

DOCKET NUMBER \_\_\_\_\_

UNITED STATES SUPREME COURT  
SUPREME COURT OF THE UNITED STATES  
1 FIRST STREET N. E.  
WASHINGTON, ,DC 20543

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FREEMAN BERRY-----PETITIONER

VS

U.S. SOLICITOR GENERAL-----RESPONDENT

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PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS  
AUTHORIZED BY 28 U.S.C. 1651(a)

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FREEMAN BERRY, PRO-SE  
REG# 48405-019  
FEDERAL CORRECTIONAL INST.  
P.O. BOX 5000  
OAKDALE LA 71463

### QUESTIONS PRESENTED

1. Does the United States Government retain the inherent right to bind this Petitioner and other Defendants to a guilty plea contract it drafted containing an indictment that does not represent the Petitioner or Subject Matter purported to be the offense against the laws of the United States.
2. Do District Courts retain jurisdictional authority to convict a defendant when the plea agreement contract implicates a non-existent indictment.
3. Can District Court acceptance of a plea agreement contract with an indictment that fails to represent the Subject and Subject Matter violate the United States Constitution.

## CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 that have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Donald F. Samuel, Defendant's Trial Counsel  
Katherine Monahan, Prosecutor, US Assistant Attorney  
Richard W. Story, District Court Judge  
Mr. Baverman, Magistrate Court Judge  
Julie E. Carnes, District Court Judge

  
Freeman Berry, Pro Se

PETITION FOR AN EXTRAORDINARY WRIT AUTHORIZED BY 28 U.S.C. 1651(a)

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### JURISDICTION

The jurisdiction of this Court is justified under the All Writs Act under 28 U.S.C. 1651(a) where the issue points to an act done by a court not otherwise covered by statute. Thereby vesting this Court with residual authority.

The date the Order was issued is May 25, 2017, by the United States Court Of Appeals For the Eleventh Circuit. The Order is attached as exhibit A-3.

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WASHINGTON, DC 20543

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FREEMAN BERRY	)	
<u>PETITIONER</u>	)	
V.	)	UNITED STATES COURT OF APPEALS
	)	FOR THE ELEVENTH CIRCUIT
UNITED STATES COURT OF APPEALS	)	CASE NO: 17-15396-A
FOR THE ELEVENTH CIRCUIT	)	
SOLICITOR GENERAL, <u>RESPONDENT</u>	)	
	)	

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PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS  
AUTHORIZED BY 28 U.S.C. 1651(a)

Comes now Petitioner, Freeman Berry Pro-Se, and submit this **Petition for an Extraordinary Writ as authorized by 28 U.S.C. 1651(a)**. Petitioner recognizes that this Writ is not a matter of right but of discretion which is sparingly exercised by this Court.

Petitioner declares that the issue being presented was procedurally administered by the Lower Court howbeit, not pursuant to any statute that was legislated by Congress. The United States Court of Appeals for the Eleventh Circuit had jurisdiction over the matter to determine the lawful jurisdiction of the Lower Court's decision to deny habeas corpus. However, the Court of Appeals in its review exhausted its power when it laid bare a misconception of law by errantly affirming the Lower Court's ruling, causing harm to Petitioner, and to an entire class of Prisoners within its circuit.

The Writ will aid the Appellate Court in review of the Lower Court's determination of its jurisdiction. Especially since Congress did not provide provision in any statute, whereby the Court could accept a plea agreement contract and convict a person when the indictment in the plea agreement does not represent the Subject or Subject Matter.

The Eleventh Circuit Court Of Appeals has created an exceptional circumstance that warrants the exercise of this Court's discretionary powers. Hence-forth,

the jurisdiction of this Court is justified under the 'All Writs Act, 28 U.S.C. 1651(a), where-in this case, the issue points to an act done by the Appellate Court in denying habeas corpus in a manner not otherwise covered by statute.

The Eleventh Circuit Court of Appeals has rendered the final decision in this case, and the issue is not subject to a successive habeas corpus § 2244, nor a Mandamus. Therefore, no other Court exist who can provide adequate relief outside of this Supreme Court. Petitioner is requesting this Supreme Court to exercise its authority to vacate his conviction and sentence, which will restore his 5th Amendment rights to the United States Constitution, and serve to protect other similarly situated class of citizens or prisoners within the Eleventh Circuit.

Further, at the very minimum, this petition may serve to effect the issuance of an extraordinary writ of habeas corpus.



### STATEMENT OF THE CASE

On or about January 22, 1999, Petitioner entered into a guilty plea agreement with the Government of the United States, pursuant to Indictment No: 1:97-CR-397(S). The Plea Agreement was signed by U.S. Assistant Attorney Katherine Monahan, Defense Counsel, Donald Samuels who advised the Petitioner to sign and approving official, Gentry Shelnut. The document was accepted by the District Court Judge, Julie E. Carnes and filed in open Court the same above referenced day.

Subsequently, Petitioner realized that he was being bound to a signed Plea Agreement Contract drafted by the Government containing offenses he did not commit under 1:97-CR-397(S). Further, Petitioner enquired of the Clerk of Court for the Northern District of Atlanta, Ms. Bynum, who submitted a written reply stating, "there is no indictment for this case it was waived." (see exhibit C). Petitioner file a § 2255 motion declaring that the guilty plea agreement contract was void on its face ab initio along with other issues, on or about October 10, 2016.

On or about October 31, 2016, Magistrate Judge Baverman issued a Report and Recommendation that the petition be denied because it was untimely pursuant to § 2255(f), and despite **the error of the Government printing the incorrect indictment number on the plea agreement, Movant's Name and Signature appear on the plea agreement.** That the Government use of an incorrect indictment number did not occur within one year before October 10, 2016.

Petitioner timely filed an objection on or about November 9, 2016. Petitioner addressed the timeliness issue, **lost of Subject and Subject Matter Jurisdiction due to the indictment controlling the plea agreement contract and the fact there was no modification to fix the error.**

On or about January 12, 2017, District Court Judge Richard Story accepted the magistrate's Report and Recommendation denying the § 2255 motion. Judge Story's order simply repeated the Magistrate's verbage that **Petitioner's Name and Signature** appear on the plea agreement and the § 2255 motion did not occur within one year before October 10, 2016.

On or about May 25, 2017, the United states court of appeal denied Petitioner's Notice of Appeal based upon the timeliness issue. (Ex. A )

On or about June 25, 2017 Petitioner executed a Rule 60(b)(4) motion along with a request for **Judicial Notice and Motion for Hearing** into the District Court. Judge Story issued an order denying the motion by stating that the "Movant failed to show that the Court lacked jurisdiction or violated the Movant's due process rights. That the Government's error does not change the fact that the Movant's **Name and Signature** appear on his plea agreement." The Judge signed the order on ~~on~~ November 14, 2017. The order did not address the issue of a COA. (see Ex. A)

On or about November 22, 2017, Petitioner executed a Notice of Appeal and request for a Certificate of Appealability. Petitioner noted in the COA request the following: **"Because the Court spoke to the substance of the merits of the claims in the § 2255 motion pursuant to Rule 60(b)(4), then Rule 11(a) provides that the District Court must grant or deny a Certificate of Appealability when it enters a final order adverse to the applicant."**

On or about January 3, 2018, District Court Judge Story issued another order stating, "On November 14, 2017, the Court issued its order denying Movant's motion for relief pursuant to Federal Rule of Civil Procedure 60(b)(4), On December 1, 2017, Movant filed a Notice of Appeal. A Certificate of Appealability is required to proceed on appeal following the denial of a Rule 60(b) motion in a § 2255 action. **Gonzalez V. Sec'Y for Dept of Corr., 366 F.3d 1253, 1263-67 (11th Cir. 2004).**" The Court goes on to say, "Because the resolution of Movant's Rule 60(b) ~~is~~ not ~~de~~batable, Movant's motion for a Certificate of Appealability is denied, and his motion for leave to appeal in forma pauperis is denied as moot. Movant is ordered to pay \$505.00 Appellant's filing fee within 30 days from the date of this order." (ex A attached)

On or about April 9, 2018, the Eleven Circuit Court of appeals denied the Petitioner's Notice of Appeal stating , "reasonable jurists would not debate the denial of Berry's Rule 60 (b)(4) motion.

## ARGUMENT AND CITATION OF AUTHORITY

### GROUND ONE:

The Government drafted the Plea Agreement that included the Caption Indictment **1:97-CR-397(S)**, which does not represent Petitioner as the **Subject or Subject Matter**. Therefore, rendering the Plea Agreement void as soon as it was signed by an unauthorized party.

### REASON FOR GRANTING THE WRIT

On or about January 22, 1999, Petitioner entered into a guilty plea agreement with the Government of the United States which was made pursuant to Indictment Number 1:97-Cr-397(S). The document was signed by A.U.S. Attorney Monahan, Defense Counsel Samuels who also advised Petitioner to sign. The document was drafted by the Government and contain the caption in bold print, **Indictment Number 1:97-CR-397(S)** across the top of the plea agreement. The Government stated specifically in the agreement that the Defendant had received a copy of that indictment. **see appendix B attached.** During the colloquy the Prosecutor described the guilty plea agreement, stating that there were 3 pages and that the defendant had signed on page 3 along with the Prosecutor and Defense Counsel. The Prosecutor then presented the document representing the negotiated contract between the Government and Petitioner to the Court who accepted it.

The Petitioner contends that the guilty plea agreement contract is void on its face because it is represented by an indictment that does not exist for the Petitioner. The Indictment Number 1:97-CR-397(S) listed in the caption of the plea agreement is for a **Mr. Charles Bickerstaff**. The records reveal that Mr. Bickerstaff waived that indictment. **see exhibit C attached.**

The Government drafted this plea agreement contract Petitioner contends to be virtually invalid. Petitioner mailed a copy of his \$ 2255 petition and Memorandum of Law Brief to the Government at the same time as he filed in the District Court. The Government never responded to the petition and simply remained silent, and the Court never directed the Government to defend the error they produced.

The Government took no interest in defending or correcting the error that renders this contract invalid. Further, the Court ignored Rule 11(a) which governs § 2255 proceedings which states, "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Petitioner aver that in the face of clearly established case law; *United States V. Kowalowski*, 2014 U.S. Dist. Lexis 165404 (11th Cir. 2014), and *United States V. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990) whereby the courts stated, "the government is held to a greater degree of responsibility for imprecision or ambiguities."

This represented contract case, however novel, was treated by the District Court and the 11th Circuit as it was not likened to contractual interpretation. Petitioner aver that this reasoning is in direct opposition with the Supreme Court's ruling in *Puckett V. United States* and other circuits. The Supreme Court stated in *Puckett*, "Plea Bargains are essentially contracts." *Santobello V. New York*, 404 US 257, 262 (1971); *United States V. Reed*, 778 F.2d 1437 (9th Circuit 1985) "Plea Bargains are contractual and subject to contract law standards just as with other forms of contracts."

In this regard, the Government drafted the agreement and via the signature of AUSA Katherine Monahan, and therefore it became party to the contract. The indisputable fact is that the contract controlling provision is the indictment, and in this instant case the Government included indictment number 1:97-CR-397(S) which does not represent the Petitioner as Subject nor the Subject Matter as purported to be an offense against the laws of the United States.

The Government's silence on this issue is acquiescing to the failure of the contract to comport to general contract standards and therefore, the Government is hiding their unclean hands and lack of meeting of the minds. Further, it is obvious that their mistake is not mutual because Petitioner had no hand in inducing this mistake. The Government had and still have a duty out of fundamental fairness to not only acknowledge this mistake but to file a Notice of intent to declare the plea agreement void. *United States V. Rodriguez*, supra. Prosecutors have an inherent duty governed by their oath to not just seek prosecutions but to seek justice fairly and lawfully upholding the U.S. Constitution.

The 4th Circuit and almost all circuits agree that a plea agreement is essential a contract between the Government and a criminal defendant. *United States V. Rodriguez*, 2017 U.S. Dist. Lexis 198831; (4th circuit 2017); *Allen V. Thomas*, 161 F. 3d 667 (11th Cir. 1999); *United States V. Keogh*, 2019 U.S. Dist. Lexis 147376 (10th Cir. 2019). The Keogh court stated, " A plea agreement is not simply a contract between two parties, it necessarily implicates the integrity of the criminal justice system and requires the courts to exercise judicial authority in considering the plea agreement and in accepting or rejecting the plea." *United States V. Wood*, 378 F.3d 342 (4th Cir. 2004)

The Petitioner aver for strict examination of the written plea agreement drafted by the Government and presented to the Court for acceptance. This Supreme Court may notice the following: (1) The written plea agreement does not contain nor allude to any proffer made a part of the agreement. (2) The guilty plea language specifically states, "Freeman Berry, Defendant, having received a copy of the above-numbered indictment 1:97-CR-397(S), hereby pleads guilty to count One and Eight thereof. The Defendant, his Counsel, and Counsel for the United States, subject to approval by the court, have agreed upon a negotiated plea in this case."

Upon review of this plea agreement, Petitioner believes that it is plain that the Government created an invalid contract which can not be enforced. The 11th Circuit Court of Appeals was presented with the agreement in an appeal from the denial of the District Court and both choose to enter a decision in conflict with decisions rendered by other circuits. Further, neither Court addressed the responsibility of the Government to present a non-ambiguous, valid and acceptable plea agreement bound in the rule of law.

Petitioner aver that this Supreme Court has Jurisdictional Authority to review this § 2255, and the Authority to exercise it's supervisory power.

## GROUND TWO

**DO DISTRICT COURTS RETAIN JURISDICTIONAL AUTHORITY TO CONVICT A DEFENDANT WHEN THE PLEA AGREEMENT CONTRACT IMPLICATES A NON-EXISTENT INDICTMENT.**

Per the law of this case, "a plea agreement does not become effective

effective and binding until approved by order of the Court." **Harbert**, 206 Fed Appx. 903, 909 (11th Cir. 2006). In this instant case the Court accepted the plea agreement presented by the Government with out any modification and with the insufficient/non existent indictment being used to grant a conviction. Petitioner aver that per **Rule 7 of (Fed. R. Crim. P.)**, an insufficient indictment or a non-existent indictment fails to satisfy the Rule requirements, and therefore, this error by the Government precluded the Court from granting a conviction. The fact of the non-existent indictment in the plea agreement contract makes it debatable that there was an offense or violation of statute that grant this Court **Subject Matter Jurisdiction** to convict.

There is no debating that this plea agreement, when closely examined hinges upon indictment No. **1:97-CR-397(S)** to grant the conviction authority to the District Court. However, when it is determined tha **no Subject Matter** exist in the terms of the plea agreement nor the guilty plea section incorporated therein, it creates a defect that the Court cannot reform. **Flowers V. United States**, 2009 U.S. Dist. Lexis 120167 (11th Cir. 2009) "By traditional Jurisdictional concepts, a court has jurisdiction of a controversy because it arises under Federal law. Therefore, it has jurisdiction to determine jurisdiction. .. If the jurisdiction of a court is questioned, the court has the power subject to review, to determine the jurisdictional issue." In this instant case, the question is whether the District Court had the authority to grant a conviction/ after accepting a guilty plea agreement representing a contract when the Indictment in the agreement is non-existent. When a court with out jurisdictional/authority convicts and sentence a defendant, the conviction and sentence are void from inception and remain void long after a defendant has suffered their direct force. **United States V. Peter**, 310 F.3d 709, 203 U.S. App. Lexis 7705 (11th Cir. 2002).

Pursuant to **United States V. Weaver**, 905 F.2d 1466, 1472 (11th Cir. 1990), "The contract, once created, is to be interpreted in accordance to the objective of its unambiguous terms in a plea agreement. Ambiguous terms in a plea agreement should be interpreted in favor of the defendant. **United States V. Jefferies**, *supra*. The District Court ruling was clearly in conflict with other circuits, and therefore, does not have the authority to convict based upon a non-existent indictment.

Almost all courts have acknowledge that a plea agreement is, in essence a contract between the Government and a criminal defendant. "Hornbook Law On Contracts" defines it as, "an agreement that must not only identify the subject matter but also must spell out the essential commitments and agreements of the parties with respect there to; and that the courts cannot specifically enforce contracts or award substantial damages for their breach when they are wanting in reasonable certainty."

The District Court acknowledged in its order when he denied the \$ 2255 petition, that the Government printed an incorrect indictment number on the plea agreement. However, the Court justified the error by stating, "the Government's error does not change the fact that the Movant's name and signature appear on his plea agreement."

Petitioner requested the Court to take judicial notice of the plea agreement contract, which reveals that there are no statutes or language representing any Federal Laws of the United States purported to have been violated by Petitioner written in the plea agreement contract. And note that the only provision in the contract that the Government could have been relying to confer conviction authority was the referenced indictment number 1:97-CR-397(S), which have been shown to be non-existent. Therefore, the District Court had only the legal authority to determine if the plea agreement contract was acceptable before a conviction could be had. see exhibit C attached.

Petitioner aver that the plea agreement contract is fundamentally and constitutionally insufficient to be considered a voluntary confession due to the non-existing waive indictment by ~~of~~ another person. This make the plea agreement contract a contested factual issue that the court cannot reconcile with law and Rule 11. The Court's acknowledgement that Petitioner's name and signature appear on the plea agreement cannot, and must not serve as an end around to make the plea agreement valid, especially when it fails to state an unlawful conduct. **United States V. Reed, 778 F.2d 1437 (9th cir. 1985)**

The McCarthy Court held, "Finality is best served, however, by insisting that guilty pleas be accepted properly initially rather than by narrowing the scope of collateral relief.

The failure to reserve finality in this and similar cases must be laid squarely at the feet of the United States Attorneys and their Assistants who fail to exercise the rather small degree of care necessary to comply with Rule 11."

Per Rule 11, a plea agreement does not become effective and binding until approved by order of the Court. The foregoing has shown that the Court did accept the plea as presented by the Government without any modification which caused the embodiment of an insufficient/non-existent indictment utilized by the Court to grant a conviction. This is clearly in violation of Rule 11 and Rule 7, with the resulting force of the Government and the Court's action invariably violating Petitioner's 5th, 6th and 14th Amendment rights to the U.S. Constitution.

Finally, the Court in **United States V. Glory**, 213 F.3d 147, 2000 U.S. APP. Lexis 11584 (3rd. Cir. 1999) held, "No passage of time can render a void judgment valid." A void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. **United Student Aids Funds, Inc. V. Espinosa**, 559 U.S. 260, 271, 130 S.CT. 1367, 176 L.Ed 2d 158 (2010).

**GROUND: THREE**

**Petitioner's 5th, 6th and 14th Amendment to the United States Constitution were violated:**

The United States Constitution Amendment V, is implemented by **Fed. R. Crim. P. 7(c)**. Rule 7(c) requires that an indictment set forth, "a plain, concise and definite written statement of the essential facts constituting the offense charged." Under long established precedent, an indictment is sufficient under the Constitution and Rule 7(c) if it (1) sets forth the elements of the charged offense in a manner which thoroughly informs the defendant of the charge against which he must defend, and (2) enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. **Hamling V. United States**, 418 U.S. 87, 117, 94 S.CT. 2887 (1974). An indictment is generally sufficient if it simply parrots the wording of the statute itself, provided the statutory language sets forth all the elements of the offense. **United States V. Resendiz Ponce**, 549 U.S. 102, 109 127 S.CT. 782 166, (2007).



In this instant case, the Government submitted a facially invalid plea agreement which the Court accepted and adjudged a conviction as well as pronounced a sentence of 180 months. This conviction and sentence pronouncement immediately violated the Petitioner's 14th Amendment right to liberty and equal protection under the law. Further, the failure to provide notice of the non-existent indictment violated Petitioner's right to due process.

### CONCLUSION

The United States District Court have original jurisdiction over all offenses against the laws of the United States. (18 U.S.C. § 3231). Despite that broad grant of power, a District Court's authority to accept a plea agreement is govern by Rule 11. When a court utilize an invalid plea agreement to convict and sentence a defendant, the conviction and sentence are void from their inception and remain void long after a defendant has fully suffered their direct force. **United States V. Peter, supra.**

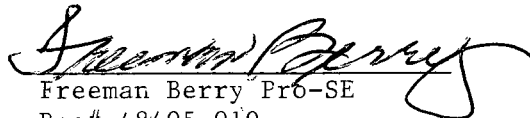
Wherefore, based upon the foregoing facts, appendices, related statutes, case law precedence, and the United States Constitution, Petitioner is confident that he has setforth an irrefutable basis for the withdrawal of this plea agreement contract.

Petitioner summaries the issues:

1. The plea agreement contract is facially invalid.
2. The indictment embodied in the agreement is non-existent, it was waived by the party originally assigned to it.
3. The plea agreement flaws provided no protection against Double Jeopardy.
4. The Court accepted the agreement in violation of Rule 11. The acceptance was without any modification and adjudicated as framed by the Government.
5. The Court provided impunity to the Government by not ordering it to defend their error.
6. The Government did not on its own elect to voluntarily defend the agreement they drafted. The apparent fact is, the Government drafted a contract in a manner that violated Fed. Crim. P. Rule 11, Hornbook Contract Law principles, and the United States Constitution 5th, 6th and 14th Amendment, all designed to afford protection for citizens against the violation of their rights.

Wherefore, Petitioner prays that this Supreme Court of the United States will exercise its supervisory powers to assure that the Government is prohibited from abusing my rights, as well as other defendants rights to be convicted by a proper and legal plea agreement. Further, that the lower courts are restrained from providing impunity to the Government which serves only to condone their mistakes.

RESPECTFULLY SUBMITTED

  
Freeman Berry Pro-SE  
Reg# 48405-019  
Oakdale FCI- P.O. Box 5000  
Oakdale, LA 71463

CERTIFICATE OF SERVICE

I, the undersigned, do swear or declare that on this 24th day of June 2020, as required by the Supreme Court, I have served the enclosed Motion for Leave to file this Petition along with brief of the Petition on each party to the proceeding by depositing an envelope containing the above documents in the U.S. Mail as provided by this institution, addressed to each party and with sufficient first class postage prepaid.

Clerk Of Court  
United States Supreme Court  
1 First Street N.E.  
Washington, DC 20543

Solicitor General of the  
United States, Room 5614  
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FREEMAN BERRY, PRO-SE #48405-019