

24-6969

No.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C. 20543

FILED

JAN 21 2025

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TONY ALEXANDER PAPAGEORGE, JR. PETITIONER
(Your Name)

vs.

STATE OF FLORIDA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

District Court of Appeal Fourth District State of Florida

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

TONY ALEXANDER PAPAGEORGE, JR.
(Your Name)

Suwannee Correctional Inst. main unit 5964 U.S. Hwy 90
(Address)

Live Oak, FL 32060
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. I express a belief, based on a reasoned and studied Professional Judgment, that the case or issue is of exceptional Importance.
2. I express a belief, based on a reasoned and studied Professional Judgment, that the Panel decision is contrary to the following decision(s) of this court and that a consideration by the full court is necessary to maintain uniformity decisions in this court.
3. Petitioner was released from Prison on the grand theft conviction this charge itself was outside the five year period required by the Statute, and the date of Commission of the new offenses.
4. If a habitual offender Sentence is imposed when, as a matter of law, the defendant was not subject to habitualization, the resulting habitual offender Sentence can be corrected as illegal provided the error is apparent from ϵ 777 So. 2d 1249 } the face of the record.
5. Judge Aitenbernd, writing for the Second District in Judge, concluded that an improper habitual offender Sentence renders a Sentence illegal "only if:
1) the terms or conditions of the Sentence exceed those authorized by sec 775.084 for the adjudicated offense, or 2) a prior offense essential to categorize the defendant as a habitual offender does not actually exist."
"596 So. 2d at 78."
6. Section 775.084(1)(a) 2. 6. Florida Statutes, Permits the imposition of a habitual offender Sentence when the necessary Predicate convictions are established and the felony for which the defendant is being convicted was committed: within 5 years of the date of the conviction of the defendant's last prior felony or other qualified offense etc....

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- PAUL ERLINGER, PETITIONER V. UNITED STATES SUPREME COURT OF THE UNITED STATES 144 S. Ct. 1840; 219 L. Ed. 2d 451; 2024 U.S. LEXIS 2715 No. 23-370 June 21, 2024, Decided March 27, 2024 Argued.
- Adams v. State, 957 So. 2d 1183 (Fla. 3rd DCA 2006)
- Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1956)
- Arnold v. State 754 So. 2d 149 (Fla. 2nd DCA 2000)
- Ashley v. State, 850 So. 2d 1265 (Fla. 2003)
- Atterbury v. State, 991 So. 2d 980 (Fla. 4th DCA 2008)
- Bover v. State, 797 So. 2d 1246, 11247 (Fla. 2001)
- Carter v. State, 786 So. 2d 1173, 1181 (Fla. 2001)
- Lillo v. State, 884 So. 2d 29 (Fla. 2nd DCA 2004)
- Lillo v. State, 913 So. 2d 1233 (Fla. 2nd DCA 2005)
- Cooley v. State, 901 So. 2d 271 (Fla. 1st DCA 2005)
- Daniel v. State, 336 So. 3d 322 (Fla. 4th DCA 2022)
- Eason v. State, 1932 So. 2d 465 (Fla. 1st DCA 2006)
- Flain v. State, 780 So. 2d 285 (Fla. 2nd DCA 2001)
- Gordon v. State, 745 So. 2d 1016, 1017 (Fla. 4th DCA 1999)
- Hill v. State, 56 So. 3d 905 (Fla. 5th DCA 2011)

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11-15-2024

INMATE:

PAPA GEORGE, TONY

DC#

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Any other use of this paper will result in disciplinary action per FAC 93-601.314 (7-4)

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- Hughes v. State, 850 So. 2d 664 (Fla. 1st DCA 2003)
- Ishmael v. State, 735 So. 2d 509 (Fla. 2nd DCA 1999)
- Lee v. State, 731 So. 2d 71, 73 (Fla. 2nd DCA 1999)
- Young v. State, 716 So. 2d 280 (Fla. 2nd DCA 1998)
- Kerney v. State, 605 So. 2d 159 (Fla. 2d DCA 1992).
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- Freshman v. State, 730 So. 2d 351 (Fla. 4th DCA 1999).

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

- ☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

- ☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☒ reported at District Court of Appeal of the State of Florida, Fourth District; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the District Court of Appeal of the State of Florida, Fourth District court appears at Appendix A to the petition and is

- ☒ reported at Circuit Court for the 19th Judicial Circuit, St. Lucie County; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was December 19, 2024.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

District Court of Appeal of the State of Florida Fourth District. Tony A. PAPAGEORGE, JR., Appellant, v. STATE OF FLORIDA, Appellee. Nos. 4D2024-2470 and 4D24-2483 [December 19, 2024], Consolidated appeal of order denying Rule 3.800 motion from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Lawrence M. Mirman, Honorable Judge; L.T. Case Nos. 562006CF004841B; 562007CF005193A; 562014CF002800A. Per Curiam Affirmed. This case and or issue is of exceptional importance or that such consideration is necessary to maintain uniformity in the courts decisions.

On or about December 7th, 2023, Appellant filed a Rule 3.800(a) motion(s) two with the lower court. I express a belief, based on a reasoned and studied Professional Judgment, that the case or issue is of exceptional importance.

I express a belief, based on a reasoned and studied Professional Judgment, that the Panel decision is contrary to the following decision(s) of this Court and that a consideration by the full Court is necessary to maintain uniformity decisions in this Court: (Citing).

Paul Erlinger, Petitioner v. Ed. 2d 451; 2024 U.S. LEXIS 2715 No. 23-370 June 21, 2024, Decided March 27, 2024 Argued. Predicate offenses -

The Fifth and Sixth Amendments require a unanimous jury to make the determination beyond a reasonable doubt that a defendant's Post offenses were committed on separate occasions for purposes of the mandatory minimum provision of the Armed Career Crime Act. In this case, Petitioner was sentenced as an (HFO) where the state failed to prove requisite predicate convictions for imposition of enhanced punishment; Petitioner argues his habitual felony offender sentences are illegal because he lacked the requisite predicate felonies. The requisite predicate felonies essential to qualify a defendant do not exist as a matter of law and that error is apparent from the face of the record. Appellant further argues his sentence for count one and count two, both are illegal because he has made a facially sufficient claim for relief unrefuted by the trial court's order of denial; the face of Appellant's motion contains sufficient facts to refute his claim that he did not qualify as a habitual felony offender. A challenge to a habitual felony offender sentence is cognizable in a Rule 3.800(a) motion citing Florida case law in Hill v. State, 56 So. 3d 905 (Fla. 5th DCA 2011).

However, to the extent that Hill claimed he did not have the predicate felonies required to support a habitual felony offender designation, his motion was cognizable under rule 3.800(a) See, Bayer v. State, 797 So. 2d 1246, 1247 (Fla. 2001). [W]here the requisite predicate felonies essential to qualify a defendant for habitualization do not exist as a matter of law and that

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

error is apparent on the face of the record Rule 3.800(c) can be used to correct the resulting habitual offender sentence. The defendant must be convicted of two or more felonies to be sentenced as a Habitual Felony offender (HFO). State intentionally misconstrued the facts in Appellant's Rule 3.800(c) motion alleging that the defendant discusses in his motion violation of Probation Predicates under the 2006 and 2007 cases. The state is misapplying the law alleging that the second predicate conviction does not require the conviction to be within five (5) years of the current offense. It's argued in Atterbury v. State, 991 So. 2d 980 (Fla. 4th DCA 2008). [W] conclude that Atterbury's habitual felony offender

sentence is illegal, as the record shows that he did not commit the current offense within the five (5) years of his release from a prison sentence. Appellant argues that his habitual felony offender sentence is "patently illegal" because he did not commit the current offenses within five years of his last release date from prison in which the habitual felony offender statutes Section 775.084(1)(a) provides within 5 years of the date of the conviction of the defendant's last prior felony or within 5 years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole. A challenge to the habitual felony offender claim is cognizable in Rule 3.800(c) motion citing Macaluso v. State, 912 So. 2d 694 (Fla. 2nd DCA 2005); Judge, 596 So. 2d at 78.

Sentencing statutes "must be strictly construed according to their letter citing Gordon v. State, 745 So. 2d 1016, 1019 (Fla. 4th DCA 1999). Citing Florida case law in Kelly v. State, 957 So. 2d 108 (Fla. 4th DCA 2007); Hill v. State, 56 So. 3d 905 (Fla. 5th DCA 2011). Oral Pronouncement Controls.

R. 502) that trial court erroneously imposed an illegal sentence on its face. The trial court is under the impression that Appellant was sentenced to thirty (30) years on count Two (2) Tampering with a witness as a Habitual felony offender. The trial court did orally pronounce that was tampering with a witness in the highest order, and so I'll adjudicate him guilty on the jury's finding of guilt, on count II, and sentence him concurrently to thirty (30) years in the Department of Corrections on that count. Appellant claims that his sentence is illegal because the trial court did not orally pronounce sentencing him as a Habitual Felony offender. The trial court's failure to orally sentence Defendant as a Habitual Felony offender required removal of habitual felony offender, The habitual offender sanction must be stricken. Citing Carter v. State, 786 So. 2d 1173, 1181 (Fla. 2001). Where the written sentence indicates the Defendant was sentenced as a habitual offender, the habitual offender sanction must be stricken from the sentence relying on Florida case law in Flain v. State, 780 So. 2d 285 (Fla. 2nd DCA 2001). The written sentence reflects that Papa George was sentenced on

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Count II, Tampering with a witness as a Habitual felony offender to (30) Thirty Years. Appellant argues that the Sentence is illegal because the trial court did not orally Sentence him as a Habitual felony offender. This claim is cognizable in a Rule 3.800(c) motion. See Simon v. State, no. D000-3703 So. 2d, 2001 WL 98564 (Fla. 2nd DCA 2000). The Appellant argues from the face of the record that his habitual felony offender Sentence is "patently illegal" because the written Sentence or judgment does not comport with the oral Pronouncement. Because the written Sentence does not comport with its oral Pronouncement which warrants reversal and remand in accordance with Cooley v. State, 901 So. 2d 271 (Fla. 1st DCA 2005), citing Arnold v. State, 754 So. 2d 149 (Fla. 2nd DCA 2000). Because the trial court did not conclusively Refute Appellant's Claim that the written Sentence did not conform to the oral Pronouncement of Sentence, the court reversed and remanded. See Rivera v. State, 34 So. 3d 208 (Fla. 2nd DCA 2010). Because the written Sentence do not comport with the trial court's oral Pronouncement, we must remand for correction of the written Sentence to reflect the oral Pronouncement. See, e.g., Holmes v. State, 84 So. 3d 421, 422 (Fla. 2nd DCA 2012) remanding for correction of written Sentences to conform to the oral Pronouncement recognizing that the written Sentences must conform to the oral Pronouncement. It is well settled that when a conflict arises between a written Sentence and the trial court's oral Pronouncement Prevails. Ashley v. State, 850 So. 2d 1265 (Fla. 2003). The record (pg 502) reflects that trial court did orally Pronounce Sentencing the Defendant to concurrent (30) Thirty years as a Habitual felony offender and now argues from the face of the record, pg. 502, that his Thirty (30) years Sentence for Count II, Tampering with a witness, see Daniel v. State, 336 So. 3d 322 (Fla. 4th DCA 2022), Eason v. State, 932 So. 2d 465 (Fla. DCA 2006). Tampering with a witness is "patently illegal" exceeding Statutory maximum of a second-degree felony resulting in a manifest injustice see Cillo v. State, 913 So. 2d 1235 (Fla. 2nd DCA 2003). Frank P. Cillo challenges the denial of his motion to correct illegal Sentence Pursuant to Florida Rule of Criminal Procedure 3.800(c). In his motion, Cillo asserts two claims. We affirm his second claim without comment. Cillo's first claim asserts that his Sentence is illegal because it exceeds the Statutory maximum. This claim was previously denied and affirmed on appeal in a prior 3.800(c). Cillo v. State, 884 So. 2d 2d (Fla. 2nd DCA 2004) (table decision). Although this claim would typically be collaterally estopped, we are nevertheless compelled to correct a manifest injustice because, as the State concedes, Cillo's Sentence exceeds the Statutory maximum. See, State v. McBride, 848 So. 2d 287, 291-93 (Fla. 2003). A manifest injustice has occurred wrongfully Sentencing the defendant to Thirty (30) years on a Second-Degree Felony is illegal.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The court finds that a manifest injustice has occurred it is the responsibility of that Court to correct the injustice if it can. Adams v. State, 957 So. 2d 1183 (Fla. 3rd DCA 2006). If it appears to a court of competent jurisdiction that a man is being illegally restrained it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. Quoting Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1956). A facially sufficient attack on the legality of a habitual felony offender sentence requires the Defendant to affirmatively allege that the predicate prior convictions do not exist as a matter of law. If a Defendant who has been sentenced as a habitual felony offender can prove that his prior offenses do not qualify him as a habitual felony offender, he will have established that his sentence is illegal. See Lee v. State, 731 So. 2d 71, 73 (Fla. 2nd DCA 1999). Appellant would not qualify for an enhanced sentence under the habitual offender statute for possession with intent to sell cannabis. Appellant's claim is supported by case law in Ishmael v. State, 735 So. 2d 509 (Fla. 2nd DCA 1999). Charles Ishmael seeks review or an order that summarily denied his motion to correct an illegal sentence filed pursuant to Florida rules of criminal procedure 3.800(a). We affirm in part, reverse in part, and remand with directions. We reverse because the trial court failed to refute Ishmael's claim that he was illegally sentenced as a habitual felony offender for possession of cocaine. Ishmael received two (2) thirty (30) year habitual offender sentences, one (1) for possession of cocaine with intent to sell or deliver and the other for sale of cocaine, on direct appeal from his judgment and sentences, the state conceded Ishmael's sentence on count one (1) was illegal as an offense not subject to habitualization. See Yano v. State, 716 So. 2d 280 (Fla. 2nd DCA 1998) (holding habitual offender sentence subject to correction by rule 3.800(a)). we reverse on Ishmael's claim that his sentence for count one, possession of cocaine is illegal because he made a facially sufficient claim for relief unrefuted by the trial court's order of denial. Hughes v. State, 1850 So. 2d 664 (Fla. 1st DCA 2003). If Ishmael's representations are true, he would be entitled to have the habitual felony offender sentences for these offenses set aside and to be resentenced pursuant to the guidelines. See Belton v. State, 673 So. 2d 880 (Fla. 2nd DCA 1996). 2797 So. 2d 1247 we have for review the decision in Bover v. State, 732 So. 2d 1187, 1192 (Fla. 3d DCA 1999), in which the Third District Court of Appeal certified conflict with the decision of the Second District Court of Appeal in Bell v. State, 693 So. 2d 700 (Fla. 2nd DCA 1997),

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Botelho v. State, 691 So.2d 648 (Fla.2d DCA 1997), and Judge v. State, 596 So.2d 73 (Fla. 2d DCA 1991) (en banc), and the decision of the Fourth District Court of Appeal in Freshman v. State, 730 So.2d 351 (Fla. 4th DCA 1999). If the State is unable to provide the documentation necessary to prove that Bozarth qualifies as a habitual offender, he must be given a Guideline Sentence. Bozarth v. State, 789 So.2d 419; 2001 Fla. App. LEXIS 8094; 26 Fla. L. WEEKLY DISC. See Bonner v. State, 2001 Fla. App. LEXIS 3878, 26 Fla. L. WEEKLY D 814 (Fla.2d DCA Mar. 23, 2001).

A conviction cannot be used to qualify a defendant as a habitual violent felony offender if his conviction or release from a Prison or Supervisory Sentence for Robbery is outside the five year time period. See Kerney v. State, 605 So.2d 159 (Fla. 2d DCA 1992). Appellant cannot specifically state which issues of fact or law the District Court may have overlooked or misapprehended. Since no written opinion was provided, nevertheless, it is respectfully submitted that it appears that if this Honorable Court would provide a written opinion for the affirmance, such an opinion would be in direct and express conflict with opinions of the Florida Supreme Court and other District Courts addressing similar issues. As such Appellant requests that this Court render a written opinion in the instant case. This Petition for a writ of Certiorari is filed within the time prescribed by Rule 29.2.

STATEMENT OF THE CASE

Petitioner was convicted by a Jury and sentenced to (30) years imprisonment on Count (1) one as a Habitual offender, (HFO), concurrent to count (2) two Tampering with a witness. A Direct Appeal was taken and Per Curiam affirmed by this District Court of Appeal of the state of Florida Fourth District. Petitioner filed (2) two motions to correct Illegal Sentence (motions) Pursuant to Fla. R. crim. P. 3.800(c) raising (six) grounds in the first motion challenging his habitual felony offender Sentence. Petitioner Argues his Habitual felony offender Sentences are illegal because he lacked the requisite Predicate felonies. The trial court issued a final order Denying Petitioner's motion to correct Illegal Sentence. The Trial court erred in denying the six claims Petitioner's Motion to correct Illegal Sentence. In all these claims, Petitioner alleged legally sufficient claims, where the requisite Predicate felonies essential to qualify a defendant do not exist as a matter of law and that error is apparent from the face of the record. Petitioner filed a second motion to correct Illegal Sentence (motion) Pursuant to Fla. R. crim. P. 3.800(c) raising (3) Three grounds Challenging his Habitual felony offender Sentence on his Prior convictions used. The Petitioner will demonstrate and show the court how the Grand theft is an insufficient Predicate felony conviction. In Criminal Case # 562006-CF-004841 Grand Theft defendant was released from Prison on November 30th, 2008. Appellant Caught new Charge of Aggravated Battery on a Pregnant woman Dated on September 2nd, 2014 and Tampering with a Witness dated on September 11th, 2014. Appellant was released from Prison on Grand theft Count for Five (5) years and Ten (10) months. Within Five (5) years of the date of conviction of the Defendant's last Prior felony or within 5 years of the Defendant's release from a Prison Sentence. Appellant Argues that the trial court illegally imposed his (HFO) habitual felony offender Sentence because he did not commit the current offenses within five years of his last release date from Prison on November 30th, 2008. The Defendant's Grand theft offense was committed more than Five (5) years after his release from Prison on November 30th, 2008. Defendant is entitled to be Resentenced to Fifteen (15) years concurrent on both counts.

STATEMENT OF THE CASE

Petitioner argues from the face of the record that his habitual felony sentence is "patently illegal" because the 2007 Possession with Intent to Sell Cannabis was committed more than (5) Five Years after his Release from Prison. The State Presented, the conviction for Possession with Intent to Sell Cannabis dated February 20th, 2008. Defendant was released from Prison on this Particular Count on February 27th, 2009. That 2007 Conviction was over (5) Years and (7) Seven months. The Possession with Intent to Sell Cannabis was an insufficient Prior Predicate which renders habitual felony offender illegal. Defendant argues that the trial court illegally imposed (HFO) habitual felony offender sentence because he did not commit the current offense within Five (5) Years of his last release from Prison on February 27th, 2009. Defendant's 2007 conviction was committed more than Five (5) Years after his release date from Prison. Petitioner will show this court that he was charged with Possession with Intent to Sell Cannabis on or around November 20th, 2007 and was released from Prison on February 27th, 2009. Petitioner caught the new offense of Aggravated Battery on a Pregnant Woman dated on September 2nd, 2014 and Tampering with a witness dated on September 11th 2014. Petitioner caught the 2014 new offenses (5) Five Years and (7) months after he was released from Prison. State could not use this conviction as a Prior felony to sentence the Defendant as a Habitual Felony offender. In Criminal Case # 562007-CF-005193 Possession with Intent to Sell Cannabis is a Prior conviction Defendant was released from Prison over (5) Five years and (7) months which makes this Prison Predicate illegal to use for habitualization. This 2007 conviction was ran concurrent with this 2006 conviction making both counts one conviction. The 2006 and 2007 conviction cannot be used to habitualize Defendant Pursuant to Section 775.084(1)(a) 126 because both Prior Predicates do not exist as a matter of law. Petitioner is entitled to an Evidentiary Hearing to be resentenced to Fifteen (15) Years concurrent on both counts. Paragraph 2006 and 2007 conviction was ran concurrent. He was released from Prison on both counts on February 27th, 2009. That's (5) Five Years and (7) Seven months from September 2nd, 2014 and September 11th, 2014. One of Petitioner's Prior Predicate felony conviction State introduced as evidence Possession with Intent to Sell Cannabis is a violation of Section 873.13 Section 775.084(1)(a) 3 Prohibits the imposition of a habitual offender sentence for a violation of 873.13 "relating to the purchase or the possession of a Controlled Substance."

REASONS FOR GRANTING THE PETITION

Petitioner states specific reasons why the Supreme Court would likely grant review:

- the decision conflicts with another district;
- an apparent conflict with another district may be harmonized or distinguished;
- there may be a basis for Supreme Court review;
- the case presents a new legal rule;
- existing law is modified by the decision;
- the decision applies novel or significantly different facts to an existing rule of law;
- the decision uses a generally overlooked legal rule;
- the issue decided may arise in future cases;
- the constitutional or statutory issue is one of first impression;
- Previous case law was "overruled by statute rule or an intervening decision of a higher court";
- there is a written dissent identifying an issue that may be a basis for Florida Supreme Court review.

WHEREFORE, the Petitioner Prays and respectfully moves this Honorable Court to grant this Petition for writ of Certiorari so that this Court may review Petitioner's meritorious claims or any other fair and equitable relief this Court deems necessary.

Respectfully Submitted,
/s/ ~~Tony~~ Alexander Papageorge, Jr. #K12780
Tony ALEXANDER PAPAGEORGE, JR. #K12780

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

For: Alexander P. Moore, Jr. #K12780 Pro se

Date: January 21st, 2025