APPEAL NO_____

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: JOSE LUIS AREVALO
Petitioner

-VS-

UNITED STATES OF AMERICA
Respondent

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

INITIAL BRIEF(S) SUBMITTED TO ASSOCIATE JUSTICE CLARENCE THOMAS
WITH SUPERVISORY CONTROL OVER THE ELEVENTH CIRCUIT
PURSUANT TO RULE 22-1 OF THE
SUPREME COURT RULES

FED. REG. # 06927-196

JOSE LUIS AREVALO

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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).

STANDARD OF REVIEW FOR MISTAKE OF LAW/ABUSE OF DISCRETION, AS THEY IMPLICATE INSTRUCTIONAL ERROR AND OTHER LEGAL SUBSTANTIAL ISSUES RAISE IN THIS REHEARING, THAT CHARACTERIZED JOSE LUIS AREVALO'S JUDICIAL PROCEEDINGS.

"An abuse of discretion does no mean a mistake of law is beyond appellate correction", because "(a) district court by definition abuses its discretion when it makes an error of law". Koon v. United States, 518 U.S. 81, 100, 135 L.Ed.2d 392, 116 S.Ct. 2035 (1996).

Accordingly, "the abuse of discretion standard includes review to determine that the discretion that was not guided by erroneous legal conclusions. "id." See, also, Latvian Shipping Co. v. Baltic Shipping Co. 99 F.3d 690, 692 (5th Cir. 1996)(We will not find an abuse of discretion unless the district court's factual findings are c clearly erroneous or incorrect legal standards were applied"; Meadow briar Home for Children Inc v. Gunn, 81 F.3d 521, 535 (5th Cir. 1996)(court "abuses the its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assess assessment of the evidence").

In Koon v. United states, 518 U.S. 81,___, 135 L.Ed.2d 392, 116 S.Ct. 2036 2045 (1996), the Court explained that while an abuse of discretion review standard preserves the sentencing court's "traditional discretion," it does not render appellate review an empty exercise. Id at ..., 116 S.Ct. 5. at 2046. A sentencing court's factual findings continue to be afforded substantial deference, but a mistake of law is, b y definition, an abuse of discretion. Id. at ---116 S.Ct. at 2.47.

As a general rule, "constitutional and other legal questions" are reviewed de novo. United States v. Brown, 250 F.3d 907, 912 (5th Cir.) cert. denied, 531 U.S. 111, 148 L.Ed.2d 769, 121 S.Ct. 854 (2001)...on whether we are able to review ---abuse of discretion or de novo, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction." Koon v. united States, 518 U.S. 81, 100, 135 L.Ed.2d 392, 116 S.Ct. 2035 (1996).

RELIEF SOUGHT

Jose Luis Arevalo avers thAt the equitable relief he seeks from the Court of Appeals for the Eleventh Circuit and the Associate Jusrtice Clarence Thomas who has suoervisopry contgriol over the circuit against thefraudulaent judgment(s) of the Diastrict Court and the Circuits"s endorsement of it, is not of statutory creation, but is a judi9cially devised remedy fashoned to releive hardships which from tgime to time arises from a hard and fast adherence to the court made rule thAt judgment shouklkd not be disturbed after the term of their entry has expired.

Jose Luis Arevalo invokes United States v. Throckmorton, 98 U.S. 61, 25 L.Ed 93, Mrshall v. Homes, 141 U.S. 61, 235 L.Ed 870, for the proposition that the Court of Appeals has both the dury and the power to protect its appellate jurisdiction from fraud practiced on it. See, also richmond v. Tayleur, 1 P. Wms 734, 24 Eng. Repreint 591; Brookes v. Mostyn, 33 Bear, 457, 55 Eng. Repreint 455, 2 De G.J. 7 5, 373, 46 Eng. reprint 419; The Alfred Nobel, 14 Asp. Mar. L. Cas (Eng) 366, Art Metal works v. Abraham & Strauss, (CCA 2d) 107 F.2d 940, cert denied, 308 U.S. 621, 84 l.Ed 518, reh. denied, 309 U.S. 696, 84 L.Ed 1036, 60 S.Ct. 611, 612.

Jose Luis Arevalo respectfully requests that pursuant to this rehearing in the Supreme court, that this Honorable court grants his petition for Prohibition and to direct the Court of Appeals for the Eleventh Circuit to, (1) adjudicate his Rule 60(b) on its merits. and (2) utilizing the power of rule 60(b) which has replaced the ancient writs to dismiss his case.

STARTEMENT OF ADJUDICATE FACTS PURSUANT TO RULE 201 FEDERAL RULES OF EVIDENCE

"...a mistake of law may be corrected regardless of the standard of review applied. See, Derr, 766 F.3d at 436 n.2 ("little turns on whether we are able to able to of this particular question abuse of discretion or den novo, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction, "(quoting Ramon, 169 F.3d at 3211 n.4); Regarding and Bates Constr. Co, 976 S.W. 2d at 708 (noting that trial court has "no discretion' to improperly, determine or to misapply law (citing Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

"(A) mistake of law, is by definition, an abuse of discretion. "United States v. Hoffer, 129 F.3d 1196, 1200 (11th cir. 1997) (citations omitted)". As to the elements of abuse of discretion review, Koon pointed out that a district court's discretion is not

boundless. For example,

> whether a factor is a permissible basis for departure under any circumstances of law, and t he court of appeals need not order to the district court's resolution of the point... (A)n abuse of discretion standard does not mean a mistake of law is beyond appellate correction. Cooter & Gell, 496 U.S. at 402, 110 S.Ct. 2447, 110 L.Ed.2d 359. A district court by definition abuses its discretion when it makes an error of law. Id at 405...the abuse of discretion was not guided by erroneous legal conclusions. Koon, 518 U.S. at 100 emphasis added).

An abuse of of-discretion occurs when the district court "based its decision on an erroneous conclusion of law or where these is no r rational basis in the evidence for the ruling. "Wang v. Hsu, 919 F.2d 130, (10th Cir. 1990).

SUBSTANTIAL CERTIFIED ISSUES PRESENTED

(1) WHETHER THE SUPREME COURT SHOULD DIRECT THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO REVERSE THE ENHANCEMENT OF AREVALO'S SENTENCE BY THE APPLICATION OF SECTION 851 THAT RUNS AFOUL OF APPRENDI, 530 U.S. 466, 120 S.CT. 2348, 147 L.ed,2d 435 (2000).

LEGAL ANALYSIS

Jose Luis Arevalo contends that the offense for which the 851 prior was being used to enhance his punishment as Void for Vagueness. According to the canon of statutory construction, a "felony drug offense is defined in 18 U.S.C. Section 802(44). See, Burgess v. Unitged States, 553 U.S. 124, 129 (2008)(holding that only section 802(44) provides the application definition.

As applied by the court, there is clearly, preponderance and ambiguity, because it fails to include any meaningful or qualitative limitations and fails to provide the degree to which the prohibited conduct must relate to narcotice drugs. See, United States v. Sullivan, 797 F.3d 623, 638 (9th Cir. 2015). Johnson rejected as as applied vagueness analysis. But with respect to 21 U.S.C. Section 841(b)(1)(A), the vagueness issue is unsalvageable and constitutionally untenable.

Petitional Jose Lui s Arevalo contends that the 851 is an element of the offense and cannot be defaulted, becaues it is jurisdictional. It is Horn Book law, that jurisdictional issues cannot be waived. Almendorez-Torres, Harris v. United States and McMillan v. Pennsylvania, all undercut any arguments the government may have with regards to its utilization of Jose Luis Arevalo's priors in his instant offense, because the indictment in this case is fatally defective.

(2) WHETHER THE SPONTE DENIAL OF AREVALO'S PETITION FOR CERTIFICATE OF APPEALABILITY WITHOUT FINDINGS OF FACTS 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.

LEGAL ANALYSIS

Jose Luis Arevalo contends that boht the District Court and the United States court of Appeals for the eleventh Circuit, ignored settled law when, t he y failed top 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, but some =defect in tghe intgegrity of the federal habeas proceedings. Exmples of motions attacking a defect in the integrity of the federal habeas proceedings, include a clAim of fraud on the Court, challenges to a court's procedural default, or a time-barred determination. "United States v. Brown, 547 F. App'x 637, 6412 (5th Cir. 2013)(unpublished)(citing Gonzalez, 545 534 . 4-5)

Errors of this type are so intrinsically harmfuil as to require reversal (i.e. affect substantial rights) without regard to their efect on the outcome "); Sullivan v. Louisiana, 508 U.S. 275, 279 (1993); Rose v. Clark, 478 U.S. 570, 577-78 (1986)("some constiututional 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)("trhere are some constitutional rights so basic to a fair trial tht their infraction can never be treated as harmless.

(3) WHETHER THE DERELICTION OF DUTIES OF AREVALO'S COUNSEL, PROSECUTORIAL MISCONDUCT, AND THE RUBBER STAMP OF THESE CONSTITUTIONAL VIOLATIONS BY THE COURT AFFECTED THE INTEGRITY OF THE JUDICIAL PROOCEEDINGS.

Jose Luis Arevalo avers that in Ring, the Supreme Court held;

"Although the doctrine of stare decisis is of fundamental importance to the rule of law,""...our precedents are not sacrosanc" ---"we have overruled prior decisions where the necessity and prorpriety of doing so, has been established." Ring, 536 U.S. at 608, 122 S.Ct. 2428, 153 L.Ed.2d 556 (quoting, Patterson v. McLean Credit Union, 491 U.S. 164 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). And in the Apprendi context, we have found that "stare decisis whose 'underpinings' have been 'eroded' by susequent developments of constitutional law." Alleyne, 570 U.S.___'133 S.Ct. 2151, 186

WHETHER THE INVOCATION OF THE CAUSE AND PREJUDICE DOCTRINE ENTITLES PETITIONER TO HAVE HIS HABEAS ISSUES DECIDED ON THE MERITS WITHOUT ANY PROCEDURAL DEFAULT.

Although the Supreme Court has emphasized that both 'Cause and Prejudice' must be demonstrated, to permit a defendant to raise on habeas matters procedurally defaulted issues, Petitioner is invoking the doctrine here for the proposition that during his judicial proceedings in the district court, the issue of selective prosecution raised here, was not brought up by Counsel . due to ineffective assistance of counsel. See, Murray v. Carrier, 477 U.S. at 496.

An illustration of the need to prove both cause and prejudice is the Supreme Court case Strickler v. Greene, 527 U.S. 263 (1991). The Supreme 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 preclude a party from relitigating a matter presented to a court and decided upon. Brown v. Allen, decided in 1953, created an important exception to collateral estopel and res judicata for habeas petitions. 344 U.S. 443 (1953). In fact, the Warren Court so valued the importance of the opportunity to relitigate constitutional issues to ensure correct decisions that it held that a petitioner convicted by federal court also may raise issues on habeas that had been presented and decided at trial. Kaufman v. United States, 394 U.S. 217 (196().

The Court further concluded that "the provision of federal collateral remedies rests...fundamentally upon a recognition that adequate protection of constitutional rights...requires the continuing availability of a mechanism for relief. Id. at 226.

Petitioner also contends, beginning in two cases decided the same day - Murray v. Carrier, 477 U.S. 478 (1986) and Smith v. Murray, 477 U.S. 527 (1986), the Supreme court has held that as an alternative to demonstrating cause for a procedural default, a petitioner may raise matters hitherto not raised, by demonstrating he is probably innocent of the charges. In the case at bar, on advice of counsel, petitioner entered a plea of guilty, pursuant to the dictates and advice of counsel Benjamin A. Gonzalez.

The issue in Murray v. Carrier, was whether a habeas petitioner could show cause for a procedural default, by demonstrating that defense Counsel inadvertently failed to raise an issue. Justice O'Connor, writing for the majority stated, "As long as defendant is represented by counsel, whose performance is not constitutionally ineffective, under the standard established by Strickland v. Washington, we discern no inequity in requiring him to bear the risk of attorney error, that results in a procedural default. Murray v. Carrier, 477 U.S. at 488.

Significantly, as applied to this case, petitioner can demonstrate cause by showing that the factual and legal basis for the claim was reasonably available to counsel. As in Reed v. Ross, some interference by state officials made compliance impracticable by reason of abuse of process. Also petitioner contends the procedural default in not raising the defense of selective prosecution was the result of ineffective assistance of counsel.

In Amadeo v. Zant, 466 U.S., 214 (1988) the court found that a prosecutor conceding the fact that, a memorandum detailing deliberate racial bias in jury deliberation constituted cause for failure to object at trial. Justice O'Connor emphasized that "ineffective assistance of counsel, then, is cause for a procedural default. Murray v Carrier, 477 U.S. at 468.

In four cases, the Supreme Court has elaborated on the meaning of actual innocence. In Sawyer v. Whitley, the issue was what actual innocence meant in the context of challenging a sentence. Petitioner invokes Herrera v. Collins, for the proposition that "actual innocence itself is not a constitutional claim, but a gateway through which he 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. The Supreme Court held that to prove actual innocence, a petitioner must show there was a constitutional violation that "probably resulted in the conviction of one who is actually innocent. 513 U.S. 298, 327 (1995), as in the case at bar.

In House v. Bell, the Supreme Court found that the requirements for showing actual innocence were not met to allow a procedurally defaulted claim of ineffective assistance of counsel to be raised. 547 U.S. 518 (2006). Thus, Petitioner contends, he is prejudiced pursuant to United States v. Frady, where the Supreme court indicated that 'prejudice' could be demonstrated

by showing that the results in the case likely would have been different, absent the complained of violation of the constitution or federal laws. 456 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, which the case at bar categoricaly establishes.

CONCLUSION

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.).