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# IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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**ROGERIO CHAVES SCOTTON,**
**(A203085029)**
**Petitioner,**

**V.**

**MERRICK B. GARLAND,**
**United States Attorney General,**
**Petitioner.**

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## PETITION FOR JUDICIAL REVIEW

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**ROGERIO CHAVES SCOTTON, PRO SE**
**7797 GOLF CIRCLE DRIVE #204**
**MARGATE, FL 33063**

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**ROGERIO CHAVES SCOTTON,**
**(A203085029)**
**Petitioner,**

**V.**

**MERRICK B. GARLAND,**
**United States Attorney General,**
**Petitioner.**

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 Scotton's 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 Scotton. Hereby, the Petitioner ask this Court consideration to reopening this case since the Petitioner receive 3 different final administrative removal orders and thus, was removed from the US without due process. The Petitioner further ask for the Court consideration that he receive the Courts March 11, 2021 letter on March 25, 2021 via WhatsApp by his stepfather.

# I. BACKGROUND

The Petitioner contends that an I-130 petition was filed on his behalf by his U.S. mother on July 11, 2018, and such application was approved on July 31, 2019, approved notice, receipt # LIN1890519581.

ICE lodges a detainer against the Petitioner on May 3, 2012 to begin the Petitioner removal only due he was charged with an offense on Southern District Florida pursuant to 18 U.S. C. § 1341.

3. On February 26, 2014, Scotton lost a trial and was therefore adjudicated guilty of twenty-seven counts of mail fraud pursuant, in which was wrongfully as a matter of law a theft of shipping services affecting FedEx, UPS and DHL companies. See, UNITED STATES vs. ROGERIO CHAVES SCOTTON, CASE NO: 12-Cr-60049-KMW.

Scotton filed timely his notice of Appeals, and on April 12, 2016, the Eleventh Circuit affirmed the conviction.

4. On October 20, 2016, Scotton submitted his petition for Writ of Certiorari without the benefit of counsel and was denied on December 12, 2016.

5. On December 11, 2017, Scotton filed his petition for habeas corpus pursuant to 28 U.S.C. §2255 which the Southern District of Florida wrongfully denied on December 28, 2017. Scotton

appealed the Court's error and on March 7, 2019, the Eleventh Circuit vacated the Southern District of Florida Court's denial of Scotton's section 2255.

6. On April 19, 2019, the Southern District of Florida reopened Scotton's section 2255, in which the government subsequently responded by filing 91 pages to the Court. Scotton's 2255 is currently pending the Court's resolution.

7. On February 27, 2020, Scotton was released from feral prison and subsequently placed under the ICE custody based on the detainer lodged against him on May 3, 2012.

The Department of Homeland Security ("DHS") claimed that the Petitioner is an "aggravated felony" under the INA Act 1101(a)(43)(M) (i) based solely on the restitution order by the Southern District of Florida as a judicial finding.

8. On March 20, 2020, the Petitioner submitted his petition for judicial review on the Appeal Court for the Eleventh Circuit challenging the DHS argument that the Petitioner is an "aggravated felony" under § 1101(a)(43)(M)(i).

9. On March 20, 2020, the Petitioner filed to the Middle District of Georgia his habeas corpus pursuant to 28 U.S.C. § 2241 requesting his release from ICE custody which could be clearly determined under the law a double incarceration. Under his section 2241 the Petitioner outline that he is currently incarcerated under ICE's eight years old detainer which ICE ignored and failed to prosecute upon the Petitioner's requests.

10. The Petitioner removal continue to bring "EXTREME HARDSHIP" to his U.S. Citizen mother who is extremely ill and is legally blind. The Petitioner also asserts that his U.S. stepfather has been also subjected to "extreme hardship" as he was enduring numerous medical issues. (See, Carlos Colon and Marina Colon affidavit and medical records in case 19-14756-D @ DOCKET).

11. The Petitioner has extraordinarily strong family ties in the United States and have resided here for over thirty (33) years.

12. The Petitioner did not pose any danger to any person or any danger to the community. In fact, the Petitioner was a community leader during his professional career as a car driver. (See, www.scottonracing.com ).

13. The Petitioner is requesting the exercise of discretion under § 212(h) of the Act.

Petitioner Rogerio Chaves Scotton ("SCOTTON"), filed his first judicial review in this Court on November 25, 2019 and his second was filed on March 22, 2020.

The Petitioner was handcuffed and shackled on May 13, 2020 for three straight days, taken to Atlanta, Louisiana, Texas, Puerto Rico and dumped in Brazil with only his clothing on his back after living on the United States for over 3 decades. Thus, the Final Administrative REMOVAL ORDER is therefore final, given this Court clear jurisdiction to review Scotton's claims.

On March 11, 2021, this Court submitted an order granting the government motion to dismiss his judicial review application alleging not haven jurisdiction on the case. (See, case number 19-14756-D).

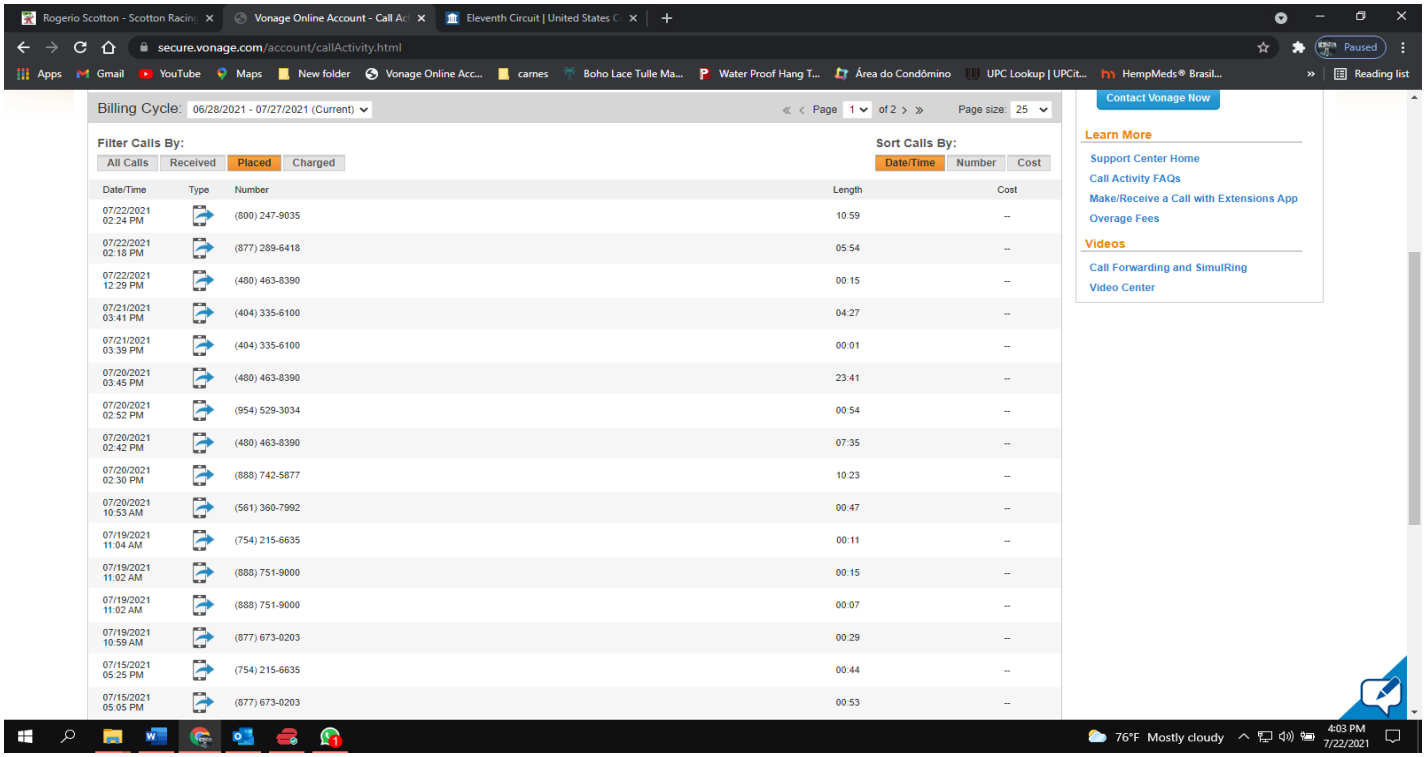
In this dismissal order, the Court stated that "in the light of the cancellation of the final administrative order of removal ("FARO") that formed the basis of this petition and in consideration of the fact that the petition had an opportunity to seek review of the subsequently entered FARO in case number 20-11181", which shows that this Court only have jurisdiction on final order only.

In the same order denial, the Court informed the Petitioner that he is allowed to submit a reconsideration pursuant to 11$^{th}$ Cir. R 27-2 within 21 days.

On April 5, 2021, the Petitioner receive the Court order denial and on in the same day, filed a motion to reopen the case. (See, https://scottonracing.com/justice-for-scotton (MOTION TO REOPENING CASE JUDICIAL REVIEW FRAUDULENT DISMISSED DUE GOVERNMENT FRAUD. (pdf)).

On many occasions the Petitioner have called the clerk's office to obtain status of case number 19-14756-D and to check if his motion to reopened was docket. The Court informed the Petitioner that his motion never arrived.

On July 7, 2021, the Petitioner called the Court again to see if his first motion or the second had arrived. The Court informed the Petitioner that was too late anyway for that.




For the reason set above and because this Court does have jurisdiction on final administrative order, the Petitioner Rogerio Scotton is hereby for the third time, submitting his petition for judicial review based on Immigration final administrative removal order in interest of justice.

The Petitioner contends that the government intentionally had avoid responding anyone of Petitioner's claims submitted under his previously filings from 2019. Knowing that the intent and final orders were lodged in violation of the Petitioner *Due Process* and knowing that there is no loss attributed to his 27 counts of the alleged charges in his criminal conviction, a mandatory requirement to form the bases under 1101(a)(43)(M) (i).

Now, Combined with the government's intentionally avoiding and failures to address Petitioner's claims on his two previously (2019 & 2020) filing, and, far to "ma[k]e a strong showing that [it] is likely to succeed on the merits," *Hilton, 481 U.S. at 776*, or that the public interest weighs in favor of the Petitioner's removal, its additional failure to present evidence of irreparable harm necessarily means that, the government has failed to meet its burden of proof that the Petitioner's conviction qualify as an aggravate felon based only on the restitution imposed by the Southern District Court.

The Petitioner contends that, his deportation issue so far has been secured through numerous acts of misconduct, shenanigans, due process violation, and wrongfully assumption that he is an aggravated felon under 1101(a)(43)(M)(i).

In this case, the government has avoided to address the claims made by the Petitioner under his two judicial review motions, *engage in an unconscionable plan* to violate the law and pervert the course of ***justice***. Petitioner's deportation was orchestrated intentional with the only intent to preventing the reverse Petitioner's conviction or any leaking from the numerous acts of prosecutorial misconduct in his criminal case. The deportation also was orchestrated to intentional deprive the Petitioner to his constitutional rights and due process due his constant fights against the system and for exposure such corruption. Thus, the normal and honest course of the process were sidetracked by those in power.

The Petitioner respectfully request this Court to review this case because he was deported under a final administrative removal order that have prevented him constitutional rights to due process time to respond, object and appeal such decision under currently federal laws. The Petitioner contends that on two occasions, INS served him with two intentional removal notice (I-851) and two final administration removal order (I-851A). All intent administrative removal notices were created on the same day that the final administrative removal notice was created. Given clear evidence that the Petitioner was denied the 10 days mentioned under the I-851A forms to respond as he was denied his due process rights. All administrative removal notices were cancelled by the government at one point without any explanation under any law, what was the reason for such cancelation. The cancelation was intentional orchestrated also to avoid the Court from make any review or ruling on Petitioner's substantial claims and arguments. Days later from such shenanigan's acts, the Petitioner were served with a final administrative removal order. For this third and final time the Petitioner were served with a final administrative removal order, the notice of intent to issue a final administrative removal order for this third and final time was never submitted Clear INS here violated they own polices which consequently also violated the Petitioner constitutional rights to be informed of INS charges.

Therefore, the Petitioner is hereby in the interesse of justice to request from the honorable Court to review not only the INS final administrative final removal order, but the entire conduct which began on November 13, 2019.

The Petitioner contend that to establish that a noncitizen has been convicted of an aggravated offense pursuant to 1101(a)(43)(M)(i), the offense must involve fraud and the loss must be more than $10,000. All courts have applied the categorical and modified categorical approach to find these elements. See Carlos-Blaza v. Holder, 611 F.3d 583, 590 (9th Cir. 2010) (applying the

modified categorical approach and concluding that conviction for misapplication of funds was one that involved "fraud or deceit" and was therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i)); Kharana v. Gonzales, 487 F.3d 1280, 1283–85 (9th Cir. 2007) (amount of loss determined under the modified categorical approach); Ferreira v. Ashcroft, 390 F.3d 1091, 1098–1100 (9th Cir. 2004) (same), abrogated on other grounds by Nijhawan v. Holder, 557 U.S. 29 (2009).

The Supreme Court held in Nijhawan v. Holder, 557 U.S. 29 (2009), that the monetary threshold in 8 U.S.C. § 1101(a)(43)(M)(i) "applies to the **specific circumstances** surrounding an offender's commission of a fraud and deceit crime on a specific occasion," rather than to an element of the fraud or deceit crime. Nijhawan, 557 U.S. at 40 (concluding that where defendant's own stipulation, produced for sentencing purposes, involved losses considerably greater than $10,000, and the court's restitution order showed the same, clear and convincing evidence supported conclusion that conviction fell within the scope of 8 U.S.C. § 1101(a)(43)(M)(i)); Wang, 830 F.3d at 961 ("We use a "circumstance-specific" approach to assess whether the loss to the victim exceeded $10,000."). In determining the amount of loss, the court is not limited to the record of conviction used for the modified categorical approach. See Nijhawan, 557 U.S. at 40–42.

"The scope of [8 U.S.C. § 1101(a)(43)(M)(i)] is not limited to offenses that include fraud or deceit as formal elements. Rather, Clause (i) refers more broadly to offenses that 'involv[e]' fraud or deceit – meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." Kawashima v. Holder, 565 U.S. 478, 483–84 (2012) (holding that petitioner's tax crimes qualified as an aggravated felony involving fraud or deceit). See also Wang v. Rodriguez, 830 F.3d 958, 961 (9th Cir. 2016) ("[A]n individual has been convicted of an aggravated felony under subsection

(M)(i) only if the elements of the offense for which she was convicted necessarily entail fraudulent or deceitful conduct.").

On March 11, 2021, this Court submitted a letter with a decision on the case 19-14756-D, stating that have granted the government's motion to dismiss in the light that the FINAL ADMINISTRATIVE ORDER OF REMOVAL was cancelled. In the case, 19-14756-D this Court was misled on the issue because the acts of shenanigan were conducted to avoid the Petitioner claims been ruled by the court. The government had never mentioned the reason for such cancelation. Then why issue a final removal order o intent to issue a final removal order on the first place? In fact, three (3) different final administrative removal order were lodged against the Petitioner. The cancellation of the first order was only to cover-up the due process violation of issue the intent administrative removal order on the same day that the final administrative removal order was issued and served. And to shutdown the Petitioner's substantial claims. Second, the truly fact that on the same day, January 17, 2020, that the government cancelled the Final administrative removal order, they issued another final administrative removal order, and such was done without even first issue the intent removal order form I-851.

## II. COURT'S JURISDICTION

This Honorable Court have jurisdiction over constitutional claims and questions of law raised in this petition as well as the final administration removal order that have unlawfully result on Petitioner removal. 8 U.S.C. § 1252(a)(2)(D). Thus, the Court should also review the denial of Petitioner's clams under the case 19-14756D for reconsideration and for abuse of discretion. Assa'ad v. U.S. Att'y Gen., 332 F.3d 1321, 1341 (11th Cir.2003). A motion for reconsideration 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 v. 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 v. Hooshmand, 931 F.2d 725, 737 (11th Cir.1991); Balogun v. U.S. Att'y Gen., 425 F.3d 1356, 1360 (11th Cir.2005).

## III. OVERVIEW

The Petitioner Rogerio Chaves Scotton came to the United States for the first time on November 13, 1989, through New York, JFK under B1/B2 visa. He is a native and citizen of Brazil.
On May 3, 2012, ICE lodged a detainer against Scotton just because he was charged (accused of offense) with an offense pursuant to 18 U.S.C. § 1341 on March 8, 2012, by a federal indictment. This despite innocent until proven guilty.

On May 8, 2014, Scotton was sentenced in the Southern District of Florida to a total term of 108 months imprisonment and three years of supervised release and a judicial finding order to pay $2,582,935.60 in restitution for the alleged offense of mail fraud under § 1341.

Scotton was sent to a private prison namely D. Ray James C.F. located at Folkston, Georgia to serve his imposed term of 108 months imprisonment.

Scotton attempted to contact the Department of Homeland Security ("DHS") as well as ICE/ERO officer at the Savannah officer on many occasions to prosecute the detainer which was lodged against him on May 3, 2012. None of his attempts was responded. The detainer forms I-247 that requesting the Petitioner been hold by officials have continue opened without resolution for over seven years. Given another layer of violation in this case.

On November 13, 2019, DHS charged the Scotton with administrative removability and SDDO Jeffrey Grant found Scotton removable for having been convicted of an "AGGRAVATED FELONY" pursuant to 101(a)(43)(M)(i) of the INA act 1101(a)(43)(M)(i).

Scotton asserts that his conviction did not qualify as an "aggravated felony" 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 his mail fraud conviction and as such was based on judicial finding regarding conduct and loss amounts that were not charged under the indictment, proven, or admitted the Petitioner.

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, standing alone, constituted "clear, unequivocal, convincing" proof of the loss necessary under 1101(a)(43)(M)(i) to transform Scotton's conviction an aggravated felon under the INA act.

On July 18, 2018, the Petitioner's U.S. citizen mother filed on his behalf an I-130 application which was approved on July 31, 2019. This approval notice allows Scotton to adjust his immigration status under 212(h). Specially because his removal from United States would (and have) bring extreme hardship to his U.S. citizen mother who is legally blind and extremely ill.

The DHS also claiming that the Petitioner entered the United States on August 2008 without inspection. However, on September 14, 2009, USCIS granted the application I-140 that was filed by a NASCAR Racing Team on Scotton's behalf. Around the year of 2008, the Petitioner also was granted by USCIS a visa for individuals with extraordinary ability, "VISA O1".

On November 01, 2010, USCIS also granted and issue on Scotton's behalf an EMPLOYMENT AUTHORIZATION CARD which was also renewed on August 23, 2011. This clear shows that

the Petitioner was not living under the shadows and thus, have attempted and/or have obtained some status in the United States.

Although the Petitioner attempted to resolve his immigration issue before the expiration of his imprisonment terms, ICE ignored the detainer act as well as laws, regulations and Scotton's numerous requests which he was simply attempted to prevent unnecessary waste of tax resource and this DOUBLE INCARCERATION which he was subjected for almost 4 months during the Covid19 pandemic.

The Petitioner contends that he is denied meaningful opportunity to access the Courts by way of unreasonably frustrating his ability to perform proper research to locate the proper laws and case citations to support this memorandum of law during the time he was placed on ICE detention; to obtain and inspect the necessary evidence; to obtain the assistance of an attorney and to confront the validity and accuracy of the DHS underlying charges in the removal proceedings during this ICE incarceration. As a direct result, not all jurisdictional and other legal citations etc., are provided on his previously memorandum of law. And now, seating on a country that he has not been for over 33 years, he could only offer (without the assistance of attorney) some legal citations that is provided from memory or personal notes. Thus, the Petitioner asks that these circumstances not prejudice this petition and relief hereby requested.

## IV. DISCUSSION

The INA provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The INA specifically defines "aggravated felony" to include "an offense that . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). To determine

whether a prior conviction constitutes an aggravated felony, the IJ must first look to the language of the statute of conviction. See In re Ajami, 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 Petitioner was convicted." Id.; Jaggernauth v. U.S. Att'y Gen., 432 F.3d 1346, 1349 n. 1 (11th Cir.2005). The IJ's determination that a prior conviction constitutes an "aggravated felony" must be supported by "clear, unequivocal, and convincing evidence." Woodby v. 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 case, Scotton was charged with, was tried to, and was convicted of, twenty-seven counts of mail fraud, in violation of 18 U.S.C. § 1341. Scotton here also dispute that his alleged offense involved fraud or deceit as he has disputed under his pending habeas corpus in front the Southern District Court. However, he also challenges the DHS and IJ's determination that his conviction qualifies as an aggravated felony based on the loss amount stated in the restitution order.

The plain language of the INA requires that an alien have been "convicted of an aggravated felony" for that conviction to form the basis of removal. 8 U.S.C. § 1227(a)(2)(A)(iii) (emphasis added). For our purposes here, this means determining, under the INA, whether Scotton's conviction constituted an "aggravated felony," defined as "an offense that . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). This is analogous to the inquiry that a sentencing court undertakes when determining whether a prior conviction constitutes a "violent felony" for purposes of sentencing enhancements under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §

924(e). To make this determination in the sentencing context, the Supreme Court in Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), held that a court can look only to the statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary, to qualify as a "violent felony" under the ACCA. Because, like the INA, the plain language of the ACCA focuses on convicted conduct, the Court found that the statute generally prohibited courts from looking to the particular facts behind the conviction, leaving the court normally to look only to the fact of conviction and the statutory definition of the prior offense. The Court should apply a modified Taylor approach to the immigration context in Jaggernauth, 432 F.3d at 1353-55 (vacating order of removal where neither the information, plea, judgment, or sentence provided clear, unequivocal, and convincing evidence that Jaggernauth was convicted of an aggravated felony).

In Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court applied the Taylor approach to a prior conviction based on a guilty plea. The Court held that a sentencing court determining the character of a prior, admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented (elsewhere in the opinion stated as "adopted by the defendant," the "defendant's own admissions or accepted findings of fact," or "judicial record" of "the factual basis for the plea [as] confirmed by the defendant"). Id. at 20, 25-26, 125 S.Ct. 1254.

In this case, the elements of the conspiracy with which Scotton was charged did not require that any loss amount be proved. Neither the indictment nor during the trial the 27 counts have specified any loss amount. Indeed, Scotton was not charged with any loss amount under the

27 counts mentioned on the indictment and did not admit to any loss during trial or sentence. In fact, still today, the Petitioner claiming to be innocent and have continue to appeal his conviction. Moreover, there was no loss attributable to the 27 counts overt charged in the indictment, to which Scotton was tried and convicted. Contrary to the DHS and IJ's conclusion during his bond hearing, there was no evidence that the mail fraud with which Scotton was charged "alleged other losses." (Emphasis added). In fact, the prosecutor had never indicated that there was any loss charged on the indictment or even during tried, rather than the introduction of unverified and inaccurately spreadsheets unlawfully introduced not related to the 27 counts of conviction. The DHS and IJ therefore could not have relied on the statutory elements of the offense, the indictment, the trial, or the sentence to conclude that Scotton was convicted of an aggravated felony, as defined in the INA.

The DHS and IJ was also not entitled to rely solely on the loss amounts contained in the restitution order as "clear, convincing and unequivocal" evidence that Scotton was "convicted of an aggravated felony." On its face, the restitution order only indicated three institutional victims, FedEx, UPS and DHL and a suggested amount of loss in total not mentioned under the indictment or under the 27 counts of conviction. The restitution was not based on the 27 counts charge to which Scotton were tried and convicted, nor have Scotton admitted to any loss amount during the sentence. Rather, the order was based on additional conduct that was alleged only in the PSI made by the government themselves and government unverified spreadsheets in which, not linked to the 27 counts of conviction. Each one of the 27 count was alleged to be shipped on different occasion and different day. Scotton objected to the PSI's assertion that he had not committed the offense, and that there are no losses referred under the 27 counts, nor the spreadsheets were accurate. Scotton therefore did not admit, adopt, or assent

to the factual findings that formed the basis of the restitution order. Furthermore, while a sentencing court in the criminal context may order restitution not 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 based on the relevant conduct that may be considered at sentencing. Rather, what constitutes an "aggravated felony" for purposes 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 v. Ignancio Munio, 909 F.2d 436, 438-39 (11th Cir.1990). Scotton was charged and convicted by a jury to 27 counts of mail fraud and not by a spreadsheet. Relevant conduct may also include acquitted conduct. United States v. Watts, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); United States v. Averi, 922 F.2d 765, 766 (11th Cir.1991). Indeed, this Court have held that relevant conduct for sentencing purposes may even include losses caused by criminal conduct that cannot be prosecuted because those acts fall outside the statute of limitations. See United States v. Behr, 93 F.3d 764, 765-66 (11th Cir.1996). See also United States v. Dickerson, 370 F.3d 1330, 1342-43 (11th Cir.2004).

In Dickerson, this Court 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 DHS and IJ confused the issues of conviction and restitution. There was no basis in this record from which the DHS and IJ could have found by "clear, unequivocal and convincing" evidence that the restitution order was based on convicted or admitted conduct. See, e.g., Knutsen v. 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 convicted counts alone."). See also Khalayleh v. INS, 287 F.3d 978, 979-80 (10th Cir.2002) (conviction constituted aggravated felony where although defendant pled guilty to only one count in indictment, that count incorporated by reference a scheme to defraud that admittedly caused losses in excess of $10,000); Chang v. 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 v. Ashcroft, 353 F.3d 225, 227 (3d 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); Ferreira v. 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 v. Gonzales, 461 F.3d 45, 55-56 (1st Cir.2006) (conviction constituted aggravated felony where defendant was convicted of a conspiracy charge which also alleged overt acts 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 Attorney General to have met his burden to show that the conviction constituted an aggravated felony under the INA (as an offense of fraud or deceit involving a loss more than $10,000) by "clear, convincing and unequivocal" evidence. The restitution order-which in this case was the only document that referred to any loss-was based on factual findings regarding conduct and loss amounts that were not charged, proven, or admitted. The sentencing court in the underlying criminal case was entitled to make these findings by a "preponderance of the evidence," rather than by "proof

beyond a reasonable doubt." Alston, 895 F.2d at 1373 (quotations and citations omitted). The DHS and IJ, on the other hand, had to find that Scotton had been convicted of an offense of fraud or deceit involving a loss more than $10,000 by "clear, unequivocal, and convincing" evidence. Because the sentencing court was entitled to base its restitution order on factual findings made by a lower standard of proof, it was error for the DHS 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.

**Other arguments** (1) Scotton's due process were violated since he was not given de opportunity to file an waiver of deportation under former INA § 212(c); (2) the immigration service violated his due process rights because the charge against him only contained a statutory citation and no factual allegations; and (3) the IJ violated his due process rights by failing to notify him of the various forms of relief from deportation for which he could apply, especially since Scotton's US citizen mother application filed on his behalf were granted, July 31, 2019. (4) Scotton's due process were violated because on the third administrative removal order he was precluded from filed a judicial review since he was immediately handcuffed and shackled for three straight days and removed from US. (5) the third Final Administrative removal order, form I-851A was issue before and without the Intent administrative removal order being issued.

Accordingly, the Court should GRANT the petition, re-opening this case for good cause and as a matter of law to review the Petitioner claim and the unlawful deportation he was submitted.

Respectfully Submitted,

Rogerio Scotton
ROGERIO CHAVES SCOTTON
7797 GOLF CIRCLE DRIVE #204
MARGATE, FL 33063

## PROOF OF SERVICE

I Rogerio Chaves Scotton, do certify that on this July 26, 2021, I have served the attached petition for Judicial review (which is under the Petitioner's constitutional rights) on the Eleventh Circuit in the above proceeding. I have served this motion via, United States Postal Service (USPS) certified mail through US postal office in Pompano Beach.

I Rogerio Chaves Scotton hereby, to serve this Court with this petition for judicial review in the interest of justice.

Rogerio Scotton
ROGERIO CHAVES SCOTTON
7797 GOLF CIRCLE DRIVE #204
MARGATE, FL 33063

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Scotton' Rogerio Chaves-Petitioner

Garland' Merrick B.-Attorney General