

19-7435
CASE NO.

IN THE SUPREME COURT
OF THE UNITED STATES

ROBERT N. BROOKS

Petitioner,

VS.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF PROHIBITION
AND/OR MANDAMUS

To The United States Court of Appeals

For The Fifth Circuit

and The United States Western District of Texas

San Antonio Division

PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

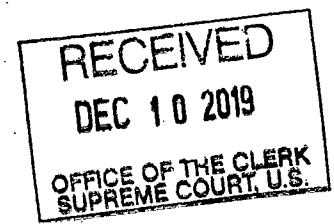
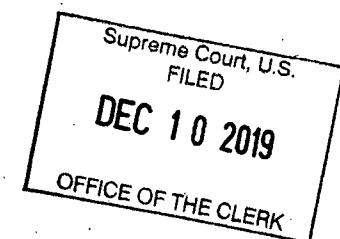
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ORIGINAL



QUESTIONS PRESENTED FOR REVIEW

Question 1: Whether a manifest miscarriage of justice occurred on the face of Count One's conspiracy indictment to commit bank fraud in violation of the Grand Jury Clause, the Indictment Clause, and the Due Process Clause of equal protection of the laws of the Fifth Amendment guaranteed requirement of a valid indictment by a grand jury, and the Notice Clause of the Sixth Amendment guaranteed right to be informed of the nature of the accusations against him?

Question 2: Whether Count One conspiracy to commit bank fraud failed to comply with the statutory jurisdictional prerequisite requirements of 18 U.S.C. § 1344 was a failure of the indictment to confer and/or invoke subject matter jurisdiction upon the District Court?

Question 3: Whether the Government's admission that it failed to prove the underlying bank fraud conspiracy scheme and the requirement of the FDIC-insured status was a clear and obvious failure to establish subject matter jurisdiction and a usurpation of the District Court's inherent power?

Question 4: Whether the District Court's conduct amounted to a manifest abuse of discretion and its inherent power to find want of subject matter jurisdiction through the Commerce Clause contained in Article I in order to circumvent the court's subject matter jurisdiction power contained in Article III?

Question 5: Whether it was a manifest miscarriage of justice and manifest abuse of discretion by the District Court's constructive amendment of the indictment in Count One conspiracy through the jury instructions in order to circumvent the court's subject matter jurisdiction limitations by redacting the essential elements and jurisdictional prerequisite of the indictment's underlying bank fraud conspiracy scheme in violation of: Petitioner's Fifth Amendment right to a valid indictment as charged by a grand jury, his Due Process right to a fair notice of charges, and his Sixth Amendment right to a jury trial requiring proof beyond a reasonable doubt of the crime charged in the indictment?

Question 6: Whether a manifest miscarriage of justice occurred on the face of the manufactured barebones tax fraud indictment in Counts One and Three for failing to state an offense in violation of the Grand Jury Clause, the Indictment Clause, and the Due Process Clause of equal protection of the laws of the Fifth Amendment guaranteed requirement of a valid indictment by a grand jury and the Notice Clause of the Sixth Amendment guaranteed right to be informed of charges?

Question 7: Whether pro-se litigants are afforded the very identical liberty protection by the Fifth Amendment's Due Process Clause - which guarantees every person equal protection of the law - as litigants who are privileged to be represented by counsel throughout post-conviction proceedings? If so, whether the panel violated Petitioner's Fifth Amendment Constitutional Rights by intentionally treating Petitioner differently from other similarly situated litigants without any rational basis in a wrongful denial of Petitioner's jurisdictional defect and insufficiency of the evidence claims?

SUBJECT MATTER JURISDICTION THRESHOLD QUESTION

Prior to reviewing each of the Questions Presented for Review and before considering or addressing the merits of this Writ, Petitioner would first point out that he is claiming, challenging, and questioning whether the face of Count One underlying conspiracy to commit bank fraud indictment (See Appx. P. 6) and tax fraud indictment (See Appx. P. 28) failed to confer and/or invoke subject matter jurisdiction upon the District Court?

This Writ has been filed because both the District and Appellate Courts have continually acted in the **clear absence of all subject matter jurisdiction**, disregarding long established Supreme Court and Fifth Circuit precedent, that matters involving **FDIC-insured financial institutions** trump the general rules governing federal jurisdiction. They seek to champion the notion that Petitioner's guilty verdict was validly obtained, despite all Counts in both the bank and tax fraud indictments being facially void on their face for failing to allege in a written statement the essential factual elements of an offense, the jurisdictional prerequisite of the victim financial institution's name, and the **FDIC-insured status** to confer jurisdiction upon the District Court. Namely, Count One underlying conspiracy to commit bank fraud in violation of 18 U.S.C. § 1344. This Court's precedent holds, "The Supreme Court, as well as the Appellate Court, is obliged to consider a question raised before it for the first time that a District Court lacked subject matter jurisdiction." See *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). "On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes.

This question the court is bound to ask and answer for itself." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998). "Because subject matter jurisdiction is a non-waivable threshold question of law, it must be resolved by this Court one way or another before the Court can proceed to a disposition on the merits." See *Id.*

A court's adjudicative jurisdiction to convict Petitioner of a federal crime cannot exist in the absence of Congress' legislative jurisdiction to criminalize the particular of which the defendant is accused. See *Salinas v. U.S.*, 522 U.S. 52, 54 (1997). "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the underlying statutory language." *Id.* In Count One of the underlying conspiracy to commit bank fraud, the relevant statutory language under § 1344 required the Government to allege in the indictment and prove in trial the identity of a named "federally insured financial institution's" FDIC-insured status to confer and establish subject matter jurisdiction upon the District Court. See *Loughrin v. U.S.*, 573 U.S. 351, 356 (2014). It's irrefutable the language in § 1344 is plain and unambiguous, thereby, the District Court was fully aware of the Government's explicit requirements to prove specific finding of criminality with regard to the conspiracy that was incorporated into every Count of both the bank and tax fraud cases (See Appx. P. 86-87). Although, the core of criminality in the entireness of this case was to defraud federally insured financial institutions; no criminality can be attached to Petitioner; by the Government's own admission in its Response, it made no effort to prove the bank fraud conspiracy (See Appx. P. 32-33).

Petitioner first raised the question of the District Court's lack of subject matter jurisdiction on July 3, 2017 and a second time on July 23, 2018. Both motions went unaddressed and were still pending at the time the panel closed Petitioner's case without ever addressing or ruling on whether the District Court lacked subject matter jurisdiction. This threshold question remains unaddressed (See Appx. P. 64-66). "If the panel or prior panel did not address the threshold question of subject matter jurisdiction, then the panel cannot be regarded as having ruled on it..." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998). Consequently, before this Court is a straight forward **subject matter jurisdiction** threshold question presenting no complex question of federal law, that can be **resolved on the face of:** (1) the four corners of the manufactured barebones indictment in Count One Conspiracy to commit bank fraud (See Appx. P. 28-30); (2) Counts One and Three in the tax fraud indictments (See Appx. P. 6); (3) the District Court's Memorandum Decision assuming "hypothetical jurisdiction" ruling that "federal jurisdiction was established through the commerce clause," but failed to determine whether subject matter jurisdiction exists in Count One conspiracy to commit bank fraud (See Appx. P. 43-44); (4) the Government's admission in its Response that it failed to prove the underlying bank fraud conspiracy and the FDIC-insured status jurisdiction prerequisite (See Appx. P. 32-33). On its face, the conspiracy indictment fails to allege an appropriate basis for the exercise of federal jurisdiction. Petitioner had a constitutional right not to be haled into court where there was no federal crime charged, a right that cannot be vindicated after trial.

Courts have no discretion to ignore the fact that no set of circumstances exists on the face of the indictments under which the law would be valid. Petitioner was not on trial in a state court, where general allegations of a bank fraud conspiracy might suffice. Instead, Petitioner was on trial in federal court whose jurisdiction was limited to trying violation of federal laws. Here, specifically, an underlying conspiracy to commit bank fraud in violation of Title 18 U.S.C. § 1349 and § 1344. Jurisdiction was not affirmatively appearing on the face of the indictment, it was simply never present. (See Appx. P. 6)

The face of Count One underlying conspiracy to commit bank fraud charged, "Brooks conspired to agree to devise a scheme (§ 1349) to defraud one or more 'federally insured financial institutions' (§ 1344(1)) and obtain money based on fraudulent pretenses (§ 1344(2)) by use of mail (§ 1341) and wire transfers (§ 1343) contrary to Title 18 U.S.C. § 1341, § 1343, § 1344, and 2." See e.g., U.S. v. Davis, 735 F.3d 194, 199 (5th Cir. 2013).

The Federal Conspiracy Statute prescribes an agreement to violate the law, 18 U.S.C. § 1349; (The essential element of a conspiracy is that the object of the agreement must be illegal."). Conspiracy is an inchoate offense usually defined as an agreement between two or more persons to commit an unlawful act or to achieve a lawful end by illegal means. See Lannelli v. United States, 420 U.S. 770, 777 (1975). It's irrefutable the agreement in Count One was to defraud "federally insured financial institutions."

Furthermore, during the jury selection and voir dire hearing, the District Court validated and explained to the jury pool

members that "this becomes a federal case for many reasons. But one of the reasons is that these federal banks or some of these victims are insured by the Federal Deposit Insurance Corporation." (See Appx. P. 69-70) Thereupon, all participants in the proceedings, including both Trial and Appellate counsel, the District and Appellate Courts failed to recognize that the federal jurisdiction basis for which the Petitioner, counsel, jury and the courts believed federal subject matter jurisdiction rested was that the Petitioner defrauded a federally insured financial institution.

The stage has been set in this case by the District Court, Government and the indictment by alleging the core issue of criminality was an underlying conspiracy scheme devised by Brooks to defraud "federally insured financial institutions" who were protected by the Federal Deposit Insurance Corporation at the time of the fraud. By obtaining a narrow indictment, the Government limited the basis upon which Petitioner could be convicted of the underlying conspiracy. Specifically to commit bank fraud in violation of 18 U.S.C. § 1344. The law is well settled, the Government made "federally insured financial institution" an essential element and the jurisdictional prerequisite of the offense by framing the indictment as it did. See Loughrin, 573 U.S. at 356; and U.S. v. Platenburg, 657 F.2d 797, 799 (5th Cir. 1981).

This Court holds, "It is a principle of first importance that federal courts are of limited subject matter jurisdiction, possessing only that power authorized by the Constitution and by federal statute." Gunn v. Minton, 568 U.S. 251 (2013). Congress created an additional statutory jurisdictional requirement and

separate limitations of the District Court's subject matter jurisdiction under Title 18 U.S.C. § 1344 of the Bank Fraud Act in 1984 that the federally insured financial institution deposits are insured by the FDIC at issue be subject to the jurisdiction of the United States, above and beyond general jurisdiction requirements imposed upon District Courts by Title 18 U.S.C. § 3231. See 18 U.S.C. § 20 and 12 U.S.C. § 1813(c)(2). "Statutes establishing jurisdiction for FDIC matters trump the general rules governing federal subject matter jurisdiction and the statutory provisions define a federal court's jurisdiction to hear cases involving the FDIC," such as in the instant case 18 U.S.C. § 1344. *Lindley v. FDIC*, 733 F.3d 1043, 1049 (2013). Furthermore, "An indictment could also fail to invoke criminal subject matter jurisdiction by failing to comply with another statutory jurisdictional requirement," such as § 1344 FDIC-insured status requirement. See *Loughrin v. U.S.*, 573 U.S. 351, 356 (2014); *U.S. v. Davis*, 735 F.3d 194, 198 (2013); and *Sealed Juvenile 1*, 225 F.3d 507, 508-09 (5th Cir. 2000). "The failure to allege the element which establishes the very illegality of the behavior and the court's jurisdiction is fatal to the indictment." *Russell*, 369 U.S. at 764. Petitioner's criminal conviction cannot be upheld if the indictment upon which it is based does not set forth the essential elements of the underlying conspiracy offense to commit bank fraud. See *Hamling v. U.S.*, 418 U.S. 87 (1974); *Loughrin* 573 U.S. at 356.

This might just be a case of first impression that "shocks" the conscious" in a way that no other federal criminal case in which a sequence of events occurred. Wherefore, the core of cri-

minality in the entireness of the instant case was based on Count One bank fraud scheme to defraud an unnamed or unidentified "federally insured financial institution" at an undisclosed location, date, and FDIC-insured status prerequisite to invoke the District Court's subject matter jurisdiction. Count One on its face makes no attempt to allege any essential factual elements and an appropriate sufficient jurisdictional basis for the exercise of federal jurisdiction. Subject matter jurisdiction was simply never present and cannot be expanded by judicial decree. See *Steel Co.*, 523 U.S. at 94. "A criminal conviction cannot be upheld if the indictment upon which it is based does not set forth the essential elements of the offense." See *Russell*, 369 U.S. at 764. Therefore, "a valid indictment is the necessary foundation of and predicate for a felony prosecution, conviction of sentence. If the indictment is defective, the entire conviction and sentence fails." See *U.S. v. Villamonte-Marquez*, 462 U.S. 579, 597 (1983).

Despite Supreme Court and the Panel's own Fifth Circuit explicit and clear precedent, the District Court and Panel intentionally disregarded the plain meaning of the statutory language in § 1344. It's irrefutable and clearly obvious on the face of the **void indictment**, the District Court and Panel failed to examine the face of the indictment and address its failure to comply with Congress' imposed Article III statutory prerequisite to the court's subject matter jurisdiction as set forth in the statutory provision of § 1344. It's irrefutable § 1344 in Count One is being unconstitutionally applied in the instant case. The indictment clearly failed to identify the federal interest served by this exercise of federal jurisdiction over the essential criminality of

the instant case. Thereby, Petitioner would ask this Court to determine whether the Government, District and Appellate Courts violated Petitioner's Fifth and Sixth Amendment Constitutional Rights, the Due Process Clause and Equal Protection Clause, by acting in the **clear absence of all subject matter jurisdiction**, by indicting, convicting, and sentencing Petitioner to 135 months in prison, without alleging in a written statement the essential factual elements of a federal criminal offense against the United States to confer and/or invoke subject matter jurisdiction upon the District Court. Moreover, whether the Appellate Court committed a manifest abuse of discretion by failing to examine the face of the four corners of the manufactured barebones indictments and address whether or not it found want of subject matter jurisdiction by the District Court. It's a fundamental principle of law that a valid indictment can recite the statutory language, but a written statement of the offense must also be included in the indictment. See Fed. R. Crim. P. 7(c) and Russell v. U.S., 369 U.S. 749, 763-65 (1962). For this reason both the conspiracy and tax fraud indictments reciting verbatim the statute alone fails to confer and/or invoke subject matter jurisdiction upon the District Court. Regardless of the shortcomings of the charge, as laid in Count One conspiracy indictment, Counts One & Three in the tax fraud indictment, somehow a case was made out.

Even though Petitioner did not raise his argument in direct appeal, this argument has not been waived. Matters of jurisdiction may be raised at any time, because if a court lacks subject matter jurisdiction, it does not have the power to hear the case.

Article III of the Constitution. If an indictment "fails to show jurisdiction in the court or to charge an offense," such objections shall be noticed by the court at any time during the pendency of the proceedings." Fed. R. Crim. P. 12(b). The court is obligated to address this matter. This subject matter jurisdiction threshold question of law is a legal issue that derives from this Court's doctrine that: (1) Subject matter jurisdiction is a threshold question of law that must be addressed prior to and independent of the merits. "We examine the subject matter jurisdiction of the trial court as a threshold matter before considering the merits of the appeal." Steel Co., 523 U.S. at 94; (2) "Federal subject matter jurisdiction is determined by the face of the well pleaded complaint." See Phillips Petroleum Co. v. Texaco Inc., 415 U.S. 125, 127-28 (1974); (3) "Further, all well pleaded allegations must be taken as true for purposes of determining the existence of federal jurisdiction." See Goosby v. Ossen, 409 U.S. 512, 521 (1973); (4) Subject matter jurisdiction cannot be forfeited or waived by Petitioner and cannot be assumed, ignored, or disregarded by the courts, because it involves a court's power to hear a case. Consequently, "A defect in Article III standing is a defect in subject matter jurisdiction that can be raised in District Court." U.S. v. Cotton, 535 U.S. 625, 630 (2002); (5) "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist the only function remaining to the court is that of announcing the fact and dismissing the case." Steel Co., 523 U.S. at 94; (6) No formal motion is needed to raise the issue and objection to subject matter jurisdiction can be raised at any time at either

trial or appellate level. 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1393, at 773-75 (2nd Ed. 1990); (7) "If the indictment is void on its face, it can be attacked at any time by filing a Motion to Dismiss to vacate the sentence." *Holiday v. Johnson*, 313 U.S. 342, 550 (1941) and; (8) In considering a Motion to Dismiss Indictment for lack of subject matter jurisdiction, "the court must examine the face of the indictment and accept its factual allegations as true, but not its legal conclusions." See *Ashcroft v. Iqbar*, 556 U.S. 662, 678 (2009). "The court may not look beyond the face of the four corners of the indictment to the sufficiency of the evidence." *U.S. v. Scruggs*, 691 F.3d 660, 668 (5th Cir. 2012). As the District Court looked beyond the face of the indictment to determine in the memorandum order that, "federal jurisdiction was established through the commerce clause because the evidence showed..." (See Appx. P. 43).

Thereby, in accordance with this Court's doctrine, this Writ raises the threshold question of whether the District Court lacks subject matter jurisdiction based strictly on historical binding Supreme Court precedent that, "standing is the most important jurisdictional doctrine, because federal courts are powerless to consider the merits of the case when it lacks subject matter jurisdiction." *U.S. v. Hays*, 515 U.S. 737, 742 (1995). In a criminal case federal courts are under an independent obligation and legal duty to examine the four corners of the face of the indictment to determine whether subject matter jurisdiction exists. The District and Appellate Courts refuse to examine the indictments and address Petitioner's threshold question, choosing to remain silent.

It is irrefutable § 1344 defines the boundaries of the courts. Section 1344 warrants the Court's attention because it raises jurisdictional questions and claims. Questions concerning the scope of jurisdictional Article III courts are of critical importance. It is a fundamental precept that federal jurisdiction, "whether imposed by the Constitution or Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). If not addressed and corrected, the jurisdictional defect would result in a manifest miscarriage of justice. Depriving Petitioner of his Fifth Amendment Rights to a valid indictment and Sixth Amendment Rights to be informed of the nature of the accusation against him. This case presents no compelling reason for the District and Appellate Courts to ignore Congress' explicit intention and refusal to exercise federal jurisdiction over bank related crimes, without establishing the financial institution's FDIC-insured status at the time of the alleged offense. "A court's power to adjudicate a federal criminal prosecution comes from 18 U.S.C. § 3231; however, § 3231 cannot function to give District Courts the power to try and sentence Petitioner for a crime with which he is not charged. Section 3231 gives the district courts original jurisdiction over crimes against the United States, but it does not give a district court the power to sentence a defendant for a crime of its own choosing. Such a rule would leave the district court with the functional power to define its sentencing jurisdiction subject only to the limits of its own imagination. As the Second Circuit explained, such a rule would allow prosecutors to avoid the jurisdictional prerequisite of a grand jury indictment by charging any federal offense at all,

and then proceeding to prosecute the defendant for a different offense. See U.S. v. Tran, 234 F.3d 798, 808 (2nd Cir. 2000). Which is exactly what the prosecutor accomplished in the instant case.

The Government in this case knew at the time the indictment was obtained that no amount of evidence at trial would be sufficient to convict Petitioner of a Section 1349 bank fraud conspiracy. It is beyond cavil that the Government's prosecutorial position was foreclosed by the binding precedent in the Fifth Circuit not only when the Government brought the indictment, but also throughout the presentation of its case-in-chief, the entire proceedings. Prosecuting Petitioner in defiance of controlling authority constitutes "vexatious", "frivolous", and "bad faith" prosecutions.

Where the District Court acts in the clear absence of all subject matter jurisdiction, the Appellate Court does not have discretion not to notice the clear and obvious error, even if defendant failed to raise the issue, it must be corrected. Despite this Court's precedent the Panel in the instant case have ignored, disregarded, and avoided its required independant obligation and legal duty to examine the face of the four corners of the indictment to assess the court's subject matter jurisdiction and address Petitioner's threshold question of whether the District Court lacked subject matter jurisdiction. The Supreme Court's precedent in Steel Co., Loughrin, and Feola are binding and has direct application in the instant case. This Court's precedent also holds, "If a precedent of this Court has direct application in a case the District and Appellate courts are bound by Supreme Court decisions." See Agostini v. Felton, 512 U.S. 203, 238 (1997).

Regarding the second indictment for Aiding in the Preparation of a False Tax Return pursuant to 26 U.S.C. § 7206(2), the Government intentionally misled both the grand jury and the District Court into believing they had territorial jurisdiction to indict and try Petitioner for the alleged Tax Fraud crime. The deception is clear on the face of the indictment (See Appx. P. 28-30) because the Government alleges the crimes occurred in the Western District of Texas and the District of Utah, but they do not allege the essential factual elements in a written statement of an offense committed by Petitioner that construed the alleged crime. Further, after the Government presented its case on this indictment, it was patently clear that no evidence was introduced linking Petitioner to committing any Tax Fraud crime in the Western District of Texas or the District of Utah. As a result, this indictment should have been dismissed for lack of territorial jurisdiction. U.S. v. Cores, 356 U.S. 405, 407 (1958) and U.S. v. Cessa, 856 F.3d 370, 372 (5th Cir. 2017). Remarkably, the Government tries to claim Petitioner waived venue prior to trial when it gave him the option of either being tried in San Antonio or Austin, which are both located in the Western District of Texas (See Appx. P. 75-80). Worse, at the time the option was given to Petitioner, the Government had not revealed it had no evidence of the Tax Fraud crime being committed in the Western District of Texas.

An Appellate Court that sees that the District Court proceeded without subject matter jurisdiction must correct the error even if neither party brought it to the court's attention. Petitioner not only brought the lack of subject matter jurisdiction

claim to the District Court, Petitioner also brought the claim to the Appellate Court's attention in his Writ of Mandamus, COA petition, and Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction. "An Appellate Court must notice such a flaw even if the issue was raised in neither the District Court nor on appeal." *Stirone v. U.S.*, 361 U.S. 212 (1960). Three different panels, nine (9) different Honorable Judges in the Fifth Circuit have failed to conduct its independent obligation to examine the face of the indictment and address Petitioner's lack of subject matter jurisdiction claims throughout the proceedings. They have intentionally disregarded their independent obligation and legal duty to examine the face of the indictments in order to avoid the threshold question of the court's subject matter jurisdiction. "The Appellate Court does not have the discretion not to notice and correct the error, it must notice and correct the error. Any rule or decision allowing a federal court to act without subject matter jurisdiction conflicts irreconciable with the basic principles of federal court authority," one of which the District and Appellate Court's position intentionally ignores entirely. See *Cotton*, 535 U.S. at 630.

The District and Appellate Courts having rendered a judgment for Petitioner under these circumstances is surprising, and it is not too much to say that it presents a case of judicial insubordination which deserves the reprehension of everyone who does not wish to see public confidence in the certainty and good faith of judicial proceedings wholly destroyed.

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RELIEF SOUGHT

Petitioner prays for this Court to grant this writ of prohibition and/or mandamus and vacate his judgment and conviction, or in the alternative, grant writ directed to the Honorable Judge Fred Biery, the United States District Court for the Western District of Texas, and to the Honorable Judges: Edith B. Clement, Gregg J. Costa, Patrick E. Higginbotham, Don R. Willett, Priscilla R. Owen, Andrew S. Oldham, Thomas M. Reavley, Leslie H. Southwick, Stephen A. Higginson, the United States Court of Appeals for the Fifth Circuit, directing and compelling these respondents to immediately dismiss the indictments and vacate the two judgments of subject matter jurisdiction, lack of grand jury jurisdiction, jurisdictional defects for the indictments' failure to state an offense and insufficiency of evidence of the banks FDIC-insured status.

UNAVAILABILITY OF RELIEF IN OTHER COURTS

It's not that no other court can grant the relief sought by this petition; both the District and Appellate Courts have committed a manifest abuse of their discretion and inherent power in the wrongful and summary denial of Petitioner's challenges to the District Court's subject matter jurisdiction defect on the face of the indictments. Petitioner filed a Writ of Certiorari with this Court and it was denied as well. The Courts have disregarded their legal obligation to examine the face of the manufactured barebones indictment and assess the court's jurisdiction, adjudicate or address the jurisdictional challenge, and correct the error.

UNSUITABILITY OF ANY OTHER FORM OF RELIEF

No other form of relief will be sufficient to dismiss the indictments and vacate Petitioner's judgment of conviction to protect Petitioner's Fifth Amendment Right to a valid indictment by a grand jury of Due Process and equal protection of the laws. As well as Petitioner's Sixth Amendment Right to a Jury Trial requiring proof beyond a reasonable doubt of the crime charged in the indictment. Petitioner has exhausted all forms of relief in the District Court, filing motions to dismiss for lack of subject matter jurisdiction and 28 U.S.C. § 2255. Filed motions to dismiss for lack of subject matter jurisdiction for invalid indictment and petition for COA in the Appellate Court. Filed a petition for Writ of Certiorari in the Supreme Court. The Federal Courts all wrongfully and summarily denied Petitioner without examining, reviewing, or addressing the District Court's lack of subject matter jurisdiction threshold question. The Federal courts have failed to find want of subject matter jurisdiction and have intentionally disregarded, ignored, and avoided Petitioner's question of the District Court's subject matter jurisdiction throughout the proceedings. Petitioner has exhausted every form of legal remedy, and there's no other form of relief available to Petitioner.

LIST OF PARTIES IN COURT BELOW

United States District Court

Western District of Texas

San Antonio Division

Chief Judge Fred Biery

United States Court of Appeals

For the Fifth Circuit

Appeal Honorable Judges:

Edith B. Clement

Patrick E. Higginbotham

Stephen A. Higginson

Writ of Mandamus Honorable Judges:

Gregg J. Costa

Thomas M. Reavley

Leslie N. Southwick

COA Honorable Judges:

Andrew S. Oldham

Priscilla R. Owen

Don R. Willett

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JURISDICTIONAL STATEMENT

D1. Pg. 1 This court has jurisdiction to issue the requested writ under 28 U.S.C. 1651(a) and Supreme Court Rule 20.

CITATIONS OF LOWER COURTS DECISIONS

The April 20, 2016 order of the District Court for the Western District of Texas, San Antonio Division construed Petitioner's Motion to Vacate for lack of subject matter jurisdiction as a § 2255 motion without addressing the court's lack of subject matter jurisdiction claim. A copy of this is attached in the (Appx. P. 38-39).

The August 4, 2017 Order of the District Court for the Western District of Texas summarily denied Motion to Vacate under 29 U.S.C. § 2255 and Motion to Dismiss for Lack of Jurisdiction is attached in the Appendix P. 40-48.

The August 16, 2017 Panel opinion of the Court of Appeals denying Writ of Mandamus for the jurisdictional defect and District Court Lack of Jurisdiction is attached in the Appendix P. 55-56.

The January 3, 2018 Order of the District Court for the Western District of Texas summarily denied § 2255 Motion for Reconsideration is attached in the Appendix P. 49-52.

The September 10, 2018 Panel opinion of the Court of Appeals denying COA is attached in the Appendix P. 57-60.

The October 12, 2018 opinion of the Court of Appeals denying Motion for Reconsideration is attached in the Appendix P. 61.

The April 29, 2019 opinion of the Supreme Court denying Writ of Certiorari is attached in the Appendix P. 63.

The July 31, 2019 Order of the Court of Appeals denied Motion to re-open case to address and rule on the District Court's subject matter jurisdiction in the two motions filed on July 3, 2017 and July 23, 2018. These were two separate motions; the 2017 motion was a factual challenge of the evidence and the 2018 motion was a facial challenge of the indictment. Both motions were ignored and not ruled on. (See Appx. P. 64-66)

CONTROLLING PROVISIONS, STATUTES, AND REGULATIONS

The Fifth Amendment provides, in pertinent part: "No person shall be held to answer for a capital crime... unless on a presentment or indictment of a grand jury... nor be deprived of... property, without due process of law..." U.S. Constitution Amendment VI.

The Sixth Amendment provides, in pertinent part: "Reserves jury trial right for prosecution of serious offenses... and guarantees criminal defendants the right to effective assistance of counsel." U.S. Constitution VI.

The Due Process Clause of the Fifth Amendment protects against deprivation of "life, liberty, or property without due process of law. U.S. Constitution Amendment V.

The Equal Protection Clause of the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.

The grand jury in pertinent part, 18 U.S.C. § 3332(a) provides: "It shall be the duty of each grand jury impaneled... to inquire into offenses committed within that district of empanelment.

In conspiracy cases, the relevant statute is § 1349 of Title 18 of the United States Code. It provides: "Any person who attempts or conspires to commit any offense under this [Chapter 18 U.S.C. et seq.] shall be subject to the same penalties as those prescribed for the offense,..." 18 U.S.C. 1349.

In conspiracy cases, the relevant statute is 371 of Title 18 of the United States Code. It provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency... 18 U.S.C. 371.

In bank fraud cases, in pertinent part, 18 U.S.C. § 1344 provides: "Whoever knowingly executes or attempts to execute a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the monies... under the custody or control of, a financial institution by means of false or fraudulent pretenses..."

In wire fraud cases, in pertinent part, 18 U.S.C. § 1343 provides: "Whoever having devised... (1) any scheme or artifice to defraud; (2) with the intent to defraud, and (3) used or caused the use of, interstate wire transmissions..."

In mail fraud cases, in pertinent part, 18 U.S.C. § 1341 provides: "Whoever having devised... (1) any scheme or artifice to defraud; (2) with the intent to defraud, and (3) used or caused the use of, mails..."

In aiding cases, in pertinent part, 18 U.S.C. § 2 provides (1) "the substantive offense was committed by someone; (2) the defendant committed an act which contributed to and furtherance of the offense; and (3) the defendant intended to aid in its commission."

In aiding or assistance in tax fraud cases, in pertinent part, 26 U.S.C. § 7206 (2) provides: "Assisting in the preparation of a fraudulent corporate tax return; and (2) filing a false individual income tax return."

STATEMENT OF THE CASE AND GOVERNING FACTS

This is an unrepresented case of first impression for the following reasons:

- (1) The underlying conspiracy scheme to commit bank fraud in Count One completely failed to confer subject matter jurisdiction upon the District Court. Thereupon, all acts taken by the District Court throughout the proceedings were taken in the complete absence of all subject matter jurisdiction. See Appx. P. 6.
- (2) The Government argued in its Response, "it was not required and did not have to prove the underlying bank fraud scheme" in Count One, the only scheme set forth in the indictment and the Government's case-in-chief. See Appx. P. 32-33.
- (3) The District Court's ruling that "federal jurisdiction was established through the Commerce Clause" was a manifest abuse of discretion and contrary to application of clearly established federal law, that "courts cannot use the Commerce Clause under Article I to circumvent the court's limitations of subject matter jurisdiction power under Article III to assume want of jurisdiction. See Appx. P. 43-44.
- (4) The Panel's manifest abuse of discretion by ignoring, disregarding and avoiding its required obligation and legal duty by intentionally leaving unanswered a question as to the District Court's lack of subject matter jurisdiction.
- (5) The local grand jury indictment for conduct and criminal offenses outside its jurisdiction and the District Court's territorial jurisdiction. See Appx. P. 29.
- (6) Panel closed Petitioner's case while his Motions to Dismiss

indictments were pending without examining the face of the indictment, addressing the jurisdiction question, or ruling one way or the other. In reviewing this case as a whole, it is undeniable this case is unprecedented; one of first impression, and there is no question a "manifest miscarriage of justice" has occurred in the instant case and all acts were taken place in the complete absence of all subject matter jurisdiction. See Appx. P. 60-66.

PROCEDURAL HISTORY

In July 2010, Petitioner was indicted in a mortgage fraud case for one count of conspiracy to commit bank fraud, the use of mails and wires in furtherance of the bank fraud and eight counts of tax fraud. Petitioner was also indicted two (2) years later for two (2) counts of tax fraud. The two cases were distinct and unrelated under separate indictments and were assigned different case numbers. However, they were tried simultaneously in a single trial proceeding, but separate judgments were entered for each case individually. In essence, the indictments were consolidated into one trial (See Appx. P. 54).

In January 2013, a jury convicted Petitioner on one count of conspiracy to commit mail fraud although the indictment charged conspiracy to commit bank fraud and seven (7) counts of mail fraud in the mortgage fraud case, as well as two (2) counts of tax fraud in the tax fraud case. The Appellate Court consolidated both cases and ordered Petitioner to file one COA request for both cases. The threshold question raised by Petitioner that was unaddressed by the Panel is whether the District Court lacked subject matter jurisdiction, and/or whether there is a jurisdictional defect in

both indictments for failing to state an offense that violated a criminal statute.

On January 22, 2013 Petitioner was tried by a jury for Mortgage Fraud and a separate unrelated case for Tax Fraud that were tried simultaneously.(See Appx. P. 54) After the Government closed its case at trial, Petitioner moved for judgment of acquittal in pursuant to Fed. R. Crim. P. 29. The District Court orally denied Petitioner's motion, after which defense argued Petitioner's case before the jury. Upon closing its case, Petitioner moved for a second Motion for Acquittal in pursuant to Fed. R. Crim. P. 29(a) on the same ground, *inter alia* the Government failed to prove its case beyond a reasonable doubt. Namely, a federally insured financial institution's FDIC-insured status that was defrauded by Petitioner (See Appx. P. 68-69). The District Court intentionally, constructively amended Count One of the conspiracy indictment from Conspiracy to commit "bank fraud" to Conspiracy to commit "mail fraud" through the jury instructions (See Appx. P. 33-34, 37). The jury verdict form found Petitioner guilty of offense charged in Count One of the indictment (Appx. P. 84). Count One's language clearly recites conspiracy to commit the underlying substantive offense of bank fraud pursuant to 18 U.S.C. § 1344 (See Appx. P.6).

On or about January 15, 2016, Petitioner filed a True Rule 60(b)(4) and (6) Motion to Vacate judgment and conviction for lack of subject matter jurisdiction for the Government's failure to prove the federally insured financial institution's FDIC-insured status. On April 21, 2015, the District Court construed the Motion as a § 2255 Motion to vacate.

On or about April 17, 2017, Petitioner filed a petition for Writ of Mandamus in the Fifth Circuit of Appeals, compelling the District Court to dismiss the Mortgage Fraud indictment and vacate Petitioner's judgment and conviction for lack of subject matter jurisdiction due to the Government's failure to prove the FDIC-insured status to establish federal jurisdiction in accordance with historical binding precedent in the Fifth Circuit.

On or about July 3, 2017, Petitioner filed a Motion to Dismiss in the Fifth Circuit Court of Appeals for the defect in the District Court's subject matter jurisdiction.

On August 4, 2017, the District Court wrongfully and summarily denied Petitioner's Motion to Dismiss for Jurisdictional Defect that was filed on September 1, 2016 as moot with prejudice. The Order also denied Mortgage Fraud § 2255 Motion to Vacate without adjudicating any of the claims raised. The Order held, "the lack of jurisdiction for the Government's failure to prove the financial institution's FDIC-insured status for the Mail Fraud convictions was procedurally barred and without merit." Petitioner has never challenged the court's jurisdiction of the Mail Fraud Counts 2-9. Petitioner's challenge claim has always challenged only Count One for Conspiracy to commit Bank Fraud. The District Court failed to adjudicate all claims raised in the § 2255 as well as the Motion to Vacate challenging the District Court's subject matter jurisdiction. The District Court also denied the Tax Fraud § 2255 Motion that claimed the indictment failed to state an offense and failed to address the grand jury's lack of jurisdiction to indict Petitioner for criminal acts or conduct outside the

Western District of Texas.

On August 16, 2017, the Panel for the Fifth Circuit of Appeals denied Petitioner's Writ of Mandamus without addressing and determining whether the District Court lacked subject matter jurisdiction. The Panel held, "Brooks' arguments regarding jurisdiction are currently before the District Court and if the District Court ruled against Brooks he will have an appellate remedy." (See Appx. P. 55-56).

On or about September 4, 2017, Petitioner filed a Motion for Reconsideration in the District Court's ruling that federal jurisdiction was established through the commerce clause, a clear and obvious violation of the Eleventh Amendment, Supreme Court precedent and a clear and obvious manifest abuse of discretion and power as well as the Court's failure to adjudicate the grounds in Petitioner's § 2255 (See Appx. P. 43-44).

On or about December 27, 2017, the District Court construed Petitioner's Motion for Reconsideration, Fed. R. Civ. P. 59(e) as a successive § 2255 motion and summarily denied Petitioner's motion (See Appx. P. 49).

On or about July 23, 2018, Petitioner filed a Motion to Dismiss Invalid Indictment in the Fifth Circuit Court of Appeals for lack of jurisdiction for failing to state an offense, failing to state the essential element and jurisdictional prerequisite of the name or identity of the federally insured financial institution and the FDIC-insured status. The Fifth Circuit failed to address and rule on Petitioner's Motion. This Motion was never ruled on and Petitioner's case was closed (See Appx. P. 66).

On or about September 10, 2018, the Fifth Circuit Court of Appeals ruled, "Brooks renews seven (7) claims." (Appx. P. 58-59). The Panel failed to address these seven (7) renewed claims. The Panel also held, "Brooks also appears to raise, for the first time in his COA motion eight (8) claims." All claims were raised in the District Court and brief in Brooks' § 2255 Motion. The Appellate Court has misconstrued claims related to Count One conspiracy to commit bank fraud to "mail fraud indictment" (Appx. P. 57). All claims made by Petitioner are in reference to Count One conspiracy to commit bank fraud, however, the Panel solely focuses on the mail fraud counts 2-9; nowhere in any of the District or Appellate Court's Orders or rulings does it address or mention "Count One or the underlying conspiracy to commit bank fraud." The Courts have turned a blind eye to the threshold criminality of the indictment's subject matter and the Government's case-in-chief that Petitioner conspired to devise a scheme to defraud **federally insured financial institutions**. The Courts have only focused on the mail fraud counts that were in furtherance of the bank fraud scheme that does not exist. The Panel summarily denied Petitioner's COA without addressing any of Petitioner's claims after ruling seven (7) claims were renewed, but went unaddressed (See Appx. P. 60).

On or about October 8, 2018, Petitioner filed a Motion for Reconsideration in the Fifth Circuit Court of Appeals with enclosed exhibits of § 2255 Motions of showing all claims were raised and briefed properly in the District Court. Requesting the Panel to address the lack of jurisdiction and no evidence of a

financial institution's FDIC-insured status to establish federal jurisdiction, as well as all claims that were properly raised and briefed extensively in both § 2255 and COA.

On October 10, 2018, the Fifth Circuit Court of Appeals summarily denied Motion for Reconsideration without addressing the subject matter jurisdiction threshold question (See Appx. P. 61).

The November 19, 2018 Panel opinion of the Court of Appeals denied Supplemental Authority for the July 23, 2018 Motion to Dismiss the invalid indictment for lack of subject matter jurisdiction. The case was closed without the Panel's ruling.

The April 29, 2019 opinion of the Supreme Court Denying Writ of Certiorari without addressing the subject matter jurisdiction threshold question.

ARGUMENT

The core issues in Petitioner's Mortgage and Tax Fraud cases are whether it is debatable among jurists that the District Court acted in the "clear absence of all jurisdiction." The denial by the Appellate and District Courts appears to take great pains to ignore Petitioner's most important arguments related to the Court's subject matter jurisdiction issues. These two cases overlap with one important issue of the District Court's lack of subject matter jurisdiction and/or jurisdictional defect in light of the following facts: (1) the grand jury in the Western District of Texas (WDTX) indicted Petitioner for tax fraud acts that took place outside its jurisdiction; i.e., the Northern District of Texas (NDTX); (2) the mortgage fraud indictment failed to allege the

essential elements and jurisdictional prerequisite of the FDIC-insured status at the time of the underlying crime; (3) the District Court assumed "hypothetical jurisdiction" through the Commerce Clause; (4) the constructive amendment of the mortgage fraud indictment through the jury instructions; (5) both mortgage and tax fraud indictments fail to state an offense or factual allegations; and (6) Count 3 in the tax fraud indictment is defective on its face for charging an offense by the grand jury in the WDTX that occurred in the District of Utah.

For these reasons, Petitioner would ask this Honorable Court to determine whether the face of the indictments (See Appx. P. 6, 28) failed to comply with the statutory jurisdictional requirements of:

(1) 18 U.S.C. § 3231 and Fed. R. Crim. P 7(c) requiring the face of the indictment to allege in a plain and concise written statement of the essential elements constituting the offense charged in language similar to that used by the underlying relevant statute 18 U.S.C. § 1344 in Count One; and the relevant statute 18 U.S.C. § 7206(2) in Counts One and Three of the tax fraud indictment.

(2) Section 1344, requiring the essential elements and statutory jurisdiction prerequisite limitations of the name or an identifiable federally insured financial institution's FDIC-insured status at the time of the alleged fraud, as well as the element of "materiality" of falsehood. Thereupon, whether the District and Appellate Courts acted in the clear absence of all subject matter jurisdiction throughout the entireness of Petitioner's criminal proceedings.

When an indictment makes it a crime to defraud a financial institution, and identifiable (and identified) defrauded bank is elemental to a violation of § 1344. See U.S. v. Farmigon, 934 F.2d 63, 66 (5th Cir. 1991). As well as, "materiality of falsehood is an element of the federal bank fraud, mail fraud, and wire fraud statutes." See Neder v. U.S., 527 U.S. 1, 25 (1999). Where the indictment fails to state, and the Government fails to sufficiently prove the FDIC-insured status of the victim bank, the Circuit Courts have unanimously overturned bank fraud convictions for lack of jurisdiction. See e.g., Davis, 735 F.3d at 199 (collecting cases). Therefore, Petitioner's conviction should likewise be overturned because the indictment failed to state the essential factual elements of the financial institution's name, the jurisdictional prerequisite FDIC-insured status, and the Government failed to prove beyond a reasonable doubt that a federally insured financial institution was the victim of any fraud. Absent proof there is no federal jurisdiction and the Government conceded there was no proof of bank fraud and the FDIC-insured status in its Response motion (See Appx. P. 32-33). This was enough evidence to end this matter.

This Court's precedent in Loughrin and Fifth Circuit precedent in Davis and Platenburg makes this a straight forward case presenting no complex legal questions of factual issues. For more than 35 years, the Fifth Circuit has repeatedly held, "18 U.S.C. § 1344 only punishes the execution of a scheme to defraud that specifically targets a federally insured financial institution protect by the FDIC at the time the fraud was committed. See

I. SUBJECT MATTER JURISDICTION

A. COMMERCE CLAUSE

Because federal courts are courts of limited jurisdiction, lower courts **must address** as a threshold matter the **vital question** of the District Court's **subject matter jurisdiction** in Count One conspiracy "to defraud a federally insured financial institution." The Panel held, "this issue was considered by the District Court and this Court in the proceedings under 18 U.S.C. § 2255, and it was determined that the court of conviction had subject matter jurisdiction." (See Appx. P. 62). The only consideration made by the District Court was its determination that "federal jurisdiction was established through the Commerce Clause" (See Appx. P. 35, 43). This ruling was a direct violation of the Eleventh Amendment and a manifest abuse of discretion. "The Eleventh Amendment restricts the judicial power under Article III, and the Commerce Clause found Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." See *Seminole Tribe v. Florida*, 517 U.S. 14, 72-73 (1996). This federal jurisdiction determination is an element of the mail fraud offense and not "jurisdictional" in the sense of bearing on whether or not the District Court has subject matter jurisdiction in Count One conspiracy to defraud a federally insured financial institution. See *U.S. v. Sealed Appellant*, 526 F.3d 214, 243 (5th Cir. 2008). Unlike Section 1344, Section 1341 interstate commerce clause requirement is an element of that crime and not a jurisdictional prerequisite to confer subject matter jurisdiction upon the District Court. See *U.S. v. Reasor*, 418 F.3d 466, 469 (2005).

B. SECTION 1341 JURISDICTIONAL HOOK

Section 1341 "interstate commerce clause requirement is a jurisdictional element or 'hook' that refers to the statutory provision that requires the Government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of § 1341. While jurisdiction in nature, it is merely an element of the offense, not a prerequisite to **subject matter jurisdiction**." See U.S. v. Robinson, 119 F.3d 1205, 1212 (5th Cir. 1997). Therefore, there is no indication in § 1341 for the statutory Interstate Commerce Clause requirement to serve any other purpose in the crime definition than as the essential element of that specific crime in Counts 2-9 to use the mails. Consequently, the Interstate Commerce Clause is simply a "jurisdictional hook." The District Court instructed in the voir dire hearing, "**the other federal 'jurisdictional hook'... Congress... made it a violation of the law to use interstate carriers to commit fraud.**" (See Appx. P. 69). The Supreme Court and this Court's precedent have referred to such statutory attempts to comply with the Commerce Clause as "**jurisdictional hooks**" that refer to a provision in a federal statute that requires the Government to establish specific facts justifying the exercise of **federal jurisdiction** in connection with any individual application of that specific statute, such as § 1341 in Counts 2-9, and does not invoke subject matter jurisdiction upon the District Court. See U.S. v. Morrison, 529 U.S. 611-12 (2000).

C. FEDERAL JURISDICTION

Where the District Court does not have original subject

matter jurisdiction, the Court lacks the threshold jurisdictional power to attach **federal jurisdiction** (jurisdictional hook) over the mail fraud Counts 2-9 interstate Commerce Clause nexus. It is irrefutable the court's determination was foreclosed by controlling Supreme Court precedent in Seminole Tribe and Morrison, Fifth Circuit precedent in Reasor, explicitly holding, "no jurisdictional hook, nor any mantric invocation by Congress of its fullest authority under the Commerce Clause can establish **subject matter jurisdiction**" in any manner in the instant case. The court records and proceedings are completely devoid of any **consideration** made by the District and Appellate Courts of how it determined, or where the Courts found want of **subject matter jurisdiction** on the **face** of Count One. From the Court's point of view, Count One simply does not exist, the courts have **avoided** addressing Count One's underlying bank fraud offense. However, the **exception of subject matter jurisdiction** cannot be found in the law of the Supreme Court or Fifth Circuit.

II. SUFFICIENCY OF INDICTMENT

A. MOTION TO DISMISS INDICTMENT

Supreme Court precedent holds, "the date of filing of the indictment is the date when subject matter jurisdiction is as- sessed." Guapo Dataflux v. Atlas Global Grp., 541 U.S. 567, 569- 70 (2004).

Whether an indictment charges an offense against a **Motion to Dismiss** is a **subject matter jurisdiction** threshold question to be determined only by examining the **face** of the indictment and not by recourse to the evidence as the District Court ruled in the

instant case. See *Padilla v. U.S.*, 278 F.2d 188, 190 (5th Cir. 1960). Therefore, the District and Appellate Courts have an independent legal duty to examine the face of the indictments. Without disputing and taking notice of the fact that the indictments failed to state the essential factual elements of an offense to confer subject matter jurisdiction upon the District Court, for the purpose of Petitioner's motion to dismiss. See *U.S. v. Fontenot*, 665 F.3d 660, 644 (5th Cir. 2011). Federal courts are required to limit their discussion in a subject matter jurisdiction appeal to the facial sufficiency of the allegations of the indictment. "Such questions as weighing of the **proof of evidence** should not be determined in a motion to dismiss an indictment." See *U.S. v. Cabrera-Teran*, 168 F.3d 141, 143 (5th Cir. 1999). By weighing the **evidence**, the District Court failed to adhere to the fundamental principle that in reviewing the sufficiency of an indictment a court must look only at the allegations and determine whether a criminal offense has been stated. See *U.S. v. Dersch*, 20 F.3d 139, 145 (5th Cir. 1994).

B. VICTIMS

The Supreme Court held that, "statutory language may be used in the indictment to describe the offense, but it must be accompanied with such a statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged." See *Hamling v. U.S.*, 418 U.S. 87, 117-18 (1974). The Sixth Amendment guarantees the right of an accused "to be informed of the nature and cause of the accusation." "The nature of the conspiracy to commit bank fraud offense

charged requires the existence of a 'victim' in order for a crime to have been committed. The identities of the 'victim' are at 'the very core of criminality'." Russell v. U.S., 369 U.S. 749, 764 (1962). "Such requirements prevent the prosecution from feeling 'free to fill in this vital missing element, in a way, which constitutionally grave whether or not its highly probable to name or identify someone different from the one intended by the grand jury'." "A prosecutorial power 'to roam at large' in this fashion is not allowable." Russell at 768-771. However, the indictment in this instant case failed to identify or name the financial institution. The Indictment Clause of the Fifth Amendment requires that an indictment contain some amount of factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury, such as the constructive amendment of Count One (See Appx. P. 33). See Russell at 770.

III. ACQUITTAL

A. THE JURISDICTIONAL REQUIREMENT FOR CONSPIRACY WHEN THE UNDERLYING OFFENSE IS BANK FRAUD

This writ is premised on the legal fact that the District Court was in error when it denied the Petitioner's motion for acquittal pursuant to Fed. R. Crim. P. 29(a) at trial (See Appx. P. 67-68). Whereas, the record clearly establishes without doubt that the subject financial institutions that were allegedly defrauded were FDIC insured at the time the offenses occurred (See Appx. P. 6). Although the defendant's counsel failed to argue this specific defect to the court is without moment. "The Defendant is allowed to claim at any time the government failed to

provide sufficient evidence to prove the jurisdictional element **post-verdict.**" U.S. v. Trice, 823 F.2d 80, 86-87 (5th Cir. 1987), and "That the defendant failed to move for acquittal due to the insufficiency of the evidence of the jurisdiction issue is... of no moment." U.S. v. Schultz, 17 F.3d 725, 728 (5th Cir. 1987). The court is therefore compelled to review all of the admissible evidence which was introduced by the Government at trial and the reasonable interferences which flow there from in a light most favorable to the verdict, in order to properly determine whether a reasonable trier of the facts could conclude or find that the Government provided sufficient proof of every element of 18 U.S.C. § 1344 beyond a reasonable doubt. Except there was no evidence of the essential element and jurisdictional prerequisite of the financial institutions FDIC-insured status introduced in trial by the Government for the court to review. Moreover, the Government admitted there was no evidence (See Appx. P. 32-33). The Government's failure to provide proof during trial that a defrauded financial institutions were insured by the FDIC at the time the offenses occurred effectively deprive the District Court of subject matter jurisdiction to impose the conviction and sentence against Petitioner.

In order to establish federal jurisdiction in a prosecution for bank fraud under § 1344, the Government must prove that the banks involved were federally insured. See Loughrin, 573 U.S. at 356; "Proof of federally insured status of the victim financial institution for § 1344 is a jurisdictional prerequisite as well as an essential element of the offense." See U.S. v. Platenburg,

657 F.2d 797, 799 (1981); U.S. v. Murrah, 478 F.2d 762, 764 (5th Cir. 1973) ("Proof of FDIC insured status is a required element of proof of the offense. Indeed it is necessary to allege and prove it to establish federal jurisdiction."). But proof that the "offense is committed in the manner therein described" in Count One (that is, that a federally insured financial institution was defrauded and, thus, that facts exist "tying the proscribed conduct to the area of federal concern") is exactly what is missing in Petitioner's case. The Government failed and admitted it failed to prove that the financial institution was federally insured at the time of the fraud (See Appx. P. 32-33), and this Court and the Fifth Circuit agreed that Petitioner could not therefore properly be convicted of violating § 1344. The District Court and Appellate Court nonetheless upheld the conspiracy conviction.

The failure to prove insured status in this case is thus akin to the federal conspiracy having been impossible - that is, as if the banks were not in fact federally insured. Because conspiracy law punishes only the agreement. See U.S. v. Feola, 420 U.S. 671, 694 (1975). As Feola recognized, "Federal concerns are sufficiently implicated by a conspiracy for the purposes of a jurisdiction when the underlying offenses are shown to be actually tied to the federal interests identified by Congress." Id. at 695. Therefore, because no evidence submitted at Petitioner's trial establishes any connection whatsoever to federal law or federal interests, either by proving an actual connection or an intended connection, there is simply no way for a federal court to assert jurisdiction over the matter.

The District Court relieved the Government of its duty to prove every element of the crime charged in the indictment beyond a reasonable doubt in violation of the Constitution. As this Court holds in *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) ("A criminal defendant is entitled to a jury determination that he is guilty on every element of the crime which he is charged, beyond a reasonable doubt.").

IV. JURY INSTRUCTIONS

A. CONSTRUCTIVE AMENDMENT

In an effort to cure the lack of subject matter jurisdictional defect and to find want of jurisdiction in the mortgage fraud case, the District Court intentionally constructively amended Count One of the indictment through the jury instructions from a conspiracy to commit bank fraud to conspiracy to commit mail fraud. The District Court redacted the underlying bank fraud statute, the essential element and the jurisdictional prerequisite of the indictment relieving the Government of its burden of proof of the underlying bank fraud crime (See Appx. P. 33-34, 37). When a Grand Jury indicts a defendant the Fifth Amendment grants the defendant the right to be tried solely on the Grand Jury's allegations. Despite the Fifth Amendment guarantee, the Government persuaded the grand jury to indict Petitioner on a bank fraud conspiracy of which, under then controlling law, alleged no crime at all. The Government drafted Count One knowing it was subject to dismissal under binding Supreme Court precedent and every Appellate Circuit's controlling precedent, but with the expectation all of Count One could sustain a conviction by intentionally inducing

the District Court to constructively amend the indictment through the jury instructions (See Appx. 33-34, 37). If proven, "such an amendment violates a defendant's right to be tried solely on the allegations returned by the grand jury and requires reversal." *Stirone v. U.S.*, 361 U.S. 212-18 (1960). "Constructive amendment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." *U.S. v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993). **Constructive amendment of an indictment requires reversal of the conviction.** In the instant case, the Government and District Court's conduct rose to the level of "conscious shocking", as well as Trial Counsel's deficient performance for failure to object to the constructive amendment of the indictment and Appellate Counsel's deficient performance for failure to raise the clear and obvious amendment on direct appeal.

In the Government's filed Response on November 2, 2016, the Government submitted into evidence the original jury instructions submitted to the Court which were read to the jury as Government "Exhibit A" (See Appx. P. 37). In reviewing the Government's "Exhibit A" jury instructions for the first time to Petitioner's knowledge the newly discovered evidence reveal the jury instructions given were labeled "Pattern Jury Instruction §2.15A (Conspiracy to Commit Offense) Criminal Case, United States Fifth Circuit District Judges Association, 2015 modified (written for Title 18, United States Code, Section 371, but applicable to Title 18, United States Code, Section 1349. Petitioner was not indicted by the Grand Jury under § 371. In fact, the Grand Jury specifically indicted Petitioner for conspiracy to devise a "scheme" to

defraud "federally insured financial institutions" in violation of Title 18 U.S.C. § 1344 (See Appx. P. 6, 38).

B. CONSPIRACY ELEMENTS

The indictment fails to allege directly or indirectly that the Grand Jury charged Petitioner with any crimes that violate Title 18, United States Code § 371. Although Title 18 can be charged under both § 371 and § 1349, it is plain that each section requires proof of a unique element not required by the other. See U.S. v. Grant, 683 F.3d 643 (5th Cir. 2012). Petitioner's position is further supported by the Government's own argument in the Jones case, "that the elements in § 1349 and § 371 are different in several ways. First, the conspiracy under § 371 require proof of an overt act, while the conspiracy charge in Count One under § 1349 does not." Even though the indictment alleged overt acts in connection with the charge under § 1349, it was not required to do so and those overt acts are not elements of the crime. Id. Second, § 1349 requires proof that the conspirators agreed to violate a statute in Chapter 63 of Title 18, while § 371 requires no such proof. Third, and perhaps most persuasively, Count One in the instant case require proof that the conspirators agreed to violate 18 U.S.C. § 1344 to defraud a federally insured financial institution. See U.S. v. Jones, 733 F.3d 574, 584 (5th Cir. 2013). Consequently, the two conspiracy statutes, 18 U.S.C. § 1349 and 18 U.S.C. § 371, each requires proof of a unique element not required by the other and therefore each offense was textually distinct from the other under the Blockburger test. See *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932). "The Blockburger analysis

focuses on the proof necessary to prove the statutory elements of each offense, rather than the actual evidence to be presented at trial." Illinois v. Vitale, 447 U.S. 410, 446 (1980). "In making that determination, we look not just at the element of the statute, but also how the offenses were charged in the indictment and presented at trial." U.S. v. Ogba, 526 F.3d 214, 232-33 (5th Cir. 2008). It is a fundamental principle of law, settled by the decisions of the Supreme Court and of the Fifth Circuit that § 371 is completely inapplicable in the instant case.

There were three fundamental problems created by the elimination of the improper bank fraud objectives from Count One. First, the allegations of a scheme to defraud the banks were so pervasive that complete elimination of them would eviscerate the indictment, leaving great gaps in the written document as well as the government's case. Second, the indictment was organized so that all the substantive counts, which were supported by the existing law, depended for their context on the allegations of a conspiracy to defraud the banks (See Appx. P. 86). If these allegations were redacted, the substantive counts of mail fraud would be in furtherance of no underlying scheme. After the court redacted the bank fraud allegations from Count One, the nature of this case, certainly the complexion of this case, is quite different once you take out the real guts of the conspiracy charge, which is really what this case is all about. Third, the question of the existence of FDIC insurance was not submitted to the jury as an element of the offense charged, and consequently the jury failed to find a crucial and jurisdictional element of the alleged crimes.

As to the accusation of having defrauded an identifiable or named federally insured financial institution, it was neither stated in the indictment, proved, nor found. Furthermore, there were no allegations in the indictment or evidence in trial that the United States or one of its agencies was a victim of fraud. The Falcon court held, "A federally insured financial institution is not a federal agency under § 371." U.S. v. Falcone, 934 F.2d 1528, 1535 (11th Cir. 1991). It is uncontested that Petitioner was not charged with committing or defrauding the United States. It is undeniable the constructive amendment of the indictment was a clear error and manifest abuse of discretion by the District Court and the Panel abused its discretion by failing to correct the obvious error that clearly affected Petitioner's substantial rights. See U.S. v. Jara-Favela, 686 F.3d 289, 299 (5th Cir. 2012).

The constructive amendment of an indictment circumvents the Grand Jury Clause of the Fifth Amendment to the United States Constitution, U.S. Const. Amend. V, and it takes place when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment. It is undeniable that conspiracy to commit mail fraud was beyond what is contained in the indictment. **A constructive amendment is a reversible error.** U.S. v. McKenzie, 678 F.2d 629, 631 (5th Cir. 1982) (holding that an indictment may be dismissed "when prosecutorial misconduct amounts to overbearing the will of the Grand Jury so that the indictment is, in effect, that of a prosecutor rather than the Grand Jury.")) Stirone at 218. ("The very purpose of the requirement that a man

be indicted by a Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.").

V. FIFTH AMENDMENT DUE PROCESS CLAUSE

A. A. EQUAL PROTECTION

The Equal Protection Clause requires the Government to treat similar situated individuals in fact and law to be treated alike as though they were the same. As it pertains to the instant case there was one identical (Perez-Ceballos) and one similarly situated (London) case as Petitioner's case published in the Fifth Circuit one before and one after Petitioner's case was decided and original Writ was filed in this Court. All three cases were decided by the Panel within 70 days of each other.

On August 15, 2018, the Fifth Circuit reversed London's three bank robbery convictions for insufficient proof of the banks' FDIC-insured status. See U.S. v. London, 2018 U.S. App. Lexis 22995 (5th Cir. 2018).

On September 10, 2018, the Panel wrongfully and summarily denied Petitioner's Motion to Vacate for lack of subject matter jurisdiction and COA for jurisdictional defects due to insufficiency of the evidence for lack of FDIC-insured status.

On October 12, 2018, the Panel wrongfully denied Petitioner's Motion for Reconsideration due to jurisdictional defect and insufficiency of the evidence.

On October 24, 2018, the Panel vacated Perez-Ceballos' Bank Fraud conviction because there was no evidence of the bank's FDIC-insured status. (See U.S. v. Perez-Ceballos, 907 F.3d 863 (5th Cir. 2018)).

In Enquist v. Oregon Dept. of Agric. holds, "when those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference." 553 U.S. 591, 602 (2008). "An equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead that s/he has

been irrationally singled out." Id. at 601. In reviewing the Perez-Ceballos and London cases it appears Petitioner has been irrationally singled out due to his position as a pro se litigant opposed to a litigant who is privileged to be represented by counsel before the courts throughout post-conviction proceedings.

Identical to Petitioner's case, in Perez-Ceballos, and similar in London's, the Government failed in trial to prove beyond a reasonable doubt proof of the bank's FDIC-insured status. In fact, Perez-Ceballos was charged with conspiracy in violation of § 1349 and 1344, the identical statutes Petitioner was charged with violating. Also identical to Petitioner's timely move for a judgment of acquittal, Perez-Ceballos and London both timely moved for a judgment of acquittal. It's undeniable that identical and similarly situated litigants were treated differently by the previous Panel's decision in Perez-Ceballos and London's case than the Panel in Petitioner's case. A *prima facia* case is made on the face of the indictment, the Government's admission and the wrongful denial of Petitioner's lack of subject matter jurisdiction claims and insufficiency of the evidence. Under the Fifth Amendment's Due Process Clause, the Government and the Panel's erroneous decision clearly violated Petitioner's constitutional rights as well as the firm rule of the Fifth Circuit "that one panel may not overrule the decisions of another." U.S. v. Taylor, 933 F.2d 307, 313 (5th Cir. 1991).

The Windsor court held, "The Due Process Clause Amendment, U.S. Const. Amend. V, forbids the federal government or any federal actors from 'denying to any person the equal protection of the laws.'" U.S. v. Windsor, 570 U.S. 744, 774 (2013). Moreover,

the Supreme Court holds, "To sustain a conviction under § 1344, the Government must prove FDIC-insured status." See *Loughrin*, 573 U.S. at 356. Nevertheless, the Panel in the instant case abused its discretion by disregarding and failing to adhere to the controlling decisions of the Supreme Court. See *Hutto v. Davis*, 454 U.S. 370, 375 (1982). ("Federal District Courts and Circuit Courts are bound to adhere to the controlling decisions of the Supreme Court.") Furthermore, Judge Willett sat on the Panel that vacated Perez-Ceballos' bank fraud conviction and Judge Willett also sat on the Panel that denied Petitioner's COA and failed to address Petitioner's subject matter jurisdiction threshold question in his motions to dismiss (See Appx. P. 64-66).

There's no question the Panel's wrongful denial in Petitioner's case was clearly intentional and egregious, opposed to an identical and similarly situated groups with the Fifth Circuit in violation of the Equal Protection Clause. The question for this Court to determine is whether Petitioner has a constitutional right to be treated like Perez-Ceballos and London? The Panel in *Quib* held, "This Equal Protection Clause is essentially a directive that all persons similarly situated should be treated alike." *Quib v. Strass*, 11 F.3d, 488, 492 (5th Cir. 1993).

VI. TAX FRAUD

A. GRAND JURY JURISDICTION

Petitioner would ask this Honorable Court to determine whether it was a violation of Petitioner's Fifth Amendment rights for a federal grand jury in the Western District of Texas (WDTX) to return an indictment for, if any at all, crimes that occurred

wholly outside Texas in the District of Utah and the Northern District of Texas (NDTX). As well as whether Counts One and Three failed to allege in a written statement the essential factual elements of an offense in violation of the laws against the United States (See Appx. P. 28-30).

The Government intentionally violated Petitioner's Constitutional rights regarding the tax fraud indictment when it presented the instant case to the Grand Jury, located in the WDTX, for acts that purportedly occurred in the WDTX for a criminal offense that took place solely in the NDTX. The Government was fully aware that Petitioner's purported conduct occurred solely in the NDTX and in an attempt to high-jack jurisdiction from the NDTX to WDTX, it falsely represented to the grand jury that Petitioner's acts took place in the WDTX. The grand jury in this case never had jurisdiction to indict Petitioner for Tax Fraud Counts. The Fifth Circuit has observed, "The dangers of abuse are manifold if the Government can obtain an indictment in a District other than the District where the offense was actually committed merely alleging that an act was committed in that District. *Green v. U.S.*, 309 F.2d 852 (5th Cir. 1962).

The Fifth Circuit has held, "by virtue of 18 U.S.C. 3237(a) that when a violation of 26 U.S.C. 7206(2) venue properly lies where the tax return is prepared and signed even though received and filed elsewhere.", *U.S. v. Bryan*, 896 F.2d 68, 72 (5th Cir. 1990). "Fraudulent tax returns, in violation of 26 U.S.C. 7206(2) a continuing offense and looking to the address listed for the tax preparer to determine venue." *U.S. v. Westbrook*, 858 F.3d 317,

327 (5th Cir. 2017). The only evidence introduced in trial by the Government was Petitioner's tax returns. The tax returns clearly show the tax preparer's office address was located at Stephen Scheller's office at 6230 N. Beltline Rd., Suite 340 in Irving, Texas 75063 within the NDTX (See Appx. P. 74). Based on these facts and applying the Fifth Amendment Right to be indicted by a grand jury within the District where the criminal offense was committed, Petitioner's Sixth Amendment Right to have his trial decided by a jury of the State and District wherein the crime shall have been committed was violated. As well as Sixth Amendment Right to effective assistance of counsel. "In tandem these Amendments mean that a grand jury should return an indictment only in a district where venue lies." U.S. v. Cabrales, 524 U.S. 1, 10 (1998). "The common law practice antecedent to the Fifth Amendment guarantee allowed only the grand jury of the county where the crime was committed to indict." Cessa, 856 F.3d at 372. Both the venue and territorial jurisdiction of a federal district court in criminal cases depend on some part of the criminal activity having occurred within its territory. See 18 U.S.C. § 3231, § 3237, § 3332(a); Fed. R. Crim P. 18; U.S. v. Lutton, 486 F.2d 1021, 1023 (5th Cir. 1973). (See Appx. P. 72). The Government has the burden of proof that the location of criminal activity be established by a preponderance of the evidence. Cauley v. U.S., 355 F.2d 175 (5th Cir. 1966). The Government failed to produce a scintilla of evidence that any conduct referenced in the tax fraud indictment occurred in the WDTX. The Government was well aware Petitioner and his CPA were located solely in the NDTX, where the

only search warrant and investigation in the tax fraud took place.

Section 3332 of the Organized Crime Control Act of 1970 was designed to guard against the possibility of government corruption. *Sargeant v. Dixon*, 130 F.3d 1067, 1068 D.C. Cir. 1997). Section 3332 provides, "It shall be the duty of each grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district." (See Appx. P. 71). In fact, federal prosecutors are instructed as a matter of policy not to ask their local grand juries to indict faraway crimes. See U.S. Attorney's Manual 9-11.121, "A case should not be presented to a grand jury in a district unless venue for the offense lies in that district." The Fifth Circuit has held, "A grand jury should return an indictment only in a district where venue lies. *Cessa*, 856 F.3d at 372. Notwithstanding the Constitutional prior Panel precedent rule, statutory provisions and its own policy, the prosecutor in Petitioner's case asked the local grand jury in the WDTX to indict Petitioner for crimes that they were well aware were committed solely in the NDTX. Furthermore, the Government in *U.S. v. Griffin* concedes that, "a federal grand jury may return indictments only for crimes committed within the district in which it sits." 814 F.2d 806, 809 (1st Cir. 1987).

The Government, in this case, intentionally violated the constitution, statutory provisions, federal rules of criminal procedure and its own policy by asking the grand jury in the WDTX to indict Petitioner for alleged offenses that were committed in the NDTX. These rules and policy were specifically to protect

Petitioner and guard against the exact misconduct of the Government in this instant case. Nevertheless, the Government intentionally disregarded the Act and both Trial and Appellate Counsel were deficient for failing to provide Petitioner his Sixth Amendment Constitutional right to effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Trial Counsel never advised Petitioner that he had the constitutional right to seek the dismissal of the Tax Fraud counts due to the criminal acts not being committed in the WDTX. Trial Counsel, after listening to the Government's presentation of its case, never realized the jurisdiction and venue were not proper, even though the evidence presented by the Government established that all of Petitioner's purported acts that constituted the basis of the Tax Fraud counts occurred in the NDTX.

B. LACK OF SUBJECT MATTER JURISDICTION

Looking at the face of the Tax Fraud Indictment, it is undeniable the indictment lacked subject matter jurisdiction for failing to state an offense (See Appx. P. 28-30). The Panel in *Scruggs* held, "We look only at the face of the indictment to assess subject matter jurisdiction." *U.S. v. Scruggs*, 691 F.3d 660, 668 (5th Cir. 2012). Count One and Three recite verbatim the citations to the statute and there were no written statements of facts or allegations. "The written statements, rather than the citations or statutes, have long been considered the controlling features of an indictment." See *U.S. v. Garcia*, 954 F.2d 273, 276 (5th Cir. 1992). The indictment failed to state any act to invoke the Court's jurisdiction and completely relied on the statutes

district and provides that this may be done only on motion of the defendant." See Fed. R. Crim. P. 21. Fed. R. Crim. P. 18, in contrast, governs intradistrict transfers, only to convenience and prompt administration in the District Court's discretion, not the Petitioner or the Government's discretion. The Government's emails intentionally circumvented and violated the Federal Rules of Criminal Procedures, as well as Petitioner's Constitutional rights, jurisdiction cannot be conferred, waived, consented or agreed to outside the territorial jurisdiction where the offense occurred and cannot be transferred to another district court without a proper legal motion from Petitioner. The Court's records are completely devoid of any motions of transfer by Petitioner or order of a venue transfer by the District Court. See Cotton, 535 U.S. at 630. The Government and potentially Trial Counsel intentionally mislead and deceived Petitioner.

The District Court held in its memorandum ruling, "venue was proper in the Western District of Texas (WDTX) because several mortgage lenders were located in the Western District (See Appx. P. 44-45). The Court's ruling was a manifest abuse of discretion and erroneous. First, the Mortgage and Tax Fraud indictments were unrelated (See Appx. P. 53). Second, in U.S. v. Johnson, the Supreme Court held, "It is settled that, in a criminal case, venue must be narrowly construed, and venue must be proper for **each separate count** of a multi-count indictment." 323 U.S. 273, 276 (1994). "The Government must establish venue by a preponderance of the evidence, and venue must be proper for undisputable that the evidence and testimony in the tax fraud offenses

for stating an offense. The Fifth Circuit noted that, "A statutory citation in the indictment cannot, by itself, substitute for setting forth a statement of the elements of the offense." U.S. v. Ramirez-Gomez, 171 F.3d 709, 714-15 (5th Cir. 2002). See also Fed. R. Crim. P. 12(b)(3)(B). It is undeniable the indictment in the instant case suffers from a jurisdictional defect, therefore, the judgment is void.

C. TERRITORIAL JURISDICTION

Prior to the Grand Jury's issuance of the Tax Fraud Indictment, Trial Counsel informed Petitioner that according to the Government, the Tax Fraud counts could be indicted and tried: either in San Antonio Division or Austin Division of the WDTX (See Appx. P. 75-80). Petitioner was charged solely with aiding in the preparation of tax returns, he was not charged with filing false tax returns (See Appx. P. 81). Therefore, pursuant to judicial precedent venue was required to be in the NDTX, and Petitioner never waived his venue rights to the NDTX. See Bryan, 896 F.2d at 72. Improper venue waiver is not a waiver where Petitioner has no actual or constructive knowledge of venue defect. The Fifth Circuit held, "Waiver is the voluntary, intentional relinquishment of a known right." U.S. v. Andino-Ortega, 608 F.3d 305, 308 (5th Cir. 2010). There is no question Petitioner did not know he had a Constitutional right to be indicted and tried **only** in the NDTX, the District and the search warrant was granted and executed (See Appx. P. 79). And Petitioner did not agree to transfer jurisdiction from the NDTX to the Grand Jury in the WDTX for the issuance of an indictment. In fact, it has been well settled that, "The Federal Rules of Criminal Procedure governs transfers to another

took place solely in the NDTX. It's automatic that the prosecution must always prove territorial jurisdiction over a crime in order to sustain a conviction." U.S. v. Benson, 495 F.2d 475, 481 (5th Cir. 1974), and thus territorial jurisdiction and venue are "essential elements of any offense in the sense that the burden is on the prosecutor to prove their existence. There's no question or evidence presented in trial that the Government failed to prove the jurisdiction of the grand jury and territorial jurisdiction of the trial in the WDTX.

This Court held, "whatever the scope of the Court's inherent power, it does not include the power to develop rules that circumvent or conflict with Constitutional provisions, statutory provisions and the Federal Rules of Criminal Procedure." Carlisle v. U.S. 416, 426 (1990). See also Whitmore v. Arkansas, 495 U.S. 149, 155-56 (1990). (A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.) A federal court must fulfill its independent obligation to assure itself that jurisdiction is proper. A federal court's subject matter jurisdiction extends only so far as the Congress provides by statute and is strictly limited to agency action(s) included therein. Since jurisdiction grants the power to declare the law, it is incumbent upon a court to determine it is acting within the sphere of its legitimate authority. Because subject matter jurisdiction goes uniquely to the fundamental power of the federal courts to hear a case, there is no reason why an appellate court should potentially compound an error of the district court by assuming it has jurisdiction. See Steel Co.,

523 U.S. at 101-02 ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.")

VII. CONCLUSION

The District Court and Panel go to great lengths to distort Petitioner's subject matter jurisdiction claims, in an effort to avoid the indisputable fact that, pursuant to Loughrin, Perez-Ceballos, Platenburg and Davis, both indictments failed to confer subject matter jurisdiction upon the District Court. Any authority exercised is a usurped authority. In addition, both the Conspiracy and Tax Fraud indictments failed to state an offense. More concerning is the fact that the grand jury in the WDTX lacked jurisdiction in the Tax Fraud indictment since every act occurred outside its district in the NDTX. The Government failed to meet its required obligation by law to introduce evidence that proves Petitioner's criminal offense occurred in the grand jury's jurisdiction and the territorial jurisdiction of the District Court within the WDTX. The Government's admission that it failed to prove the underlying conspiracy to commit bank fraud to establish subject matter jurisdiction in the District Court was a clear usurpation of the District Court's power, if it had any at all in the first place. For the exercise of such authority, when the want of jurisdiction is known, no excuse is permissible to act in the absence of subject matter jurisdiction. Therefore, the District Court jurisdictional error was egregious and the judgment should be treated as void. The Government's theory all along and the

proof adduced at trial, at most, proved only that Defendant and independent private mortgage lenders might have illegitimately, not unlawfully, formed a close relations to obtain money in exchange for residential property.

For the District Court to pronounce the meaning or the constitutionality of a federal law when it has no jurisdiction to do so, by very definition, is for a court to act ultra vires. When a court without **federal jurisdiction** convicts and sentences a defendant, the conviction and sentence are **void** from their inception and remain void long after a defendant has fully suffered their direct force.

It's irrefutable Petitioner's **Constitutional Rights** to a fair trial were violated under the:

(1) Fifth Amendment Indictment Clause right to be tried on charges alleged in a **facially valid indictment**, returned by a local grand jury in the district in which the offense was committed and acted on the basis of adequate and competent evidence as charged;

(2) Fifth Amendment Due Process Clause **equal protection component**, that guarantees under federal laws to every individual in the United States, that the Government treat all identical and similarly situated alike. Except in this case that guaranteed equal protection does not exist;

(3) Sixth Amendment guaranteed right to a jury trial requiring the Government to present proof beyond a reasonable doubt of every indictment element of the crime charged in the: (i) conspiracy indictment to devise a scheme to defraud federally insured financial institutions; and (ii) tax fraud indictment to aid and assist

in the preparation of fraudulent tax returns in the WDTX and the District of Utah;

(4) Sixth Amendment Counsel Clause, guaranteed right to effective assistance of trial and appellate counsel.

There's no other case cited in the Supreme Court or Circuit Courts that allows the District Court to establish subject matter jurisdiction through the commerce clause "jurisdictional hook." In fact, there's no other case cited in a federal court in which such a sequence of events occurred throughout the proceedings in both the District and Appellate Courts in Petitioner's case. It's irrefutable Petitioner suffered a complete miscarriage of justice. This Writ of Prohibition and/or mandamus is necessary to correct the fundamental miscarriage of justice in Petitioner's case, where the violation of Petitioner's constitutional rights resulted in his conviction, and Petitioner's actually innocent of all charges.

It's clear and undisputable Petitioner has shown a Writ of Prohibition is appropriate in the instant case where the District Court proceeded wrongly in the clear absence of all subject matter jurisdiction. Therefore, this Court holds, "A court may issue a Writ of Prohibition where the District Court assumed jurisdiction of a matter beyond its legal cognizance," as the District Court assumed jurisdiction through the commerce clause beyond its legal cognizance.

Respectfully Submitted,



Robert N. Brooks

I declare under penalty of perjury that the foregoing is
true and correct to the best of my knowledge and belief.

Executed this 30th day of November 2019.

Respectfully Submitted,



Robert N. Brooks, Pro Se
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FCI - El Reno