UNITED STATES DISTRICT COURT
IN THE
MIDDLE DISTRICT OF GEORGIA

ROGERIO CHAVES SCOTTON,
Petitioner.

Case no:______________________

Vs.

WARDEN,
IRWIN COUNTY DETENTION CENTER,
Respondent.
____/

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HIS § 2241 APPLICATION

Comes now, Rogerio Chaves Scotton ("SCOTTON"), by and through pro se, respectfully moves this Honorable Court with this memorandum of law in support of his application pursuant to § 2241 to request his release from ICE custody as a matter of law and in the interest of justice. In support of this memorandum of law, Scotton states as follows:

As an initial matter, Scotton respectfully request, as a prose litigant, that this Court construe his motion liberally pursuant to *HAINES vs. KERNER, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*, accepts all factual allegations contained herein and as detailed under this application as true, and evaluates all reasonable inferences derived from those facts in the light most favorable to Scotton. *TANNENBAUM vs. UNITED STATES, 148 F.3d 1262 (11th Cir. 1998)*. Indeed,

Scotton reminds the Court that this is a prose motion that should be deserving of the less stringent standard of consideration mandated under *UNITED STATES vs. JONES, 125 F.3d 1418, 1428 (11th Cir. 1997)*, and the Court "must look beyond the labels of petition filed by prose detainees to interpret them under whatever statute would provide relief". *MEANS vs. ALABAMA, 209 F.3d 1241, 1242 (11th Cir. 2000)(per curiam)*; *ANDREW vs. UNITED STATES, 373 U.S. 334, 337-38, 83 S. Ct. 1236, 10 L. Ed. 2d 383(1963)*. "[A]djudication upon the underlying merits of claims is not hampered by reliance upon the titles Petitioners put upon their documents". *(quotation omitted)*. This practice acknowledges the importance of allowing meritorious claims to be heard and decided regardless of mere pleading defects introduced by legally unsophisticated litigants, as this one filed by Rogerio Chaves Scotton.

I. RELEVANT BACKGROUND

Scotton is a native and citizen of Brazil. In 2014, he was convicted of 27 counts of mail fraud in violation of 18 U.S.C. § 1341, and two counts of making false statements in violation of 18 U.S.C. § 1001(a)(2) and was sentence to 108 months in prison and ordered to pay $2,582, 935.60 in restitution, after five week of trial.

Scotton appealed his conviction and sentence to the Eleventh Circuit, and on April 12, 2016, the Court affirmed the District Courts findings. See *UNITED STATES vs. ROGERIO CHAVES, 647 f. App'x 947 (11th Cir. 2016) cert. denied 137 S. Ct. 604(2016)*.

On December 11, 2017, Scotton filed his habeas corpus pursuant to 28 U.S.C. § 2255, in which he challenges the legality of his charges, evidences introduced at trial, restitution among

other issues. Said application is currently awaiting the Southern District of Florida resolution. See, *ROGERIO CHAVES SCOTTON vs. UNITED STATES, case no: 17-CV-62428-KMW*.

On three occasions beginning with November 13, 2019, January 17, 2020 and March 12, 2020, the DHS issued a final administrative removal order against Scotton suggesting that he is an aggravated felon under 1101(a)(43)(M)(i) of the Act. Although three final administrative removal order was lodged against Scotton, he was not removed from the U.S.

II. OVERVIEW

Rogerio Chaves Scotton came to the United States for the first time on November 13, 1989 through New York, JFK under B1/B2 visa.

On May 3, 2012 ICE lodged a detainer against Scotton after been charged with an offense pursuant to 18 U.S.C. § 1341 on March 15, 2012.

On May 8, 2014, Scotton was sentence in the Southern District of Florida to a total term of 108 months imprisonment and three years of supervised release and an judicial finding order to pay $2, 582, 935.60 in restitution for the alleged offense of mail fraud pursuant to 18 U.S.C. § 1341 and two counts of false statement pursuant to 18 U.S.C. § 1001(a)(2).

Scotton served his entire term at D. Ray James Correctional Facility (“DRCF”), located at Folkston, Georgia. He was release on February 27, 2020 and placed under ICE custody to begin his removal proceedings.

During his time at DRJCF Scotton attempted to prosecute his ICE detainer by submitted numerous requests to the Department of Homeland Security (“DHS”). None one of Scotton’s attempts was responded.

On November 13, 2019, DHS charges Scotton within an administrative removability. Supervisor Detention & Deportation Officer Jeffrey Grant had found Scotton removable for having been convicted of an "AGGRAVATED FELONY" pursuant to 101(a)(43)(M)(i).

Scotton rebut the charges lodged by DHS, asserting that he did not quality as an "aggravated Felon" under 8 U.S.C. § 1101(a)(43)(M)(i) solely based on the loss amount stated in the restitution order.

This Honorable Court will see that the restitution order was the only document that referred to any loss in Scotton's conviction of mail fraud and as such, was based on judicial findings regarding conduct and loss amounts that have not been charged, proven or admitted in the indictment.

Because the sentencing Court based its restitution order on judicial findings made by lower standard of proof, it was an error for the DHS officers to conclude that the restitution order, stating alone, constituted " clear, unequivocal and convincing" evidence of the loss necessary under 1101(a)(43)(M)(i) to transform Scotton's conviction an aggravated felony under the INA Act.

On July 18, 2018, Scotton's U.S. Citizen mother filed with USCIS an application petition I-130 on his behalf. The application was granted on July 31, 2019. This approval allows Scotton to adjust his immigration status concurrently with a waiver under § 212(h) where he would be able to clearly demonstrate "EXTREME HARSHIP" to himself and to his U.S. citizen mother who is 76 years old, ill and legally blind.

On March 25, 2020, Scotton filed to the Immigration Court, Atlanta Division his application for adjustment of status concurrently with a waiver of inadmissibility under § 212(h) which is currently pending resolution.

Although Scotton attempted on numerous occasions to resolve his immigration issue before the expiration of his term, DHS ignored all his request, violating policies, rules and laws. As a result, Scotton was subjected to endure double incarceration on the taxpayers' expenses.

III. NOTICE TO THE COURT

Scotton contends that he is denied meaningful opportunity to access the Courts by way of unreasonable frustrating his ability to perform proper research to locate the proper laws and case citations to support this motion; to obtain and inspect the necessary evidence; to obtain the assistance of an attorney and to confront the validity and accuracy of the underlying charges in the removal proceeding. As a direct result, not all jurisdictional and other legal citations etc., are provided in this motion and some of those provided are from memory or personal notes. Scotton respectfully asks that this circumstance not prejudice this petition. In fact, this continue incarceration has prevented the petition to proceed with his approved I-130 petition and obtaining the assistance of attorney.

IV. <u>ARGUMENT OF AUTHORITY</u>

A) WHETHER SCOTTON IS ENTITLED TO RELEASE PENDING RESOLUTION OF HIS PETITION UNDER § 2255, JUDICIAL REVIEW AND HIS ADJUSTMENT OF STATUS CONCURRENTLY WITH WAIVER UNDE § 212(H)

Scotton contends that the DHS served him within an undated and unsigned notice to intent to issue a final administrative removal order, on January 29, 2019. (**See, exhibit 2**). The Final Administrative removal order was issued on January 17, 2020 by SSDO Jeffrey Grant. Although the DHS chose to issue "another" final administrative removal order on March 12, 2020, the final administrative removal order dated January 17, 2020 was not cancel and thus, still valid.

Therefore, based on the January 17, 2020 final administrative removal order, the 90 days removal period established by section 241(a)(1)(A) has end on "**April 17, 2020**".

Scotton contends that he has been served on three occasion, final administrative removal orders containing the same argument that he is an aggravated felon under 1101(a)(43)(M)(i) based solely on the restitution imposed on his previously criminal case. The *first* final order was served on November 15, 2019 and issued on November 13. 2019 which the Government cancelled on January 17, 2020. The *second* final removal order was issued on January 17, 2020 by SDDO Jeffrey Grant and served on January 29, 2020. The *third* final removal order was served on March 13, 2020. Hence, the only final administrative removal order cancelled was the one issued on November 13, 2019. Both notice, January 17, 2020 and March 12, 2020 are currently active. Thus, Scotton was not removed nor, has the DHS requested his travel documentation from the Brazilian Consulate until now. The government suggested that on

January 24, 2020, DHS issue a notice to intent to issue a final administrative removal order. Said notice has not been served on Scotton.

Scotton contends that a serious constitutional problem [arise] in this case because his detention is currently indefinite, perhaps a death sentence since, **1)** the risk of been contaminated by the Corona virus which he is subject now at Irwin County Detention Center, **2)** After almost three months, DHS requested Scotton's travel documents from the Brazilian Consulate under three final administrative removal orders. No flight has been booked. **3)** the Brazil border is currently closed due the Corona Virus pandemic which clear shows that Scotton removal is indefinite and, **4)** both petition for judicial removal, the petition to stay removal and the petition for adjustment of status are currently pending resolution in the Courts.

Scotton contends that he is unlawfully detained by ICE who has deprived him from his human rights of liberty without any [procedural] protection.

Scotton has attempted to resolve his removal on numerous occasions while serving his sentence. (**See, exhibit 3**). No one request was responded. On the other hand, ICE failed to remove Scotton within the required rational purpose time and established law, under three final administrative removal orders. *SHERATA vs. ASHCROFT, No. 02 CIV. 2490(LMM), 2002 WL 538845 at *2 (S.D.N.Y. April 11, 2002) (``Here, on the other hand, the 90 day period is quite limited in time, and serves a rational purpose, to allow INS to effect removal of a person already determined to be removable.''); see also BADIO vs. UNITED STATES, 172 F. Supp. 2d 1200, 1205 (D. Minn. 2001) (``Zadvydas does not apply to petitioner's claim because pre-removal-order proceedings do have a termination point.'')*. The holding in *Zadvydas* rests upon considerations of substantive due process. Although the Supreme Court did not expressly label

its decision as one based on ``substantive due process," it made it clear that this was the foundation of its reasoning as it explicitly invoked the Fifth Amendment's Due Process Clause, see *Zadvydas, 533 U.S. at 690*.

Scotton's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially unreasonable.

The DHS conduct under three final administrative removal order, violates Scotton substantive due process because it is so extreme and intrusive that it can be said to ``shock the conscience." *Rochin v. California, 342 U.S. 165, 172 (1952)*.

The DHS is constitutionally required to ``proceed with reasonable dispatch to arrange removal. See, *Memorandum for Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations from Dea Carpenter, Deputy General Counsel, re: Authority to Detain During the 90-Day Removal Period at 1 (Jan. 28, 2002) (``INS Memorandum")*. Here in this case, the DHS failed to follow their own rules and federal laws. As a result, subjected Scotton to unnecessary incarceration time on the taxpayers' expenses.

Scotton contends that DHS did not have all of the mechanical steps that are necessary to effectively remove him from the United States, and such steps have not been taken as required by law. Thus, the Constitution imposes some limitations on the purposes for which it is permissible to further delay Scotton's removal while keeping him in detention. In *Zadvydas*, the Supreme Court explained that the reasonableness of an alien's detention must be measured ``primarily in terms of the statute's basic purpose," which the Supreme Court identified as securing the alien's removal. *Zadvydas, 533 U.S. at 699*.

In this case, the requirements of substantive due process are not met because the government lodged three final administrative removal orders, however, only recently, have attempted to obtain Scotton's travel documents from the Brazilian Consulate. Because Scotton's apparent cannot be deported due to numerous issues mentioned above, his detention can no longer be said to be for purposes of effecting his removal. See, *UNITED STATES EX RE. BLANKENSTEIN vs. SHAYGNESSY, 117 F. Supp. 699, 703-04 (S.D.N.Y. 1953) (``courts have the power to release on habeas corpus an alien held for deportation on a showing ... that the detention cannot in truth be said to be for deportation'')*; *UNITED STATES EX REL. KUSMAN vs. IN, 117 F. Supp. 541, 544-45 (S.D.N.Y. 1953)*; *RODRIGUEZ vs. MCELROY, 53 F. Supp. 2d 587, 591 n.6 (S.D.N.Y. 1999) (``[d]etention is intended for the sole purpose of effecting deportation'')*; *FERNANDEZ vs. WILKINSON, 505 F. Supp. 787, 793 (D. Kan. 1980), aff'd, 654 F.2d 1382 (10th Cir. 1981)*; *WILLIAMS vs. INS, No. 01-043 ML, 2001 WL 1136099, at *4 (D.R.I. Aug. 7, 2001)*.

There is support in the cases for the general principle suggested by the INS to this extent; the detention of an alien, perhaps even during the 90-day removal period, likely must be related to enforcing the immigration laws and properly effecting Scotton's removal in accordance with the nation's immigration laws and policies. Thus, in the abstract, it might raise difficult constitutional questions if the Attorney General were expressly to delay the removal of Petitioner (and thereby prolong his detention) solely for a purpose that was, by hypothesis, entirely unrelated to any legitimate interest in the enforcement of the immigration laws. The civil confinement at issue was not limited, but potentially permanent. Also, the detention provision did not apply narrowly, but broadly to aliens ordered removed for many reasons. Moreover, the sole procedural

protections available to the alien were administrative proceedings where the alien bore the burden of proving he was not dangerous.

In this case, there can be no dispute that Scotton, a former NASCAR and American Le Mans professional race driver, poses any danger to any person or any danger to the community. Thus, is entitled to release.

Scotton has already endured more than eight years incarcerated. He has been now under ICE custody since February 27, 2020 and there is no significant likelihood of removal in the reasonably foreseeable future. This because the delay of DHS obtaining Scotton travel papers and because the COVID-19 pandemic, Brazil closed their border. There is no realistic chance that Scotton will be removed any time soon, he has requested a stay of removal pending his judicial review, rebutting the alleged classification that he is an aggravated felon, and he have filed with the Immigration Court his adjustment of status for that matter. Moreover, Scotton's father is currently under the final stage of lung cancer and his U.S. citizen mother, who is 76 years old is ill, and is legally blind, is now due for heart surgery. Both of Scotton's parents are in critical risk of been contaminated with the corona virus. If this occurred, consider both currently medical issues, they chance of survive is zero.

Therefore, Scotton respectfully request the Honorable Court to consider the expedition of this section 2241, since he is subjected to this extreme hardship under the currently and indefinitely ICE detention. See *28 U.S.C.§ 1657*. See also, *VELEZ-LOTERO vs. ACHIM, 414 F.3d 776, 782 (7th Cir. 2005)*.

COVID-19 AT IRWIN COUNTY DETENTION CENTER

There is now three confirmed case of COVID-19 at Irwin County Detention Center. This further COVID-19 evidence establishes the need to release.

Scotton is currently in an enclosed small dorm jail environment (**"23 hours a day"**), with many detainees without any personal protective equipment, (PPE) where it is impossible to practice social distance. Several new detainees are brought into the dorm on a regular basis, with flu symptoms, without been tested for CORONA VIRUS, **NO QUARANTINE**. One already has been rushed to the hospital with the symptoms of the COVID-19. Other two detainees have been detected to have the virus as well. This information come from the jail staff and the government themselves. This in part from the fact that Scotton is older, and he have been under hunger strike since April 12, 2020 which ICE have been informed in writing under grievance note. (**See, exhibit 4**). This eight year plus incarcerate has substantially weakened Scotton's immune system, among other things.

Without the DHS resolution on his unresolved deportation issue, based on three final administrative removal orders issued. This double incarceration Scotton have now been subjected could turn into a ***DEATH SENTENCE***.

Scotton liberty is being taken away for the exclusive needs for-profit private companies like Lasalla Corrections LLC, at the taxpayers' expenses. This detention has no legitimate purpose whatsoever. And is absolute inhumane and unlawful.

Scotton has lived in the United State for over three decades. He has strong family ties here and was a community leader during his race car career. If release, Scotton will reside with his U.S. Citizen mother and stepfather until the resolution of his immigration issues.

Scotton further contends that DHS rely they decision under the wrongfully criminal record. The indictment with which DHS rely and made their findings that he is an aggravated felon containing only 26 counts of mail fraud. And again, no loss amount was mentioned.

B) WHETHER SCOTTON WAS WRONGFULLY SUBJECTED TO DOUBLE INCARCERATION WHERE ICE VIOLATED POLICIES, RULES AN LAWS BY THEN VIOLATING SCOTTON'S CONSTITUTIONAL RIGHTS

On May 8, 2012, ICE lodged a detainer against Scotton which he has acknowledged and which he requested to prosecute such detainer under the Act. However, ICE failed to respond by the required time frame.

On July 30, 2014, while at prison, Scotton enrolled to receive an immigration hearing, as denoted by the attached entry of, "IHP" participant. During the entire time he serve his term at DRJCF, he was not allowed to process his immigration issue nor, was he allowed to receive hearing under the IHP program.

Current law title 8 U.S.C. § 1252(i), requires the INS now ICE to begin deportation hearing as soon as possible after conviction resolved before the prisoner's term expires. In this case, ICE failed to follow their own regulations and laws. As a result, Scotton was subjected to a double incarceration time and thus, denied his freedom. His constitutional rights were violated.

Therefore, Scotton is under this petition to request the Court his release from ICE custody without any further delay for the reasons stated in this petition.

C) WHETHER SCOTTON IS AN AGGRAVATED FELON UNDER 101(a)(43)(M)(i) OF THE INA ACT 8 U.S.C. § 1101(a)(43)(i)

On March 3, 2020, the Immigration Judge ("IJ") denied Scotton bond by stating that he is an aggravated felon and thus, did not qualified.

During the bond hearing, the IJ made his judicial findings that Scotton is an aggravated felon without specifying on record which document he relied on to make his decision clear, unequivocal and convincing evidence, that Scotton is an aggravated felon under 1101(a)(43)(M)(i). There is a clear evidence that the DHS has relied on the wrong criminal record to make their conclusion that Scotton is an aggravated felon.

Scotton was administratively ordered to be removed based on his conviction of mail fraud and restitution under 8 U.S.C. § 1227(a)(2)(A)(iii), however, he asserts that the fraud offense of with which he was convicted did not meet the definition of an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i).

Scotton argued that removal based on an aggravated felony of fraud in which the loss to the victim exceeded $10,000 was improperly applied to him, because the amount of loss mentioned under the restitution order was not an element of the alleged counts of conviction.

Scotton's restitution order was based on factual findings regarding conduct and loss amounts that were not charged by the indictment, proven or admit; therefore, it was an error for IJ to conclude that the restitution order standing alone, constituted "clear, unequivocal and

convincing" proof of the loss necessary to transform Scotton's conviction into an aggravated felony.

Scotton contends that the Court should review the denial of his motion for bond for abuse of discretion. *ASSA'AD vs. UNITED STATES AG, 332 F.3d 1321, 1341 (11th Cir. 2003)*. A motion for bond must specify the errors of law or fact on which the previous order was based. 8 U.S.C. § 1229a(c)(6). "[A] mistake of law is, by definition, an abuse of discretion". *UNITED STATES vs. HOFFER, 129 F.3d 1196, 1200 (11th Cir. 1997)(citation omitted)*. Whether Scotton's conviction qualifies as an "aggravated felony" is a question of law that the Court should review DE NOVO. See, *UNITED STATES vs. HOOSHMAND, 931 F.2d 725, 737 (11th Cir. 1991)*; *BOLOGUN vs. UNITED STATES AG, 425 F.3d 1356, 13600 (11th Cir. 2005)*. To determine whether Scotton's prior conviction constitutes an aggravated felony, the IJ must first look to the language of the statute of conviction. See, *In re Akami, 22 I&N. Dec. 949, 950 (BIA 1999)*. If the statutory language contains some offenses that would qualify as aggravated felonies and others that would not, then the statute is "divisible", and the IJ must look to "the record of conviction, meaning, the indictment, plea, verdict, and sentence, to determine the offense of which the alien was convicted". *Id.*; *JAGGERNAUTH vs. U.S. AG, 432 F.3d 1346, 1349 n.1 (11th Cir. 2005)*. In this case, the IJ relied on the wrong indictment contained 26 counts of mail fraud. The IJ determination that a prior conviction constitutes an "aggravated felony" must be supported by "clear, unequivocal and convincing" evidence. *WOODBY vs. INS, 385 U.S. 276,286, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966)*; *8 U.S.C. § 1229a(c)(3)(A)*.

In this particular case, Scotton was charged with mail fraud in violation of 18 U.S.C. § 1341 and was convicted after five weeks by a jury. Scotton challenges the IJ's determination during

the bond hearing, that his conviction qualifies as an aggravated felony based solely on the loss amount mentioned under the restitution order.

In this case, the element of the mail fraud with which Scotton was charged did not require that any loss amount be proved. "Unless", such increase Scotton's punishment. Indeed, and by law, any factor that increase punishment were element within which the jury must find guilty beyond a reasonable doubt under, *ALLEYNE vs. UNITED STATES, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)*; *SOUTHERN UNION CO. vs. UNITED STATES, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (212)*; *APPRENDI vs. NEW JERSAY, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*. "The significant increased sentencing range triggered by…the finding of a purpose to loss amount", means that the purpose "must be treated as a material element [that] **MUST** be found guilty by a jury beyond a reasonable doubt.". *Id. at 30 731 A. 2d at 498*. The dissenters conclude that "there can be little doubt that the sentencing factor applied during his sentence for the purpose of loss amount to a victim or victims, must fairly be regarded as an element of the crime requiring inclusion in the indictment, and proof beyond a reasonable doubt". *159 N.J. at 51, 731 A. 2d at 512*.

[A]t stake in this case, as well as under Scotton criminal case, there are constitutional protections of surpassing importance which proscription of any deprivation of liberty without "due process of law" and the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury". Taken together, these rights indisputably entitled a criminal defendant to "a jury determination that [he] is guilty "beyond a reasonable doubt" of every element of the crime with which he is **"CHARGED" BY "INDICTMENT"**. *UNITED STATES vs. GAUDIN, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115*

S. Ct. 2310 (1995); See also, *SULLIVAN vs. LOUISIANA, 508 U.S. 275, 278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993)*; *WINSHIP, 397 U.S. at 364 ("the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged")*. Restitution is not a form of judicial punishment dependent upon factfinding by the jury, but if it increases the defendant punishment, it must be taken back to the jury to be found guilty or innocent beyond a reasonable doubt. In this case, this did not occur.

The trial Court's factual finding as to the alleged loss amount caused by Scotton in his criminal case, violated *APPRENDI*, *ALLEYNE* and *SOUTHERN UNION CO*, and Scotton's sixth amendment rights to a jury determination, because the criminal restitution order was a judicial findings not related to the twenty-seven counts of conviction. Such judicial findings were an error in the underlying criminal case because seriously prejudice Scotton. As such, his imposed sentence was substantially increased. *(SOUTHERN UNION CO. SUPRA, 132 S. Ct. at pp. 2350-2352)*. The trial Court have unlawfully increased Scotton's punishment beyond the jury's verdict under the twenty-seven counts mentioned on indictment. Scotton's constitutional rights were violated.

The second superseding indictment did not specify any loss amount nor, have specify any loss amount to the twenty-seven counts of conviction. Indeed, Scotton was not charged with any loss amount and did not admit to any loss during the trial or during his sentencing hearing.

Moreover, there is no loss amount attributable to the twenty-seven-count charged in the indictment, to which Scotton was charge and found guilty at trial. Contrary to the IJ's conclusion, there was no evidence that the mail fraud counts of conviction with which Scotton

was charged "alleged other losses". In fact, the prosecutor didn't indicate any loss under the indictment whatsoever. The IJ therefore could not have relied on the statutory element of the offense, the indictment, the trial or sentence records to conclude that Scotton was convicted of an aggravated felony, as defined in the INA act.

The IJ was also not entitled to rely solely on the loss amount mentioned in the restitution order as "clear, unequivocal and convincing" evidence that Scotton was convicted of an aggravated felony. On its face, the restitution order of $2,582,935.60 was not linked to the count of conviction and only judicial requested that such must be payed to three companies, FedEx, UPS and DHL. The restitution order was not a finding made based on the twenty-seven counts of conviction nor, its related to the twenty-seven counts mentioned under the indictment. Rather, the order was based on additional conduct that was alleged only under unverified and inaccurate spreadsheets unlawfully introduced at trial, and unproved conduct mentioned under the PSI. Scotton objected to the PSI's assertion that he had caused losses to FedEx, UPS and DHL over the twenty-seven packages ("counts of conviction") undelivered associated with the losses mentioned on the restitution. And further objected to the total loss amount mentioned under the PSI not charged by the indictment and not link to the counts of conviction. Scotton, therefore, did not admit, adopt, or assent to the factual findings that formed the basis for the restitution order.

Furthermore, while a sentencing, the Court in the criminal context may order restitution nor only for convicted conduct, but also for a broad range of relevant conduct. The plain language of the INA requires that an alien have been convicted of an aggravated felony to be removable. The INA does not authorize removal on the basis of the relevant conduct that may be considered at

sentencing. Rather, what constitutes an aggravated felony for purpose of the INA must be tethered to convicted conduct. Relevant conduct for sentencing purposes, on the other hand, may include criminal conduct that was not charged. See, *UNITED STATES vs. IGNACIO MUNIO, 909 F.2d 436, 438-39 (11TH Cir. 1990)*. Relevant conduct may also include acquitted conduct. *UNITED STATES vs. WATTS, 519 U.S. 148, 117 S. Ct. 633, 136 L. ed. 2d 554 (1997)*; *UNITED STATES vs. AVERI, 922 F.3d 764, 765-66 (11th Cir. 1996)*. See also, *UNITED STATES vs. DICKERSON, 370 F.3d 1330, 1342-43 (11th Cir. 2004)*.

In *DICKERSON*, the Eleventh Circuit rejected the argument that a restitution order based on conduct that could not be prosecuted was inconsistent with the defendant's plea to a conspiracy charge, observing that "[c]ounsel confuses the separate issues of conviction and restitution". *370 F.3d at 1343, n.20*.

Similarly, here, the IJ confuse the issues of conviction and restitution. There was no basis in the record from which the IJ could have found by "clear, unequivocal and convincing" evidence that the restitution order was link to the twenty-seven counts of conviction or that such was based on admission. See, e.g., *KNUTSEN vs. GONZALES, 429 F.3d 733, 739-40 (7th Cir. 2005) (vacating removal order based on admission of loss caused by relevant conduct and contained in restitution order; holding that inquiry should focus narrowly on losses "particularly tethered to conviction counts alone.")*. See also, *KHALAYLEH vs. INS, 287 F.3d 978, 979-80 (10th Cir. 2002)(conviction constituted aggravated felony where although defendant pled guilty to only one count in the indictment, that count incorporated by reference a scheme to defraud that admittedly caused losses in excess of $10,000)*; *CHANG vs. INS, 307 F.3d 1185, 1191 (9th Cir. 2002)(vacating removal order based on restitution award in excess of $10,000 where amount of*

loss admitted in the plea agreement was less than the requisite amount); *MUNROE vs. ASCROFIT, 353 F.3d 225, 227 (3rd Cir. 2003)(conviction constituted aggravated felony where defendant pled guilty to fraud charges that alleged loss in excess of $10,000, even though sentencing Court later reduced restitution amount to $9,999); FEREIRA vs. ASHCROFT, 390 F.3d 1091, 1099 (9th Cir. 2004)(conviction constituted aggravated felony where charging document alleged loss, and plea agreement set restitution at $22,305 for fraud conviction)*; *CONTEH vs. CONZALES, 461 F.3d 45, 55-56 (1st Cir. 2006)(conviction constituted aggravated felony where defendant was convicted if a conspiracy charge which also alleged overt act in furtherance of the conspiracy that caused losses in excess of $10,000)*.

Moreover, the restitution order was insufficient, as a matter of law, for the DHS to have met his burden to show that Scotton's conviction constitutes an aggravated felony under the INA Act (as an offense of fraud or deceit involving a loss in excess $10,000) by "clear, unequivocal and convincing" evidence. The restitution order in this case, was the only document that referred to any loss amount, and it is not linked to the twenty-seven counts of the indictment, does not refer to the twenty-seven counts of conviction. The restitution order was based only on factual findings regarding conduct and loss amount that were not charged, proven or admitted. The IJ , on the other hand, had to find that Scotton has been convicted of an offense of fraud or deceit involving a loss in excess of $10,000 by clear, unequivocal and convincing evidence. Because the sentencing Court based its restitution order on factual findings made by a lower standard of proof, it was an error for the IJ to conclude that the order, standing alone, constituted clear, unequivocal and convincing proof of the loss necessary to transform Scotton's conviction into an aggravated felony under the INA act.

The U.S. Supreme Court unanimously held that the $10,000 threshold set out in 1101(a)(43)(M)(i) referred to the particular circumstances in which, the alien committed the fraud crime on the particular occasion, rather than to an element of the fraud crime. The language of the definition referred to conduct, involved in an offense of conviction, rather than to element of the offense, and the statutory amount of loss would otherwise have little, if any, meaningful application in view of the minimal fraud statutes with a monetary loss threshold as an element.

The relevant statute 18 U.S.C. § 1341 did not require a finding of loss. Indeed, the jury made no such finding during Scotton's trial. However, at sentencing, Scotton objected the stipulated loss amount which exceeded $2,5 million, especially because as such, have increased Scotton's imprisonment term without taken first to the jury to make the decision beyond a reasonable doubt. Scotton was sentenced as a first-time offense to a term of 108 months imprisonment and requested to pay $2,582,935.60 million in restitution.

Subparagraph (M)(i)'s threshold refers to the particular circumstances, in which an offender committed a fraud or deceit crime on a particular occasion rather than to an element of the fraud or deceit crime. Subparagraph (M)(i)'s language is consistent with a circumstances-specific approach. The words "in which" (modifying "offense") can refer to the conduct involved *"in"* the commission of the offense of conviction, rather than to the elements *of* the offense. Congress is unlikely to have intended subparagraph (M)(i) to apply in such a limited and haphazard manner.

The question before the Court is whether the italicized language refers to an element of the fraud or deceit "offense" as set forth in the particular fraud or deceit statute defining the offense of which Scotton was previously convicted. If so, then in order to determine whether a prior

conviction form the kind of offense described, the IJ must look to the criminal fraud or deceit statute to see whether it contains a monetary threshold of $10,000 or more. See, *TAYLOR vs. UNITED STATES, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990)(so interpreting the Armed Career Criminal Act)*. Scotton asserts, however, that the italicized language does not refer to an element of the fraud or deceit crime. Rather, it refers to the particular circumstances, in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion.

Rogerio Chaves Scotton, an alien and professional race car driver, immigrated to the United States in November 13, 1989. In 2012, he was indicted for alleged offense of mail fraud, 18 U.S. C. § 1341. A jury found Scotton guilty after a five-week trial, and after submitting a note to the Court stating that they have not understood the charges lodged against him. And because the statute does not require a finding of any particular amount of the alleged offense cause to the victim or victims, the jury made no finding about the amount of loss. At sentencing, Scotton did not admit to any loss amount and further object such. The Court then imposed a sentence of 108 months of imprisonment and order Scotton to pay $2,582, 935.60 in restitution.

In November 13, 2019, January 17, 2020, and March 12, 2020, the Department of Homeland Security, claimed that Scotton was convicted of an aggravated felony, and sought to remove him from the United States under said final administrative removal order issued on the days mentioned above, which was served on Scotton on November 15, 2019, January 29, 2020 and March 13, 2020.

During the Bond Hearing on April 3, 2020, the Immigration Judge made his own decision that Scotton's conviction classify as an aggravated felony, stating that the records in front of him,

clear shows that the victims' loss exceeded $10,000; and that Scotton's conviction consequently falls within the immigration statute's aggravated felony definition. See, 8 U.S.C. §§ 1101(a)943)(M)(i). The IJ have not specify which record of Scotton's conviction he had used to make his findings. The government bears the burden of proving removability by clear and convincing evidence. See, *Id. § 1229a(c)(3)(A)*, and by extension, must carry the devoir of persuasion as to a Scotton's conviction for an aggravated felony. Thus, if § 1101(a)(43)(M)(i)'s $10,000 threshold referred an element that must be proven in every instance to sustain a conviction, Scotton's fraud conviction would not have been aggravated felony conviction. But if the $10,000 threshold referred to facts underlying the convictions, then the fraud conviction would have been aggravated-felony conviction.

The Supreme Court has also clarified that "the loss [amount] **must be tied** to the **specific counts** covered by the **conviction**". In this case, such was not done. See, *NIJHAWAN vs. HOLDER, id. At 42, 129 S. Ct. at 2303 (quotation makers omitted)*.

Therefore, Scotton respectfully request the honorable Court to reverse the IJ order denying bond and release him without any further delay.

D) WHETHER SCOTTON IS ENTITLED TO ADJUSTMENT OF STATUS CONCURRENTLY WITH A WAIVER UNDER 212(h)

At the conclusion of the bond hearing, the IJ stated that Scotton is not entitled to adjustment of status concurrently with a waiver of inadmissibility under 212(h) because he is an aggravated felon. Scotton also challenge such finding made by the IJ as a matter of law.

Scotton contends that an I-130 petition was filed on his behalf by his U.S. citizen mother on July 18, 2018. And said application was granted on July 31, 2019. (See, **hereto exhibit 1**).

Scotton asserts that his removal would bring "EXTREME HARSHIP" to himself, to his ill U.S. citizen mother, Marina Colon, who is declared legally blind, and to his U.S. citizen stepfather, Carlos Colon. Scotton asserts that he does have strong family ties in the United States and have lived here for over three decades.

Scotton is not an aggravated felon. He did not pose and danger to any person or any danger to the community. He should be allowed to request the exercise of discretion under § 212(h) of the Act.

Scotton I-130 was approved as he is now applying for relief from removal, therefore, he has filed a concurrent adjustment of status application at the Atlanta Immigration court.

Under section 212(h) of the Act; 8 C.F.R. section 1245, 1(F)(2013), "provides that an adjustment of status application is the sole method of requesting the exercise of discretion under § 212(h) of the Act". As it relates to the inadmissibility of an Alien in the United States. *MATTER OF SUNCHEZ, § 212(H). Under 601(d)(4) of the Immigration Act*.

The attorney General of the United States has consented that a "waiver" under § 212(h) is provided for certain exclusion grounds.

When an alien like Rogerio Chaves Scotton is applying or re-applying for a visa and for admission to the United States and is applying for adjustment of his status, concurrently with a waiver for relief from removal is must do under § 212(h).

Scotton contends that he can prove "EXTREME HARDSHIP" to his U.S. mother at any time. Scotton U.S. mother is 76 years old. She is declared legally blind and has several illnesses and is on several medication. She has endured surgery for colostomy, for colon perforation and

two incisional hernias repair surgery tines which was consequence of errors during the colostomy surgery.

Scotton's mother recently has two stents proceeding done which the last on October 2019. She has history of hemorrhagic retinal stroke. She has been declared legally blind with now only the ability to see shadows. She has history of hypothyroidism and malignant hypertension.

In the *MATTER OD Y-N-P, 26 I&N, Dec. 10, 16 (BIA 2012)* was held that an inadmissible alien in removal proceeding can only file a section 212(h) waiver application to adjust his status under section 245 of the Act 8 U.S.C. § 1255 (2006) or one of the other regulatory provisions. *MATTER OF BUSTAMANTE, 25 I&N, Dec, 564, 567 (BIA 2011)*, which states that the "purpose of section 212(h) is to overcome a ground of inadmissibility that would otherwise preclude an alien like Scotton Rogerio Chaves Scotton from obtaining admission or adjustment of his status".

Scotton's U.S. mother has started the process of applying for a family-sponsored immigration visa petition, I-130 which was approved on July 31, 2019. See, *C.F.R. § 20419(e)(1)*.

Scotton contends that he has submitted substantial evidence under his application for adjustment of status concurrently with a waiver, filed with the Atlanta Immigration Court, in which he can clear demonstrate under section 224(a) of the act that his deportation would in fact, result in "EXTREME HARSHIP" to his U.S. citizen mother and stepfather. Therefore, the *MATTER OF ANDERSON, SUPRA*, should apply to his case. When assessing extreme hardship, the DHS or Immigration Court should also apply *SANTANA FIGUERRA vs. INS, 644 F.2d 1354, 1357 (9th Cir. 1981)*; *BRIDGES vs. WIXON, 326 U.S. 135, 147 (1945)(quoting NG FUNG HO vs. WHITE, 259 U.S. 276, 284 (1922)*.

In this case, Scotton has requested the Immigration Court for adjustment of status by way of his U.S. citizen mother Marina Colon who has filed on his behalf. He also seeks a waiver, regarding inadmissibility based on his conviction and the "extreme hardship" his removal would bring to himself, his mother and his stepfather. His mother needs daily care which is currently dare by his stepfather who has hard-a-time to do it because of his own health condition. She is unable to travel to Brazil and have not been able to visit Scotton during his time in prison as well as during the current time, under ICE custody because of her current health condition.

Scotton has requested the Immigration Court to consider the "emotional" and "psychological" impact that his removal would bring to his ill mother Marina Colon.

Scotton's mother has started the process of applying for a family-sponsored immigration visa petition, I-130 which was approved. And which is why the Court should apply that [LIFE] Act to Scotton's case. The Legal Immigration Family Equity [LIFE] act stated that certain family-based immigration can entered or remain in the United States while their immigration petition is pending.

The Respondent will reside at 7797 Golf Circle Drive, Apt# 204, Margate, Florida 33063 with his U.S. mother and his U.S. stepfather if the Court grant his bond pending resolution of his adjustment of status or removal process.

Accordingly, and for all of the reason and case facts submitted with this motion, Rogerio Chaves Scotton now, respectfully requests the Court to grant this petition and order his release without any further delay. Alternative, the Appellant request the honorable Court to place him on a home confinement pending resolution of his petition for adjustment of status or his removal.

Wherefore, in the interest of justice and fairness, the Appellant prays for the reasons stated above, that the Honorable Court grant him his petition.

Scotton submits this motion in good faith and the interest of justice.

Respectfully Submitted,

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ROGERIO CHAVES SCOTTON
ICDC#70926
IRWIN COUNTY DETENTION CENTER
132 COTTON DRIVE
OCILLA, GA 31774

PROOF OF SERVICE

I Rogerio Chaves Scotton, do certify that on this April 24, 2020, I have served the attached memorandum of law in support of Petitioner's application, § 2241(which is under the Petitioner's constitutional rights) on the Middle District of Georgia in the above proceeding. I have served this memorandum with application via, United States Postal Service (USPS) priority mail through, Irwin County Detention Center legal mail.

____

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