No. 19-5294

IN THE

SUPREME COURT OF THE UNITED STATES

ABRAHAM ASLEY AUGUSTIN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ABRAHAM A. AUGUSTIN
(Your Name)

USP 1 P.O. Box 1033
(Address)

Coleman, Florida 33521
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Fed. R. Crim. P. 15(a) Motion's right to amend as a matter of course a 28 U.S.C. Sec. 2255 before a Responsive pleading is filed can be arbitrarily disregarded and denied?

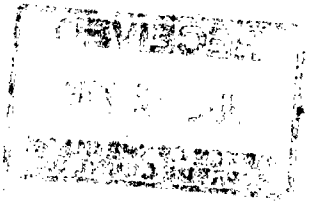
2. Whether the district court erred when it refused to grant an evidentiary hearing, even though Petitioner made a substantial preliminary showing that the affiants knowingly and intentionally included false statements in their affidavits in violation of the Fourth Amendment?

3. Whether Fair Notice was violated when evidence of the overt act/substantial step presented to the grand jury and charged in the indictment ("by hiring a person to kill") was not met at trial and a different theory of guilt was presented to convict and sustain conviction?

4. Whether Fair Notice was violated when the government charged a defendant for violating a statute, based on the case agent's testimony to the grand jury that the government "recorded" defendant's use of the phone, then added a "or caused to to be used" phrase to the statute at trial to obtain conviction due to another party's use of the phone?

5. Whether structural error occurred when the government used evidence, a letter, in the murder-for-hire offense as a confession towards the kidnapping offense after it explicitly told the district court (months before trial) it would not do so at trial?

6. Whether a statute punishing the use of an instrumentality of interstate commerce, a cellular phone, during the commission of a crime requires the government to prove the interstate capabilities of the cellular phone?



LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ABRAHAM A. AUGUSTIN — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, Abraham Asky Augustin, do swear or declare that on this date, June 17, 2019, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States
Department of Justice, Room 5614
950 Pennsylvania Ave., Washington D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 17, 2019

Abraham Augustin
(Signature)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] 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 B 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.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was February 1, 2019.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 19, 2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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 INVOLVED

1. Fourth Amendment, United States Constitution provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
2. Sixth Amendment, United States Constitution provides:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
3. Fifth Amendment, United States Constitution provides:
   No person shall be held to answer for a capital. or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in an criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
4. The statute under which Petitioner was prosecuted was 18 U.S.C. Sec. 1201, which provides: See Appendix F
5. The statute under which Petitioner was prosecuted was 18 U.S.C. Sec. 1958, which provides: See Appendix G
6. The statute unde which Petitioner sought post-conviction relief was 28 U.S.C. Sec. 2255.
7. The statute under which Petitioner sought appellate relief was 28 U.S.C. Sec. 2253(c).

STATEMENT OF THE CASE

On March 23, 2010, a Superseding Indictment (Appendix E) was filed in the United States District Court for the Eastern District of Tennessee, charging petitioner, Abraham A. Augustin, with the following charges:

Count 1: Kidnapping, in violation of 18 U.S.C. Sec 1201(a)(1) and 2.

Count 2: Using and Carrying a firearm during a crime of violence, in violation of 18 U.S.C. Sec. 924(c)(1)(A) and 2.

Count 5: Felon in possession of a firearm, in violation of 18 U.S.C. Sec. 922(g)(1).

Count 7: Use of interstate commerce facilities in the commission of murder-for-hire, in violation of 18 U.S.C. Sec. 1958.

Count 8-10: Tampering with a witness, in violation of 18 U.S.C. Sec. 1512(a)(1)(A).

Count 11: Tampering with witnesses to obstruct official proceeding, in violation of 18 U.S.C. Sec. 1512(c)(2). (See Appendix E).

Petitioner was also indicted for (Count 3:) Conspiracy to to possess with intent to distribute Cocaine, in violation of 21 U.S.C. Sec. 841(a)(1), (b)(1)(C), and 846 and (Count 4:) Using and Carrying a firearm during a drug trafficking, in violation of 18 U.S.C. Sec. 924(c)(1)(A) and 2. Petitioner and his codefendant, Lorrance B. Dais, were found NOT GUILTY of Count 3 and 4.

Petitioner was sentenced to a 500 month prison sentence with 5 years of supervised release on March 10, 2011. (Dist. Ct. Dkt. 12, 28, 89). Petitioner appealed his conviction but it was affirmed on March 14, 2014. (Doc. 120 & 134). The Supreme Court denied certiorari on October 6, 2014. (Doc. 133).

On September 15, 2015, Petitioner filed a 28 U.S.C. Sec. 2255 Motion to Vacate asserting 10 claims of ineffective assistance of trial and appellate counsels. (Doc. 141). On

November 17, 2015, before a responsive pleading is filed, Petitioner filed a motion to supplement 2 claims: Malicious Prosecution and Prosecutorial Misconduct, pursuant to Fed. R. Civ. P. 15(a). (Doc. 155). Twenty days later, on December 7, 2015, the government filed the Responsive pleading to the 10 initial claims. (Doc. 156).

On September 10, 2018, the district court DENIED and DISMISSED WITH PREJUDICE the 28 U.S.C. Sec. 2255 Motion, including a conclusion that the supplemental claims did not relate back to the original petition pursuant to Fed. R. Civ. P. 15(c) and an erroneous conclusion that the government's only witness never explicitly denied that Petitioner used the phone. On October 24, 2018, Petitioner filed a COA, informed the United States Court of Appeals for the Sixth Circuit that his supplemental claims were requested to be supplemented pursuant to Fed. R. Civ. P. 15(a) and that the district court never addressed the merits of this claim, i.e., Petitioner had a right to amend his 28. U.S.C. Sec. 2255 Motion to Vacate before a responsive pleading was filed. (dist. ct. Appendix B, COA Appendix A).

On February 1, 2019, the appellate court DENIED the COA, stating that Petitioner had only a year from October 6, 2014, the date the Supreme Court denied his writ, and therefore was untimely for not being filed by October 6, 2015. The Court ignored the Rule 15(a) claim and reiterated the district court's Order that the 2 supplemental claims did not relate back to the Motion to Vacate.

On February 22, 2019, Petitioner filed his Panel Rehearing pursuant to Fed. R. App. 40. On April 19, 2019, the appellate court DENIED the request stating it did not overlook or mis-

apprehend any point of law or fact in denying the COA. (Appendix C).

REASONS FOR GRANTING THE PETITION

I. WHETHER THE FED. R. CIV. P. 15(a) MOTION'S "RIGHT TO AMEND" A 28 U.S.C. SEC. 2255 BEFORE A RESPONSIVE PLEADING IS FILED CAN BE ARBITRARILY DISREGARDED AND DENIED?

In Mayle v. Felix, the Supreme Court instructed:

> Under Habeas Corpus Rule 4, a petition is not immediately served on the respondent. The judge first examines the pleading to determine whether 'it plainly appears ... that the petitioner is not entitled to relief.' Only if the petition survives that preliminary inspection will the judge order Respondent to file an answer. In the interim the petitioner may amend his pleading 'as a matter of course,' as Felix did in this very case. Rule 15(a). Accordingly, we do not regard Rule 15(a) as a firm check against petition amendments that present new claims dependent upon discrete facts after AEDPA's limitation period has run. 545 U.S. 644, 655, 162 L. Ed. 2d 582, 125 S. Ct. 2562 (2005).
>
> A habeas petitioner's opportunity to amend as a matter of course, without permission of the trial court, exists only before the responsive pleading is served, and even then only once. Rule 15(a). Id.

The docket sheet (Appendix H) is clear that Petitioner supplemented his claims twenty days before the government served its responsive pleading. The court of appeals has decided a federal question, applied a Federal Court rule, and Supreme Court decision in a way that conflict with the applicable decisions of this Court. Petitioner's right to a COA is deeply grounded in this court's jurisprudence and continuously reaffirmed throughout the federal court system.

> Accordingly, "in deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the appellant to federal habeas relief." Schriro v. Landrigan, 550 U.S. 465, (2007).

Further, to succeed in procuring a COA, petitioner must make "a substantial showing of the denial of a constitutional right."

28 U.S.C. Sec. 2253(c)(2).

Petitioner asserts that he was denied due process when the Sixth Circuit erroneously denied issuing a COA on whether he should receive an evidentiary hearing to ascertain the facts of the case. In Thomas, the Third Circuit instructed that "without a fully developed record (the court) cannot foreclose the possibility that (defendant) will be able to show prejudice," Thomas v. Horn, 570 F.3d at 126 (3rd Cir. 2009), which is required to prove an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668, 687 (1984).

The decision by the court of appeals to deny petitioner a COA does not parallel the principles laid out in Fed. R. Civ. P. 15(a) and Mayle v. Felix and should be reversed.

II. WHETHER THE DISTRICT COURT ERRED WHEN IT REFUSED TO GRANT AN EVIDENTIARY HEARING EVEN THOUGH PETITIONER MADE A SUBSTANTIAL PRELIMINARY SHOWING THAT THE AFFIANTS KNOWINGLY AND INTENTIONALLY INCLUDED FALSE STATEMENTS IN THEIR AFFIDAVITS IN VIOLATION OF THE FOURTH AMENDMENT?

In the Motion to Vacate, three claims challenged the veracity of the affidavits used to obtain the search warrant for the hotel room and arrest warrant for Petitioner. On September 10, 2018, the district court erroneously concluded, "the record shows that the officers' initial entry into the hotel room was justified by exigent circumstances." (Doc. 211 at Page ID: 1994).

The Court specifically used the case agent's testimony/version of events (even when it conflicted with first-hand account of officers at the scene who also submitted their factual statements in the discovery) to deny relief.

The State of Tennessee applied for the search warrant and its affiant, Bradley County Sheriff's Office Detective David Shoemaker, testified at trial to testimony that showed he had

knowingly and intentionally committed perjury by including false statements to establish probable cause in the search warrant affidavit. The affiant's trial testimony was also consistent with a report he submitted in the federal-case discovery, showing even then - the report was dated two weeks after the application for the search warrant - that the affiant had knowingly and intentionally committed perjury in the affidavit. When Petitioner made prima-facie showing that trial counsel was ineffective for his failure to even read and compare the police reports in the case file (including the affiant's own police report) which showed the affiant knowingly and intentionally falsely placed Jordan's phone signal coming from the area of the hotel room and even described in the warrant application particular weapons not in plain view that could've been known only through a prior illegal search for evidence, the district court denied that an evidentiary hearing on such material issues was warranted.

When faced with a direct contradiction between SWAT officers who first entered the room under exigent circumstances to render "medical attention," who also reported that nothing incriminating was observed in plain, and the case agent (not part of the search team) who claimed weapons, drugs, and other evidence were in plain view, the district court chose the case agent's testimony as truth and denied relief. (Appendix A and B, No. 18-6007, P.5). And when Petitioner made prima-facie showing that the arrest-warrant-complaint-affidavit was also infused with known and intentional false statements by the case agent, being unable to contest the presented evidence, the district court ignored the prima-facie showing entirely and ruled, nothing in the record

would suggests that the actions of the police were inconsistent with the Fourth Amendment. (Appendix B, Doc. 211, Page Id: 1994).

REASONS FOR GRANTING THE PETITION

This Court in Franks v. Delaware instructed:

> Where the defendant makes a substantial preliminary showing that a false statement, knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. 438 U.S. 154, 155, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

The district court simply refused to apply the law, ignored first-hand accounts of officers in favor of one non-attending testimony to deny the evidentiary hearing request as to the search warrant.

In its denial of the challenge to the criminal complaint (Appendix I), the district court contradicted this Court's decision in Giordenello v. United States, 357 U.S. 480, 2 L. Ed. 2d 1052, 78 S. Ct. 1245 (1958). The Court denied the request and claimed it was "of no consequence" since petitioner was indicted 13 days after the arrest and later convicted at trial. (Doc. 211, Page Id: 1991). However, the facts of this case are that Petitioner's arrest was the result of the complaint, not an indictment, and therefore:

> Here, in the absence of an indictment, the issue of probable had to be determined by the Commissioner, and an adequate basis for such a finding had to appear on the face of the complaint. Id., at 357 U.S. at 487.

To leave this contradiction in applying the law and Supreme Court precedent, denial of due process, would ensure other courts and the police continue to trample on the Fourth Amendment. If the Supreme Court allows an officer to commit perjury to arrest a defendant, declare the existence of known non-existent

("recordings") evidence, convict such a defendant with more perjury, and when that arrest warrant is challenged this Court allows the affiant to simply use the trial conviction as the end-justifies-the-means excuse; no one in this country is safe. The Court is asked to reverse and remand this miscarriage of justice.

III. WHETHER FAIR NOTICE WAS VIOLATED WHEN EVIDENCE OF THE OVERT ACT/SUBSTANTIAL-STEP PRESENTED TO THE GRAND JURY AND CHARGED IN THE INDICTMENT--"BY HIRING A PERSON TO KILL"--WAS NOT MET AT TRIAL AND A DIFFERENT THEORY OF GUILTY WAS PRESENTED TO CONVICT AND SUSTAIN CONVICTION.

In his Motion to Vacate, Petitioner challenged the sufficiency of evidence to sustain his conviction for (Count 7) murder-for-hire, 18 U.S.C. Sec. 1958; (Count 8-10) Witness Tampering, 18 U.S.C. Sec. 1512(a)(1)(A); and (Count 11) Obstruction of Justice, 18 U.S.C. Sec. 1512(c)(2). On September 10, 2018, the district court denied relief. The Court never addressed the merits of Petitioner's argument. It denied the claim by stating that counsel was not ineffective for failing to file an en banc even though Petitioner's ruling contradicted controlling and precedent Sixth Circuit cases that had not been overturned by an en banc.

The three counts (Counts 8-10) of Witness Tampering are dependent on the evidence and conviction of the (Count 7) murder-for-hire. In Counts 8-10, Petitioner was charged as follows:

> The Grand Jury further charges that on or about January 1, 2010, in the Eastern District of Tennessee, the defendant, ABARAHAM A. AUGUSTIN, did attempt to kill (named witness) **by hiring a person to kill** him/her with the intent to prevent the attendance and testimony ... in violation of 18 U.S.C. Sec. 1512(a)(1)(A). (See Indictment, Appendix E.

Therefore, the overt-act presented to and charged by the

grand jury was evidence of Petitioner "hiring a person to kill" the witnesses. However, at trial the government could not, did not, and still cannot present any evidence of Petitioner exchanging money with, in agreement with, nor made a promise to, anyone to even be legally indicted (yet convicted) of "hiring a person to kill" anyone. The record is clear that Petitioner never even contacted nor conversated with the alleged hit man that he was convicted of "hiring."

REASONS FOR GRANTING THE PETITION

The indictment must be a plain, concise, and definite written statement of essential facts constituting the offense charged. Fed. R. Crim. P. 7(a). Furthermore, for each count, the indictment must give the provision of law that the defendant is alleged to have violated. Id. This Court instructed:

> The defendant has a right to be appraised of what overt act the government will try to prove at trial, and he has a right to have a grand jury consider whether to charge that specific overt act. United States v. Resendiz-ponce, 549 U.S. 102, 106, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007).

This Court stated the overt act's requirement to be stated in the indictment is "both to provide fair notice to defendants and to ensure that any conviction would arise out of the theory of guilt presented to the grand jury." Id., at 109-10.

Thereby, the Supreme Court required the government to present its case to the grand jury with integrity, charging the overt act in the indictment to give Petitioner fair notice that it will provide at trial evidence of this "hiring a person to kill," then present the evidence at trial to substantiate and validate the overt act charged.

At trial the government never provided any evidence of WHO Petitioner hired. Petitioner asserts that the law required

the government to prove at trial evidence of Petitioner "hiring a person to kill" the witnesses. What is specifically needed to validate the overt act charged ("hiring a person to kill") in counts 8-10 and the murder-for-hire (count 7) is an agreement or promise made between the hirer and hiree. Evidence of price quote will not suffice.

Petitioner's decision and refusal to grant an evidentiary hearing conflicts with the evidence (or lack thereof) presented at trial and this Court's requirement that the overt act charged in the indictment must be proven at trial to convict. Petitioner begs this Court to grant this writ and prevent the Sixth Circuit and others from allowing the government to move the goal post as a case progresses towards trial and a conviction seem uncertain.

Also, just as important, is this Court's request to establish these important issues:

1. Whether a defendant can be convicted of murder-for-hire if the evidence can confirm that he hired no one?
2. Can a defendant write to a friend (not the hit man) and express a willingness to hire and pay a hit man double the going rate for certain murders, and have this correspondence be counted as evidence of a "promise to pay double"?
3. Simply put, does the murder-for-hire statute (Sec. 1958) require a promise or agreement to be made between the hirer and hiree?

Petitioner asserts the statute and its legislative history requires the promise or agreement be made between the solicitor and murderer to carry liability. Any correspondence or willingness (even if it can be misconstrued as a promise) to pay double is insufficient to sustain a murder-for-hire and overt act charged in the indictment. This Court's guidance is needed to illuminate this issue and prevent the government from warping evidence to obtain a conviction.

IV. WHETHER FAIR NOTICE WAS VIOLATED WHEN THE GOVERNMENT CHARGED A DEFENDANT VIOLATED A STATUTE, BASED ON THE CASE AGENT'S TESTIMONY TO THE GRAND JURY THAT THE GOVERNMENT "RECORDED" DEFENDANT'S USE OF THE PHONE; THEN ADDED A "OR CAUSED TO BE USED" PHRASE TO THE STATUTE AT TRIAL TO OBTAIN CONVICTION DUE TO ANOTHER PARTY'S USE OF THE PHONE?

In the Motion to Vacate, Petitioner raised an ineffective assistance of counsel claim due to his counsel not arguing on appeal that a variance of indictment had occurred. Starting on December 8, 2009, the case agent in his criminal complaint stated:

> According to Jordan, Dais and Augustin would communicate by cell phone during the kidnapping. Also, Jordan stated that his mother communicated with Augustin via cell phone regarding the ransom demand. (See Appendix I, p. 3-4).

Due to case agent attesting Augustin's use of cell phone to Jordan, also on December 8, 2009, Jordan was called to testify to the veracity of those statements. Jordan testified that Augustin and Dais never communicated by cell phone. (Appendix J, P. 45 L. 20 to P. 46 L. 3). Jordan also testified that Augustin and his mother never talked. (Appendix J, P. 38 L. 9-22, P. 43 L. 13 to P. 44 L. 4). At the end of this hearing, through some deception, still unclear today, even though Jordan denied the use of instrumentality of interstate commerce by Augustin--the only federal nexus--two arrest warrants were issued. (P. 59 L. 4-11).

Then on December 22, 2009, after the case agent admitted he had a "6D clearance" so had reviewed Jordan's December 8 testimony, exactly 2 weeks prior, (Appendix K, P. 14 L. 9-10), he testified to the grand jury, "Augustin is talking to Mr. Jordan's mother he is using a cellular phone" and "we recorded these telephone calls." (Id., at P. 19 L. 5-9). And when Petitioner requested an unaltered copy to discover the first

4 missing lines, the district court denied the request. The case agent reiterated his prior testimony that Augustin "communicated" with Dais and Jordan's mother. (Id., at P. 16 L. 4-8).

On March 23, 2010, during his superseding indictment testimony, the case agent again testified that Augustin and Dais called and talked to Jordan's mother (Appendix L, P. 5 L. 6-23, P. 7 L. 15-19) and fabricated the overt act through his perjured testimony that Augustin in the letter had ordered the recipient to "round up" and "collect" his money and "go out" and "find" the witnesses to "kill all three of them." (Id., at P. 9 L. 9-23). No such instructions existed in the letter.

However, at trial, the government only presented evidence of Jordan using his own phone to communicate with his mother to return the money he admitted he owed Augustin from his fake drug deal. It is to be remembered that Jordan testified to the grand jury on December 8, 2009 that these phone calls were not "encouraged" by anyone. (Appendix J, P. 38 L. 9-23).

At trial, not having the evidence of Augustin's use of the cell phone but Jordan's use (not covered in the statute), the government added the phrase "or caused to be used" in the kidnapping statute to present a different theory of guilt that Augustin forced/caused Jordan to use the phone. The district court denied relief.

In his 2255 petitioner argued that had Congress wanted to punish anyone other than the "offender" using the instrumentality of interstate commerce, Congress would simply have stated so as it did in the clear language of Count 7, murder-for-hire.

Compare 18 U.S.C. Sec. 1201(a), the kidnapping statute (App. F) ("the offender uses an instrumentality of interstate com-

merce") to 18 U.S.C. Sec. 1958, the murder-for-hire statute (App. G) ("Whoever uses or causes another an instrumentality of interstate commerce").

Petitioner asserted in his COA application that Congress' silence on an issue usually means it has considered the issue and gave it no importance.

REASONS FOR GRANTING THE PETITION

The case agent declared on the criminal complaint on December 8, 2009, the grand jury indictment on December 22, 2009, and superseding indictment on March 23, 2010, that the government possessed "recorded" telephone calls of Petitioner using the instrumentality of interstate commerce, that the statute required, to communicate to Dais and Jordan's mother. As a result of this "evidence," the grand jury indictment charged Petitioner for the "recorded" use of the phone and gave him fair notice that his "conviction would arise out of the theory of guilt presented to the grand jury." Resendiz-ponce, 549 U.S. at 109-10.

At trial, however, the government never provided any recordings of Petitioner nor his confederate using the cell phone.

A violation of constructive amendment is a violation of Fair Notice, i.e., the theory of guilt presented to the grand jury, given notice of in the indictment's charge, to which a defendant has prepared his defense for, is suddenly changed at trial. The sudden addition of the "or caused to be used" phrase in the kidnapping statute and jury instruction violated the fair notice requirement. This Court has ruled that no one should be taken by surprise by having to answer in court for what the

statute has not warned to be answered to. "The requirement of fair notice applied to statutes too." Dimaya.

Petitioner asserts due to Congress' absence of "or caused to be used" in the kidnapping statute, "it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168, 123 S. Ct. 748, 154 L. Ed. 2d 653 (2003).

The district court violated the fair notice and caused Petitioner to be found guilty of a violation not prescribed by Congress. This decision conflicts with Dimaya's and other Supreme Court rulings that fair notice applies to statutes too. This Court is asked to reverse and remand this case to grant relief.

V. WHETHER STRUCTURAL ERROR OCCURRED WHEN THE GOVERNMENT USED THE EVIDENCE, A LETTER, IN THE MURDER-FOR-HIRE OFFENSE AS A CONFESSION TOWARDS THE KIDNAPPING OFFENSE AFTER IT EXPLICITLY TOLD THE DISTRICT COURT IT WOULD NOT DO SO.

At trial the case agent read Augustin's letter written to Ms. Justine Vanorden--that Augustin prevented a third party from forwarding it to its final destination:

> And frankly, at this point, I'll pay double on each of their heads. It's the two guys that's witnesses. Their names are Curtis Smith and Robert Jordan. And Robert Jordan was the one we snatched. And his mother's name is Deidre Watkins. If we can get all three, I'll pay for it all. (Trial--P. 138 L. 5-14).

The jury at trial heard and understood this portion of the letter to be a confession. This incident, amongst many, prejudiced the trial.

On May 13, 2010, five months before trial, following the reading of the above portion during a suppression hearing to suppress that letter, the magistrate stated:

And I believe that the way the letter was characterized was as a confession of kidnapping, amongst other things. (Supp. H. P. 145 L. 8-10).

Furthermore, since the district court established the right of counsel was attached to the kidnapping and the government (through an ATF informant "incidentally" housed in Augustin's cell within days of his arrest and provided the contact information of the alleged hit man that was never contacted) could not elicit information from Petitioner outside of counsel's presence and use it as a confession at trial, the court asked:

COURT: Is the government's position that he kidnapping if it's referenced in the information is also not the same offense?

AUSA: No, you Honor. There is only one kidnapping, same kidnapping he was charged with.

The magistrate then asked how exactly the government would separate the statements in the letter regarding the pending kidnapping from the murder-for-hire offenses at trial, since the government could not use the letter as a confession regarding the kidnapping. (P. 145 L. 1 to P. 146 L. 7). The government's argument at the hearing was, since the murder-for-hire charges were distinct and separate from the kidnapping (which had the attachment of counsel), it would use the letter strictly and merely against Augustin in regards to the murder-for-hire charges (which at the time of the elicitation had no attention of counsel).

The magistrate reminded the government that it had been "arguing that there were distinct offense using the Blockberger Test, and that his right to counsel had not attached as to--murder for hire and the drug charges." (P. 146 L. 2-6). And the court continued, "But you're not arguing that as to kidnapping and there was information about the kidnapping elicited."

(P. 146 L. 8-10). The government then replied:

> In the letter ... the only reference to the kidnapping, which I don't think was in reference to kidnapping, when he talks about Robert Jordan being the one, he's the person, that's the guy we snatched. Now I think that's in referenced to who he wanted to kill. (P. 146 L. 11-15).

Next, the magistrate reminded the government:

> And at some point in today's testimony I'd have to look through my notes, and I could be wrong, but I thought that was referred to as a confession of sorts to the kidnapping, some aspect of that letter. (P. 146 L. 22-25).

The government then denied again of having used or would in the future use the letter or mentioned portion as a confession at trial, and argued that it would only use the portion in reference to who Augustin wanted to kill. The magistrate then reproposed the question:

COURT: You're not contending that that is a different kidnapping?

AUSA: No, your Honor. Any kidnapping in that letter, any confession to any kidnapping in this letter is the same kidnapping, the Sixth Amendment right had attached with regard to that kidnapping. (P. 147 L. 4-9).

During the suppression hearing, the court acknowledged that, "there was information about the kidnapping elicited" by the government informant. (P. 146 L. 9-10). And the government stated this elicited information would not be used as a confession in the kidnapping offense since "the Sixth Amendment right had attached with regard to that kidnapping." Instead, it would merely be used as evidence in the murder-for-hire.

The district court denied the suppression of the letter, for it believed that the government would not use the letter as a confession in the kidnapping since it violated Augustin's Sixth Amendment right.

But in its closing argument, the government used the letter against Augustin and Dais as a confession to the kidnapping:

> Is there anything corroborating Robert Jordan and Curtis Smith when they say that Jordan was kidnapped? Well, there is a letter written by the defendant Abe Augustin, who says frankly, "At this point, I'll pay double on each of their heads. It's the two guys that's witnesses. Their names are Curtis Smith and Robert Jordan. And Robert Jordan was the one we snatched. And his mother's name is Deidre Watkins. If we can get all three, I'll pay for it all." The defendants themselves are corroborating what Robert Jordan and Curtis Smith said.
>
> "That's a confession." (Trial--P. 549 L. 14 to P. 550 L. 3).

The government lied to the court and through deception and prejudice obtained Petitioner's conviction. Petitioner informed the district and appellate courts of the effect of this prejudice through trial counsel's own admission that a juror called the trial counsel the day after trial and stated that if it wasn't for the letter being read at trial and used as a confession to the kidnapping, it would've been hard for the jury to find the kidnapping plausible. Trial counsel, Mr. Lloyd Levitt, also informed Dais' counsel, Ms. Hallie McFadden, of this phone call.

REASONS FOR GRANTING THE PETITION

In Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), this Court "adopted the general rule that a constitutional error does not automatically require reversal of a conviction." Arizona v. Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (citing Chapman, supra). If the government can show "beyond reasonable doubt that the error complained of did not contribute to the verdict obtained," the Court held, then the error is deemed harmless and the defendant is not entitled to reversal. Id., at 24, 87 S. Ct. 824, 17 L. Ed. 2d 705.

This Court recognized, however, that some errors should not be deemed harmless beyond a reasonable doubt. These errors

came to be known as structural errors. The purpose of the structural error is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself. For the reason, a structural error defies analysis by harmless error standards." Weaver v. Massachussets, 582 U.S. _____, 137 S. Ct. ___, 198 L. Ed. 2d 420 (2017).

It is clear that the government misled the magistrate when it informed her it would not, since it could not, use the letter as a confession to the kidnapping offense due to the fact that at the time the letter was written (initiated by information obtained from an ATF informant, Mark Gibson, strategically placed in Augustin's cell to give him the name and phone number of the alleged hit man that Augustin wrote the letter to have Ms. Vanorden contact to obtain only a price quote) the right of counsel was attached to the kidnapping offense. But at trial the government did the exact opposite and violated Petitioner's due process rights. This violation vitiated the entire trial and resulted in a structural error.

IV. WHETHER A STATUTE PUNISHING THE USE OF AN INSTRUMENTALITY OF INTERSTATE COMMERCE, A CELL PHONE, DURING THE COMMISSION OF A CRIME REQUIRES THE GOVERNMENT TO PROVE THE INTERSTATE CAPABILITIES OF THE CELL PHONE?

In the initial Motion to Vacate and COA, Petitioner argued that his counsel was ineffective for not requiring, according to controlling authority in the Sixth Circuit, Weathers, that the government was required to prove how the interstate commerce was violated, i.e., the defendant or cell phone's signal crossed

state lines. The district court ruled the simple use of the phone was sufficient to satisfy the interstate commerce element.

In his COA, Petitioner detailed controlling precedent's requirement that the trial court, as the district judge in Weathers, hold a hearing and allow the government to meet this interstate requirement. In Weathers the government presented the testimony of a Bell South technician who explained how the cell phone's paging signal was sent to all of the "cell sites" located in Kentucky and Indiana simultaneously, and these cell sites, in turn, searched for the signal that was being emitted constantly from Weathers' cell phone. The Court refused to apply its precedent towards Petitioner.

REASONS FOR GRANTING THE PETITION

In analyzing the requirement, the district court in Weathers stated that based on the statute's phrase "use of an instrumentality of interstate commerce," evidence of "use of the cellular phone, would satisfy the interstate commerce element if the search signal crossed state lines." United States v. Weathers, 169 F.3d 336, 339 (6th Cir. 1999).

Following the Bell South technician's testimony, the trial judge stated, "based on the nature, the hardware, and the way that the system operates and did on this particular occasion by nature and also by use ... I think that this was a communication facility usage **that was** interstate." Id., at 341.

On appeal, Weathers' panel began its ruling by acknowledging:

> It is well established that the telephones, even when used in intrastate constitute instrumentalities of interstate commerce. Id.

And since there must be more than simple use, the Sixth Circuit ruled:

> In deciding this issue, we focus on the evidence regarding the technical aspects of the operation of Weathers' cellular phone, and the legal consequences flow therefrom. Cf. FPC v. Florida Power & Light Co., 404 U.S. 453, 30 L. Ed. 2d 600, 02 S. Ct. 637 (1972) in which the United States Supreme Court emphasized that legal conclusions may depend upon the evaluation of technical's facts." Id., at 342.

The Sixth Circuit in Weathers concluded:

> As the district court found, it is clear from the testimony about the manner in which Weathers' cellular phone operated that Bell South Mobility was required to engage in interstate by sending a search signal to communications equipment in another state to locate Weathers' cellular telephone. Without that interstate search, the transmission of a telephone call to or from Weathers' cellular telephone would not have been possible. Thus, even though the signal that actually connected the two parties was ultimately intrastate, interstate activities were required to make that connection possible. Id.

Compare Weathers' panel decision to Petitioner's decision. Petitioner's panel decision simply stated, "caselaw unequivocally holds that 'cellular telephones, even in the absence of evidence that they were used to make interstate calls, have been held to be instrumentalities of interstate commerce.' (quoting Weathers, 169 F.3d at 341." Any challenge to the district court's jury instruction, the appellate court concluded, would have been inconsequential. (App. B, P. 4).

Petitioner's decision contradicted Weathers' standard instruction that Jordan's "use of the cellular phone would satisfy the interstate commerce element if the search signal for the cellular phone crossed state lines." Id., at 339.

In Weathers, the Sixth Circuit guided by Lopez stated:

> This conclusion is bolstered by the Supreme Court's exegesis of the Commerce Clause in United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995). There the Court held that in passing the Gun-Free School Zones Act of 1990, which made the possession of a gun in a school zone a federal offense, Congress exceeded its authority under the Commerce Clause. After considering its prior interstate jurisprudence, the Court identified three broad categories of activity that Congress may regulate under the Commerce

Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that have a substantial effect on interstate commerce. See id. at 558-59. Hence we conclude that the phrase of 'facility in interstate commerce' is best interpreted as Congress's attempt to regulate the use of the channels of interstate commerce and the phrase 'facility of interstate commerce' as an attempt to regulate the instrumentalities of interstate commerce, as those categories are delineated in Lopez. Id., at 341-42.

In regulating the instrumentalities of interstate commerce, not just their use, Congress and the Supreme Court required the government to prove more than just a defendant's use. A standard upheld in Weathers, then without an en banc to overturn the controlling caselaw, the court arbitrarily denied Petitioner the same remedy.

In summary the issue raised in this Petition are essential to ensure that the courts require law enforcement to tell the truth in their affidavits; give a defendant a hearing once prima-facie is made showing that an affidavit contains known and intentional false statements by the affiant; prevent the government from violating Fair Notice by using perjured testimony and fabricated evidence to the grand jury to arrest and indict a defendant on one theory of guilt but then use a different one to convict him at trial; prove at trial the overt act ("hiring a person to kill") charged in the indictment and not a different theory of guilt; prevent the government's use of trickery and deception to obtain a conviction when the government lied to the magistrate about not using evidence from one offense as confession towards another to commit a structural error; and prove the interstate commerce violation required by the Supreme Court when charged with the use of an instrumentality of interstate commerce.

CONCLUSION

This Court is asked to turn the tide of over zealous prosecutors and officers who flout the U.S. Constitution, state and federal laws, in their hyper-focus endeavor to obtain a conviction. Without such a check, officers will continue and augment this corrupt behavior where the government obtain a conviction by any (legal or illegal) means it deems necessary, as shown in this case where the case agent fabricated evidence/ recordings to obtain an indictment.

And this Court is asked to over turn the district court's decision, collusion, and compliance with the government when the court turned a blind eye and refused to follow Federal Court Rules, Supreme Court authority, and U.S. Constitution to grant relief.

If the government was to be held accountable for its misconduct, it would prevent further and similar abuses in the future.

It is contradictory and immoral to think that one can uphold the law by breaking it. Justice requires more and cannot be served if the very government accusing a defendant of committing crimes is breaking worst laws. As shown in the record and facts of this case, the district court granted the government plenary power to add language (not sanctioned by Congress) to a statute, and legitimized those actions by refusing to rule that due process was violated. The district court's task is to read, interpret, and enforce the statute's literal meaning, not add language or misinterpret it in a away that gives the government a position not intended by Congress.

Furthermore, a district court's job is to ensure the overt

act charged in the indictment is actually proven at trial. In these aspects the district court has failed miserably and the Sixth Circuit has erroneously decided to affirm and support this miscarriage of justice that will now become precedent in the Circuit and other circuits if the Supreme Court does not act.

The Supreme Court should grant the Petition because justice demands it.

Dated this 17th of June, 2019.

Respectfully Submitted,