reasonable doubt. This strategy could have allowed the court to resolve any conflicting testimony, such as the agent's Affidavit and his testimony during the preliminary detention hearing, and to decide facts based on reasonable inferences from the case. This cannot be viewed as second-guessing defense counsel's strategy because he did not develop a strategy for Count I...there was nothing to second guess. In all actuality, the government's plea offered no benefit to Mr. Offineer. If he goes to trial and is not found guilty of Count I, if Count I is dismissed in a pretrial motion, or if the judge gave a jury correct instructions of the elements of the alleged crime in Count I, and he is found guilty of Count II only, then his sentence is between 78 and 97 months according to his PSR. If Mr. Offineer goes to trial and is found guilty of all counts, then he can still appeal with the appellate court reviewing the elements of the charges. Defense counsel's ineffective assistance is clearly evident here by his failure to develop even a single defense to Count I. The appellate court has mistakenly held that Mr. Offineer did not show counsel's performance was substandard or that it prejudiced him. Counsel's performance was substandard because he provided no defense to Count I. Counsel's performance prejudiced Mr. Offineer because it directly led to the acceptance of a plea that is unnecessarily harsh and unfair in light of similar crimes. Defense counsel had a duty to conduct a reasonable investigation to possible defenses of all counts, which extends to the laws as well as to the facts of the case. In Heard v. Addison, 728 F.3d 1170 (10th Cir. 2013) the court held, "The prospect of asserting a viable defense that Heard's conduct fell outside of [the statutes] ambit...was an alternative available that Heard (or any reasonable defendant, for that matter) would have deemed important...For that reason on this record we reject any notion that counsel's decision to advise Heard to plead guilty without mentioning viable defenses might have been justifiable on any strategic basis." Mr. Offineer discovered these defenses only after he had been sentenced and was able to research in the law library. If a pro se litigant such as Mr. Offineer can find viable defenses, it is entirely unreasonable that an experienced, professional lawyer could not have found such defenses and developed them unless counsel simply did not investigate them. It is reasonable to presume that had defense counsel brought similar cases to the prosecutor's attention during the negotiation, Mr. Offineer might have received a less severe plea or even lesser charges. Defense counsel had the duty to research, to understand, and to provide some kind of defense to both counts of the indictment before advising Mr. Offineer to plead guilty. The court made clear in Heard that counsel has a "...duty to investigate the law [and] to advise the client of the results of that research, because both duties require a common an-

alysis of the standards to be expected of minimally competent counsel and the causation question of whether counsel's breach of one or both of these duties likely caused the defendant to plead guilty when, had counsel not breached one or both of these duties, the defendant would likely have plead not guilty...". Defense counsel was obligated to do more than just inform Mr. Offineer there was no defense to Count I, which led to an uninformed decision to plead guiltyand to waive his constitutional rights. When an experienced lawyer advises an unexperienced defendant that he should accept the terms of the plea, no matter how disproportionate they may be, that defendant would certainly take counsel's advice in order to mitigate his sentence, just as Mr. Offineer has done. This is not a strategy developed by effective assistance.

IV. Ineffective Assistance Regarding Case Law

Defense counsel failed to provide effective assistance by arguing a case, Riley v. California, 134 S. Ct. 2473, 2482 (2014), which was described in the magistrate's Report and Recommendation (see Petitioner "Appendix A") as "...clearly inopposite to the facts of this case...". The warrants in this case lacked the specificity and the particularity required by the Fourth Amendment. The agents were allowed to search for evidence capable of being stored on a laptop computer, not the computers themselves, and have been allowed to conduct an exploratory, rummaging search by, in part, counsel's ineffectiveness in arguing. That defense counsel relied on a "clearly inopposite" case because of the perceived lack of a binding precedent should not excuse defense counsel's inability to argue the numerous violations of Mr. Offineer's Fourth Amendment rights. After all, precedents are established at some point during proceedings that lack them.

Courts are recognizing personal computers as similar to containers requiring specific warrants to gain access to the information they hold. The agents had access to the information located on Mr. Offineer's laptop only once the computers had been opened, turned on, and the password protection bypassed. The agents in this case had nearly 3 single-spaced pages of electronic items they were authorized to search, which makes it entirely unreasonable for agents to believe they were also authorized to search Mr. Offineer's computers because they were not specifically stated in the warrants. The agents violated the limiting principle of the warrants because they searched the computers anyway. The agents executed a generalized search based on the agents guesses, conclusory statements, and generalizations that CEM might be found on some type of electronic device somewhere that Mr. Offineer spent a significant amount of time. For defense counsel not to have seized upon the numerous Fourth Amendment violations by the government in this case is baffling and ineffective assistance at it's worst. From the conclusory statements made in the Affidavit, to the wildly varying amounts of CEM Mr. Offineer allegedly possessed, to the failure to establish

probable cause, defense counsel failed to provide adversarial challenge to the government's case in key areas. The agents either knew the limits of the warrants and disregarded them or they never bothered to read the warrants. In either circumstance, then, the agents are not allowed to rely on any type of good-faith exceptions (see U.S. v. Angelos, 433 F.3d 738 (10th Cir. 2007). Judge McCoy issued the dissenting opinion in U.S. v. Andrews, 483 F.3d 711 (10th Cir. 2007) and stated, "This case concerns the reasonable expectations of privacy of password protected computers. Given the majority's correct decision to categorize computers as containers, with all the attendant protections afforded under case law, whether a computer search is objectively reasonable depends on fact-specific determinations in individual cases with no bright-line rules. This scenario appears to present itself infrequently likely because the majority of computer searches occur pursuant to a search warrant." Mr. Offineer's rights have been eviserated by the government's warrantless search and then by defense counsel's ineffective assistance in arguing. In U.S. v. Wolfenburger, 696 F.2d 750, 752 (10th Cir. 1982) the court held, "Consequently the lack of a warrant allowed precisely the kind of rummaging through a person's belongings, in search of evidence of even previously unsuspected crimes or of no crime at all." The charge of Count I of the indictment is a direct result of the government's illegal search of Mr. Offineer's personal computers, a crime that was previously unsuspected. Without this illegally obtained evidence, in this instance the voyeuristic videos made by Mr. Offineer, the government had only enough evidence to charge him with Count II of the indictment. The evidence the government used to charge Mr. Offineer with Count I is not allowed because the warrants allowed the search only for evidence of CEM, not the voyeuristic videos, which did not meet the jurisdictional elements to be charged under Count I. The failure of defense counsel to develop this strategy is ineffective assistance claimed by Mr. Offineer.

V. Conclusory and Vague Pleadings

The appellate court's Order (see Petitioner "Appendix A") directly contradicts established Supreme Court doctrine concerning vague and conclusory allegations from pro se litigants that do not satisfy Strickland's prejudice inquiry. The Supreme Court has ruled that "...a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers..." (Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), which reversed a pro se petitioner that was dismissed"...on the ground that petitioner's allegations of harm were too conclusory to put these matters in issue." The Supreme Court ruled in Slack v. McDaniel, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) that liberal construction requirements for pro se litigants carry particular weight because

"...the writ of habeas corpus plays a vital role in protecting constitutional rights." The record shows that these same standards have not been equally applied in Mr. Offineer's case by the lower courts. Because Mr. Offineer may not have eloquently expressed his defense counsel's ineffectiveness in making an appeal should not allow the lower courts to simply dismiss his claims as overly broad and conclusory without any further attempt to narrow those claims made by Mr. Offineer. The lower courts have provided no clear guidance to Mr. Offineer on how to express his claims more clearly or offered him an opportunity to remedy his failure to explain causation. Mr. Offineer has twice requested appointment of counsel (see Petitioner "Appendix B"), which was denied both times, and has requested an evidentiary hearing (see Petitioner "Appendix A"), which was also denied, in order to help him articulate his claims and determine relevant facts as has been allowed in other circuits under similar circumstances (see Estremera v. U.S., 724 F.3d 773, 777 (CA72013)). The Eastern District of Oklahoma now stands in contradiction, through it's denial of counsel and denial of an evidentiary hearing, with other district courts.

VI. Failure to Appeal and Inform

The law states that only a district judge can enter final judgement and that this judge is limited to submitting to the proposed findings of fact and recommendation for the disposition by a judge of the court. This results in prejudice to the indigent prisoner because: (1) an under-privledged petitioner likely has no legal training and doesn't understand the dangers of acquiescence; and (2) without legal knowledge the petitioner has no idea that a district judge will not review a magistrate's report and recommendation for accuracy without an objection on file. There is no reasonable, rational explaination as to why Mr. Offineer would not want to appeal the denial of the motions to suppress because they were the only strategies developed by defense counsel, the outcomes of those motions to suppress might have been decided differently on appeal, and because the denial of those motions deserve further proceedings. In Garza v. Idaho, 139 S. Ct. 738 (2019) the court stated, "This court held when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed with no further showing from the defendant of the merits of his underlying claims. Accordingly, a defendant who has signed an appeal waiver does not, in directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest." The court held that no showing of prejudice is necessary "...if the accused is denied counsel at a critical stage of his trial" (U.S. v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 50 L. Ed. 2d 657 (1984)) or if the accused is left "...entirely without the assistance of counsel on appeal" (Pension v. Ohio, 488 U.S. 75, 88, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988)).

Both of the lower court rulings in Mr. Offineer's § 2255 are based on the merits of the arguments that he might have made on appeal and have described any appeal that might have been made as futile and meritless. These rulings are contrary to established Supreme Court doctrine and have denied Mr. Offineer his constitutional right to appeal. The Supreme Court ruled in Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) "...that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwised pursued, prejudice to the defendant should be presumed with no further showing from the defendant of the merits of his underlying claims. We hold that the presumption of prejudice recognized in Flores-Ortega applies regardless of whether the defendant has signed an appeal waiver." The fact remains, and is supported by the record, that defense counsel made the decision not to appeal without any discussion with Mr. Offineer, which has established an inefffective assistance claim and violated his constitutional rights. Defense counsel's own admissions establish this as fact. In defense counsel's Affidavit (see Petitioner "Appendix C") he states, "Based on my experience, I made the educated decision not to appeal the decision based on the evidence in the case and current legal authority." This decision is not defense counsel's to make, that has been made clear and is well established by the Supreme Court. The Supreme Court has ruled the decision to appeal or not lies solely with Mr. Offineer and that defense counsel's only role is to decide what arguments to make during that appeal (see Jones v. Barnes, 463 U.S. 745, 751, 103 S. ct. 3308, 77 L. Ed. 2d 987 (1983)). "And in any event, the bare decision whether to appeal is ultimately the defendant's, not counsel's, to make" (see McCoy, 584 U.S. at 138 S. Ct. 1500, 200 L. Ed. 2d 821). The Supreme Court has made abundantly clear that Mr. Offineer is the only party that decides to appeal or not and that defense counsel's only role in that decision is how to present the appeal to the court, regardless of how meritless counsel, and the courts, may believe that appeal is. Defense counsel's representation was ineffective regarding an appeal and Mr. Offineer is not required to show he was prejudiced. The Supreme Court has also ruled in Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003) that "...until a C.O.A. has been issued, the Federal courts of appeals lacks jurisdiction to rule on the merits of appeals from habeas petitioners [because] the question is of the debatability of the underlying constitutional claim, not the resolution of that debate." In Garza v. Idaho, 139 S. Ct. 738 (2019) the Supreme Court held that "...the accused has ultimate authority to decide whether to take an appeal, the choice of what specific arguments to make within that appeal belongs to appellate counsel. In other words, filing a notice of appeal is, generally speaking, a simple, nonsubstantive act that is within the defendants prerogative Past precednets call for a presumption of prejudice whenever the accused is denied counsel at a critical

stage, it makes even greater sense to presume prejudice when counsel's deficiency forfeits an appellate proceeding altogether. After all, there is no disciplined way to accord any presumption of reliability...to judicial proceedings that never took place. In other words, Garza had a right to a proceeding, and he was denied that proceeding altogether as a result of counsel's deficient performance. That Garza surrendered many claims by signing his appeal waivers does not change things. First, this Court has made clear that when deficient counsel causes the loss of an entire proceeding, it will not bend the presumption-of-prejudice rule simply because a particular defendant seems to have poor prospects...we affirm that, when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal, with no need for a further showing of his claims' merits, regardless of whether the defendant has signed an appeal waiver. Moreover, while it is the defendant's prerogative whether to appeal, it is not the defendant's role to decide what arguments to press. That makes it especially improper to impose that role upon the defendant simply because his opportunity to appeal was relinquished to deficient counsel. Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings. We accordingly decline to place a pleading barrier between a defendant and an opportunity to appeal that he never should have lost." Mr. Offineer has claimed his right to appeal was denied since the very start of his § 2255 motion and that counsel took a right from Mr. Offineer that he was not allowed to take under any circumstances. That the lower courts, and his counsel, have denied Mr. Offineer a constitutionally protected right to appeal because, in their opinions, his appeal claims were meritless and futile cannot be allowed to stand in this case just like it was not allowed to stand in Garza.

VII. Sentencing Disparities Under 18 U.S.C. § 3582(c)(2)

Skewed sentences in most non-production CEM cases are common and create a high occurance of disparity among the district courts. The calculation of offense levels being based on the use of a computer, the type, and the volume of pornography, according to 2G2.2, accounts for 13 offense levels, which applies to nearly all offenders and fails to differentiate among those offenders. These enhancements are similar to the Kimborough crack versus powdered cocaine debate, which was ridiculed as creating another problem instead of solving one. For example, U.S. v. Morrison, 771 F.3d 687 (10th Cir. 2012) was tried in the same district court as Mr. Offineer's case. Morrison was found to be in possession of over 20,000 images and/or videos with 53 prev-

iously unidentified victims. Morrison also received an enhancement for distribution of CEM. Morrison had previous convictions, placing him at a Category III and was offered a plea of 10 years in custody and only 5 years of supervised release. Mr. Offineer was found to be in possession of 1,329 images and 31 videos and had no criminal history, which should have placed him in the Guideline range between 78 and 97 months, after all the calculations were complete. However, the plea defense counsel advised him to accept, and the district court approved, was for 10 years in custody and 15 years of supervised release. Massive amounts of pornography are capable of being downloaded through the use of peer-to-peer networks without the individual knowing exactly what type of, or even how much, pornography they are receiving. Mr. Offineer downloaded ZIP files, which the government concedes can contain thousands of images and/or videos, from the website without knowing for certain what those ZIP files contained. As he has maintained throughout these proceedings the website Mr. Offineer purchased these ZIP files from did offer legal pornography, not solely CEM. The government has never contested the website offered legal pornography and was not a dedicated CEM website. The result of downloading ZIP files to a computer is the imposition of 2G2.2 enhancements for the use of a computer, enhancements for the type, and enhancements for the volume of pornography in the guideline sentencing table. The imposition of the 2G2.2 enhancement results in nearly all offenders receiving 13 offense levels just to start, which apply to nearly all offenders and fail to make any distinction between offenders as set out by laws such as 18 U.S.C. § 3553(a)(1). Courts have begun to vary downward from possession of CEM Guidelines, especially the 2G2.2 enhancement, based on policy disagreements with those Guidelines because they deviate from an individual, case-by-case basis and often result in excessive sentences for the defendant in comparison to other crimes. The sentencing disparity in Mr. Offineer's case is contrary to the Eight Amendment narrow proportionality principle and the deferential abuse of discretion principle. The plain error standard of review is applicable to Mr. Offineer's sentence because: (1) the district court erred in accepting the plea bargain because of the existence of the sentencing disparity; (2) the error has affected Mr. Offineer's right to equality and equal protection under the law; and (3) this error has affected the fairness and integrity of the judicial process. It was not objectively reasonable for counsel not to have attempted to negotiate a more favorable plea before advising Mr. Offineer to accept the plea. Defense counsel, based on his experience with similar indictments, is reasonably expected to have understood the large disparity that exists between this case and similar cases, some of which he even provided counsel in. A sentenced imposed pursuant to a Type-C, Fed. R. Crim. P. 11(c)(1)(C) agreement is no exception to the general rule that Mr. Offineer's guideline range should have been both the starting point and a basis for his ultimate

sentence. The Guidelines prohibit district courts from accepting Type-C plea agreements without first evaluating the recommended sentence. The district court's acceptance of the plea agreement and the sentenced imposed according to the agreement are supposed to be based on Mr. Offineer's Guideline range. The Sentencing Reform Act was enacted to create comprehensive sentencing among crimes of similar severity under similar conditions to ensure similar sentences. 18 U.S.C. § 3582(c)(2) is meant to ensure that district courts can adjust imposed sentences within a range that is not too severe or out of step with the seriousness of the charge(s) or analogous charges, and inconsistent with the Sentencing Reform Act. The district court has failed to uphold these laws by accepting the terms of Mr. Offineer's plea agreement, which is above the Guideline range and unnecessarily harsh in comparison to his crime and similar crimes. Mr. Offineer has, in actuality, received a combined 25 year sentence when other defendants convicted of similar crimes have received less than half of that sentence, some despite having previous criminal convictions. Mr. Offineer's sentence is disparate undoubtedly and deserves further proceedings and relief. The Supreme Court held in Hughes v. U.S., 138 S. Ct. 1765 (2018) that there "...is no reason a defendant's relief eligibility for relief should turn on the form of his plea agreement" and "In making it's decision, the district court must consider the Sentencing Guidelines. And it may not accept the agreement unless the sentence is within the applicable guidelines range, or outside that range for justifiable reasons specifically set out...". The district court in Mr. Offineer's case appears to have rubber stamped his plea agreement in spite of laws in place to ensure his sentence is not greater than necessary. The courts have held that an imposed sentence pursuant to a plea agreement is no exception to the rule that the Guideline range is the starting point and the basis for the sentence imposed. Both lower courts in Mr. Offineer's case have issued contradictory rulings by stating that because of the plea agreement the sentence imposed is just. The sentence is above the Guideline range for the charged offense and requires relief.

VIII. Failure to Correct Inaccurate PSR

Defense counsel stated in his Affidavit (see Petitioner "Appendix C") that Mr. Offineer should have pointed out incorrect information contained in his PSR. The appellate court's Order (see Petitioner "Appendix A") states that any objection to the PSR would have been irrelevant, which undermines the importance of the PSR and is contrary to the judicial system's reliance upon the report in deciding things ranging from Mr. Offineer's place of confinement, to his security level, to the type of programs he may participate in while incarcerated. This places another burden on Mr. Offineer because he was unaware of the ramifications of not correcting those errors.

The errors occured when information relating to Count I (the listing of 2 victims) was left in the report despite Count I being dropped as part of the plea agreement. It is unreasonable and ineffective for defense counsel, who is obligated to understand how important the accuracy of the information contained in the PSR is to the ultimate disposition of the case, not to have tried to remove any references to Count I. Mr. Offineer plead guilty to possession and attempted possession of CEM, which did not involve the victims listed in the PSR. Defense counsel is supposed to make sure the probation officer preparing the report takes into account all the good things that Mr. Offineer has done and is doing and that the PSR is as favorable to him as possible. Judges typically do not have the time to investigate all of the circumstances of a particular case so they tend to rely heavily upon the information in the PSR which often results in a rubber stamping process. Preparation is also critical because probation officers may rely on information that would not have been permissible in court, such as the illegally obtained evidence used to charge Mr. Offineer with Count I. This provides another reason why defense counsel's failure to appeal was harmful, ineffective, and unreasonable to Mr. Offineer. The PSR remains the major source of information about the offender during later stages of the correctional process and will follow Mr. Offineer through the correctional system. The PSR is the main document administrators use to make assessments of Mr. Offineer at the start of his prison term. Case managers will use the PSR to consider the severity of the offense, counselors will use it to decide who can visit Mr. Offineer, education administrators will use it to determine what type of programs he is required to participate in, psychologists will use it to recommend beneficial programs for him, and medical staff will use it to form a basis of his health. The reliance upon this information by the B.O.P. in making determinations relating to Mr. Offineer's custody, then, can be skewed by untrue and/or unchallenged factual information that counsel and the lower courts have deemed unimportant. The B.O.P.'s classification manual states, "...In the case where an inmate was charged with an offense that included one of the following elements, but as a result of a plea bargain was not convicted, application of this [public safety factor] should be entered." This highlights the significant harm caused by defense counsel's ineffective assistance by relying on "clearly inopposite" case law and his failure to appeal. Mr. Offineer now faces great difficulty in trying to have his PSR corrected after he has been sentenced because the sentencing court does not have the jurisdiction to correct the PSR. Because defense counsel failed to ensure the accuracy of Mr. Offineer's PSR, the district court did not make the proper written findings or make a disclaimer of the disputed information. This has unfairly burdened and punished Mr. Offineer above and beyond his sentencing. The appellate court's decision to allow the uncorrected information in the PSR to remain now sets

another hurdle Mr. Offineer must clear in order to find a remedy, the B.O.P. "administrative remedy" process. The administrative remedy is an additional penalty sanctioned without due process of law because this process does not allow Mr. Offineer to have representation to aid him in his declarations of an inaccurate PSR. The inaccuracies in Mr. Offineer's PSR, and the unjust process of trying to have those errors corrected with no legal representation, have damaged the fairness and integrity not only of the judicial process, but the rehabilatative process as well.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to correct the Tenth Circuit's ruling that Mr. Offineer did not raise the issue of the validity of his plea agreement in previous pleadings and the Tenth Circuit's error in stating the district court correctly dismissed Mr. Offineer's claims concerning the validity of his plea agreement when the district court issued no such ruling. The contentions raised by the government regarding the waiver have required Mr. Offineer to purchase additional resources in order to rebut false statements made by the government and in order to avoid appearing as Mr. Offineer's acquiescence to those contentions. Mr. Offineer has been deprived of his constitutional rights under the agreed upon plea agreement and has been forced to use his precious resources and time, and has lost sleep and the peace of mind that the government would honor it's own contract. Mr. Offineer's pleadings have further burdened him beyond the obligations of Strickland by requiring him to first litigate for an agreed upon right of a contractual agreement. The government has, through it's response, withdrawn it's consideration in the plea agreement and, therefore, voids the agreement by knowingly breaching the contract. The government and defense counsel have deprived Mr. Offineer of his civil rights to contract as provided in 42 U.S.C. § 1981 and have created a conflict of interest between Mr. Offineer and defense counsel, which has created an egregious prejudice that has irreparably harmed his ability to defend himself. Mr. Offineer, as a pro se litigant, has tried to express that he was not duly informed of all the effects of the plea agreement throughout these proceedings. The district cout based Mr. Offineers's guilt upon rehearsed yes or no answers, which he did not fully understand as a result of the unfamiliar legal jargon concerning rule 11 steps. Mr. Offineer's guilt or innocence was not an issue because he was simply following defense counsel's instructions in order to mitigate his sentence. The additional restrictions are well known to professional law practicioners, but those outside of lawyers are unfairly blindsided and prejudiced by their ignorance of such laws and cases. The record clearly shows Mr. Offineer was not made aware of these extrinsic provisions at any point in the proceedings, which has prejudiced him in a distinctive way: the strong presumption that counsel was reasonable and advised him of those provisions. Mr. Offineer's plea agreement is, then, voidable because it was developed and executed as a misleading instrument that has defrauded the court, Mr. Offineer, and the judicial system. The fraudulent, hidden, and extrinsic provisions implied but not expressed in the plea agreement were only discovered after Mr. Offineer plead guilty and only after he discovered his right to adequate representation was denied. That he would be barred from relief because of those provisions not annuciated in the plea agreement or at the Change of Plea Hearing, defense counsel's advice to enter into the plea creates an extrinsic ineffective assistance of counsel waiver: a conflict of

interest. When the government places a collateral attack waiver, intrinsic or extrinsic, in the plea agreement, it creates a conflict of interest and, because the government knows this but fails to inform, the government commits fraud as Mr. Offineer has the right to be correctly informed of the facts. The waiver, then, does in fact affect fairness, the integrity, and the public reputation of judicial proceedings resulting in a fundamentalmiscarriage of justice. Furthermore, Mr. Offineer specifically instructed defense counsel to negotiate a more favorable plea agreement, but defense counsel refused to honor Mr. Offineer's request.

The Court should grant certiorari to determine if the appellate court erred in ruling that because Mr. Offineer signed the collateral attack waiver, he is not allowed to raise the claim that he was impeded in accessing a law library dispite this impediment occurring before he signed the waiver. The impediment to a law library has violated Mr. Offineer's constitutional right to defend himself against the government's accusations, to knowingly enter into the plea agreement, and to willingly enter into the plea agreement. The Supreme Court has held that while incarcerated Mr. Offineer has the constitutional right to meaningful access to the courts, which must include the right to a law library. Mr. Offineer's plea cannot support a judgement of guilt because it was not voluntary and knowing as demanded under the Fourteenth Amendment. The impediment to a law library denied Mr. Offineer the ability and the right to make informed decisions about his case, including the details within the plea agreement itself. The Supreme Court has held that Mr. Offineer's plea cannot be voluntary in the sense that it constituted an intelligent admission that he committed the charged offenses unless he has received real notice of the true nature of those charges against him, which is the first and foremost recognized requirement of due process. Mr. Offineer receives real notice when he has been informed of both the nature of the charges to which he is pleading guilty and it's elements. Without access to a law library, Mr. Offineer was unable to discern the elements of those charges. Mr. Offineer avers that during the 8 months he was in custody at Muskogee County jail there were no calls by staff to sign-up for a law library visit and there was no signage indicating the jail had a law library available or that he had a right to access a law library. Mr. Offineer avers that, had he had access to a law library, there is a reasonable probability that the outcome of these proceedings would have been different.

The Court should grant certiorari to determine if defense counsel's reliance on inopposite case law prejudiced Mr. Offineer with ineffective assistance and if defense counsel's failure to investigate reasonable defensive strategies was ineffective assistance. The courts have held that an assessment of whether a defendant would have gone

to trial dependson objective factors that could have changed the outcome of the proceedings, such as a defense that the defendant was not advised of. ABA Standards require defense counsel to advise the defendant in reaching a decision only after appropraite investigation and that counsel inform himself fully on the facts and the laws pertaining to Mr. Offineer's case. Defense counsel has not refuted telling Mr. Offineer that even though his actions did not meet the elements to be charged with Count I, he should accept the plea because "nearly all sex offenders are found guilty". This is not a reasonable defense strategy for competent counsel to employ. Once Mr. Offineer was able to reasearch in a law library he discovered there were, in fact, viable defensive strategies that defense counsel did not inform him of. One of these strategies that could have changed the outcome of the proceedings was a bench trial, which could have allowed the court to review the evidence to determine whether any rational tier of fact would have found the elements of the crime charged in Count I beyond a reasonable doubt. This strategy could have allowed the court to resolve any conflicting testimony, such as the agent's statements made in the Affidavit and his testimony to the court during the Preliminary Detention Hearing, and to decide facts based on reasonable inferences from the case. The government's plea offer contained no benefit to Mr. Offineer: if he goes to trial and is not found guilty of Count I, if Count I is dismissed in a pretrial motion because it does not meet the elements of the crime, or if the judge gives a jury correct instructions on the elements of the alleged crime charged in Count I, and Mr. Offineer is found guilty of only Count II, then his sentence is somewhere between 78 and 97 months according to his PSR. If Mr. Offineer goes to trial and is found guilty of all counts, then he can still appeal and the appellate court can review the elements of the charges. Defense counsel never discussed these options with Mr. Offineer before advising him to plead guilty and left him with essentially no representation and no choice but to accept the government's disparate plea agreement. There is no way to know for certain if these strategies would have changed the outcome of the proceedings because defense counsel's ineffective assistance denied Mr. Offineer the right to those proceedings and failed to duly inform Mr. Offineer of them.

The Court should grant certiorari to determine if defense counsel's reliance upon "inopposite" case law prejudiced Mr. Offineer with ineffective assistance and if the appellate court ammended the magistrate's Report and Recommendation without the authorization to do so. The magistrate's Report and Recommendation (see Petitioner "Appendix A") stated the Riley was "clearly inopposite to the facts of this case". The appellate court's Order (see Petitioner "Appendix A") then reworded the R&R to state that Riley was "distinguishable [but] objectively reasonable for Offineer's counsel to rely upon a relatively recent Supreme Court case involving similar issues." The appellate court's rewording of the R&R is contradictory. The only similarities between these cases is the

Need Page # of Conclusion

government's warrantless search of personal property. It is unreasonable and ineffective for defense counsel to rely on inopposite case law instead of arguing the merits of Mr. Offineer's case because counsel could not find a binding precedent for warrantless computer searches. The lack of a binding precedent seems to be because nearly all computer searches are done through a warrant that has permitted that search. After all, binding precedents are established when defense counsel has argued the merits of the case and the constitutional laws involving those cases, not "clearly inopposite" case law that prejudices the defendant.

The Court should grant certiorari in order to determine if the appellate court's descriptions of Mr. Offineer's pleadings as too conclusory and vague is contrary to established Supreme Court precedent. The Court has ruled multiple times that pro se litigants are to be given leniency in trying to describe and develop their claims because they are not professional lawyers. The lower courts have ruled contradictory to those established precedents regarding Mr. Offineer's pleadings and have not afforded him the same opportunity to narrow the scope of his claims as other circuits have allowed other pro se defendants to do. Other circuit courts have provided pro se litigants this opportunity by provideing some instruction on how to clarify their pleadings because those courts have recognized the important constitutional ramifications that the habeas corpus writ plays in a fair and just judicial proceedings. Mr. Offineer has asked for the appointment of counsel twice during his § 2255 motion, which was denied both times, in order to help him develop and present his claims to the district court. Mr. Offineer has also requested an evidentiary hearing to determine the relevant facts of his pleadings in order to protect his constitutional rights, which was also denied in district court. The appellate court's denial of Mr. Offineer's pleadings, simply because the court believed them to be too conclusory and vague, without any chance afforded to him to clarify those pleadings, undermines the importance of the writ in maintaining the fairness and integrity of the judicial system. It also directly contradicts Supreme Court precedent and other circuit court rulings regarding conclusory and vague pleadings made by pro se litigants.

The Court should grant certiorari to determine whether Mr. Offineer was prejudiced with ineffective assistance which failed to perfect an appeal on his behalf and failed to inform him of his right to appeal. Mr. Offineer has held that there is no rational explaination why he would not want to appeal the denial of 2 motions to suppress because defense counsel had developed no other strategies for his defense. In light of the fact defense counsel cited inopposite case law to argue for the suppression of evidence, the importance of making an appeal becomes even more important and even more reasonable.

Defense counsel denied Mr. Offineer the right to appeal because he did not explain that Mr. Offineer had the right to do so. Defense counsel has openly admitted that he made the decision notto appeal without the inclusion of Mr. Offineer in this decision. The Court has repeatedly made clear that the decision to appeal is solely Mr. Offineer's to make and that defense counsel's only role in that decision was what arguments to make on that appeal. The Court has also repeatedly made clear that it does not matter what defense counsel thinks about the odds of making a successful appeal are. The denial of Mr. Offineer's right to appeal made the outcome of the proceedings a foregone conclusion. The significance of the constitutional issues surrounding the motions to suppress - the lack of probable cause to obtain a search warrant for Mr. Offineer's truck and the warrantless search of his personal computers - could have been decided differently on appeal and certainly deserve further proceedings, on appeal if nothing else. The significant constitutional issues surrounding the search of Mr. Offineer's truck include the agent's conclusory and generalized statements that he knew modern electronics are small, portable, and easily concealable on Mr. Offineer's person or in his vehicle. The agent provides no proof that tied Mr. Offineer to even owning a personal computer or that tied Mr. Offineer to a computer and the computer to his truck. The agent just guessed. The fact is that, as technology has expanded, the size of modern electronics has decreased along with the cost of those electronics. The end result is that nearly every person who desires electronics(i.e. tablets, phones, laptops, etc.) can now afford them and can carry them with them nearly any place they go. The agents generalizations and conclusory statements are in direct contradiction of well established Fourth Amendment laws regarding specific and particular warrants intended to avoid the generalized, rummaging searches that are not allowed under the Fourth Amendment. Defense counsel failed to investigate the agent's Affidavit in regards to the number of images and/or videos Mr. Offineer allegedly possessed that ranged anywhere from 3,000 up to 42,000. Defense counsel failed to investigate the actual number of images and videos, 1,329 and 31 respectively, on Mr. Offineer's laptop and to scrutinize that number to the number cited in the agents Affidavit. Upon closer examination, it becomes apparent the agents infomation was knowingly and recklessly included in the Affidavit in order to mislead the magistrate judge. This information would have allowed defense counsel to rely on multiple good faith exceptions as described in Leon, which reasonably could have changed the outcome of the proceedings. The only absolutes included in the agent's Affidavit were that Mr. Offineer owned a cell phone, had made purchases from a website the agent had allegedly never even been to in the course of the investigation (see P. 14, Preliminary Detention Hearing transcript), from a website the government conceded did contain legal pornography (see P. 14, lines 17-23, Preliminary Detention Hearing Transcript).

Defense counsel was ineffective is failing to investigate and inform Mr. Offineer that there were reasonable strategies that could have been used to counter Count I. The most glaring example is the government used the warrantless search of Mr. Offineer's computers to obtain the evidence they used to charge him with Count I. This evidence is illegal because the agents were allowed to search only for evidence of CEM. The evidence the agents obtained was the voyeuristic videos made by Mr. Offineer, which do not meet the elements, according to defense counsel, to be charged under Count I. Defense counsel violated Mr. Offineer's Sixth Amendment right to effective assistance by not advising him of any of the obvious and nonfrivolous defenses involving Count I before advising him to plead guilty. The courts have held that, in such cases, it is reasonable to presume Mr. Offineer would have wanted to appeal or withdraw his guilty plea altogether if he had been advised of the aforementioned defenses that counsel did not advise him of.

Defense counsel was ineffective by failing to show that the courts have held personal computers in the same regard as locked suitcases or lockers, which require a specific warrant to get access to the information they contain. The courts have held Mr. Offineer's personal computers require a high degree of expectation of privacy and that society has recognized this expectation of privacy as reasonable. The agents were allowed to search only for evidence of CEM and not Mr. Offineer's computers specifically, but the agents ignored the specificity requirement of the Fourth Amendment altogether and executed a generalized, rummaging search without a warrant. The fact that the agents could have applied for a specific warrant for Mr. Offineer's computers upon their discovery adds to the unreasonableness of the search. The warrantless search of Mr. Offineer's computers allowed the government to charge him with Count I based on the illegally obtained evidence of a previously unsuspected crime: in this case it was the voyeuristic videos made by Mr. Offineer. The result has been a shotgun-style approach hoping that something might hit the target. There is nothing that ties the agent's guesses in the Affidavit to Mr. Offineer...no probable cause at all. There are no limiting principles in place to guide and control the agents and barely anything to protect the Fourth Amendment rights of Mr. Offineer. The agent just guesses that CEM might be found on some type of electronic device, somewhere that Mr. Offineer spent a significant amount of time, but the agent offers no proof to support his guess work. The very few specifics given in the Affidavit consist of purchases of pornography, made more than a year prior to the information used in the warrant application, from a website the agent had allegedly never even been to and never denied did contain legal pornography. The Supreme Court has held that seized items not <u>specifically</u> listed in the warrant are to be suppressed because the warrant is required to be limited to the terms of that warrant. A reasonable person, especially a highly trained federal agent, would believe that com-

puters would likely be involved with Mr. Offineer's case and especially with the amount of detailed information the agent had already painstakingly compiled (i.e. bank records, cell phone records, internet service provider records, etc.). Even with all this information, the agent still could not establish a nexus between Mr. Offineer and any computer so he knowingly disregarded the requirements of Mr. Offineer's Fourth Amendment rights and searched his computers anyway. To allow the failure to obtain the warrant would completely obviate the warrant requirement and damage the reputation and integrity of the judicial system. And if subjective good faith alone were the test of reasonableness, the protections of the Fourth Amendment would disappear altogether. Search warrants must be supported by probable cause, which is more than mere suspicion. The record in Mr. Offineer's case clearly shows the agent knowingly misled a magistrate in order to secure the warrants, that those warrants did not authorize the search of Mr. Offineer's computers, and that defense counsel failed to provide effective assistance by relying on a clearly inopposite case to suppress the evidence that was illegally obtained from the warrantless search of Mr. Offineer's computers.

The Court should grant certiorari in order to determine if the lower court's have accepted Mr. Offineer's plea agreement contrary to 18 U.S.C. § 3582(c)(2), which is in place to prevent inconsistencies in sentences involving similar circumstances. Mr. Offineer's defense counsel advised him to accept the plea agreement which called for 10 years in custody and 15 years of supervised release in addition to $8,500 in restitution. Upon researching similar cases within the same district court once he had access to a law library, Mr. Offineer discovered how unreasonable and disparate his sentence was in comparison to similar crimes under similar circumstances. Mr. Offineer's sentence, a combined 25 years, is far greater than necessary, arbitrary, and manifestly unreasonable in comparison. Defense counsel was ineffective in failing to bring the disparity of Mr. Offineer's proposed sentence to the prosecutor's attention during plea negotiations and, if necessary, to the district court's attention during the proceedings. The district court failed to uphold the law as required by 18 U.S.C. § 3582(c)(2) in failing to ensure Mr. Offineer's sentence was tailored to his specific circumstances, which has amounted to a rubber-stamping process. The U.S. Sentencing Guidelines are in place in part to assure that sentences are not arbitrary for defendants, but more often than not, especially in CEM cases, the occurrence of skewed sentences has a high occurance. This places greater responsibility on the courts to guarantee that imposed sentences are within the guidelines, tailored to each defendant, and that rubber-stamping is avoided, even when plea agreements are in place. These standards have not been upheld in Mr. Offineer's case and have prejudiced him with a sentence that is greater than necessary, disperate, and fails to make any distinction between

him and other defendants. There are myriad cases just in the Tenth Circuit alone in which a defendant, some with previous criminal histories, have received far less severe sentences than Mr. Offineer even though those defendants had far more CEM and some used sophisticated technology to cover their tracks. Because of the disparity in Mr. Offineer's sentence, the Eigth Amendment's narrow proportionality principle and the deferential abuse of discretion principle have been circumvented by defense counsel as well as the lower courts. Mr. Offineer's constitutional rights to equality and equal protection under the law have jeopardized the fairness and the integrity of the judicial system. The appellate court is outside the confines of the deferential abuse of discretion principle because it failed to review Mr. Offineer's sentence which is outside his Guidelines range of 78-97 months. The Supreme Court has held that erroneously imposed sentences are especially ripe for review because those sentences can harm the public reputation of the courts and it's perceived fairness to defendants.

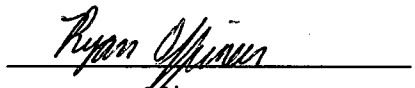
The Court should grant certiorari in order to determine if the current process used to correct an inaccurate PSR has negated Mr. Offineer's due process rights and if the lower courts incorrectly ruled that those corrections would have been irrelevant to his case. Defense counsel has stated in his Affidavit (see Petitioner "Appendix C") that the responsibility to correct erroneous information in the PSR should fall upon Mr. Offineer. The fact that Mr. Offineer was a first-time offender and did not understand the full impact of the information contained in his PSR should carry greater weight than defense counsel who inexplicably has tried to shift that responsibility to Mr. Offineer. After all, defense counsel has a much better understanding of, knowledge of, and experience with the intricacies of the PSR process. Defense counsel is obligated to attempt to remove the inclusion of any information relating to Count I because that count was dropped as part of the plea agreement. The inclusion of that information has significant impacts on Mr. Offineer's incarceration and rehabilitative treatments and is vital to the ultimate disposition of the case. Defense counsel failed to provide constitutionally effective counsel by failing to ensure Mr. Offineer's PSR contains relevant, accurate information that would assist him in obtaining the best possible treatment and his success in the rehablitative process. As it stands now, Mr. Offineer is unfairly burdened in trying to correct information in his PSR through a process that denies him his right to due process because he is not allowed to have representation to aid him in this process. Only the sentencing court has the jurisdiction to correct inaccurate information in Mr. Offineer's PSR, something that defense counsel is reasonably required to understand. Now that the appellate court has ruled that the erroneous information included in Mr. Offineer's PSR is irrelevant, he is forced to attempt to correct the errors through the B.O.P.'s "administrative remedy" process,

which does not allow him representationto aid him and is completely contrary to his constitutional due process rights. The PSR process is ripe for review from the Court because the Court has not held any proceedings on this issue since at least 2000 and because this process is unconstitutional at it's core.

CONCLUSION

Mr. Offineer respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,



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