

No. 20-5324

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IN THE  
SUPREME COURT OF THE UNITED STATES

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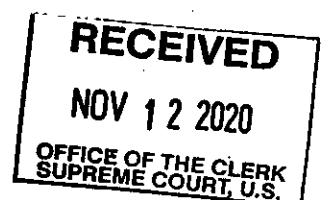
JEREMIAH YBARRA-PETITIONER

vs.

UNITED STATES OF AMERICA-RESPONDENT  
ON PETITION FOR RE-HEARING

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Jeremiah Ybarra  
Pro-Se Litigant  
FMC ROCHESTER  
Reg#55024-280  
PMB 4000  
Rochester, Minnesota, 55903-4000



### FACTS OF THE CASE

At trial, the Judge first prejudiced the petitioner by stating to the jury that "the petitioner had no burden to prove his or her innocence or to present any evidence or to testify". (Please see Case 4:16-cr-00523-PRM Document 117 filed 11/17/17 page 19 of 168). Petitioner feels that this was a CONSTITUTIONAL violation of his rights due to having the evidence to prove his innocence and to put into question the government's case. This hindered the petitioner in the fact that the jury was not allowed to see or hear the facts of what really happened.

2. At trial, agent Bustamante stated that petitioner contacted him about meeting at the Flying J in Fort Stockton, Texas for a buy of narcotics. (Please see Case 4:16-cr-00523-PRM Document 117 filed 11/17/17 page 32 of 168).

Petitioner requested the phone records of this agent to show that petitioner never called Bustamante but that Bustamante contacted petitioner, asking petitioner to go to the Flying J.

3. At trial Agent Bustamante stated that he never identified the other people involved (Please see Case 4:16-cr-00523-PRM Document 117 page 37 line 3 and 4). Petitioner has it in his pre-sentence report that the people involved were identified as one Stella Crespín and one Blake Ramey. So how were they not identified? Another question is why were they not present for the trial if they were able to also identify the petitioner and what he supposedly had done on that day?

Another question is how was the supposed narcotics submitted into evidence when they were never put into a heat-sealed bag the way it is supposed to be with the agent that acquired the evidences initials?

4. At trial Agent Bustamante stated that a female driving a maroon Nissan was the person who had the meth. (Please see Case 4:16-cr-00523 Document 117 filed 11/17/17 page 47 of 168 lines 5 through 12) So if that person was the one that brought the supposed narcotics why would she and the male passenger be questioned or charged as well? Then Agent Bustamante stated that the female was the one who supplied the supposed narcotic.(Please see Case 4:16-cr-00523PRM Document 117 filed 11/17/17 page 48 of 168 lines 1 through 9). So once again if the female was the supplier, why would they only charge the petitioner with the alleged offense?

5. At trial Agent Bustamante stated that he only contacted the petitioner.(Please see Case 4:16-cr-00523-PRM Document 117 page 49 of 168 line 5 through 10). Petitioner once again would have showed that he was not the one who called the female but it was the Agent Bustamante that called her. If petitioner would have been given the phone records of the Agent he would have been able to show that the Agent was lying.

6. The Agent Bustamante states that there were pictures being taken throughout the operation but there were never any pictures of the actual hand off or who gave the agent the supposed narcotics.(Please see Case 4:16-cr-00523-PRM Document 117 page 53 of 168 line 5 through 20). So if they were taking pictures, why were there no pictures of the petitioner handing off or taking the money?

7. At trial the second Agent Mr.Ruckman stated that what they expected was for the petitioner to show up with crystal meth. then he further states that a woman showed up with crystal meth or that somebody showed up in a red Nissan with the crystal meth.(Please see Case 4:16-cr-00523-PRM Document 117 filed 11/17/17 page 64 of 168 line 19 through 25).

once again, if there were others involved and were there at the time of the supposed offense, why were all people involve not there to testify about the fact of what really happened on that day?

Then agent Ruckman states that there was a female and a male involved. (Please see Case 4:16-cr-00523-PRM Document 117 filed 11/17/17 page 65 of 168 line 1 through 6).

Petitioner was charged with pure methamphetamine in the indictment. How was the government able to charge the petitioner with pure anything if they never even had the lab report stating that it was what they say it was? At trial, agent Ruckman stated that or verified should it be said that the lab report was not returned until march, so how was it charged as pure meth if there was no lab report?.

(Please see Case 4:16-cr-00523-PRM Document 117 filed 11/17/17 page 66 of 168 line 9 through 10).

Petitioner was not ever in possession or was representing anything that was referenced to any narcotics.

8. At trial, the chemist that works for the DEA stated that she did Qualitative tests that are presumptive tests that tell about what exactly the substance consists of. The chemist states that she did an infrared spectroscopy test and a color test. Then she did a gas chromatography test coupled with a mass spectrometry test and to check the purity was a high liquid chromatography. (Please see Case 4:16-cr-00523-PRM Document 117 filed 11/17/17 page 119 of 168 line 11 through 18).

Petitioner would like to show that the test done was not a certain test to show that it was 99% pure due to the fact that the test to be done to prove the kind of methamphetamine is a more sophisticated "plane polarized light" test, or the "optically active column" test which no such test was done.

Once again at trial the question was asked as to why the lab report was not returned until March of 2017.(Please see Case 4:16-cr-00523--PRM Document 117 filed 11/17/17 page 121 of 168 line 11 through 18). How CONSTITUTIONAL is it when a judge states "The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged". That means that a knowing spectator can be charged with just knowing someone that sells a controlled substance? That is unCONSTITUTIONAL initself. At the begining of the trial the judge states the elements of the alleged offense which in the end changes from possession with intent to distribute to aiding and abetting possession with intent to distribute. I cannot stress enough about the other people that could have been there to testify about what really happened. It was a wrong jury instruction to give to the jury which it also amended the indictment.

9. In the governments closing argument, the proösecutor stated that petitioner was being charged with possession with intent to distribute.(Please see Case 4:16-cr-00523-PRM Document 117 filed 11/17/17 page 147 of 168 line 7 and 8).

10. The prosecutor also bolsters the agents and the chemist when he states that the jury should believe the testimony and believe they are reliable.(Please see Case 4:16-cr-00523-PRM Document 117 filed 11/17/17 page 150 of 168 line 1 through 4).

On the affidavit that is present as Appendix A, the prosecutor stated that he did not present the case to the Grand Jury. So how can a citizen be indicted without it being presented to the Grand Jury? He also states that he doesnt know what witnesses the petitioner is refering to when in fact he knows that I had asked for the people

that were mentioned in the police report and also the actual people that were there. Then on the affidavit made by prior counsel, she states on(Appendix B) that the prosecutor was sworn in as an expert witness at the Grand Jury presentation of the case so how can a prosecutor be a witness at the Grand Jury and then prosecute the case? She states that the prosecutor was a witness about the purity of the supposed controlled substance. How if the lab report was not even turned in until the month of March.?

There is just to many violations of petitioners rights that petitioner needs this Honorable Court to exercise it supervisory power and review this case. Please consider the follwing argument and case law.

### GROUND FOR PETITION

Ground One: The innocence that is suffering due to the violation of CONSTITUTIONAL rights that are supposed to be protected by the people elected to protect those rights afforded under the CONSTITUTION.

Ground Two: The prosecutorial misconduct by not presenting the case to the Grand Jury and also the prosecutor interfering himself into the case by being an expert witness.

Ground Three: The evidence that was never investigated by defense counsel.

Ground Four: The question as to why the others involved in the alleged offense were never cross-examined or even charged in the offense.

Ground Five: The unfairness of petitioners trial.

Ground Six: The denial of the discovery in the case.

### CERTIFICATE THAT THE GROUNDS ARE LIMITED TO INTERVENING CIRCUMSTANCES OF SUBSTANTIAL OR CONTROLLING EFFECT OR TO OTHER SUBSTANTIAL TO GROUNDS NOT PREVIOUSLY PRESENTED

I, Jeremiah Ybarra, certify that the circumstances in this case are limited to intervening of this Honorable Court due to the violations of the rights that are afforded and protected by the CONSTITUTION of the United States. There are also substantial grounds that were not presented previously due to the lack of resources that petitioner had access to. Petitioner has requested relief from the sentencing court as well as the court of appeals. Both courts have denied every effort by petitioner to present the facts of the case and how he was prejudiced by the trial court as well as the ineffectiveness of his trial counsel. Petitioner has continued to claim his innocence in the alleged offense that he

was charged with. Petitioner has a pending \$2255 motion in the district court that has not even given a report and recommendation to. It has been two years and still to this day the district court has denied and stone walled petitioner in gaining the relief he has been requesting. This Honorable Court can use its Supervisory Authority and examine this case for the violations that petitioner is presenting..

#### PRESENTMENT OF GROUND ONE

Petitioner is innocent of the alleged offense that he is being charged with. At trial, there was no evidence that petitioner sold anything to the Undercover agent. There were other people that were there at the scene of the alleged offense. Petitioner requested these other people to verify the story that the agent was stating the truth of the events that happened on that day in question. If there were others that were there at the time of the alleged offense, would it not be logical to ask those people present questions of what really happened? These other people were never charged or cross-examined to get the truth.. Petitioner was not afforded a way to prove his innocence at trial and show the jury that what the agent was saying was a lie. The magistrate judge and the trial judge denied the petitioners request for the discovery on the case. Preventing discovery is a violation of the Sixth Amendment. The right to prepare a defense includes the right to adequate discovery. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194...., The petitioner requested that an independent testing be done on the supposed controlled substance and was denied this request or the defense counsel failed to make the request. Either way, petitioners right was violated on the denial on several issues that he presented.



## PRESENTMENT OF GROUND TWO

There was prosecutorial misconduct by the government and also false statements made by the prosecutor. Petitioner has an affidavit by the prosecutor stating that the case was never presented by him to the Grand Jury. Petitioner also has an affidavit by prior defense counsel that the prosecutor inferred himself in the case by stating the purity of the supposed controlled substance to the Grand Jury after knowing that there was not a lab report given until after the indictment. How can a prosecutor not present the case to the Grand jury and then infer himself as an expert witness and then also prosecute the case? [...] The Fifth Amendment provides that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces ...Russell v. United States, 369, U.S. 749, 82 S.Ct. 1038(1962). The Constitutional provision that a trial may be held in a serious federal criminal case only if a Grand Jury has first intervened reflects centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166. "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the CONSTITUTION by the founders.[...] The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes". Costello v. United States, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed 397.

"The United States Attorney is the representative not of an ordinary party to a controversy, but of sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it

shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so, but, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." See Donnelly v. DeChristoforo, 416 U.S. 637, 40 L.Ed 2d 431, 94 S.Ct. 1868).

### PRESENTMENT OF GROUND THREE

Trial counsel never investigated the others that were involved nor did she file any other motions to defend petitioner. The lab report was never shown to the petitioner or was the recording that was heard by the jury at trial ever investigated as to whom was actually speaking in the recording. The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed 682(1948), it described what it regarded as the most basic ingredients of the Due Process of Law. The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. Petitioner requested that the others that were there on the day in question be there to testify about what really happened. Counsel never requested these other wit-

esses to coaberate what petitioner was trying to prove at trial. Where counsel fails to investigate and interview promising witnesses, and therefore "ha[s] no reason to believe they would not be valuable in securing [defendant's] release," counsel's inaction constitutes negligence, not trial strategy. United States ex rel. Cosey v. Wolff, 727 F.2d 656, 658 n.3(7th Cir. 1994).;[omitted]. There is also the fact that counsel never investigated the lab report or the chain of custody. There were only pictures of the supposed controlled substance and was never pictured in a heat-sealed bag the way it is to be in a controlled substance case. There are also inconsistencies in what was stated in the police report and what the agents testified to at trial. Petitioner requested that the supposed controlled substance be tested by an independent lab. This request was not adhered to by counsel. In cases involving a controlled substance, "a concomitant part of the examination or inspection [is] the right of the accused to have an independent chemical analysis performed on the seized substance." United States v. Gaultney, 606 F.2d 540, 545(5th Cir. 1979). The recording that was presented to the jury was never examined by the analyst that examined the other recording that were shown to be edited and falsified by the agents that were involved. A witnesses voice identification is subject to the same due process analysis as other forms of identification. See United States v. Alvaraz, 860 F.2d 801, 810(7th Cir. 1988). In determining the admissibility of identification testimony, "reliability is the linchpin," Brathwaite, 432 U.S. at 114, 97 S.Ct. 2243, and an identification procedure is unduly suggestive

if it "give[s] rise to 'a very substantial likelihood of irreparable misidentification,'" Degaglia, 913 F.2d at 376 (quoting *United States v. Carrasco*, 887 F.2d 794, 806 (7th Cir. 1989)). To assess the reliability of a voice identification, we apply the same factors articulated in *Biggers*, and we must weigh them against the "corruptive effect of the suggestive identification." Alvarez, 860 F.2d at 810 (quotations omitted).

#### PRESENTMENT OF GROUND FOUR

Like before, the others that were involved as being witnesses at the scene were never questioned, charged or cross-examined as to what really happened on the day in question. Petitioner requested that he be allowed his phone to retrieve the evidence needed to prove that he was not the one who gave anything to anyone. Petitioner has the text messages where the others involved stated that no controlled substance was ever given to the agent but was "rock salt". There is also the fact that agents threatened the others involved not to be present at trial. There was a police report that stated there were two other people that were present at the scene at the time of the alleged offense. That report was not shown to the jury. There are also statements of the witnesses at trial that state there were others involved but not arrested or questioned as to what happened. CONSTITUTIONALLY effective counsel must develop trial strategy in the true sense-not what bears a false label of "strategy"-based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation. Ramonez v. Berghuis, 490 F.3d 482 (CA6 2007).

#### PRESENTMENT OF GROUND FIVE

Petitioners trial was unfair and petitioner was prejudiced when his rights to discovery and the right to defend himself and present evidence on his own behalf to show that he was actually innocent of the alleged offense is reason enough to show that he needs help from this Honorable Court. The denial of discovery, the denial of presenting the others involved, and not calling the informant as well was unfair in petitioners trial. [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be discretely assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Strickland v. Washington, [passim], 104 S.Ct. 2052(1984).

#### PRESENTMENT OF GROUND SIX

The denial of discovery is a violation of the Fifth and Sixth Amendments of the United States CONSTITUTION. Petitioner requested the phone records of the Agent involved (Bustamante).to prove that he was the one that called the others involved. There is also the fact that petitioner has text messages where the person that was harrasing and asking on a constant basis for help to find someone to sell them drugs. Petitioner was not predisposed to find people to sell anyone anything. Even at trial the government witnesses state that the petitioner refused to find other people to sell them drugs. Plus the police reports were never shown to the petitioner. There were multiple officers at the scene on the day in question and there was only one police report. Plus, the statments made on the police report were not identical to the offered testimony by the officers.

PETITION FOR REHEARING IS PRESENTED IN GOOD FAITH AND NOT FOR DELAY

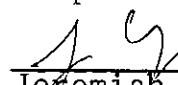
I, Jeremiah Ybarra, certify that this petition is presented in good faith and is not for delay. I have tried to be heard in a court that can actually look at the evidence and review what was presented in trial. I am innocent of the offense that was alleged against me. I will continue to fight my case until I am able to be heard and be able to present the evidence to prove that the conviction is unlawful and unCONSTITUTIONAL due to the discovery that was withheld before trial and after as well. I am asking that this Honorable Court just look at this case due to it being a public interest for the people of this Nation. There is no justification in what happened to me. This is not just happening to me but to others as well. There are citizens of this Nation that are being trapped by the people that are sworn in to protect the innocent and try the guilty. So there is evidence that the court abused its discretion and also its power in allowing the government to gain a wrongful conviction. I have lost my mother through this ordeal and am about to lose my father due to my older siblings not being able to care for him. I am asking just for this Honorable Court to look at the facts and make their own judgment. I have been waiting for the district court to decide on my \$2255 petition and still to this day the magistrate judge has not made a report and recommendation. It is going on three years now. Why is it that to convict someone it takes less time and to gain justice it takes forever? I am not guilty of the alleged offense. I do have the evidence that will prove that I am innocent and even if I am not able to gain relief while being unlawfully imprisoned, I will continue to fight when I am released to prove that I have been telling the truth all along. The agents involved in my case are corrupt and for this to go on uncorrected or even investigated is an injustice and will also prove that there is no justice. All I am asking is for the CONSTITUTION to be upheld the way our forefathers wanted it to be.

CONCLUSION

Wherefore premisses considered, petitioner requests that this Honorable Court GRANT this Motion in all respects and at least review the case for consideration of the facts that are being presented by the petitioner. There is a Public interest in this case due to the fact that innocence is suffering by the people who are supposed to protect that innocence and there is a Grave Miscarriage of Justice in this case. IT IS SO PRAYED.

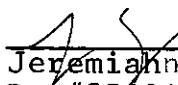
Dated: 10-31-2020.

Respectfully Submitted,

  
\_\_\_\_\_  
Jeremiah Ybarra  
Reg#55024-280  
PRO SE LITIGANT  
FMC ROCHESTER  
PMB 4000  
Rochester, MN, 55903-4000

CERTIFICATE OF SERVICE

I, Jeremiah Ybarra, declare under the penalty of perjury that this foregoing motion is true and correct to the best of my knowledge, I also certify that this true and correct copy was placed into the mailbox located at this facility on the 31st day of October to be deposited into the United States Postal Service to be hand delivered to this Honorable Court.

  
\_\_\_\_\_  
Jeremiah Ybarra  
Reg#55024-280

APPENDIX A

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
PECOS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	4:19-CV-6 DC
	)	4:16-CR-523
JEREMIAH YBARRA,	)	
Defendant.	)	

AFFIDAVIT OF MONTY KIMBALL,  
IN REPOSE TO 2255 MOTION

Before me, the undersigned notary, Monty Kimball, personally appeared and stated under oath as follows:

1. My name is Monty Kimball. I am above 18 years of age and I am competent to make this affidavit. The facts contained in this affidavit are within my personal knowledge and are true and correct.
2. I was the Assistant United States Attorney that prosecuted the defendant, Jerimiah Ybarra ("Ybarra"), in the above styled and numbered cause. I understand Ybarra is making claims that certain actions I took in the course of the prosecution were improper or unconstitutional.
3. I read Ybarra's 2255 motion and it appears he asserts two charges related to my handling of his prosecution: (1) I knew others were involved in distributing the controlled substances but failed to investigate why the others were not arrested; and (2) I interrupted a meeting between Ybarra and his counsel and threatened Ybarra with filing an enhancement if he went to trial.
4. Apparently, Ybarra bases his first allegation on the fact that he was the only defendant in his indictment. That fact does not support his allegation that others were not prosecuted. In fact, several targets of the investigation were arrested, indicted and convicted, either in Federal court



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AFFIDAVIT

State of Texas  
County of Brewster

Mary Ellen Smith, of lawful age, being first duly sworn upon her oath, affirms the following:

My name is Mary Ellen Smith.

1. I am an attorney, licensed in the State of Texas, State Bar number 00785002. I am admitted to practice law in the Western District of Texas and in the Fifth Circuit Court of Appeals.
2. I represented Jeremiah Ybarra, from the date of my appointment, through trial, and verdict. At Mr. Ybarra's request, my representation was terminated before sentencing, and new counsel was appointed, Mr. Damien Castillo.
3. I have attached, as an exhibit, the CJA-20 which has a detailed accounting of the work performed for Mr. Ybarra. The details were noted contemporaneously, with the tasks performed.

Issues Raised by Case 4:16-CR-00523 -DC Document 129-1 .

Page 13 Asserts that I, as Defense Counsel was not allowed to raise evidence to support the defenses of Entrapment and Entrapment by Estoppel.

I was allowed to present evidence to support the Defense of Entrapment. One, Mr. Ybarra testified to the fact that he was asked by a friend to put these "buyers" together with drugs to sell to truck drivers. DEA agent Ruckman testified to the fact that Mr. Ybarra had declined the invitation to find cocaine and meth for the "buyers".

We raised the evidence of entrapment sufficiently to obtained an Jury Instruction on entrapment.

Mr. Ybarra's testimony weakened the defense of Entrapment. During many client conferences (Please reference attorney's CJA-20 time sheets) with Mr. Ybarra, he described being pressured by a childhood friend to allow a meth dealer to contact Mr. Ybarra to arrange for the meth seller to acquire meth to sell to truckers. On the witness stand in his own defense, Mr. Ybarra did not describe this sequence of events, but rather, that just thought it was a good idea.

Page 15 Failure to object to the Court's exclusion of evidence. Or to the Court's

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refusal to exclude evidence. I don't know what trial court rulings Mr. Ybarra refers to.

Page 16. The evidence of possession with intent to distribute the meth included: undercover police witnesses, additional drugs in his hand, to constitute possession. in hopes of avoidinal DEA witnesses who were on the scene, and Mr. Ybarra's own testimony.

Mr. Ybarra endeavored to avoid physically handling the methamphetamine, believing that he had to have the drugs in his hand, to constitute possession. Mr. Ybarra's previous attorney had given Mr. Ybarra copies of the applicable law of possession. I reiterated the applicable law.

Law enforcement witnesses and Mr. Ybarra testified that he put together the meth sale. He arranged to have meth brought to his buyers, who, as far as Mr. Ybarra knew at the time, were acquiring meth through him in order to sell it to truckers. ["Buyers" refers to Task Force Officers who set up the sting, whom Mr. Ybarra believed to be buyers.] These events were described in texts, recorded phone calls, personal conversations (recorded), and Mr. Ybarra's testimony.

Page 15. Mr. Ybarra and I invited AUSA Monty Kimball to meet with Mr. Ybarra, to re-convey the government's offer. This was by informed consent of Mr. Ybarra. Mr. Ybarra did not say anything to Mr. Kimball. Mr. Kimball was fairly aggressive in his exhortation that he was holding open the plea offer without enhancement. The re-conveyance of the offer was to let Mr. Ybarra know that, despite several acceptance deadlines having passed, the government was still offering an unenhanced charge. I consulted extensively with Mr. Ybarra about having Mr. Kimball meet with us.

Page 16. Evidence of Intent to Distribute. Mr. Ybarra himself testified to his actions which included distribution of the drugs. Our defense was an affirmative defense, acknowledging the drug sale, while asserting the defense of Entrapment.

Mr. Ybarra gathered the methamphetamine to be given to the [TFO] Buyers, and Ybarra was physically present for the exchange. He physically facilitated the exchange of money for methamphetamine.

Page 17. Judge Martinez allowed evidence in support of the Entrapment Defense. I was allowed to bring it up in opening statement, argue it in closing, and call both Mr. Ybarra to the stand, as well as Mr. Ybarra's probation officer.

A witness whom Mr. Ybarra believed would support his claim of pressure and duress, when interviewed, told me, quite vehemently, that there was no duress, no entrapment, and only voluntary actions of Mr. Ybarra. This was Mr. Ybarra's counselor. When I interviewed her about testifying to Mr. Ybarra's rehabilitation, in the context of the

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entrapment defense, she told me that Mr. Ybarra acted voluntarily and that "he is playing you [me]". I decided not to call her as a witness because she adamantly disbelieved the notion of Mr. Ybarra having been persuaded, unduly, by the Task Force or by a childhood friend of Ybarra's, who first approached Ybarra about helping some guys get meth to sell to truckers.

In Ms. Mata's place, I called Mr. Ybarra's probation officer, who gave very supportive, detailed, documentation of Mr. Ybarra's successful behavior on probation.

Pg. 18. The trial Judge allowed me to put on evidence of entrapment, sufficient to obtain a Jury instruction on entrapment. Without evidence to raise the defense of entrapment, I could not have obtained the Jury instruction. This was entrapment by surrogate, about which I conducted immense legal research.

Mr. Ybarra and I spent many hours talking about how the childhood friend had played on childhood loyalties, when asking Mr. Ybarra to talk with the Buyers looking for a meth supply, who turned out to be Task Force Officers. In client conferences, we delved into the special pull of childhood loyalties that propelled Mr. Ybarra to launch on this several month effort to help these men get methamphetamine. This special pull was to be the heart and soul of Mr. Ybarra's testimony. However, Mr. Ybarra's testimony about his reasons for agreeing to find drugs for the Buyers was devastating to his defense. He did not tell the jury about the childhood ties, the emotional pressure exerted by his friend. He answered vaguely about his reasons for trying to facilitate a meth (and cocaine) sale. His testimony undermined the viability of his defense of Entrapment.

Page. 19: The young woman who brought the methamphetamine to the sale point was Cece Crespín. There was no proof that she was an informant nor a cooperating witness. She was not arrested, but neither was Mr. Ybarra arrested at the scene of this methamphetamine sale. In fact, Mr. Ybarra continued to try to connect the Buyers with Methamphetamine. Had Crespín been working as a cooperating witness or confidential informant, the Government would have had a duty to reveal this. I filed the appropriate discovery motions to urge this duty. I investigated the whereabouts of Ms. Crespín and obtained a subpoena for her to testify. I hired a private process server, and neither of us could locate Ms. Crespín to serve the subpoena. She could not have been forced to testify to her involvement with the drug sale.

Mr. Ybarra believed that there was ample evidence of the communications and urgings of his childhood friend on Mr. Ybarra's cell phone. I moved the Court to allow me to hire an expert to make sure that I was getting everything on Mr. Ybarra's cell phone that was in the custody of the DEA. I received authorization, and the expert drove from Dallas to Alpine to dump and copy the phone. There were no calls or texts on that

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phone from or to the childhood friend. Whatever phone held those texts and calls was not in the custody of the DEA nor of Mr. Ybarra. Mr. Ybarra had given or sold the phone before being arrested.

The childhood friend was not a participant in the crime. His involvement ended when he persuaded Mr. Ybarra to take the calls from the Buyers, or to call the Buyers. The childhood friend had nothing else to do with Ybarra, nor with the events that unfolded, as Ybarra sought to obtain methamphetamine and cocaine for the Buyers, over a period of months. There were no communications between the childhood friend and Ybarra on the latter's cell phone.

Page 20: Again, Mr. Ybarra misapprehends the legal definition of Possession.

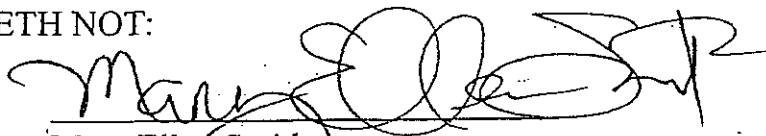
Page 20: There was one police report. I don't usually submit police reports to the jury. They harm the defense.

Page 21. Grand Jury Transcripts. There were no Grand Jury Transcripts. I told Mr. Ybarra this. According to AUSA Monty Kimball, and e testified, after qualifying as an expert witness, to the lab work and the findings, include quantity and chemical analysis (purity). Part of the affirmative defense of Entrapment fairly regular practice in this Division, the Grand Jury testimony was not recorded.

Chain of Custody: The chain of custody was properly demonstrated and attested to. The chemist who handled the methamphetamine testified, after qualifying as an expert witness, to the lab work and the findings, include quantity and chemical analysis (purity).

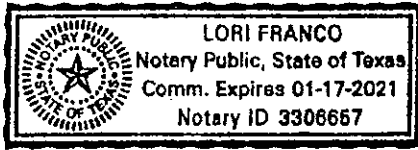
Grand Jury Transcript. There was no transcript nor recording of the Grand Jury testimony. This is fairly regular practice in this Division, that the Grand Jury testimony not be recorded.

FURTHER AFFIANT SAYETH NOT:

  
Mary Ellen Smith

APPENDIX B

Subscribed and sworn to or affirmed before me on this 7<sup>th</sup> day of May, 2020.



Signature of Notary Public

*Lori Franco*