No. 19-6532

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IN THE

SUPREME COURT OF THE UNITED STATES

PEDRO J. AMARO - PETITIONER

VS

NEW MEXICO ATTORNEY GENERAL - RESPONDENTS

ON PETITION FOR REHEARING
OF ORDER DENYING CERTIORARI

PEDRO J. AMARO
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The petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the petition for writ of certiorari, entered January 13, 2020, and (2) granting the petition or (3) remanding the case back to the lower courts for proceedings consistent with the plain commands of the governing Rule. As grounds for this motion, petitioner states the following:

1. THE VIOLATION OF THE COURT'S PRINCIPLES OF McNABB v. UNITED STATES

In McNabb v. United States, 318 U.S. at 340-341 (1943), the Court held that "judicial supervision of the administration of criminal justice in the federal courts" implies the duty of establishing and maintaining "standards of procedure and evidence" which applies to this case on three fronts:

First, the Court of Appeals for the Tenth Circuit has so far deviated from the usual course of judicial proceedings in regards to Habeas Corpus practice and procedure - and sanction such departure by the Circuit's lower federal courts - as to call for an exercise of this Court's "Supreme" supervisory power by misapplying the holding from the Circuit's own case of Fymbo v. State Farm Fire & Cas. Co., U.S. F.3d 1320, 1321 (10^{th} Cir. 2000) to procedurally dismiss a Habeas Corpus case on the grounds that a 'non-attorney cannot act on behalf of others', where Habeas Law and the Rules Governing Habeas Corpus Cases In The United States District Court have long-held that a Petition For Writ Of Habeas Corpus MAY be presented to the court on behalf of those who were wrongfully denied or deprived of their Civil/Constitutional Rights.

These petitions are sometimes referred to as "next friend" petitions and have been an accepted tradition of Habeas Corpus practice and procedure in America for at least 100 years.

If the 10^{th} Cir. and its lower courts are allowed to continue dismissing otherwise meritorious-claim-based Habeas Corpus petitions simply because the request for relief was submitted to the court by a 'non-attorney' acting in the best interests of a person or persons not quite capable of preserving their own rights or submitting a Petition For Writ Of Habeas Corpus on their own, how will indigent persons with no fundamental understanding of the law receive the relief they are (or may be) legally and/or Constitutionally entitled to?

The practice of the 10th Cir. and its lower courts in summarily dismissing Habeas Corpus petitions submitted by 'non-attorneys acting on behalf of others' does not comport with spirit or contemporary standards of Habeas Corpus practice and procedure and is a clear abuse of discretion, and this Court's supervisory power is needed in this case to correct the refusals of federal courts in the 10th Circuit to consider the merits of Habeas Corpus petitions submitted by non-attorneys on behalf of others so as to maintain long-established principles and practices in the fair administration of criminal justice.

Second, the Court has granted Certiorari in cases where the enactment of new legislation has a substantial or controlling effect upon a case (Massey v. United States, 291 U.S. 608 (1934)), which is applicable to this case in that the 10th Circuit Court of Appeals and its lower courts abusively misapply the 10th Cir.'s own case of Fymbo v. State Farm Fire & Cas. Co. to procedurally dismiss cases initiated by non-attorneys on the grounds that a non attorney does not possess the legal 'competence' to act on behalf of others or adequately protect their interests.

The <u>misapplication</u> of this caselaw stems from the fact that while Fymbo was decided in 2000, Congress enacted Amendments in 2003 to the Rule governing the 10th Cir.'s holding in the Fymbo case: Fed. R. Civ. P. 23.

Fed. R. Civ. P. 23(a) states four prerequisites to sustaining a "class action" suit: numerosity; commonality; typicality; and, adequacy (Rule 23(a)(1-4), respectively).

According to LEXIS NEXUS, the purpose of Fed. R. Civ. P. 23(a)(4) - the "adequacy" requirement - is:

"To ensure that the scope of the interests of the representatives of the class are as broad as the interests of the class as a whole, and that the representatives of the class will vigorously pursue the litigation. This requires consideration of two factors:

(1) the qualifications, experiences, and ability of plaintiff's attorneys to conduct the litigation; and,

(2) whether the named plaintiff's interests are antagonistic to the interests of other members of the class."

In 2003, Congress enacted a particular Amendment to Fed. R. Civ. P. 23, which was molded to cure Rule 23(a)(4)'s issues of 'non-attorney' adequacy and/or insufficient (i.e. 'incompetent') legal representation by adding Subdivision (g).

According to the Rule's "Committee Notes," regarding the 2003 Amendment to Rule 23:

"Subdivision (g) new, responds to the reality that selection and activity of class counsel are often critically important to the successful handling of a class action.

"23(g)(1)(A) requires that the court appoint class counsel to represent the class.

"(g)(1)(B) - Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual member of it.

"(g)(1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate [legal] representation called for by paragraph (1)(B)."

Thus, the 10th Circuit's procedural dismissal of a "class action" matter on the grounds that the particular Plaintiff/Petitioner initiating the action 'cannot adequately represent the interests of the class' because of his own 'non-attorney' status egregiously fails the court's "basic responsibility... to appoint class counsel who will provide the adequate representation called for by [Fed. R. Civ. P. 23(g)] (1)(B)" (per Rule 23(g)(1)(C)), and is manifestly against the contemplated 'response' and intent of Congress in taking the time to purposefully draft and enact 'new' law in 2003, therewith **requiring the court** itself to appoint qualified legal counsel to the class upon certification, and also violates the detailed prescriptions of the the Rule with its 'new' legislation-as it became effective in 2003.

The succession of clearly erroneous decisions of the 10th Circuit Court of Appeals in issuing dismissals premised on the application of a procedural ruling pursuant to a caselaw that was decided under 'old' law and in existence before the addition of the new Subdivision to Rule 23 requiring the court to appoint qualified legal counsel to a class upon certification is having a devastating effect on otherwise meritorious-claim-based cases and affecting separate classes of persons in a wide variety of unrelated cases across the the 10th Circuit's four States (Colorado, New Mexico, Oklahoma, and Wyoming) simply because the respective action is initiated by a 'non-attorney' (who understands the plain english of Rule 23(g)) - even though the court itself is required by Congress to appoint legal counsel to a class upon certification.

In this regard, the Supreme Court's supervisory power is very much needed to correct the practice of the 10th Circuit Court of Appeals, and its lower courts, in continuing to issue summary dismissals of otherwise meritorious "class action" cases on the grounds that the particular plaintiff or petitioner is a 'non-attorney,' where the governing Rule the petitioner is proceeding under explicitly provides for the court's appointment of counsel to the class upon certification as a required RESPONSIBILITY and obligation of the court.

Until the pre-2003 Amendment two-factor considerations of Fed. R. Civ. P. 23(a)(4)'s "adequacy" requirement are brought up-to-date with the 'curative' provisions Congress added to this Rule requiring the court to appoint counsel to a class upon certification, the 10th Circuit Court of Appeals and its lower courts will continue to abusively (mis-) apply the outdated caselaw of Fymbo v. State Farm Fire & Cas. Co.

For these reasons, the Court's supervisory power is needed to enforce the 'new' standards of procedure of Fed. R. Civ. P. 23 upon the 10th Circuit and its lower courts, therewith causing the courts of the 10th Circuit to recognize and apply the new structure of Rule 23 instead of continuing to issue summary dismissals based the 10th Circuit's own outdated caselaw.

Third, in the case of U. S. v. Johnson, 319 U.S. 503, 512-513, 63 S. Ct. 1233, 1237-1238, 18 L.Ed 1546 (1943), the Court held that "[t]he grand jury proceeding is accorded the presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process."

This holding presents a long-established doctrine regarding grand-jury-related challenges to a conviction, but represents yet another issue in which the courts of the 10th Circuit do not prescribe to or faithfully apply the standards of procedure or principles set by the U.S. Supreme Court.

In this case, the "serious violation of grand jury rules" by both judges and prosecutors of New Mexico's 9th Judicial District — as the District's 'custom' — was not brought to light until 2012, and it was not until the New Mexico Supreme Court issued its Opinion "to explain why the process used was inappropriate" (and exposed the factual basis of the grand jury 'irregularities' practiced in the District) that Amaro was able to specifically identify the issues at-hand and properly state the claim that the District, in its utilization of clearly forbidden practices in the selection and summoning of grand jurors by personnel of the District Attorney's Office via ex parte communication with no involvement from the court, did not acquire the requisite jurisdiction before proceeding with felony prosecutions in grand jury-based cases.

Contrary to the Court's doctrine, as announced in U.S. v. Johnson, the federal courts of the 10th Circuit have stated that relief to the proposed class in this case is time-barred as the Petitioner himself was found guilty by a jury in 2003, affirmed by the State's highest court in 2005, which is a holding that clearly disregards the Court's requirement regarding grand jury-based challenges to a conviction as Amaro could not state a claim for 'failure to acquire jurisdiction' based on the District's 'custom' until after the 'custom' was exposed.

As the Court, as announced in U.S. v. Johnson, requires "particularized proof of irregularities in the grand jury process" **before** a grand jury-based claim for relief can be made, Amaro clearly could <u>Not</u> blandly state a valid claim for relief based simply on a general allegation of "irregularities," and certainly could not do so pursuant to U.S. v. Johnson before gaining access to the New Mexico Supreme Court's Opinion in DeLeon v. Hartley, in August of 2014.

Where the New Mexico Supreme Court's Opinion provided the factual basis of the claim, supported by open acknowledgments of the 'custom' by the District's Chief District Court Judge (Teddy Hartley) and District Attorney ("Matt" Chandler), the burden of "particularized proof of irregularities in the grand jury process" was met and became the time at which Amaro could state a valid claim for relief from the "serious violation of grand jury rules" by the District's prosecutors.

thus, the Court's supervisory power is needed to bring the 10th Circuit's opinions into alignment with the established standards and/or principles of the U.S. Supreme Court, and to afford persons wrongfully deprived of Due Process and their 5th Amendment Right to be indicted only by a legally constituted and unbiased Grand Jury their 'day in court' to challenge convictions wrongfully obtained in the complete absence of the requisite jurisdiction, as a matter of Due Process of law and the Right to Equal Protection of the Laws (per the 14th Amendment).

2. THE VIOLATION OF THE COURT'S PRINCIPLES OF U.S. v. COTTON AND U.S. v. GATEWOOD

In U.S. v. Cotton, 535 U.S. 625, 630 (2002) the Court plainly held:

(subject matter jurisdiction never forfeited or waived; defects require correction regardless of whether error raised in district court)

and, in U.S. v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999), the court there held:

(jurisdictional challenge to indictment may be raised at any time).

These cases, in conjunction with the the Court's principles as pronounced in U.S. v. Mechanik, 106 S.Ct. 938 (1986), should have had a controlling effect upon the case of AMARO v. New Mexico Attorney General as the intentional departure from the statutorily prescribed Rules of Grand Jury Procedure by prosecutors, in the State's 9th Judicial District, constituted structural defects which erected an insuperable ne plus ultra bar to the State's ability to acquire the requisite jurisdiction needed as a prerequisite to prosecution and/or a valid criminal conviction.

According to the principle of Gatewood, a "jurisdictional challenge to an indictment may be raised at any time" with no stipulations or mention of a time-bar as, by all accounts, jurisdiction is of utmost importance, and if a court of conviction never rightfully or legally obtained the requisite jurisdiction, the conviction is legally invalid and must be reversed as the lack of jurisdiction from the inception of the case - ANY case - cannot be overcome.

In Cotton, the Court plainly held that "subject matter jurisdiction is NEVER forfeited or waived; [and] defects [regarding the requisite jurisdiction] REQUIRE correction regardless..." (emphasis added), with no stipulation whatsoever as to who may submit or present applications to the court requesting 'correction' of jurisdictional defects or a complete lack of jurisdiction (as in this case).

The Court's language in Cotton makes the meaning plain:

"defects require correction regardless...,"

which also tends to imply invocation by the Court of its power of Supremacy and ability to rectify fundamental errors sua sponte.

In Amaro v. New Mexico Attorney General, the underlying facts have been established on record by the New Mexico Supreme Court and are indisputable:

as was their 'custom' the District Court of the 9th Judicial District shirked the responsibility strictly delegated to it under State law pursuant to Federal demands of the U.S. Constitution's 5th Amendment regarding a 'Target's' Right to a legally constituted and unbiased Grand Jury, and allowed the prosecutors to assume absolute control over the Grand Jury and its process, thereby resulting in a clear breach of the integrity of the grand jury in a manner that established a clear defect to the Structural framework of each indictment obtained through the flawed - and forbidden - process: the New Mexico Supreme Court held that this process and its 'irregularities' were not appropriate. (DeLeon v. Hartley, 2014-NMSC-005, 316 P.3d 896)

3. LACK OF ACCOUNTABILITY

While the practice of law is purported to be a 'self-policing' profession, the State

District Courts of New Mexico's 9th Judicial District have been allowed to sustain grand jury-based prosecutions obtained in the sheer absence of the requisite jurisdiction, where the District's judges breached the integrity of the grand jury process by granting absolute control over the grand jury and its process to the District's prosecutors who then utilized forbidden practices so as to obtain the proverbial 'ham sandwich' indictments.

In addition to the District's secret practice of an illicit 'custom' which incontrovertibly deprived 'Targets' of their "Right to a legally constituted and unbiased grand jury" (per the U.S. Constitution's 5th Amendment) the District has also dealt with issues regarding petit juries in which the 'non-randomization of panels' came to light and was addressed by two attorneys in three separate cases:

State v. Stephanie Mendoza, No. D-905-CR-2011-368;
State v. Homer Ashley, No. D-905-CR-2011-2016; and,
State v. Thomas M. Pearce, No. CR-2012-0210.

The District has also had convictions overturned as it was the habit of prosecutors conducting the grand jury proceedings to allow prohibited persons to "observe" the secret work of the grand jury.

All of these issues are serious, yet at no time has any of the court officers been held accountable for any of their indiscretions - even when they're sued for sexual harassment.

With no measure of accountability, the court officers of this District have had no reason to actually apply the letter or spirit of the law where they can cut corners and cheat as they may, with the only deterrence being a reversal of a single conviction if and when an issue is finally exposed by a former 'insider.'

Even in just the underlying factors of this case, the misconduct of officers in the selection or summoning of grand jurors has been held to constitute contempt of court (38 Am. Jur. 2d Grand Jury § 7 et seq.; 7 A.L.R. 345), yet in New Mexico and the federal courts of the 10th Circuit, this type of conduct is allowed to go unchecked despite Due Process being a 'cornerstone' of modern legal procedures, requires a recognition of the defendant's rights and holds the agents of justice accountable for any actions which might contravene those rights.

4. THE DECISION BELOW IS PLAINLY WRONG AND CONTRARY TO THE EVER-EVOLVING STANDARDS OF AMERICAN JURISPRUDENCE

It is a naked fact that, as was the 'custom' of New Mexico's 9th Judicial District, prosecutors intentionally failed to protect both the public's interests and the Constitutional Rights of the accused in choosing to surpass Constitutional Limitations of essential fairness by breaching the integrity of the grand jury process with condemned practices long-forbidden by all just courts of the American U.S.

Every standing caselaw available on the issue establishes that Bills of Indictment obtained by prosecutors who operate outside the scope of law MUST be nullified and made void 1) in order to protect the Rights of the accused; and 2) to deter unscrupulous prosecutors from engaging in conduct that violates the elementary and fundamental requirements of Due Process, or in any other way intentionally denies or deprives persons of the most rudimentary demands of due process of law.

In this case, with public acknowledgment of an illicit 'custom' involving utilization of forbidden practices by prosecutors who selected or summoned grand jurors via ex parte communication with no involvement from the court - by the very people who practiced the 'custom' - it is incontrovertible that the defendants in cases in which the 'custom' was utilized were prosecuted in the absence of the requisite jurisdiction, but for courts to deny relief on the grounds that the person who initiated the petition requesting relief is a 'non-attorney' — that's just wrong, especially where the appropriate procedure mandated the court to engage in a "rigorous analysis" (under Fed. R. Civ. P. 23(a)), and actually required the court itself to appoint qualified legal counsel to the class upon certification.

In Lexecon Inc. v. Milberg, Weiss, Bershad, Hynes, & Lerach, 523 U.S. at 32, 35 (1998), the Court granted certiorari and reversed the 9th Circuit's ruling on a procedural issue even though the court below had followed the law recognized in every other circuit, law that had been embodied in a rule of the Judicial Panel on Multidistrict Litigation," yet in this case the Court has denied certiorari in the 10th Circuit's summary dismissal of a seldom-used class action Habeas Corpus case on a long-dead/irrelevant/inapplicable procedural issue, where neither the 10th Circuit nor the U.S. District Court (D-NM) followed the established law, procedure, practices, or principles of Habeas Corpus practice and procedure recognized in every other court/circuit - law that has been embodied in both Fed. R. Civ. P. 23 (2003 Amendment) and the Rules Governing Habeas Corpus Cases In The U.S. District Court.

Barring relief to the class on the grounds that the Petitioner is a 'non-attorney' - with outdated caselaw - violates the very concept of "jurisprudence" and offends the common law, common logic, and common sense of even the common man.

Petitioner, under the circumstances of the case, clearly was entitled, as a matter of due process, to have the issue of jurisdiction - or lack thereof - by the court of conviction appraised by a court, yet no court of law (State or Federal) has taken on the challenge of addressing the issue and answering the matter according to law, as controlled by the cases of Johnson, Gatewood, and Mochanik.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below or, in the alternative, remand the case back to the lower courts for proceedings consistent with the plain commands of Fed. R. Civ. P. 23(g) (2003 Amendment) and the Rules Governing Habeas Corpus Cases In The U.S. District Court.

Respectfully Submitted,

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February 5, 2020

CERTIFICATE OF PETITIONER

I, Pedro J. Amaro, hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

In compliance with 28 U.S.C. §1746, I, Pedro J. Amaro, declare under penalty of perjury that I am filing this Petition For Rehearing by submission to the prison's internal mailing system by depositing the parcel into the "Legal Mail" box located in the facility Library, First Class Postage prepaid, on February 6, 2020. PJA