APPEAL NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: JOSE LUIS AREVALO
Petitioner

-VS-

UNITED STATES OF AMERICA
Respondent

ON WRIT OF PROHIBITION UNDER 28 U.S.C. SECTION 1651(A) TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF SUBMITTED TO ASSOCIATE JUSTICE CLARENCE THOMAS BY REASON OF EXTRAORDINARY CIRCUMSTANCES PURSUANT TO RULE 22-1 OF THE SUPREME COURT RULES

JOSE LUIS AREVALO
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Petitioner in propria persona

QUESTIONS PRESENTED

(1) WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT WAS VIOLATED IN THE CASE OF AREVALO, BECAUSE HIS PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT, EVERY ELEMENT OF THE CRIME, ESPECIALLY WITH RESPECT TO THE "MONEY LAUNDERING" ACTIVITIES, ALLEGEDLY TAKEN BY AREVALO IN ARIZONA, WHICH HAD NOTHING TO DO WITH THE MONEY LAUNDERING PROCEEDS, WHICH HAD NOTHING TO DO WITH THE ALLEGED DRUG CRIMES IN FLORIDA.

(2) WHETHER A PANEL OF THE ELEVENTH CIRCUIT COURT OF APPEALS ABUSED ITS DISCRETION WHEN IT DISMISSED AREVALO'S PETITION FOR A CERTIFICATE OF APPEALABILITY , BY DEPARTING FROM JUDICIAL PRECEDENT WHICH FLATLY PROHIBITS SUCH A DEPARTURE PROSCRIBED BY 28 U.S.C. SECTION 2253.

(3) WHETHER AREVALO'S INVOCATION OF THE CAUSE AND PREJUDICE DOCTRINE, ALLIED WITH AN ACTUAL INNOCENCE CLAIM, ENTITLES HIM TO A MERITS DETERMINATION BY ASSOCIATE JUSTICE CLARENCE JUSTICE THOMAS PURSUANT TO RULE 22-1 OF THE SUPREME COURT RULES.

LIST OF PARTIES

IN RE: JOSE LUIS AREVALO

-VS-

UNITED STATES OF AMERICA

THE NAMES OF ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE. THERE ARE NO ADDITIONAL PARTIES.

MEMORANDUM OF POINTS AND AUTHORITIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF PROHIBITION

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 A to the petition and is

[ ] reported at _____; 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[✓] is unpublished.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 _____ to the petition and is

[ ] reported at _____; 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[✓] is unpublished.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 _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

STATEMENT OF JURISDICTION

The Supreme court of the United States has original jurisdiction over three categories of case. first, the Supreme Court can exercise original jurisdiction over "actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls or foreign states are parties." See, e.g. Maryland v. Louisiana, 451 U.S. 725, 737 (1981).

Second, the Supreme court also possesses original jurisdiction for "(all) controversies between the United States and a state," 28 U.S.C. Section 1251(b)(2).

Finally, Section 1251 provides for original jurisdiction in the Supreme court, "for (all) actions or proceedings by a state against the citizens of another state or against aliens." See, Oregon v. Mitchess, 400 U.S. 112 (1970), United States v. Louisiana, 339 U.S. 699 (1950), United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeal" and "certiorari" as vehicles for appellate review of the decision of state and lower federal courts. Where he statutes provides for "appeal" to the Supreme court, the Court is obligated to take and decide the case when appellate review s requested. Where the statute provides for review by "writ of certiorari," the court has completer case if there are for votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for review was virtually entirely eliminated. Now almost all cases come to the Supreme Court by writ of certiorari. Pub.L.N. 100-352, 102 Stat. 662 (1988).

WRIT OF PROHIBITION PURSUANT TO 28 U.S.C.. ACTION 1651 IN AID OF THE SUPREME COURT'S JURISDICTION.

(a) The Supreme Court and all courts established by Act of Congress, may issue all writs necessary or appropriate inn aid of their respective jurisdictions ad agreeable to the usages and principles of law.

(b) An alternative writ or law may be issued by a justice or judge of a court which has jurisdiction.

Utilizing Rule 22-1 of the Supreme Court Rules, a justice (Associate Justice of the Eight Circuit to whom an application to a Writ of prohibition is submitted may refer to the Court for determination.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was JANUARY 16, 2018

[ ] 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: _____, 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 _____ (date) on _____ (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 _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, 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 _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

LAW RELATED TO STRUCTURAL ERROR

In conducting harmless error analysis of constitutional violations in habeas cases, the Supreme Court repeatedly has reaffirmed that "(s)ome constitutional violations...by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Satterwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999)("(W)e have recognized a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards'...Errors of this type are so intrinsically harmful as to require automatic reversal (i.e.. 'affect substantial rights') without regard to their effect on the outcome.").

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)("Although most constitutional errors have been held to harmless-error analysis, some will always invalidate the conviction."(citations omitted)); id at 283 (Rehnquist, C.J., concurring); United states v. Olano, 507 U.S. 725, 735 (1993); Rose v. Clark, 478 U.S. 570, 577-78(1986)("some constitutional errors require reversal without regard to the evidence in the particular case...(because they) render a trial fundamentally unfair"); Vasquez v. Hillary, 474 U.S. 254, 283-264(1986); Chapman v. California, 386 U.S. 18, 23 (1967)("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error").

LAW RELATED TO STRUCTURAL ERROR FOR INEFFECTIVE ASSISTANCE OF COUNSEL

The Right to Effective Assistance of Counsel. See Kyles v. Whitley, 514 U.S. at 435-436; United States v. Cronic, 466 U.S. 648, 654-57 (1984); Hill v. Lockhart, 28 F.2d 832, 839 (8th Cir. 1994)("it is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective significant claim for ineffective assistance of counsel").

LAW RELATED TO STRUCTURAL ERROR FOR CONCEALMENT OF EVIDENCE

Included in those rights is the protection against prosecutorial suppression of exculpatory- evidence and other prosecutorial and judicial failures to make "material" evidence or witnesses available to the defense=se at trial, when "materiality" is defined as at least a "reasonable probability that had the evidence been disclosed to the defense, the result of the proceedings would have been different. Kyles v. Whitley, 514 U.S. at 435(quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion); id at 685 (White, J., concurring in judgment)). In addition to Bagley, which addresses claims of prosecutorial suppression of evidence, the decisions listed below-all arising in "what might loosely be called the area of constitutionality guaranteed access to evidence,"'Arizona v. Youngblood, 488 U.S. 51, 55 (1988)(quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)-require proof of "materiality" or prejudice.

The standard of materiality adopted in each case is not always clear, But if hat standard requires at least a "reasonable probability " of a different outcome, its satisfaction also automatically satisfies the Brecht harmless error rule. See, e.g. Arizona v. Youngblood, supra at 55 (recognizing due process violation based on state's loss or destruction before trial of material evidence); Pennsylvania v. Richie, 480 U.S. 39, 57-58 (1987)(recognizing due process violation based on state agency's refusal to turn over material social services records; "information is "material" if it "probably would have changed the outcome of his trial "citing United States v. Bagley, supra at 685 (White, J., concurring in judgment)).

Ake v. Oklahoma, 470 U.S. 68, 83 (1985)(denial of access by indigent defendant to expert psychiatrist violates Due process clause when defendant's mental condition is 'significant factor' at guilt-innocence or capital sentencing phase of trial); California v. Trombetta, 467 U.S. 479, 489-90 (1984)(destruction of blood samples might violate Due Process Clause, if there were more than slim chance that evidence would affect outcome of trial and if there were no alternative means of demonstrating innocence).

United States v. Valenzuela-Bernal, supra at 873-874 ("As in other cases concerning the loss (by state or government) of material evidence, sanctions will be warranted for deportation of alien witness only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.", Chambers v. Mississippi, 40 U.S. 284, 302 (1973)(evidentiary rulings depriving defendant of access to evidence "critical to (his) defense "violates "traditional and fundamental standards of due process"); Washington v. Texas, 388 U.S. 14, 16 (1967)(violation of Compulsory Process Clause when court arbitrarily

deprived defendant of "testimony (that) would have been relevant and material, and...vital to his defense").

LAW RELATED TO STRUCTURAL ERROR FOR JUDICIAL BIAS

Included in the definition of structural errors, is the right to an impartial judge, i.e. the right to a judge who follows the constitution and Supreme Court precedent ad upholds the oath of office. See, e.g. Neder v. United States, supra., 527 U.S. at 8 ("biased trial judge" is "structural error" and thus is subject to automatic reversal"); Edwards v. Balisok, 520 U.S. 461, 469 (1997); Sullivan v. Louisiana, 508 U.S. at 279; Rose v. Clark, 478 U.S. 570, 577-78 (1986); Tunney v. Ohio, 273 U.S. 510, 523 (1927).

STATEMENT OF CASE AND PROCEDURAL POSTURE

Jose Arevalo was convicted, on February 15, 2000, of conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. Sub-Section 841(a)(1) and 846 (count 1), and conspiracy to commit money laundering, in violation of 21 U.S.C. Section 1956(a)(1)(A)(i), (B)(i), (ii)(Count 3). he was sentenced to 120 months' imprisonment for Count 1, and 240 months' imprisonment for Count 3, to be served consecutively, and judgment was entered in his case on January 17, 2001. The Court of Appeals for the Eleventh Circuit affirmed Arevalo's conviction and sentence on April 25, 2002. On September 16, 2002, the district court entered an amended judgment to incorporate a preliminary order of forfeiture. The Eleventh Circuit court of Appeals affirmed the amended judgment on June 13, 2003, and the mandate issued on June 18, 2004.

On October 6, 2003, while the direct appeal of the amended judgment was pending, Arevalo filed a pro se 28 U.S.C. Section 2255 motion, raising four claims for relief. Specifically, he maintained that:

(1) counsel was ineffective for failing to argue that venue did not exist for his many laundering charges, and the Court erred by finding that evidence was presented at trial to support venue.

(2) counsel was ineffective for failing to ensure that the jury was properly instructed concerning that elements of a conspiracy and that the proceeds from prior crimes could not be attributed to the money laundering charge in the current indictment;

(3) counsel was ineffective for filing to challenge the government's inadequate notice of his 21 U.S.C. Section 851 enhancement and the use of his prior convictions to enhance his sentence, pursuant of Section 8412(b)(1)(D);

(4) the district court's drug quantity computations to enhance his sentence violated Apprendi v. New Jersey, 530 U.S. 466 (2000).

The district court stayed Arevalo's Section 2255 pr[proceedings while the direct appeal from his mended judgment was pending and then lifted the stay and ordered briefing after the court affirmed his mended judgment.

The government responded to the Section 2255 motion, contending that Claim 1 was procedurally barred, because it was raised and rejected on direct appeal. The government noted that, on direct appeal, Court of Appeals Court held that evidence was presented at trial to support jurisdiction and venue. Specifically, the Court of Appeals held that:

> (t)he district did not err by exercising its jurisdiction to sentence Arevalo on the money laundering count. We are unpersuaded by Arevalo's argument that there was insufficient evidence presented at trial that his trafficking activities extended into Florida.

The government maintained that Claim 2 was belied by the record, as the district court did not instruct the jury regarding concealment when it reviews the elements of money laundering by providing the following:

> (t)o knowingly conduct and attempt to conduct financial transactions represented the proceeds of some form of unlawful activity, when the financial transactions, in fact involved the proceeds of a specified unlawful activity, to wit: the importation, sale and otherwise dealing in marijuana, in part to conceal or disguise the nature or location, the source, and the ownership of the proceeds of the specified unlawful activity, contrary to the provisions from title 18, U.S.C. Section 1956(a)(1)(B)(i).

Because Arevalo did not demonstrate that the jury was improperly instructed, the government maintained, Arevalo failed to demonstrate that counsel's performance was deficient, or that he was prepared from any alleged failure to challenge the jury instructions. The government maintained that Claim 3 was raised and rejected on direct appeal, where Arevalo argued that the district court erred by utilizing the enhancement provision of Section 841(b)(1)(D) to sentence him to ten years' imprisonment for his drug conspiracy conviction, because the prior convictions stemmed from substantive offenses that were part of the conspiracy for which he was convicted in the instant case.

The Court of Appeals held that his claim was foreclosed by United States v. Hansley, 54 F.3d 709, 717 (11th Cir. 1995), as Arevalo continued his involvement in the conspiracy to traffic in marijuana for years following his prior convictions. In addition, the government noted that Arevalo's Apprendi allegation was without merit, as Apprendi specifically held that prior convictions used to increase a penalty beyond the statutory maximum did not need to be submitted to a jury.

Arevalo replied to the government's response, re-asserting his arguments raided on the Section 2255 motion. On march 7, 2005 the district court entered an order that denied Arevalo's Section 2255 motion. The district court found the government's argument persuasive and adopted and incorporated these arguments into its order. The district court later denied a COA, and Arevalo sought a COA and IFP status. (See Case No. 05-12629). Arevalo filed a motion for reconsideration, which the Court of Appeals denied on October 11, 2005.

On November 16, 2016, Arevalo filed a motion to reopen his original Section 2255 proceedings, pursuant to Fed. R. Civ. 60(b). he argued that the district court violated section 2255*b) when it denied his Section 2255 motion by adopting and incorporating the government's arguments. He maintained that the district court did not provide any findings of fact or conclusions of law in its order denying relief, and did not articulate why a denial was warranted, besides referencing the government's response.

On November 22, 2016, the district court denied Arevalo's Rule 60(b) motion in an endorsed order, without nay comment. Arevalo filed a notice of appeal and moved for IFP status with the Court of Appeals. The Court of Appeals entered a limited remand, so that the district court rule on whether a COA was warranted from the denial of his Rule 60(b) motion. The district court entered an order denying a COA and IFP status, in order to appeal the denial of his Rule 60(b) motion. Arevalo subsequently sough a COA from the Court of Appeals which was denied, triggering this appeal to the United States Supreme Court.

REASONS FOR GRANTING

Petitioner Arevalo avers that, given the totality of the circumstances of his case an analysis of the constitutional violations he has argued before the courts in his briefs, point clearly to what the Supreme Court has repeatedly affirmed that"(s)ome constitutional violations ...by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." Safferwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. united States, 527 U.S. 1, 7 (1999)("(W)e have recognized a limited class of fundamental constitutional errors that "defy analysis by "Harmless Error" standards.

In the case at bar, both the district court and the Court of Appeals for the Eleventh Circuit, ignored settled law when, they failed to acknowledge the quintessential element of Arevalo's Rule 60(b) Motion, which attacks, not the substance of the federal court's resolution of a previous claim on the merits, but some defect in the integrity of the federal habeas proceedings. Examples of motions attacking a defect in the integrity of the federal habeas proceedings include a claim of fraud on the court r challenges to a court's procedural ruling which precluded a merits determination, such as when a ruling is based on an alleged failure to exhaust, a procedural default, or a time-bar determination." United States v. Brown, 547 F. App'x 637, 6412 (5th cir. 2013) (unpublished(citing Gonzalez, 545 U.S. t 532 nn 4-5)

Errors of this type are so intrinsically harmful as to require automatic reversal (i.e. affect substantial rights) without regard to their effect on the outcome") Sullivan v. Louisiana, 508 U.S. 275, 279 (2993); Rose v. Clark, 478 U.S. 570, 577-78 (1986) ("some constitutional errors require reversal without regard to the evidence in the particular case...(because they) render a trial fundamentally unfair"), Vasquez v. Hillary, 474 U.S. 254, 263-264 (1986), Chapman v, California, 386 U.S. 18, 23 (1967)("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless.

Some commentators, in analyzing constitutional errors have treated harmless-error jurisprudence as establishing a strict dichotomy between trial error, which is subject to harmless error analysis, and structural error, which is per se reversible. See, Twenty-Fourth Annual Review of Criminal procedure, 83 Georgetown L.J. 665, 1365 (96 F.3d 1144)(March-April 1995). The case law does not appear to establish such a rigid dichotomy, however. In its recent Brecht decision, the Supreme court characterized the divergence between trial and structural errors as a "spectrum, of constitutional errors" rather than a rigid dichotomy. Brecht, __U.S. at __, 113 S.Ct. at 1717 (emphasis added).

Most of not all of Arevelo's constitutional claims arise from failure of Counsel to "subject the Government's case to strict adversarial testing" as enunciated by Strickland v. Washington (citations omitted). The law related to structural errors as it related to the denial of the Sixth Amendment right to effective counsel is very clear. The Right to Effective Assistance of counsel. See, Kyles v. Whitley, 514 U.S. at 435-436; United States v. Cronic, 466 U.S. 648, 654-57 (19840, Hill v. Lockhart, 28 F.2d 832, 839 (6th Cir. 1994)("it is unnecessary to add a sep[arate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutional significant claim for ineffective assistance of counsel claim.

Petitioner contends, included in the definition of structural error, is the right to an impartial judge, or panel of judges who follow the constitution and Supreme court precedent and uphold their oath of office. To paraphrase Chief Justice Roberts, in taking his oath of office reaffirmed the doctrine that the Supreme Court was not going to have the government s a client. To drive home this notion of impartiality, see e.g. Neder v. United states, 527 U.S. at 8 ("biased trial judge is structural error.").

The panel's sponte denial of Arevalo's petition for a Certificate of Apealability without findings of fact and conclusions of law, is a thinly veiled res judicata, choosing, as it were, the path of finality of judgment over fairness in the criminal context, amounting to a clear miscarriage of justice. Traditionally, efficiency and finality have carried less weight that farness in the criminal context, because criminal sanctions may result in imprisonment and greater social stigma than civil sanctions. See, Stacey & Dayton, supra note 2 at 137 ("As our ...commitment to the availability of habeas corpus, finality and efficiency concerns carry relatively less sway in criminal cases than they do in civil proceedings- a product of a criminal defendant's countervailing liberty interest") (footnote omitted).

The category of errors known as trail errors can be harmless of the government can show beyond a reasonable doubt that they did not contribute to the verdict. See id at 24, see also Sullivan v. Louisiana, 508 U.S. 2754, 279 (1993) (stressing that the test for harmlessness " is not whether, in a trial that occurred without the error a guilty verdict would surely have been rendered but whether rhea guilty verdict actually rendered in this trial was surely attributable to the error").

The Supreme court has recognized a narrow set of rights that, if denied are structural errors, the right to counsel, see, Gideon v. Wainwright, 372 U.S. 335, 343-45 (1063) and to counsel of choice, See, United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006), the right of e=self e=representation, see, McKaskie v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (finding harmless error analysis inapplicable to deprivation of the right to self representation because exercising the right increases the chance of a guilty verdict, the right t an impartial judge, See, Tunney v. Ohio, 273 U.S. 510, 534 (1927)(holding that trial before a biased judge "necessarily involves a lack of due process"); freedom from racial discriminatory grand jury selection undermined "the objectivity of those charged with bringing a defendant to judgment; the right to a public trial, See, Waller v. Georgia, 467 U.S. 39, 49 (1984)("The defendant should not be required t prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee"), and the right to accurate reasonable doubt instruction=, no actual jury verdict had been rendered and the court could thus not apply harmless error analysis to determine whether the error affected the verdict.

By contrast, in Arevalo's case, the list trial errors are extensive. See, Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991) (declaring that "most constitutional errors can be harmless," ad naming sixteen examples of trial errors. While the list of structural errors have remained consistent, the Supreme Court's methods of distinguishing between trial and structural errors have remained consistent, the Supreme Court's methods of distinguishing between trial errors and structural errors have fluctuated. The prejudicial impact of the constitutional errors is assessed by asking whether the error has "a substantial and injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), see also Fry v. Pliler, 551 U.S. 112, 119-120, 127 S.Ct. 2321, 168 L.Ed 16 (2007)(holding that the Brecht standard applies whether or not the state court recognized the error and reviewed it for harmlessness).

WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT WAS VIOLATED IN THE CASE OF AREVALO, BECAUSE THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT, EVERY ELEMENT OF THE CRIME, ESPECIALLY WITH RESPECT TO THE 'MONEY LAUNDERING' ACTIVITIES, ALLEGEDLY TAKEN IN ARIZONA BY AREVALO, WHICH HAD NOTHING TO DO WITH THE DRUG PROCEEDS."

As a threshold matter, Arevalo avers that under the due Process Clause of the Fifth Amendment, the prosecution is required to prove beyond as reasonable doubt every element of the crime with which a defendant like Arevalo is charged. See, In re Winship, 397 U.S. 358, 364 (1970)(holding that the government must prove "every element necessary to constitute the crime" beyond a reasonable doubt); see also U.S v. O'Brien, 560 U.S. 218, 224 (2010)(distinguishing between "(e)lements of a crime (that) must be charged in an indictment and proved to a jury beyond a reasonable doubt" and (s)entencing factors (that) can be proved to a judge at sentencing by a preponderance of the evidence").

The Winship "beyond a reasonable doubt" standard applies to both state and federal proceedings. See, Sullivan v. La, 508 U.S. 275, 278 (1993). The standard protects three interests. First, it protects the defendant's liberty interest. See, Winship, 397 U.S. at 363. Second, it protects the defendant from the stigma of conviction. Id. Third, it encourages community confidence in criminal law by giving "concrete substance" in the presumption of innocence. Id. at 363-64. In his concurring opinion Justice Harlan noted that the standard is founded on " fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Id at 372 (Harlan. J. concurring).

As far as the money laundering charge is concerned, Arevalo invokes U.S. v. Christo, 129 F.3d 578, 579-580 (11th Cir. 1997) for the proposition that in "determining when the predicate crime bec(ame) a 'completed offense' and which (then and only then) money laundering can occur." Arevalo addressed the facts underlying this argument Arevalo's Memorandum in Support, an argument that was deliberately ignored by the government in its Response. The government in an attempt at reductio ab adsurdum invokes an excerpt from the Appellate court's decision in the case. The Court opined "We are unpersuaded at trial by Arevalo's argument that there was insufficient evidence presented at trial that his trafficking activities extended to Florida. " See, U.S. v. Arevalo, 37 Fed. Appx. 504 (11th Cor.), cert. denied, 537 U.S. 926 (October 7, 2002).

In point of fact, it is the money laundering charge that is being challenged, not the drug trafficking activities. "Money laundering is an offense to be punished separately from the underlying criminal offense." Chirsto, at 579. "A violation of the concealment provision must 'follow in time' the completion[of the underlying transaction as an activity designed to conceal or disguise the origins of the proceeds." U.S. v. majors, 196 F.3d 1206, 1212 (11th Cir. 1999). "This section of the money laundering statute was designed to punish defendants who thereafter take the additional step of attempting to legitimize their proceeds, so that observers think their money is derived from legal enterprises." Id. (emphasis added).

In sum, the reasonable doubt requirement a-applies to elements that distinguish a more serious crime from a less serious one as well as those elements that distinguish criminal from non-criminal conduct. See, Apprendi v. New Jersey, 530 U.S. 466, 488 -92 (2000)(requiring proof beyond a reasonable doubt that defendant's crime was racially motivated to support increased hate crime sentence). Thus, a state may not distinguish between similar offenses that have different maximum penalties without the prosecution to prove beyond a reasonable doubt that facts that distinguish the two offenses. See, Id.

The Eleventh Circuit holding in U.S. v. Range, 94 F.3d 614, 620 (112th Cir. 1996) instructs that, "A court must, however, be able to determine with absolute certainty that the jury based its verdict on the ground on which it was properly instructed. If the legal conclusions arrived at in Christo and Majors, are so 'subtle' as to confuse the government, one can imagine the impact it must have had on the jury itself. In point of fact, it is settled that the government's failure to meet its burden of proof results in the defendant's acquittal at trial or reversal of the conviction on appeal. See, Winship, 397 U.S. U.S. at 363. Also see, U.S. v. Jimenez, 705 F.3d 1305, 1308-11 (11th Cir. 2013).

The defendant must also be acquitted, if the court defines reasonable doubt in such a way that it eases the burden on the prosecution's burden of proof. See, Cage v. La, 4908 U.S. 39, 41 (1990)(per curiam), overruled on other grounds by Estelle v. McGuire, 502 U.S. 62 (1991).

In sum, the prosecution's case against Arevalo, can best be summarized by the immortal words, culled from Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed 1314 (1935).

" The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartiality is compelling as its obligation to govern at all, and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense, the servant of the law, the twofold aim of which is that guilty shall not escape or innocence suffer. He may prosecute with earnestness (compliance) and vigor...indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

WHETHER THE PANEL OF THE ELEVENTH CIRCUIT COURT OF APPEALS, INVERTED THE STATUTORY ORDER OF OPERATIONS, BY APPLYING THE WRONG STANDARD IN DENYING AREVALO'S PETITION FOR A CERTIFICATE OF APPEALABILITY PURSUANT TO THE DISTRICT COURT DENIAL OF A COA ON HIS RULE 60(b) MOTION, IN CONTRAVENTION OF THE CONTROLLING AND UNAMBIGUOUS HOLDING IN THE SUPREME COURT CAE IN BUCK V. DAVIES, 137 S.CT. 759 (2017) THAT CLARIFIES THE STANDARD FOR COA.

PROCEDURAL POSTURE

Following the denial of petitioner Arevalo's Rule 60(b) by the District Court, the former filed a motion for reconsideration, pursuant to 11th Cir. R-22-1(c) and 27-2, of the 11th Circuit's November 8, 2017, order denying a certificate of appealability, in order to appeal the denial of his Fed., R. Civ.,. P. 60(b) motion. upon review, Arevalo's motion for reconsideration was DENIED because, the Court of Appeals alleged, he had offered no new evidence or arguments of merit to warrant relief.

LEGAL ANALYSIS

As a threshold matter, Arevalo avers, the correct standard for the denial or acceptance of a Certificate of Appealability is son critical because it raises issues having systemic consequences not only having to do with habeas jurisprudence, but also for the development of the law and administration of justice. This case has been directed to Associate Justice Clarence Thomas by reason of his Supervisory Control over the Eleventh Circuit Court of Appeals, because the denial of a Certificate of Appealability is an issue that arises infrequently, for which correction and review would be most propitious. At one end of the spectrum, there are respected jurists who believe that even in cases of actual innocence.

Arevalo further contends that, "The elements of a "fraud upon the court" are numerous. Fraud on the court is conducted (1) on the part of an officer of the court,(2) that is directed t the judiciary machinery itself, (3) that is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth, (4) that is a positive averment or a concealment when one is under a duty to disclose; (5) that deceives the court. In other words an officer of the court may not usurp the statutes of Congress or contravene the dictate of the constitution, as has being flagrantly done in the prosecution against Arevalo..

In light of the above, the threshold question about the issuance of a Certificate of Appealability, as a matter Supreme Court law, should be decided without "full consideration of the factual or legal basis adduced in support of the claims." Id. at 336. 123 S.Ct. 1029, 154 L.Ed.2d 931. Thus, "when a court of appeals sidesteps (the COA) process by first deciding the merits of an appeal, and then justifies its denial or a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Id. at 336-337, 123 S.Ct. 1029, 154 L.Ed.2d 931.".

As a consequence, Arevalo contends that the Eleventh circuit Court of Appeals or the panel of Judges, should have limited its or their examination (at the COA stage) to a threshold inquiry into the underlying merit of Arevalo's claims, and ask only if the District Court's decision was debatable. See, Miller-El, 537 U.S. at 327, 348, 123 S.Ct. 1029, 154 L.Ed .2d 931.

WHETHER PETITIONER'S INVOCATION OF THE CAUSE AND PREJUDICE DOCTRINE, ALLIE WITH AN ACTUAL INNOCENCE CLAIM, ENTITLES HIM TO A MERITS DETERMINATION ON HIS HABEAS CLAIMS.

The Supreme Court has emphasized that both cause and prejudice must be demonstrated to permit a defendant to raise on habeas corpus matters not presented in State Court. See, Murray v. Carrier, 477 U.S. at 496. An illustration of the need to prove both cause and prejudice is Stickler v,. Greene, 527 U.S. 263 (1999). The Court found that the failure of the prosecution to disclose information under Brady V. Maryland, 373 U.S. 83 (1963), even inadvertently, was sufficient cause for the federal court to hear a habeas petition.

The principles of res judicata and collateral estoppel generally preclude a party from relitigating a matter already presented to a court and decided upon. Brown v. Allen, decided in 1953, crated ad important exception to collateral estoppel and res udicata for habeas petitions. 344 U.S. 443 (1953).

In fact, t he Warren Court so valued the importance of the opportunity to relitigate constitutional issues to ensure correct decisions that t held if a petitioner convicted by a federal court also may raise issues on habeas that had been presented and decided at trial. Kaufman v. United Sates, 394 U.S. 217, (1969). The Court concluded that "the provisions federal collateral remedy rests...fundamentally upon a recognition that adequate protection of constitutional rights...requires the continuing availability of a mechanism for relief. Id. at 226.

Petitioner contends, beginning in two decisions decided the same day, Murray v., Carrier, 477 U.S. 478 (1988) and Smith v. Murray, 477 U.S. 527 (1986), the Supreme Court has held that as an alternative to demonstrating cause, a habeas petitioner, as in the caser at bar, may raise matters hitherto not raised by demonstrating he is probably innocent of the charge.

Petitioner can show cause because his counsel neither filed for a direct appeal nor raised issues in eh sentencing court. Further, on advise of counsel, his plea was unknowingly made. unintelligently made. Petitioner can show cause for the procedural default by not renewing the claim oar for that matter, filing a direct appeal. The issue in Murray v. Carrier, 477 U.S. 478 (1986), was whether a habeas petitioner could show cause for a procedural default by demonstrating that the Defense Counsel inadvertently failed to raise an issue. Justice O'Connor emphasized that, "ineffective assistance of counsel, then is cause for a procedural default." Murray v. Carrier, 477 U.S. 478, 468 (1986).

PETITIONER'S PROFFER OF ACTUAL INNOCENCE.

In four cases, the court has elaborated the meaning of achual innocence. In Sawyer v. Whitley, the issue was what actual innocence meant in the context of challenging a sentence. petitioner further invokes Herrera v. Collins, for the proposition that "actual innocence itself is not a constitutional claim, but a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claims considered on the merits." 506 U.S. 390, 404 (1993).

Following Herrera v. Collins, the Court decided Schlup v. Delo, that to prove actual innocence, a habeas petitioner must show thee was a constitutional violation that "probably resulted' in the conviction of one who is actually innocent. 513 U.S. 298, 327 (19950, as in the case at bar.

In House v. Bell, the Supreme Court found tat the requirements for showing actual innocence were met to allow a procedurally defaulted claim of ineffective assistance of counsel to be aided, 547 U.S. 518 (2006). Thus, petitioner contends, he was prejudiced pursuant to united States v. Frady, where the Supreme Court indicated that "prejudice" could be demonstrated by snowing that the results in the case likely would have been different absent the complained of violation of the constitution or federal laws, 455 U.S. 152 (1982).

A demonstration of prejudice likely will require a showing that the alleged constitutional violation affected the outcome of the trial or the appeal - that the results probably would have been different but for the violation of federal law. These errors world to petitioner's actual and substantial disadvantage, infecting the entire judicial judicial proceedings with errors of constitutional dimensions. 456 U,S. at 170. (emphasis in original). The results would have been different but for the violation of federal law. See, also Murray v. Carrier, 477 U.S. 478, 496 (1986). Strickler v. Greene, 527 U.S. 253 (1993).

CONCLUSION

A Traditionally, efficiency and finality have carried less with than fairness in the criminal context, because criminal sanctions may result in imprisonment and greater social stigma than civil sanctions. see, Stacy & Dalton, supra note 2, at 137 ("As our ...commitment to the availability of habeas corpus, finality and efficiency concerns carry relatively less sway in criminal cases than in civil cases -a product of criminal defendant's countervailing liberty interest." (footnote omitted).

The category of errors known as trial errors can be harmless if the government can show beyond a reasonable doubt that they did not contribute to the verdict. See id at 24, see also, Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)(stressing that the test for harmlessness "is not whether, in a trial that occurred without the error, a guilty verdict would have surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.").

The Supreme Court has recognized a narrow set of rights that, if denied are structural errors; the rights to counsel, see Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) and to counsel of choice, see, United States v. Gonzalez- Lopez, 548 U.S. 140, 150 (2006)(deeming deprivation of counsel of choice a structural error.); the right of self representation, see,, Mckaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)(finding harmless error analysis inapplicable to deprivations of the right to self-representation, because exercising the right increases the chance of a guilty verdict); the right to an impartial judge, see, Tunney v. Ohio, 273 U.S. 510, 534 (1927)(holding that trial before a biased judge "necessarily involves a lack of due process").

Also denominated in the narrow set of rights deemed structural error, is the freedom from racial discrimination, in grand jury selection. This denial of have been found to undermine "the objectivity of those charged with bringing a defendant to judgment"); the right to a public trail, see, Waller v. Georgia 467 U.S. 30, 49 (1984)("the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee"), and the right to accurate reasonable-doubt instruction, see, Sullivan v. Louisiana, 508 U.S. 275, 280 (1993)(finding that because of an inadequate reasonable doubt instruction, no actual jury verdict could thus not apply harmless error analysis to determine whether error affected the verdict.).

By contrast, the list of trial errors is extensive. See, Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991) (declaring that "almost constitutional errors can be harmless," and naming sixteen examples of trial error. While the list of structural errors have remained consistent t, the Supreme Court's m ethos of distinguishing between trial and structural= errors have fluctuated. The prejudicial impact of these constitutional errors is assessed by asking whether the error hard " a substantial and injurious effect or influence in determining the jury's verdict." Bretch v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), See also, Fry . Pliler, 551 U.S. 112, 119-120, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (holding that the Bretch standard applies whether or not the state court recognized the error and reviewed it for harmlessness.).

CERTIFICATE OF SERVICE

Petitioner Jose Luis Arevalo does herby certify and declare under penalty of perjury, pursuant to 28 U.S.C. Section 1746, that a true, correct and complete copy of this "Brief submitted to Associate Justice Clarence Thomas by reason of extraordinary circumstances, pursuant to Rule 22-1", was placed in the U.S. Mail, [postage prepaid, on the 113th of April, 2018, in compliance with the prison Mail box Rule, as articulated in Houston v. lack, 487 U.S. 226 (1988), addressed to the following parties:

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