20-5465

NO. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

In Re Francisco Felix

_____PETITIONER
(Your Name)

-V-

United States of America
_____RESPONDENT

ON PETITION FOR A WRIT OF PROHIBITION PURSUANT TO ALL WRITS ACT 28 U.S.C. 1651, DIRECTED TO ASSOCIATE JUSTICE WITH SUPERVISORY CONTROL OVER THE NINTH CIRCUIT UNDER SUPREME COURT RULE 22-1.

UNITED COURT OF APPEALS FOR THE NINTH CIRCUIT
NAME OF COURT THAT RULED ON THE MERITS OF YOUR CASE

PETITION FOR A WRIT OF PROHIBITION

IN Re FRANCISCO FELIX

(Your Name)
FEDERAL CORRECTIONAL INSTITUTION

(Address)
P.O. BOX 3000
ANTHONY, NM/TX 88021

(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTIONS PRESENTED

(1)

WHETHER THE GOVERNMENT'S UNAVAILING DEFENSE OF THE INDEFENSIBLE, WITH RESPECT TO THE INDICTMENT, INADEQUATE JURY INSTRUCTIONS, AND THE CONSTRUCTIVE DENIAL OF COUNSEL WERE CLEARLY PREJUDICIAL TO FRANCISCO FELIX, WHICH BY ANY STANDARD OF REVIEW, THE COURT SHOULD ALSO FIND DEFENDANT'S COUNSEL HOPELESSLY DEFICIENT.

(2)

WHETHER PETITIONER FRANCISCO FELIX'S INVOCATION OF THE "ACTUAL INNOCENCE" AND THE "CAUSE AND PREJUDICE" DOCTRINES, ALLOWS THE SUPREME COURT TO ENTERTAIN ANY PROCEDURALLY DEFAULTED CLAIMS PRESENTED BY FRANCISCO FELIX.

(3)

WHETHER BY REASON OF THE NUMEROUS CONSTITUTIONAL VIOLATIONS COMMITTED BY THE DISTRICT COURT, IT EFFECTIVELY LOST SUBJECT MATTER JURISDICTION UNDER THE POWERS GRANTED IT BY CONGRESS PURSUANT TO 28 U.S.C.. 3231 TO TRY FRANCISCO FELIX.

LIST OF PARTIES

In Re Francisco Felix

-V-

United States of America

The names of all parties appear in the caption of the case on the cover page. There are no additional parties.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix ______ to the petition and is

[ ] reported at ______________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[✓] reported at Judgment and Commitment Order; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______________________________ court appears at Appendix ______ to the petition and is

[ ] reported at ______________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

STATEMENT OF JURISDICTION

The Supreme Court of t he United States has original jurisdiction over three categories of cases. First, the Supreme Court can exercise original jurisdiction over "actions proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties," See, Maryland v. Louisiana, 451 U.S., 725, 737 (1981). Second, the Supreme court also possesses original jurisdiction for "(all) controversies between the United states and a State." 28 U.S.C. Section 1251 (b)(2). Finally, Section 1251 provides for original jurisdiction in the Supreme Court for "all actions or proceedings by a state against the citizens of another state or against aliens." See, e.g. Oregon v. Mitchell,, 400 U.S. 112 (1970); United States v. Louisiana, 339 U.S. 699 (1951); United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeals" and "certiorari" as vehicles for appellate review of the decisions of sate and lower federal courts. where the statute provides for "appeal" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the state provides for review by "writ of certiorari "the Court has complete discretion to hear the matter.

The Court takes the case if there are four votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review virtually eliminated. Now almost all cases to the supreme court by writ of certiorari. Pub.. L. No. 100-352, 102 Seat, 662 (1988).

WRIT OF PROHIBITION PURSUANT TO 28 U.S.C. SECTION 1651(a) IN AID OF THE SUPREME COURT'S JURISDICTION.

(A) The Supreme Court and all courts established in aid of their respective jurisdiction and agreeable to the usages and principles of law.

(B) An alternative writ or rule may be issued by a Justice (Chief Justice) to whom an application to a writ of prohibition is submitted may refer to the Court for determination.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was JANUARY 22, 2020

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In conducting harmless error analysis of constitutional violations, including direct appeals and especially habeas generally, the Supreme Court repeatedly has reaffirmed that "(some constitutional violations ...by their very nature are so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Satterwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999) ("We have recognized a limited class of fundamental constitutional errors that defy analysis by "harmless error," standards"...Errors of this type are so intrinsically harmful as to require automatic reversal(i.e. affect substantial rights) without regard to their effect on the outcome.")

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993))"Although most constitutional errors have been held to harmless error analysis, some will always invalidate the conviction" (citations omitted), Id. at 183 (Rehnquist, C.J. concurring); United States v. Olano, 507 U.S. 725, 735 (1993); Jose V. Clark, 478 U.S.. 570, 577-78 (1986) ("some constitutional errors require reversal without regard to the evidence in the particular=r case...because they render a trial fundamentally unfair");

Vasquez v. Hillery, 474 U.S. 254, 283-264 (1986); Chapman v. California, 386 U.S. 18, 23 (1967) ("there are =some constitutional rights so basic to a fair FORMAL that their infraction can never be treated as harmless error ").

JUDICIAL NOTICE/STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 OF THE FEDERAL RULES OF EVIDENCE.

The right to effective assistance of counsel. See, Kyle's v. Whitley, 514 U.S. at 435- 436; United States v. Cronic, 466 U.S. 648, 654-57 (1984); Hill v. Lockhart, 28 832, 839 (8th Cir. 1994)("It is unnecessary to add a separate layer of harmless-error analysis to bar evaluation of whether a petitioner has presented a constitutionally significant claim for ineffective assistance of counsel).

LAW RELATED TO STRUCTURAL ERROR

Included in the rights granted by the U.S. constitution, is the protection against prosecutorial suppression or manipulation of exculpatory evidence and the prosecutorial and judicial failures that amount to fraud upon the court. Failure to make available to defendant's counsel, information that could well lead to the assertion of an affirmative defense is material, when 'materiality' is defined as at least a 'reasonable probability that has the evidence been disclosed to the defense, the result of the judicial proceedings would have been different. Kyles v. Whitley, 514 U.S. at 435 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion); Id. at 685 (White, J. concurring in judgment)). Counsel impermissibly withheld evidence of strictissimi juris).

In addition to Bagley which addresses claims of prosecutorial suppression of evidence, the decisions listed below, all arising in 'what might be loosely be called the area of constitutionally guaranteed access to evidence," Arizona v. Youngblood, 488 U.S. 51`, 55 (1988)(quoting U..S. v. Valenzula-Bernal, 458 U.S. 856, 867 (1982) or require proof of "materiality" or prejudice.

The standard of materiality adopted in each case is not always clear, but if that standard required at least a "reasonable probability" of a different outcome, its satisfaction also automatically satisfies the Utrecht harmless error rule. See, e.g. Arizona v. Youngblood, supra at 55 (recognizing the due process violation based on state's loss or destruction before trail of material evidence); Pennsylvania v. Ritchie, 480 U.S. 39, 57-58 (1987)(recognizing due process violation bases on state agency's refusal to turn over material social services records' "information is material" if it "probably would have changed the outcome of his trial "citing United States v. Bagley, supra at 685 (White, J. concurring in judgement).

Ake v. Oklahoma, 470 U.S. 68, 83 (1985)(denial of access by indigent defendant to expert psychiatrist violates Due Process Clause when defendant's mental condition is "significant factor" at guilt-innocence or capital sentencing phase of trial); California v. Trombetta, 467 U.S. 479, 489-90 (1984)(destruction of blood samples might violate Due Process Clause, if there were more than slim chance evidence would affect outcome of trial and if there was no alternative means of demonstrating innocence.)United States v. Valenzuaela-Bernal, supra at 873-874 ("As in other cases concerning the loss (by states or government of material evidence, sanctions will be warranted for deportation of alien witness only if there is a reasonable likelihood that the testimony could have affected the judgment of the Trier of Fact. "Chambers v. Mississippi, 40 U.S.. 284, 302 (1973)(evidentiary process."); Washington v. Texas, 388 U.S. 14, 16 (1967)(violation of Compulsory Process Clause when it arbitrarily deprived defendant of "testimony (that) would have been relevant and material, and ...vital to his defense.").

STATEMENT OF CASE

In 2018, Francisco Felix was tried and convicted in the United States District court, Eastern District of California, Sacramento, for possession and distribution of marijuana. At the outset of the trial, during opening statement, the government loudly and proudly with audacity told the jury that, of the six defendants standing trial, on Francisco Felix was being prosecuted. The other defendants the members of the jury were quick to find out were offered gratuities, such as permanent residence, sums of money ranging from $85,000 to $230,000 for was clearly their efforts in collaboration with government Agents to entrap Francisco Felix.

Francisco Felix's believes his equal protection rights were violated by reason of his co-defendants who were similarly situated in the criminal enterprise were merely present in court for the sole purpose of helping the government convict Francisco Felix, as evidenced by pronouncements during the Government's opening and closing arguments. This case is a clear unvarnished example of malicious or vindictive prosecution and judicial activism.

REASONS FOR GRANTING

As a threshold matter, Francisco Felix avers the Writ of Prohibition which he is applying for, is an extraordinary Writ under the All Writs Act pursuant to 28 U.S.C. 1651(a) which in pertinent part states that, all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions, and agreeable to the usages and principles of law." As herem the traditional use of the Writ of prohibition is clerly in aid of appelation jurisdicion both at common lawand in the federal courts. In dsdition, he writ has been involed to confine the court(s) agaisnt which the writ is sought to a lawful exercise of its prescribed jurisdiction. "Roche v. Evaporated Milk Assn; 319 U.S. 21, 26, 87 L.Ed 1185.

In the case at bar, Francisco Felix contends that what he seeks is a "drastic and extraordinary remedy "reserved for really extraordinary causes, such as his where he avers the Writ of Prohibition is a safety valve for promptly correcting serious errors. These errors are so exceptional that they amount to Judicial usurpation of power and a clear abuse of discretion, justifying the invocation of the extraordinary remedy of Mandamus or Prohibition. Francisco Felix's claims meet the high threshold buttressing his right to the writ, not only because it's a stain on the administration of justice in the Ninth Circuit, but contempt for the law, which infecting and undermining irredeemably Ninth Circuit jurisprudence

Firstly, Judicial Activism with respect to the Ninth Circuit Pattern instruction on stipulation. See, Appendix 1- Exhibit 1 - Document filed 07/22/18, LINE 15-25.

> THE COURT: I like my instructions the way they are stipulated.
>
> MR. BECKWITH: Your Honor, I would...I think the pattern, because they play a role in this case ---and we're not disputing what he just said. some of them are foundational, and also, some of them are, for example plant count.
>
> THE COURT: No, not all your stipulations were that somebody would testify something. There were a number of stipulations that just stipulated to facts. Anyway, I'm happy with the way they are.
>
> MR. KAPLAN: Thank you, your Honor.
>
> MR. BECKWITH: Your Honor, we would just ask that you would ask the one pattern instruction.
>
> THE COURT: No, I think the Ninth Circuit is just flat-out wrong on that. Okay? Go tell them that.
>
> MR. BECKWITH: All right.
>
> THE COURT: The burden of proof is always on the government. if you put a thousand witnesses on the stand, the jury is free to disbelieve those thousand witnesses.
>
> MR. BECKWITH: Absolutely, your Honor.
>
> THE COURT: And if you put a stipulation in, the jury is free to disregard ---not disregard it, to not believe it is. That's the way the law is. If the the Ninth Circuit says otherwise, they are just plain flat put wrong. Tell them that. Okay, your Honor.

The District Court Judge is not willing to play by the rules. Whether Government Prosecutor acceded to the Judge's request for him to be the harbinger of 'Judicial Activism' remains a matter for speculation. Go "tell the Ninth Circuit, they are flat wrong, Not once, but twice did the Hon. Judge disabuse the authority of the Ninth Circuit, proclaiming they are flat wrong. An act

synonymous with a frontal attack on the entire Ninth Circuit of Appeals.

In conducting harmless error analysis of constitutional violations, the Supreme Court repeatedly has reaffirmed that "(s)ome constitutional violations...by their vary nature cast so much doubt on the fairness of the trial process that, s a matter of law can never be considered harmless. Safferwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999)("we have recognized a limited class of fundamental constitutional errors that defy analysis by "harmless error," standards"...Errors of this type are so intrinsically harmful as to require automatic reversal (i.e. affect substantial rights) without regard to their effect on the outcome.").

The district Judge's action also constitutes a flagrant example of the usurpation of judicial power. Francisco Felix avers that the district court's refusal to give an accurate instruction is reversible if it impairs the defendant's theory (as it did) of the case and is not covered adequately by the instruction given. Newcomb, 6 F.3d at 1132 (citing United States v. Williams F.2d 1504, 1512 (6th Cir. 2001).

Included in the definition of structural is the right to an impartial judge, i.e. the right to a judge who follows the constitution and Supreme court precedent ad upholds the oath of the office. Judge Schubb by his unprovoked attack on the Ninth Circuit, shows he does not respect the Ninth Circuit, and by implication the Constitution. See, e.g.. Neder v. United States, supra, 527 U.S. at 8. (biased trial judge is "structural error" and this is subject to automatic reversal); Edwards v. Balisok, 520 U.S. 461, 468 (1997); Sullivan v. ;Louisiana, 508 U.S. at 279; Rose v. Clark, 478 U.S. 570, 577-78 (1986); Tunney v. Ohio, 273 U.S. 510, 523 (1927).

Francisco Felix further contends as the Questions Presented in this Petition that errors ,made by the court and the government also participating are so egregious as infect the entire proceedings. As it stands, Francisco Felix has no other means of getting relief. Continuing the litigation as it did was an exercise in futility.

Based on the issues raided in the petition his entitlement to the writ is clear and undisputed. Since a panel of the Ninth Circuit, in a shocking display of rubberstamping the district court's abuse of discretion was not satisfied Francisco Felix was entitled to relief. See, "LAW RELATED TO STRUCTURAL ERROR" in this brief under Constitutional and Statutory provisions.

In conclusion, the supreme Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrassing the executive arm of the government. "Ex Parte Peru, 318 U.S. 578, 588, 87 L.Ed 1014, 63 S.Ct. 793 (19430, or result in the "intrusion by the federal judiciary on a delicate area f federal state relations. "Will, supra at 95, 19 L.Ed.2d 305, 88 S.Ct. 269 (citing Maryland v. Soper (No. 1), 270 U.S. 9, 70 L.Ed.2d 305, 88 S.Ct. 269)citing Maryland v. Soper (No. 1), 270 U.S. 9, 70 L.Ed 449, 46 S.Ct. 185 (1926).

WHETHER THE GOVERNMENT'S UNAVAILING DEFENSE OF THE INDEFENSIBLE WITH RESPECT TO THE INDICTMENT, INADEQUATE JURY INSTRUCTIONS, AND THE CONSTRUCTIVE DENIAL OF COUNSEL, WERE CLEARLY PREJUDICIAL TO FELIX, FOR WHICH BY ANY STANDARD OF REVIEW, THE COURT SHOULD FIND DEFENDANT'S COUNSEL'S PERFORMANCE HOPELESSLY DEFICIENT, BORDERING ON CONSTRUCTIVE DENIAL OF COUNSEL.

STANDARD OF REVIEW AND LEGAL ANALYSIS

The Sixth Amendment right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 McMinn (1970). The benchmark for judging any claim of ineffective assistance of counsel, however, is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Strickland v. Washington, 466 U.S. 668, 688 (1984); also, Boykin v., Wainwright, 737 F .2d 1539, 1542 (11th Cir. 1984).

Because a lawyer is presumed to be competent to assist a defendant, the burden is not on the accused to demonstrate the denial of the effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 658 (1984). Ineffectiveness of counsel may be grounds for vacating conviction if;

(1) counsel's performance fell below an objective standard of reasonable assistance and;

(2) the defendant was prejudiced by the deficient performance. Strickland, 466 U.S. at 687, 694. "There is no reason for a court deciding an ineffective assistance claim...to address both components of the inquiry if the defendant makes an insufficient showing on one. "Strickland, 466 U.S. at 697.

Thus, if the defendant fails to show that he is prejudiced by the alleged error of counsel, this court may reject the defendant's claim without determining counsel was deficient. See Coulter v. Herring, 60 F .3d 1499, 1504 n.8 (11th Cir.). For performance to be deficient, it must be established that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. "Strickland, 466 U.S. at 690.

In other words, when reviewing counsel's decisions, "the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled. "Chandler v. United States, 218 F .3d 1305, 131 (11th Cir. 2000) (en banc) (quoting Burger v. Kemp, 483 U.S. 776 (1987), cert denied, 531 U.S. 1204 (2001).

Furthermore, "(t)he burden of persuasion is on a petitioner to prove, by a preponderance of the evidence, that counsel's performance was reasonable. "Id. (citing Strickland, 466 U.S. at 688). The burned of persuasion, though not insurmountable, is a heavy one. See Id. At 1314 (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). "Judicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge (the) strong presumption "that counsel's performance was reasonable, and the counsel made all significant decisions in the exercise of reasonable professional judgment. "Id. (quoting Strickland, 466 U.S. at 689-90). Therefore, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken "might be considered sound trial strategy. "Id. (quoting Darden v. Wainwright, 477 U.S. 168 (1986).

If the record is incomplete or unclear about counsel's actions, then it is presumed that counsel exercised reasonable professional judgment. See Id. at 1314-15 n. 15. Thus, the presumption afforded counsel's performance 'is not... that the particular defense lawyer in reality focused on and, then deliberately decided to do or not to do a specific act." Id. Rather, the presumption is "that what the particular defense lawyer did at trial...were acts that some reasonable lawyers might do. "Id. Moreover, "(t)he reasonableness of a counsel's performance is an objective inquiry. "Id. at 1315. For a petitioner to show deficient performance, he "must establish that no competent counsel would have taken the action that his counsel did take." Id.

To uphold a lawyer's strategy, a court "need not attempt to divine the lawyer's mental processes underlying the strategy." Id. at 1315 n. 1 6. Finally, "(n)o absolute rules dictate what is reasonable performance for lawyers." Id. at 1317.

Further, counsel does not provide ineffective assistance when frivolous arguments are not raised on appeal. Jones v. Barnes, 463 U.S. 745 (1983); see also United States v. Winfield, 960 F .2d 970, 974 (11th Cir. 1992) (attorney not ineffective for ailing to argue a meritless issue).

American Bar association standards are to be used only as "guides" in reviewing whether an attorney's performance is reasonable, reversing a finding of deficient performance where the lower court treated the ABA standards as "inexorable commands that attorney's must "fully comply with," United States v. Mooney, 497 F .3d 397, 404 (4th Cir. 2007) (counsel in criminal cases are charged with the responsibility of conducting appropriate investigations, both factual and legal, to determine if matters of defense can be developed).

The critical issue is whether, applying prevailing professional norms, trial counsel conducted an objectively reasonable investigation to mitigating evidence. Potter v. McCallum, 558 U.S. 30, 40, 130 S. Ct. 447,452-53, 175 L. Ed. 2d 398 (2009); Kramer v. Kemna, 21 F .3d 305, 309 (8th Cir. 1994) (failure to interview witnesses or discovering mitigating evidence may be a basis for finding ineffective assistance of counsel)," Hart v. Gomez, 174 F .3d 1067, 1070 (9th Cir. 1996) (a lawyer who fails adequately doubt as to that question to undermine confidence in the verdict, renders deficient performance)."

CONSTRUCTIVE DENIAL OF COUNSEL. - STANDARDS AND ARGUMENT

In United States v. Cronic, 466 U.S. 648, 658-59, 80 L. Ed.2d 757 (1984, the Supreme court held that "presumption of prejudice applied when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing, where counsel is actually or constructively denied during a critical stage of the proceedings, or when there are "various kinds of state interference with counsel's assistance").

Right from the outset, Counsel did not only have an effective trial strategy, he did not present one to the court and have the latter have a jury instruction based on the facts of the case, from the defense standpoint. This amounts to a violation of Francisco Felix's Fifth and Sixth Amendment violations of due process. Kaplan should heave filed a pre-trial motion to dismiss the case a clear case of Vindictive or Selective prosecution.

To put it bluntly, FELIX was looking for an effective F. Lee Bailey type aggressive lawyer, what he got was Barnum and Bailey travesty of a defense. A comedy of errors, amongst which are (a) instructional error. (b) Lack of a Pinkerton instruction. (c) Failure to give a correct 'Reasonable Doubt" instruction, not to mention Government Misconduct outside of the grand jury indictment. In point of fact, Counsel was no more than a coat hanger for the Government to hang its jacket. Counsel Henry was a sparring partner, unwilling to throw hard punches at the government, following a well scripted strategy where he gave a semblance of effective representation, without throwing any hard punches at the government's case. Most of Counsel's mishaps happened during critical aspects of the trial including at sentencing.

AN ABUNDANCE OF TRIAL RELATED PREJUDICE WITH RESPECT TO COUNSELS' REPRESENTATION

The Third Circuit in United States v. Kaufman, 109 F .3d 186, 191 (3d. Cir. 1997), also has that, in the context of a claim that counsel failed to subject the government's case to "strict adversarial testing" as required by Strickland v. Washington, (citations omitted), to counsel the defendant as to the actual sentence he faces, prejudice is demonstrated by showing that the result of the judicial proceeding would have been different.

APPLICABLE LAW TO CLAIMS THAT NEGATES COUNSELS NOTION OF NON-FRIVOLOUS ISSUE.

Despite the Government's equivocation that David Lopez's counsel was ineffective, generally, claims of ineffective assistance of counsel are analyzed pursuant to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed .2d 674 (1984). In order to prevail on such a claim, Movant must show;

(1) deficient performance-counsel's performance fell below the unprofessional errors; the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 687-88, 684; see also United States v. Thornton, 23 F .3d 1532, 1533 (9th Cir. 1994) (per curiam); and United States v. Solomon, 795 F .2d 747, 749 (9th Cir. 1986).

WHAT CONSTITUTES A REASONABLE PROBABILITY IN THE CONTEXT OF FELIX'S JUDICIAL PROCEEDINGS.

The Circuits have all been very vocal on this issue. In Ward v. Dretke, 420 F .3d 479, 487 (5th Cir. 2005). The court held (prejudice inquiry where defendant claims that the outcome of the judicial proceedings would have been different has counsel not made the egregious errors); See also Trottie v. Stephens, 720 F .3d 231, 251 (5th Cir. 2013) (materiality exists if there is "a reasonable probability that, had the evidence (Double Jeopardy) been disclosed to the defense, the result of the proceeding would have been different."). The following constitutes the nucleus of several courts' holding on the subject.

Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674 (1984) (a "reasonable probability sufficient to undermine confidence in the outcome). Nix v. Whiteside, 475 U.S. 157, 175, 89 L. Ed. 2d 123 (1986) (reasonable probability standard less demanding than preponderance standard). Porter v. McCollum, 558 U.S. 30, 175 L. Ed. 2d 409 (2009) ("We do not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding" is a probability sufficient to undermine the outcome of his penalty proceeding."); Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 170, 131 S. Ct. 1388, 1403, 179 L. Ed. 2d 557 (2011) ("A reasonable probability" is a probability sufficient to undermine confidence in the outcome."). Ferrara v. United States, 456 F .3d 278, 294 (1st Cir. 2006) (a "reasonable probability" is a probability sufficient to undermine confidence in the outcome); Kiruvan v. Spencer, 631 F .3d 582, 591 (1st. Cir. 2011) ("reasonable probability" test does not require showing the proceeding would have actually been different); Gonzalez v. United States, 722 F .3d 118, 130 (2d. Cir. 2013) (there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different); Baker v. Barbo, ("reasonable probability" test is not stringent one); United States v. Smith, 497 Fed. App'x 269, 272 (4th Cir. 2012).

COUNSEL FAILED TO RAISE THE ISSUE OF THE COURT NOT GIVING THE JURY AN INSTRUCTION THAT THE GOVERNMENT HAD TO PROVE ITS CASE BEYOND A REASONABLE DOUBT.

FAILURE OF THE DISTRICT COURT TO GIVE A PINKERTON JURY INSTRUCTION WAS PREJUDICIAL TO FELIX. In United States v, Rios, 636 F.3d 168, 171 (5th Cir. 2011), the Fifth Circuit held that, a district court's failure to give certain instructions to the jury is reviewed for an abuse of discretion. David Lopez avers that the referenced Pinkerton instruction that is district court failed to give is stated hereunder;

> "A conspirator is responsible for offenses committed by another (other) conspirator(s) if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy.
>
> Therefore, if you have first found the defendant guilty of the conspiracy charged in Count ( )a and if you find beyond a reasonable doubt that during the time defendant was a member of the conspiracy, another (other) conspiracy(s) committed the offense(s) in Count(s)( )in furtherance of and as a foreseeable consequence of that conspiracy, then you may find the defendant guilty of Count(s) ( ), even though the defendant may not have participant in any of the acts which constitute the offense(s) described in Count(s)( ).

5th Cir. Crim. Jury Instruction 2.17 (2015). See United States v. Thomas, 348 F.3d 78, 84-85 (5th Cir. 2003). David Lopez further avers that a corollary of the Pinkerton Liability "(E)ach conspiracy may be held criminally culpable for substantive offenses committed by the conspiracy of which he is a member while he is a member." United States v. Garcia, 917 F.3d 1370, 1377 (5th Cir. 1990), citing United States v. Basey, 816 F.2d 980, 997 (5th Cir. 1987).

Because of a lack of jury instruction on the Pinkerton Liability, the District Court abused its discretion, and by rubberstamping this abuse of discretion, the Fifth Circuit Court of Appeals was complicit. Further, failure of David Lopez's counsel to request a specific intent instruction, etc, aggravated an already constitutionally untenable state of affairs. See 3:16-cr-00896-PRM Document 236 Filed 12/05/19 Last two pages of Page 12 of 23 to Page 13 of 23 where the government struggles to justify the unjustifiable.

> "Movant was not entitled to a Pinkerton instruction and Movant' attorney was not ineffective for failing to request one. Hypothetically there is no guarantee that the instruction would have been granted by the court even if Movant's attorney had requested a Pinkerton instruction...."

Poor logic, advocacy for judicial activism and jurisprudential alchemy, would be kind and generous epithets to describe the government's defense with respect to this issue.

In sum, the district court, allied with the Court of Appeals for the Fifth Circuit, in this case, failed to perform an absolute duty as a matter of law, as distinct from other types of acts that may be a matter of the lower court's discretion. For this reason alone David Lopez should be granted the writ. He has no other vehicle of getting relief, because the above issues not only have to be addressed now, but are cognizable under application, for a Writ of Prohibition, which is directed to the Associate Justice in charge of the Fifth Circuit, to right this egregious wrong. "Under the doctrine of procedural default, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a section 2255 proceeding." Mackay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011) (internal citations omitted).

Thus, Felix is invoking the use of the Writ of Prohibition because his situation is extraordinary, which other judicial remedies at this time would be inadequate to redress. See, 9 F. Supp. 422, 423. It is an emergency situation that only an extraordinary writ can address. 74 P. 695, 501.

David Lopez further avers that, this Honorable Court in the exercise of its discretion, must be satisfied that the merit is appropriate under the circumstances. Kerr, supra, at 403, 48 L.Ed.2d 725, 96 S.Ct. 2119 (citing Schlagenhauf v. Holder, 379 U.S. 104, 112 n8, 13 L.Ed.2d 152, 85 S.Ct. 234 (1964).

WHETHER FELIX'S INVOCATION OF 'ACTUAL INNOCENCE' AND THE CAUSE AND PREJUDICE DOCTRINE ALLOWS THE SUPREME COURT TO ENTERTAIN ANY PROCEDURALLY DEFAULTED CLAIMS NOT RAISED IN HIS DIRECT APPEAL.

is raising the doctrine of cause and prejudice doctrine to demonstrate why he did not raise the issues of 'constructive amendment of his indictment,' 'constructive denial of counsel' and a defective indictment in his direct appeal. In Shaid, 937 F.2d at 232, the Fifth circuit stated;

> "A defendant must meet this cause and actual prejudice test even when he alleges a fundamental error. "Murray v. Carrier, 477 U.S. 478, 493, 106 S.Ct. 2639, 2468, 91 L.Ed..2d 397 (1986) (applying the test of fundamental defects affecting the court's truth finding function). The court has held that cause and prejudice standard apples to inadvertent attorney errors as well as deliberate tactical decisions. Smith v. Murray, 477 U.S. 527, 533 106 S.Ct. 2661, 2665, 91 L.Ed.2d 434 (1986); to racial discrimination in the composition of of the grand jury. Davis v. United States, 411 U.S. 233, 242-45, 93 S.Ct. 1577, 1582-84, 36 L.Ed.2d 216 (1973); and to claims that may affect the truth finding function of the trial. Engle v. Isaac, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982). The Court recently demonstrated its continued commitment to this test by requiring its use in the context of abuse of the writ. McClesky v Zant, 499 U.S. 467, 111 S.Ct. 1454, 1468-71, 113 L.Ed.2d 517 (1991).

Id. The Fifth Circuit has made it clear that the movant must demonstrate both cause and prejudice. Shaid, 937 F.2d at 232-236. If the movant does not meet this burden of showing cause and prejudice, he is procedurally barred from attacking his conviction. United States v. Drobny, 955 F.2d, 900, 994-995 (5th Cir. 1992). To re-iterate, the issues raised in this application for the writ of prohibition, utilizing Rule 22-1 of the Supreme Court Rules is predicted on both ineffective of trial and appellate counsel who were derelict in subjecting the government's case, to strict adversarial testing.

PETITIONER'S PROFFER OF ACTUAL INNOCENCE.

In four cases, the Supreme Court has elaborated the meaning of actual innocence. In Sawyer v. Whitley, (citations omitted) the issue of what actual innocence meant in the context of challenging a sentence. Petitioner invokes Herrera v. Collins (citations omitted) for the proposition that "actual innocence itself is not a constitutional claim, but a gateway through which a habeas petitioner, must pass to have his otherwise barred constitutional claims considered on the merits."506 U.S. 390, 404 (1993).

Following Herrera v. Collins, the Court decided Schlup v. Delo, (citations omitted). The court held, to prove actual innocence, a habeas petitioner must show there was a constitutional violation that "probably resulted" in the conviction of one who is actually innocent. 513 U.S. 298, 327 (1995) as in the case at bar.

In House v. Bell, (citations omitted), the Supreme Court found that the requirements for showing actual innocence were met to allow a procedurally defaulted claim of ineffective assistance of counsel to be added. 547 U.S. 518 (2006). Thus, petitioner contends, he was prejudiced pursuant to United States v. Frady, where the Supreme Court indicated that "prejudice" could be demonstrated by showing that the results in the case likely would have been different absent the complained of violation of the constitution or federal law.

These errors would be to petitioner's actual and substantial disadvantage, infecting the entire judicial proceedings with errors of constitutional dimensions, 456 U.S. at 170 (emphasis in original). The results would have been different, but for the violation of federal law. See also Murray v. Carrier, 477 U.S. 478, 496 (1986). Strickler v. Greene, 527 U.S. 253 (1993).

ABUSE OF DISCRETION BY THE DISTRICT COURT BY CONTINUING THE JUDICIAL PROCEEDINGS WHEN IT BECAME APPARENT THAT AFTER THE GOVERNMENT RESTED ITS CASE, THE EGREGIOUS ERRORS IMPLICATING THE INDICTMENT, CONSTRUCTIVE DENIAL OF COUNSEL ETC, IT HAD LOST SUBJECT MATTER JURISDICTION, AN ISSUE PARAMOUNT TO PETITIONER'S CLAIM OF ACTUAL INNOCENCE.

Article 3, Section 2, of the United States constitution states, in pertinent part that 'United States District Courts have only such jurisdiction as is conferred by an Act of Congress under the Constitution. See, 28 U.S.C.A. 1344)(Hubbard v. Ammerman, 465 2d 1169 (5th Cir. 1972)(head note 2. Courts).

Petitioner avers that 'The United States District Courts are not courts of general jurisdiction. They have no jurisdiction except as prescribed by Congress pursuant to Article 111 of the Constitution, (many cites omitted)

Graves v. Snead, 541 F.2d 159 (6th Cir. 1876)

The question of jurisdiction in the court either over the person, the subject-matter or place where the crimes was committed can be raised at any time in the proceeding. It is never presumed, but must always be proved, and it is never waived by the defendant.

U.S. v. Rogers, 23 F.658 (D.C. Ark. 1885)

In a criminal proceeding, lack of subject matter jurisdiction cannot be waived and may be asserted at any time by collateral attack.

U.S. v. Gernie, 228 F. Supp. 329 (D.C.N.Y. 1964).

Jurisdiction of court can be challenged after the conviction by judgment by way of a writ of habeas corpus.

Mookini et al. v. U.S. 303 U.S. U.S. 201 (1936).
(emphasis added)

The words 'district court' of the United States commonly describe constitutional courts created by Congress under Article 111 of the constitution and not territorial courts.

In Longshoremen's and Warehousemen's Union et al v. Wiirtz, 170 F.2d 183 (9th Cir. 1948)
(head note 1)
(emphasis added)

Peersonette v. Kennedy (In re Midgard Corp.) 204 B.R. 764, 768 (10th Cir. 1997)(order is final under collateral order doctrine, if it;

(1) conclusively determines a disputed question completely separate from the merits of the action;

(2) is effectively unreviewable on appeal from any final judgment, and;

(3) is too important to be denied review.

Pierce v. Underwood, 487 U.S. 552, 558, 108 S.Ct. 2541, 101 L.Ed.2 490 (1988), Fowler v. Bros. v. In re: Young, 91 F.3d 1367, 1370 (10th Cir. 1996)

Slave Regina College v. Russell, 490 U.S. 225, 238, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991)

Las Vegas Ice & Cold Storage Co. v. Far W. Bank, 893 F.2d 1182, 1185 (10th Cir. 1990)(quoting LeMaire v. United States, 826 F.2d 949, 953 (10th Cir. 1991).

Moothart v. Bell, 21 F.3d 1499, 1504, (10th Cir. 1994)(quoting McEwan v. City of Norman, 926 F.2d 1539, 1553-54 (10th Cir. 2005)(appellate court reviews trial court's decision on post judgment for abuse of discretion). Warfield v. Allied Signal Holdings, Inc, 267 F.3d 538, 542 (6th Cir. 2001)(courts have discretion to set aside voluntary dismissal with prejudice, if it was not a "free, calculated, and deliberate choice).Hackett v. Barnhart, 475 F.3d 1166, 1172 (10th Cir. 2007)(quoting Kiowa's Indian Tribe of Oklahoma v. Hoover, 150 F.3d 1163, 1165 (10th Cir. 1998). In re Graves, 609 F.3d 1153, 1156 (10th Cir. 2010).

See Braunstein v. McCabe, 571 F.3d 108, 120 (1st. Cir. 2009)(....)The Court of Appeals could reach merits of the case in other to determine jurisdiction, though claim found to authorize appeal.

United States v. Ruiz, 536 U.S. 622 (2002). A federal court has jurisdiction to determine its own jurisdiction.

Marine-Debjorgnez v. Ashcroft, 365 F.3d 510, 516 (8th Cir. 2002)(Court of Appeals could reach merits of case to determine legality of sentence for jurisdiction).

Petitioner's case also implicates Will v. United States, 389 U.S. 90, 19 L.Ed.2d 305, 885 S.Ct. 269 (1967), where the Supreme Court on the same language utilized in cases like Labuy, that essentially laid the foundation of Justice Brennan's dissent.

WHETHER BY REASON OF THE NUMEROUS CONSTITUTIONAL VIOLATIONS COMMITTED BY THE DISTRICT COURT IT EFFECTIVELY LOST SUBJECT MATTER JURISDICTION AND THE POWERS GRANTED IT BY CONGRESS UNDER 28 U.S.C. 3231

The use of a petition for a Writ of Prohibition is well settled. It is patently clear from two Supreme Court cases in Dairy Queen Inc. v. Wood, 469 U.S. L.Ed.2d 44 825 S. Ct. 894 (1962), and Beacon Theaters v. Wood, 359 U.S. L.Ed.2d 988, 79 S. Ct. 948 (1959), support the use of the writ of Prohibition to correct an abuse of discretion by the district court. Personette v. Kennedy) In re Midgard Corp) 204 B.R. 764, 768 (10th Cir. 1997).

Like the case at bar, the following cases show that the district court "displayed a persistent disregard of the criminal and civil rules of procedure." Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir. 1994)(quoting McEwan v. City of Norman, 926 F.2d 1539, 1553-54 (10th Cir. 1991); Jennings v. Rivers, 394 F.3d 850, 854 (10th Cir. 2008)(appellate review of trial court's decision on post judgment se aide voluntary dismissal with prejudice if it was not "free, calculated and deliberate choice"). Hackett v. Barnhart, 475 F.3d 1166, 1172 (10th Cir. 2007) (quoting Kiowas Indian Tribe of Oklahoma v. Hoover, 150 F.3d 1163, 1165 (10th Cir. 1998). In re Graves, 609 F.3d 1153, 1156 (10th Cir. 2010); See Braunstein v. McCabe, 571 F.3d 108, 120 (1st Cir. 2009) (giving courts broad discretion in preventing injustice or fairness).

The real issue at stake in this case is one of subject matter jurisdiction. Subject matter jurisdiction also refers to the competency of the court to hear and determine a particular category of cases. Federal district courts have "limited" jurisdiction in that they have no such jurisdiction as is explicitly conferred by federal statute. 3231 et seq.

Thus, given the totality of the claims raised by David Lopez in this petition, he expects the Supreme Court to determine if the District Court and the Court of Appeals properly exercised the jurisdiction conferred on it by 28 U.S.C. 3231 and 28 U.S.C. Section 1291 respectively , and whether the constitutional prohibition against Double jeopardy, includes within it, the right of the defendant (but not the state) to plead 'collateral estoppel' and thereby preclude proof of some essential element of the state's case found in the defendant's favor.

FELIX'S CONTENTION THE ALLEGATIONS HE MAKES CONSTITUTE "EXCEPTIONAL CIRCUMSTANCES.'

David Lopez's indictment charged him, inter alia with possession with intent to distribute Marijuana, intent to distribute Marijuana, 21 U.S.C. Section 841(b) (1) (a), along with an 851 Notice to enhance sentence. Judicial notice should be taken with respect to Count 1. The identity of the defendant on the 851 Notice, was not Petitioner David Lopez. The name was the same, but the nationality, age, and date of birth were markedly and significantly different, rendering count 1, on its face, insufficient and defective. Additionally, he proof of the offense conduct during trial, demonstrate that there was yet another fatal error in Count 2, when his driver was arrested. The government failed to state, invoke or prove a constructive possession of the drugs.

When the charging terms of an indictment are changed after its return by either the trial judge or the prosecutor, a constructive amendment or fatal variance occurs. A constructive amendment such as occurred in David Lopez's case, is a more extreme form of variance and is prejudicial intrinsically, because it violates the Sixth Amendment and Fifth Amendment Grand Jury Clause, which guarantees an accused the right to be tried on the indictment returned by the grand jury. Williamson, Supra, United States v. Koen, 31 F.3d 722 (8th Cir. 1994); Fischer supra at 462; United States v. Roshko, 969 F.2d 1, 5 (2nd Cir. 1992)(prosecutor's trial presentation constructively amended the Possession with intent to distribute charge by expending its object); United States v. Kellar, 916 F.2d 628 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991)(trial judge rewrote the indictment to add new facts and theories; United states v. Leisure, 844 F.2d 1347 (8th Cir.)(reversed where judge instructed the jury on elements of crime different from the crime charged in the indictment), cert. denied, 488 U.S. 932 (1988).

David Lopez contends that the typical conspiracy count will recite that the defendant conspired with "others, both known and unknown" to commit a particular act..." Upon scrutiny by this Honorable Court, it will be abundantly clear they the following h=should invalidate David Lopez's sentence and conviction by reason of the following.

(1) ACTS OF CLEAR ERROR, MISTAKE OF LAW AND ABUSE OF DISCRETION. These errors were committed by the lower courts (Fifth Circuit Court of Appeals and District Court in Texas) that the Constitution and the Supreme Court consider to be ministerial acts that compels these lower courts, to the fulfillment of determining if jurisdiction lies to subject David Lopez to a lawful prosecution.

In relation to the facts, Felix contends because of the constructive denial of counsel, prosecutorial misconduct, and the validation of both, abuse of discretion a panel of the Fifth Circuit Court of appeals, judicial intervention by invocation of the Writ of Prohibition and Rule 22-1 of the Supreme Court Rules would be provident.

Through the Plain Error standard of review, the panel of the Fifth Circuit Court of Appeals should have discovered the legal infirmities present in the case.

CONCLUSION

In conducting harmless error analysis of constitutional violations, including direct appeals and especially habeas generally, the Supreme Court repeatedly has reaffirmed that "(some constitutional violations...by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they cannot be considered harmless. Safferwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999) ("We have recognized a limited class of fundamental constitutional errors that defy analysis by "harmless error" standards.'...Errors of this type are so intrinsically harmful as to require automatic reversal (i.e.. 'affect substantial rights') without regard to their effect on the outcome.") Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) ("Although most constitutional error have been held to harmless-error analysis, they will always invalidate the conviction "(citations omitted).

WHEREFORE, David Lopez respectfully moves this Honorable court to grant his application for a Writ of Prohibition.

Date: APRIL, 20 2020

Francisco Felix
Respectfully Submitted,

CONCLUSION

The petition for a writ of ~~certiorari~~ Prohibition should be granted.

Respectfully submitted,

Francisco Felix

Date: April 20, 2020