No. 21-238

In the Supreme Court of the United States

KEITH FOSTER,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. How can panels of Ninth Circuit Court of Appeals affirm decisions as matters of law, that are in direct conflict with previously established binding Precedents of the Ninth Circuit Court of Appeals; and Precedents established by the United States Supreme Court?

2. Should the petitioner have been granted a judgment of Acquittal by the District Court?

3. Should the petitioner's 28 U.S.C. § 2255 motion have been granted by the District Court?

4. Should the Trial Judge have recused himself from presiding over the petitioner's trial?

5. Should the petitioner have been granted a Certificate of Appealability by the Ninth Circuit Court of Appeals?

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 20-15375

United States of America, *Plaintiff-Appellee,*
v. Keith Foster, *Defendant-Appellant.*

Date of Final Order: May 14, 2021

U.S. District Court Eastern District of California

No. 1:15-Cr-0104

United States of America, *Respondent,*
v. Keith Foster, *Petitioner.*

Date of Final Order: March 6, 2020

United States Court of Appeals for the Ninth Circuit

No. 17-10496

United States of America, *Plaintiff-Appellee,*
v. Keith Foster, *Defendant-Appellant.*

Date of Final Opinon: June 20, 2019

Date of Rehearing Order: September 3, 2019

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PETITION FOR A WRIT OF CERTIORARI

Keith Foster (hereinafter "Petitioner") petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered in his consolidated appeal; which judgment affirmed the denial by the district court of his 28 U.S.C. § 2255 motion to either vacate the sentences imposed by the United States District Court for the Eastern District of California or, alternatively, to allow an evidentiary hearing to attempt to determine if the government had presented Constitutionally sufficient evidence to obtain a drug conspiracy conviction.

In addition, the Petitioner is requesting the petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered in his Request for a Certificate of Appealability, which was denied and the court of appeals opined, " . . . the appellant has not made a substantial showing of the denial of a constitutional right." The petitioner believes the Ninth Circuit Court of Appeals' denial of his Certificate of Appealability is in direct conflict with the Supreme Court precedent established in *Buck v. Davis*, 137 S. Ct. 759 (2017). In *Buck*, the Supreme Court held that the COE inquiry is not coextensive with a merit analysis; and the Supreme Court decided, "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of an applicant's constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." The Supreme Court added, " . . . When a court of appeals sidesteps

the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

OPINIONS BELOW

The order of the United States Ninth Circuit Court of Appeals denying a certificate of appealability is included below at App.1a. The order of the United States District Court for the Eastern District of California is included below at App.2a.

JURISDICTION

The preliminary judgment of the court of appeals for the denial of the direct appeal was entered on June 20, 2019. (App.25a). The judgment to deny the petition for panel rehearing and the denial of a rehearing *en banc*, was rendered on September 3, 2019. (App.28a) The final judgment on the denial of the direct appeal was entered on September 11, 2019. (App.24a). The judgment for the request for a Certificate of Appealability was timely filed and the judgement was entered May 14, 2021. (App.1a). This petition is timely filed pursuant to 28 U.S.C. § 2101(c).

Also, Jurisdiction on Writ of Certiorari is established pursuant to Rule 10(a) of the Rule of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty or property, without due process of law."

The Sixth Amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

The Eighth Amendment of the United States Constitution provides in pertinent part: No person shall be subjected to "cruel and unusual punishment."

STATEMENT OF THE CASE

A. Case History

The court of appeals in this case held the government established sufficient evidence at trial to sustain a drug conspiracy conviction. The court of appeals also held that petitioner's rights to effective counsel were not denied by either trial counsel or appellate counsel. The court of appeals held that the trial judge did not commit errors which denied the petitioner due process of law. Lastly, the court of appeals held that the petitioner did not make a substantial showing of the denial of a constitutional right, thereby denying the petitioner's request for a Certificate of Appealability.

The court of appeals has rendered decisions in this case, that are in direct conflict with previously established binding precedents of the Ninth Circuit, decisions on the same matter decided by other circuits, statutory law and matters decided by the Supreme Court.

The court of appeals denied the petitioner's direct appeal on June 20, 2019 (*See United States v. Foster*, 772 Fed Appx. 544 (9th Cir. 2019). (App.26a):

The court of appeals held:

> "Defendant Keith Foster, a former Deputy Police Chief from the Fresno Police Department, appeals his jury convictions for conspiring to possess with the intent to distribute marijuana and heroin in violation of 21 U.S.C. 841 and 846. He contends that the evidence was insufficient, that his trial counsel ineffective, that the jury should have been instructed on a buyer-seller relationship, and that the court erred in denying his request to unseal juror information. For the reasons below, we affirm.
>
> There is sufficient evidence to support both convictions. Foster's telephone calls and text messages with co-conspirators Rafael Guzman and Lashon Jones sufficiently demonstrated Foster's role in the conspiracy to distribute heroin. Jones relayed heroin orders from buyers to Foster and assured Foster that the deals would benefit both of them. Foster discussed heroin types, prices, and meeting times with a supplier Guzman, and relayed those details back to Jones. On an

agreed-upon date, Foster attempted to meet Guzman to obtain the drugs, but the deal fell through when Jones did not answer her phone.

Foster's phone calls with his nephew Denny sufficiently established Foster's role in a conspiracy to distribute marijuana. Denny and Foster discussed marijuana quantities, meeting times, and prices, and Foster repeatedly pressed Denny for money for Foster's 'boy'.

After later learning that Denny had been arrested with six pounds of marijuana in his car, Foster expressed frustration that Denny had not asked for 'cover' and Foster said he would see what his 'narc guys' could do for Denny.

Although Counsel arguably performed deficiently by not moving for acquittal after the Government's case in chief, Foster's ineffective assistance of counsel claim fails because there was no prejudice. The evidence was sufficient to support both convictions, so a motion for acquittal would have been denied.

See United States v. Feldman, 853 F.2d 648, 665-66 (9th Cir. 1988) (Failure to move for acquittal cannot be the basis for a finding of ineffective assistance if the crimes of conviction are supported by sufficient evidence). Counsel's decision not to request a buyer-seller instruction appears to be the product of strategy, not incompetence. *See Strickland v. Washington,* 466 U.S. 668, 689-90 (1984).

> The theory of the defense was that Foster was investigating the activities of others in his capacity as Deputy Police Chief. A buyer-seller instruction would have clashed with this defense. For similar reasons, the District Court did not err in failing to sua sponte instruct the jury on a buyer-seller relationship, *United States v. Montgomery*, 150 F.3d 983, 996 (9th Cir. 1998).
>
> Finally, the District Court did not err in denying Foster's motion to unseal juror information. Although Foster may have suspected that jurors had read prejudicial news articles, the record contains no basis for that supposition. Speculation alone cannot overcome the presumption of juror impartiality. *See United States v. Clardy*, 540 F.2d 439, 447 (9th Cir. 1976) (Finding similar request frivolous where defendant had not shown 'that any of the jurors had seen such material')." Emphasis added.

B. Analysis of the Court of Appeals Reasoning for Denial of Petitioner's Direct Appeal

The court of appeals held the government established sufficient evidence to support both convictions against the petitioner. The court of appeals stated in reference to Count 11, Conspiracy to possess with the intent to distribute heroin: "Foster's telephone calls and text messages with co-conspirators Rafael Guzman and Lashon Jones sufficiently demonstrated Foster's role in the conspiracy to distribute heroin."

The court of appeals stated in reference to Count 12, Conspiracy to possess with the intent to distribute

marijuana: Foster's phone calls with his nephew Denny sufficiently established Foster's role in a conspiracy to distribute marijuana."

The court of appeals ruling on the sufficiency of evidence to sustain a drug conspiracy conviction is in direct conflict with the previously established binding precedents of *United States v. Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980), *United States v. Moe*, 781 F.3d 1120, 1124 (9th Cir. 2014), *United States v. Lennink*, 18 F.3d 814, 818-19 (9th Cir. 1994), *United States v. Ramirez*, 714 F.3d 1124, 1140 (9th Cir. 2013), *United States v. Loveland*, 825 F.3d 555 (9th Cir. 2016), *United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984); and, the persuasive precedent of *United States v. Horn*, 946 F.2d 738, 741 (10th Cir. 1991), citing *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

> In *United States v. Melchor-Lopez,* the court of appeals decided:
>
> "Telephone conversations discussing the purchase of cocaine and brown heroin, which prices were discussed, . . . were insufficient to prove a conspiracy."
>
> The court went on to add, "There can be no conviction for guilt by association, and it's clear that mere association with members of a conspiracy, the existence of an opportunity to join a conspiracy, or simple knowledge, approval of, or acquiescent in the object or purpose of the conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator."

> The *Melchor-Lopez* court held, "The government proved that each appellate engaged in conversations which might have ended in firm commitments but it failed to establish the meeting of the minds to consummate an illegal transaction which is essential to conspiracy."
>
> The *Melchor-Lopez* court reversed the appellants' convictions on the ground of insufficiency of the proof as to the essential element of the conspiracy offense [Meeting of the Minds]." Emphasis added.
>
> In *United States v. Moe*, the court of appeals decided the essential elements of a drug conspiracy required the government to prove:
>
> 1. An agreement to accomplish an illegal objective; and
>
> 2. The intent to commit the underlying offense.

The *Moe* court held, " . . . a conviction for conspiracy requires proof of an agreement to commit a crime other than the crime that consists of the sale [of drugs] itself and mere sales to other individuals do not establish a conspiracy to distribute or possess with the intent to distribute . . . " *Id.* Quoting *United States v Lennink*, 18 F.3d 814, 819 n.1 (9th Cir. 1994). Emphasis added.

The *Moe* court went on to explain, " . . . not every agreement to commit an illegal objective may serve as the basis for a conspiracy conviction. *Id.* The *Moe* court added it would: "Uphold a conviction for conspiracy between a buyer and seller where there is evi-

dence of a prolonged and actively pursued course of sales coupled with the seller's knowledge and a shared stake in the buyer's illegal venture". *Moe.* At 1125, quoting *United States v. Ramirez*, 714 F.3d 1124, 1140 (9th Cir. 2013).

In *United States v. Lennink*, and reaffirmed in *United States v. Ramirez*, the court of appeals held:

> "To prove conspiracy, the government had to show more than a defendant sold drugs to someone knowing that the buyer would later sell [the drugs] to others. It had to show that the defendant had an agreement with the buyer pursuant to which the buyer would further distribute the drugs. In the end, what the court is looking for is evidence of a prolonged and actively pursued course of sales coupled with the defendant's knowledge of and a shared stake in the buyer's illegal venture." Emphasis added.

In *United States v. Loveland*, the court of appeals reaffirmed and emphasized;

> "In the context of conspiracy, when deciding if there is sufficient evidence of an agreement, courts look for evidence of a prolonged and actively pursued course of sales coupled with the seller's knowledge of and a shared stake in the buyer's illegal venture."
>
> The *Loveland* court added,
>
> "Conspiracy is an agreement to commit a crime and the intent to commit the underlying offense.

> We assume for purposes of decisions that *Loveland* intended to commit the crime of possession of methamphetamine for the purpose of distribution. And we assume for the purpose of decision that the Sanchez group knew *Loveland* was probably reselling the methamphetamine they sold him because the quantity exceeded what he could use himself. But, *Loveland*'s intent to possess for purpose of redistribution and the Sanchez group's sales to him do not add up to conspiracy. The Sanchez group has to have agreed with *Loveland*, expressly or tacitly, that *Loveland* should resell the methamphetamine in order for them to have conspired together."

The *Loveland* court added, "We have a long list of decisions directed at the problem of distinguishing between the sale of an illegal substance and conspiracy of the seller with the buyer for the buyer to resell. The parties agree that *United States v. Ramirez and United States v. Lennink* are most challenging cases for the government, but disagree on whether *Loveland*'s conviction can stand despite these precedents."

The *Loveland* court explained, "*Lennink* held that evidence was insufficient to support a conviction for conspiracy to distribute narcotics, where *Lennink* distributed marijuana, but there was no evidence that he agreed with the people whom he sold or gave the drugs that they should distribute to others. Conspiracy requires proof of an agreement to commit a crime other than the crime that consists of the sales itself."

The *Loveland* court then reasoned: "The case before us [*Loveland*] is stronger for the government than *Lennink* on the facts because in *Lennink*, arguably the quantities were too small to support an inference that *Lennink* knew his distributees would redistribute. But we worded our holding broadly; 'To show a conspiracy, the government must show not only that *Lennink* gave drugs to other people knowing that they would further distribute them, but also that he had an agreement with these individuals to so further distribute the drugs. In so holding, we agreed with the First, Seventh and Tenth circuits."

The *Loveland* court also compared the holdings of *Lennink* and *Ramirez*, "Unlike *Lennink*, which involved small amounts of marijuana, *Ramirez* involved repeated sales of escalating quantities of methamphetamine. But we held that even repeated sales and large quantities could not sustain a conspiracy conviction, in the absence of involvement of *Ramirez* in his buyer's drug sales."

The *Loveland* court also examined the buyer-seller relationship compared to a conspiracy, "Though courts once called the buyer-seller rule a narrow exception to conspiracy, a particularly thoughtful Supreme Court of Connecticut decision, *State v. Allen*, notes that the buyer-seller relationship is a failure of proof of conspiracy, not an exception to conspiracy.

As we held in *Lennink* and reiterated in *Moe*, conspiracy requires proof of an agreement to commit a crime other than the crime that consists of the sale itself, and the government must show that the buyer and seller had an agreement to further the drug in question. Distribution is a different crime from conspiracy to distribute. For the seller to be conspiring with

the buyer to redistribute, there has to be an agreement, not just surmise or knowledge, between the seller and the buyer for the buyer to redistribute. The agreement is an element of the crime and has to be proved." Emphasis added.

The *Loveland* court continued, "Of course, like any elements, the agreement may be proved by direct evidence or by circumstantial evidence. And the agreement can be explicit or tacit. But the agreement has to be there. A relationship of mere seller and buyer, with the seller having no stake in what the buyer does with the goods, shows the absence of a conspiracy, because it is missing the element of an agreement for redistribution."

Lastly, the *Loveland* court explained by referencing *Colon* [*United States v. Colon*, 549 F.3d 565 (7th Cir. 2008)], "What distinguishes a conspiracy from its substantive predicate offense is not just the presence of an agreement, but an agreement with the same joint criminal objective to distribute drugs. This objective is missing when the conspiracy is based solely on an agreement between a buyer and seller for the sale of drugs."

Finally in *Loveland*, the court ruled, "There was no evidence of an agreement, so the evidence was insufficient to support *Loveland*'s conspiracy conviction. Therefore, we reverse the judgment and vacate *Loveland*'s conviction and sentence."

In *United States v. Escobar de Bright*, the court held, "A conspiracy is defined as an agreement between two or more people to commit an unlawful act which arguably requires some form of meeting of the minds."

The *Escobar de Bright* court added, "The formal requirements of the crime of conspiracy have not been met unless, an individual conspires with at least one bonafide coconspirator."

The *Escobar de Bright* court also opined, "There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. A failure to instruct the jury on the defendant's theory of a case is reversible per se.

The *Escobar de Bright* court added, "The right to have the jury instructed as to the defendant's theory of a case is one of the rights so basic to a fair trial that failure to instruct where there is evidence to support the instruction can never be considered harmless."

The *Escobar de Bright* court continued, "A defendant is entitled to an instruction concerning his theory of the case if it is supported by law and has some foundation in the evidence. A defendant is entitled to have a jury instruction on any defense which provides a legal defense to a charge against him and which has some foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility."

In *United States v. Horn*, citing *Direct Sales Co.v. United States*, 319 U.S. 703, 711:

> "We cannot sustain a conspiracy conviction if the evidence does no more than create a suspicion of guilt or amounts to a conviction resulting from piling inference on top of inference."

The court of appeals stated,

> "Although Counsel arguably performed deficiently by not moving for acquittal after the Government's case in chief, Foster's ineffective assistance of counsel claim fails because there was no prejudice. The evidence was sufficient to support both convictions, so a motion for acquittal would have been denied; citing *United States v. Feldman*, 853 F.2d 648, 665-66 (9th Cir. 1988) (Failure to move for acquittal cannot be the basis for a finding of ineffective assistance if the crimes of conviction are supported by sufficient evidence). Counsel's decision not to request a buyer-seller instruction appears to be the product of strategy, not incompetence; and *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984)."

The court of appeals conceded, the petitioner's trial attorney performed deficiently by not moving for an acquittal after the government's case in chief. However, the court of appeals erroneously ruled the evidence presented by the government at trial, was sufficient to support a drug conspiracy conviction. (*See Melchor-Lopez, Moe, Lennink, Ramirez, Colon, Loveland, Escobar de Bright*, and *United States v. Horn.*)

In addition, In the case against the petitioner, *United States v. Foster*, despite having plea agreements in place which mandated cooperation with the government, none of the coconspirators were called to testify during the trial. The government's case in chief consisted of twenty-three (23) recorded telephone conversations and four (4) text messages between the petitioner and the three co-conspirators. During one conversation the petitioner inquired on the price of one (1) ounce of heroin and in another conversation

the petitioner inquired on the price of one (1) pound of marijuana.

The government failed to present any evidence at trial that the petitioner and any coconspirator had:

1. An agreement to redistribute either heroin or marijuana; and
2. Intent to commit a criminal offense (Meeting of the Minds).

Also, the government never alleged or presented any trial evidence that the petitioner ever possessed, sold, or gave either marijuana or heroin to anyone. The government also never alleged or presented any trial evidence that the petitioner ever received any proceeds from the sale of heroin or marijuana. The government never alleged or presented any trial evidence that the petitioner was ever associated with the completion of a single illicit drug transaction. The government's case in chief violated the *Corpus Delicti Rule.* The corpus delicti rule states,

> "In order to secure a conviction, the prosecution must establish the facts of a transgression before anyone can be convicted of having committed that transgression. This fact of transgression must be established with corroborating evidence. The doctrine prohibits the prosecution from proving the corpus delicti based solely on extra-judicial statements. (BLACK'S LAW DICTIONARY, Tenth Edition 2014).

((*Summit v. Blackburn*, 795 F.2d 1237 (5th Cir. 1986) (Counsel deemed constitutionally ineffective for failing

to invoke the corpus delicti rule on an uncorroborated confession).

The aforementioned precedents clearly indicated the government failed to present sufficient evidence to support a drug conspiracy conviction, thereby invalidated the court of appeals argument in *United States v. Feldman.*

In *Escobar de Bright* the court of appeals held,

> "There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. A failure to instruct the jury on the defendant's theory of a case is reversible per se. The right to have the jury instructed as to the defendant's theory of a case is one of the rights so basic to a fair trial that failure to instruct where there is evidence to support the instruction can never be considered harmless.
>
> A defendant is entitled to an instruction concerning his theory of the case if it is supported by law and has some foundation in the evidence. A defendant is entitled to have a jury instruction on any defense which provides a legal defense to a charge against him and which has some foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility."

In addition, the court of appeals in *Loveland* examined the buyer-seller relationship compared to a conspiracy and opined,

> "... though courts once called the buyer-seller rule a narrow exception to conspiracy, a particularly thoughtful Supreme Court of Connecticut decision, *State v. Allen*, notes that the buyer-seller relationship is a failure of proof of conspiracy, not an exception to conspiracy."

The rulings in *Escobar de Bright* and *Loveland* demonstrates the fact that the [petitioner's] trial attorney's failure to request a buyer-seller jury instruction was either a willful disregard of the rules of law [established in *Escobar de Bright* and *Loveland*] or *incompetence*. Either way, the court of appeals citation of *Strickland* to determine the petitioner's trial attorney's failure to request a buyer-seller instruction was a product of strategy, cannot stand.

The court of appeals also stated, "The theory of the defense was that Foster was investigating the activities of others in his capacity as Deputy Police Chief.

A buyer-seller instruction would have clashed with this defense. For similar reasons, the District Court did not err in failing to sua sponte instruct the jury on a buyer-seller relationship, *United States v. Montgomery*, 150 F.3d 983, 996..."

As previously mentioned, the rulings in *Escobar de Bright* and *Loveland* clearly demonstrates the court of appeals citation of *United States v. Montgomery* to determine that the district court did not err in failing to sua sponte instruct the jury on a buyer-seller relationship, is erroneous.

The court of appeals rulings in affirmation of the petitioner's convictions are contradicted by the rules

of law established in *Melchor-Lopez*, *Moe*, *Lennink*, *Ramirez*, *Colon*, *Loveland*, *Escobar de Bright*, *United States v. Horn*, *Fiore v. White*, 531 U.S. 225 (2001) and *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Therefore, the court of appeals affirmation of the petitioner's convictions are not supported by law; thus, the convictions and the affirmation have violated the petitioner's Constitutional Rights to Equal Protection of Law and Due Process of Law.

C. Analysis of the Court of Appeals' Denial of Petitioner's Request for a Rehearing and Hearing En Banc

On August 8, 2019, the petitioner filed a petition for panel rehearing and rehearing en banc with the court of appeals. The petitioner asserted that the appellate panel's decision affirming his convictions were in direct conflict with binding circuit precedents. (App.28a).

On September 3, 2019, the appellate panel voted to deny the petition for panel rehearing and stated "No judge requested a vote on whether to hear the matter en banc." (App.28a).

An en banc review of a circuit decision is an opportunity to reconsider a panel's decision. The principle purpose of an en banc review is to establish uniformity within the circuit among all panels. Such a review is an "extraordinary procedure intended to bring to the attention of the entire court an issue of exceptional public importance or a panel decision that conflicts with precedent of the Supreme Court or the circuit."

An en banc review will resolve an intra-circuit conflict between two panels. This process leads to certainty in the application of the law, which is the desired outcome of stare decisis (*See Zuniga v. United Can Co.*, 812 F.2d 443, (9th Cir. 1987)).

The court of appeals decision to deny the petitioner's request for a panel rehearing and the decision not to convene a rehearing en banc; has failed to correct a [court of appeals] decision which violates the petitioner's Constitutional Rights to Equal Protection of Law and Due Process of Law.

D. Analysis of the Court of Appeals Denial of Petitioner's Request for Certificate of Appealability

On December 10, 2019, the petitioner filed a 28 U.S.C. § 2255 motion in the United States District Court for the Eastern District of California, Fresno Division, asserting Ineffective Assistance of Counsel, prosecutorial misconduct, judicial misconduct and ineffective assistance of appellate counsel.

On January 13, 2020, the district court denied the petitioner's 28 U.S.C. § 2255 motion without ordering an evidentiary hearing. The District Court stated:

> "Many of the issues raised by the petitioner were precluded by an opinion by the Ninth Circuit on direct appeal, that the petitioner failed to show that the undersigned should have recused himself, that the petitioner failed to demonstrate any prejudicial attorney misconduct or ineffective assistance of counsel, and that the petitioner failed to identify any prejudicial trial errors." (App.6a)

On February 28, 2020, the petitioner filed a "motion for correction omission" because the district court failed to address the petitioner's request for a certificate of appealability.

On March 6, 2020, the district court denied the petitioner's motion for a certificate of appealability. (App.2a)

On April 1, 2020, the petitioner filed a request for a certificate of appealability from the United States District Court for the Eastern District to the United States Court of Appeals for the Ninth Circuit, asserting the following:

1) Petitioner is not procedurally barred from asserting Ineffective Assistance by his trial counsel or challenging the sufficiency of evidence to prove the heroin and marijuana conspiracies.

2) The Ninth Circuit's finding that the petitioner was not prejudiced by his trial counsel's failures is clearly erroneous.

3) The petitioner's crimes of conviction lack the essential elements required for conspiracy convictions.

4) The evidence adduced by the government was insufficient to prove the existence of either the heroin or marijuana conspiracies and therefore the petitioner's convictions represent a manifest injustice.

5) The petitioner's trial counsel was ineffective for failing to recognize that the government had not met its burden of proof.

6) The petitioner received ineffective assistance from his Appellate Counsel.

Assertion #1, with exception of the petitioner's claim of ineffective assistance by his appellate counsel, all of the issues were denied by the district court on the ground that they were precluded from consideration by the Ninth Circuit decision on the petitioner's direct appeal.

Considering only the general rule established by the Supreme Court, the district court's decision would be correct:

> "At least as a general rule, federal prisoners may not use a motion under 28 U.S.C. § 2255 to relitigate a claim that was previously rejected on a direct appeal. *Foster v. Chatman*, 136 S. Ct. 1737, 1758 (2016)."

However, like most general rules, there are exceptions. Continuing with its opinion, the *Foster* court went on to hold:

> "Absent countervailing considerations, district courts may refuse to reach the merits of a constitutional claim previously raised and rejected on appeal."

Such "countervailing considerations" include situations where "the first decision was clearly erroneous" and instances where "manifest injustice would otherwise result." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

The petitioner respectfully asserts that both conditions exist in his case, and that a showing of either one of these conditions is sufficient to allow him to assert ineffective assistance by his trial counsel and

to challenge the sufficiency of evidence against him on his 2255 motion.

Assertion #2, the court of appeals determination the petitioner was not prejudiced by his trial counsel's failures, is clearly erroneous. In its decision upholding the petitioner's convictions, the court of appeals conceded that the petitioner's trial counsel "arguably performed deficiently by not moving for acquittal after the government's case in chief. (App.1a). In fact, the petitioner's trial attorney failed to make a motion for acquittal after the close of evidence.

However, the panel decided, these failures made no difference, "as the evidence was sufficient to support both conspiracy convictions, so a motion for acquittal would have been denied." (App.1a) As the panel found that the petitioner was not prejudiced, it concluded the petitioner did not receive ineffective assistance.

However, by failing to make a motion for a judgment of acquittal at the close of the government's case in chief, the Ninth Circuit's panel was limited to reviewing the inactions of the petitioner's trial counsel under the plain error standard, rather than the broader de novo standard. *United States v. Stauffer*, 922 F.2d 508, 511 (9th Cir. 1990); also *see United States v. Gonzalez*, 563 Fed. Appx. 582, 583 (9th Cir. 2014).

As explained by the Ninth Circuit, reversal based on the plain error standard is the exception, not the rule:

> "Reversal based on plain error is exceptional and occurs only when necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial

> process. *United States v. Roberts*, 319 Fed. Appx. 575, 578 (9th Cir. 2009) quoting *United States v. Tarazon*, 989 F.2d 1045, 1051 (9th Cir. 1993)."

A de novo review requires a decision:

> "After viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319..."

The petitioner was clearly prejudiced by his trial attorney's failures, due to the limitation placed on the Ninth Circuit's review under the plain error standard, rather than the broader de novo standard. Had the petitioner's motion for acquittal been properly timed, the government's insufficient evidence [phone calls and text messages] would have been compared to the binding precedents establishing circuit law; and the [drug conspiracy] charges against the petitioner would have been dismissed in their entirety.

Assertion #3, the petitioner's crimes of conviction lack the essential elements required for conspiracy convictions. The rules of law establishing the sufficiency of evidence required to sustain a drug conspiracy conviction, are clearly delineated in the precedents of *Melchor-Lopez*, *Moe*, *Lennink*, *Ramirez*, *Colon*, *Loveland* and *Escobar de Bright*, all of which, conflict with the court of appeals determination that the government established sufficient evidence at trial, to sustain the drug conspiracy convictions against the petitioner.

Assertion #4, the evidence adduced by the government was insufficient to prove the existence of either the heroin or marijuana conspiracies and therefore the petitioner's convictions represent a manifest injustice. As previously mentioned, the government failed to establish sufficient evidence to sustain the drug conspiracy convictions against the petition (*see Melchor-Lopez*, *Moe*, *Lennink*, *Ramirez*, *Colon*, *Loveland* and *Escobar de Bright*). Consequently, the petitioner's convictions are for crimes that he is *actually and factually* innocent of and these convictions represent a manifest injustice, whereby the petitioner was wrongly convicted and imprisoned. (*See Thomas v. Goldsmith*, 979 F.2d 746, 749 (9th Cir. 1992) (Showing of factual innocence is necessary to trigger manifest injustice relief)).

Assertion #5, the petitioner's trial counsel was ineffective for failing to recognize that the government had not met its burden of proof. Had the petitioner's trial attorney adequately prepared for trial, he would have been aware of the circuit law established in *Melchor-Lopez*, *Moe*, *Lennink*, *Ramirez*, *Colon*, *Loveland* and *Escobar de Bright*; and he would have realized the government had failed to meet its burden of proof to sustain the drug conspiracy convictions against the petition and would have prevailed in a Rule 29 motion.

Assertion #6, the petitioner received ineffective assistance from his appellate counsel. The district court's order denying the petitioner's 28 U.S.C. § 2255 motion mentions the petitioner's claim of ineffective assistance by his appellate counsel only once, and then only is describing the claim. There was no evidence in the district court's ruling that the court ever

considered the petitioner's claim that his appellate counsel was ineffective for failing to assert on direct appeal that the government had failed to prove the existence of either the heroin or marijuana conspiracy. Consequently, the district court could not and did not rule as to whether the petitioner's appellate counsel's representation fell below an objective standard of reasonableness and but for this error, the petitioner would have prevailed on appeal. (*See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).

The Ninth Circuit Court of Appeals' denial of the petitioner's request for a Certificate of Appealability is in direct conflict with the Supreme Court precedent established in *Buck v. Davis*, supra.

E. Analysis of Ineffective Assistance of Counsel

The United States Supreme Court has long "recognized that the right to counsel is the right to effective assistance of counsel" under the Sixth Amendment of the United States Constitution. In *Strickland v. Washington*, 466 U.S. 668, 686: (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *United States v. Cronic*, 466 U.S. 648, 655 (1984), an effective attorney "*must play the role of an active advocate, rather than a mere friend of the court.*" *Evitts v. Lucey*, 469 U.S. 387, 394 (1967); *Cronic* at 656; *Anders v. California* 386 U.S. 738, 743 (1967):

> "The benchmark for judging any claim of ineffectiveness must be 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*, at 686."

The Tenth Circuit, in *United States v. Glover*, 97 F.3d 1345 (10th Cir. 1996), aptly summarized the *Strickland* requirement, that every lawyer representing a criminal defendant can only provide effective representation by being a vigorous advocate who challenges the government's evidence and effectively presents their client's side of the case. The *Glover* court stated:

> "Our analysis is guided both by the Supreme Court's broad formulation in *Strickland* and by this court's particularized application thereof to analogous facts in *United States v. Kissick*, 69 F.3d 1048 (10th Cir. 1995). When counsel has unwittingly relieved the government of its burden of proof, particularly when the evidence of record does not satisfy that burden, it is fair to say counsel has 'so undermined the proper functioning of the adversarial process that it cannot be relied upon on as having produced a just result.' *Strickland*, 466 U.S. at 686.
>
> That is, of course 'the benchmark for judging any claim of ineffectiveness.' *Id. See also Kimmelman v. Morrison*, 477 U.S. 365 (1986) ('The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the proceeding was rendered unfair and the result rendered suspect.')."

In *Strickland*, the Supreme Court considered when a defense attorney may be constitutionally ineffective "simply by failing to render 'adequate legal assistance.'" 466 U.S. at 686 (quoting *Cuyler*, 466 U.S. at 344.).

The petitioner's trial attorney failed to research the rules of law governing drug conspiracy convictions prior to the trial. Thus, the petitioner's trial attorney failed to cite the rules of law pursuant to circuit precedent into the trial record; and argue the fact that the government's case in chief had not established the essential elements of a drug conspiracy, as required by *Melchor-Lopez*, *Moe*, *Lennink*, *Ramirez*, *Colon*, *Loveland* and *Escobar de Bright*. (*See Kimmelman v. Morrison*).

Petitioner's trial attorney failed to file a Rule 29 motion for a judgment of acquittal, after the government's case in chief, due to the government's failure to present constitutionally sufficient evidence to sustain the drug conspiracy convictions.

The court of appeals also conceded petitioner's trial attorney arguably performed deficiently by failing to file a Rule 29 motion. However, the court of appeals then contradicted binding circuit precedent and determined the government's evidence was sufficient to support the convictions.

The petitioner's trial attorney failed to review the grand jury transcripts and properly prepare for trial; which prevented the trial attorney from effective cross-examination of the government's key law enforcement witness. Had the trial attorney properly prepared, the trial attorney would have noticed the witness' court testimony was significantly different from the nwitness' grand jury testimony, which was favorable to the petitioner; and could have successfully impeached the witness. (*See Driscoll v. Delo*, 71 F.3d 701, (8th Cir. 1995) cert. denied, 519 U.S. 910 (1996) (Counsel was deemed ineffective in failing to prepare for the cross-examination of a key prosecution witness

and failing to impeach the witness with inconsistent statements).

The petitioner's trial attorney also failed to invoke the *corpus delicti rule* to prevent the petitioner's conviction from being based solely on speculations and inferences from *uncorroborated telephone calls.* (*See (Summit v. Blackburn, supra.* (Trial counsel deemed constitutionally ineffective for failing to invoke the corpus delicti rule to prevent a conviction based on uncorroborated extra-judicial statements.)).

The petitioner's trial attorney also failed to request a buyer-seller jury instruction, which clearly distinguished a buyer-seller relationship from a drug conspiracy; and failed to object to the obvious defects in the jury instructions improper citation of the elements of offense. (*See Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993) (Trial attorney was ineffective in failing to object to obvious defect in jury instructions on elements of offense.)

The petitioner's trial attorney committed numerous unprofessional errors; but for these errors, including failure to adequately investigate the petitioner's representations, the result of the proceeding would have been different. (*See Johnson v. Baldwin*, 114 F.3d 835 (9th Cir. 1997). (Counsel deemed ineffective for failure to investigate adequately which resulted in the presentation of a weak defense.)"

The petitioner's appellate attorney also failed to adequately research the rules of law governing drug conspiracy convictions pursuant to *Melchor-Lopez, Moe, Lennink, Ramirez, Colon, Loveland* and *Escobar de Bright.* Therefore, during the appeals process, the petitioner's appellate attorney failed cite the prevailing

law; and failed to argue the fact that the government had not met the burden of proof pursuant to circuit precedent, to support the petitioner's drug conspiracy convictions.

Both the petitioner's trial attorney and appellate attorney's performance, 1) fell below an objective standard of reasonableness and; 2) were prejudicial to the petitioner. But, for the substandard performance and unprofessional errors of both the petitioner's trial attorney and appellate attorney respectively, the result of the proceedings would have been different. (*See Strickland and Kimmelman*).

F. Analysis of Judicial and Prosecutorial Misconduct

The prosecution and trial judge engaged in misconduct which denied the petitioner Due Process of Law, as guaranteed by the Fifth Amendment. The trial judge was involved in the prosecutions' pre-indictment accusatory process and investigation of the petitioner, by virtue of involvement in the briefings, reviews of documents, authorization of wiretaps, wiretap extensions and case updates. The trial judge obtained extensive personal knowledge of the prosecutions' theories, pre-trial evidence and disputed evidentiary facts.

The trial judge was statutorily compelled to recuse himself from any judicial proceedings involving the petitioner, however, he failed to do so.

> 28 U.S.C. 455-Disqualification of Justice, Judge or Magistrate Judge:
>
> (a) Any Justice, Judge or Magistrate Judge of the United States shall disqualify himself

> in any proceeding in which his impartiality might be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has personal bias or prejudice concerning the party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

In addition, *United States v. Zarowitz*, 326 F. Supp 90 (C.D. CA 1971) states:

> "Any judge who issues orders authorizing . . . wiretaps and who necessarily receives five-day reports of evidence obtained in the course thereof, should disqualify himself from sitting upon any trial of the person who participated in the telephone conversations . . . , as well as upon any pretrial motions to suppress such evidence."

The court of appeals in *Hurles v. Ryan*, 752 F.768, 788 (9th Cir. 2014) (quoting *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1977)) stated:

> "The Constitution requires recusal where the 'probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).
>
> The Hurles court explained: "In determining whether the standard is satisfied, the relevant inquiry is whether the average judge in [the relevant] position was likely to be neutral or whether there existed an unconstitutional potential for bias. *Id.* At 789 citing *Caperton*

> *v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009).
>
> In addressing due process concerns, the United States Supreme Court has ruled that circumstances making recusal necessary include those where a judge . . . acts as part of the accusatory process. *In re Murchison*, 349 U.S. 133, 137 (1955); or becomes so enmeshed in matters involving [a litigant] as to make it most appropriate for another judge to sit. *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971)."

Pursuant to *In re Murchison* (*supra*), The United States Supreme Court opined"

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But, our system of law has always endeavored to prevent even the probability of unfairness. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however that <u>every procedure</u> which would offer a <u>possible temptation to the average man as a judge . . . not</u> to hold the balance nice, clear and true between the state and the accused <u>denies the latter due process of law</u>. *Tumey v. Ohio,* 273 U.S. 510, 532 (1971).

> Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But, to perform its high function in the best way, 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14 (1954)."

The trial judge willfully disregarded the essential elements of a drug conspiracy, pursuant circuit laws that were established in *Melchor-Lopez*, *Moe*, *Lennink*, *Ramirez*, *Colon*, *Loveland* and *Escobar de Bright*; thereby, improperly instructing the jury on the essential elements of a drug conspiracy. (See *Cole v. Eagle*, 704 F.3d 624 (9th Cir. 2012) (Jury instructions must correctly state the law and failure to do so warrants reversal, unless the error was harmless). (*See also Walker v. Deeds*, 50 F.3d 670, (9th Cir. 1995) and *Escobar de Bright*, supra.

The trial judge specifically stated in reliance on the Ninth Circuits' Model jury instructions, " . . . the elements [to establish a drug conspiracy] do not require a defendant to actually sell narcotics or make an agreement with a buyer." (*See* App.15a, "Denial of Petitioner's 28 U.S.C. § 2255 Motion, last sentence of the footnote).

The trial Judge's reasoning is in direct conflict with binding precedents of *Melchor-Lopez*, *Moe*, *Lennink*, *Ramirez*, *Colon* and *Loveland*.

The trial judge's jury instructions materially and constructively amended the indictment, which lessened the government's burden of proof. Count 11 of the indictment charged the petitioner with "Conspiracy

to distribute and possess with the intent to distribute heroin" and Count 12 "Conspiracy to distribute and possess with the intent to distribute marijuana."

The joining of two separate offenses, each with a separate and distinctly different "mens rea" requirement as a single count, rendered the charges as duplicitous and invalid. (*See United States v. Ramirez-Martinez*, 273 F.3d 903, 913).

However, the trial judge verbally amended the charges on the indictment during jury instructions to; Count 11 "Conspiracy to possess with the intent to distribute heroin" and Count 12 "Conspiracy to possess with the intent to distribute marijuana". Thus, lessened the government's burden of proof. (*See United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002)). The errors committed by the trial judge denied the petitioner Equal Protection of the Law and Due Process of Law as guaranteed by the Fifth Amendment.

The prosecution willfully and deliberately disregarded the essential elements of a drug conspiracy, pursuant the circuit laws established in *Melchor-Lopez*, *Moe*, *Lennink*, *Ramirez*, *Colon*, *Loveland* and *Escobar de Bright*, and misrepresented the extra-judicial and uncorroborated telephone calls and text messages between the petitioner and the three alleged co-conspirators as, sufficient evidence to sustain a drug conspiracy conviction.

The prosecution's entire case in chief portrayed the co-defendants as "material" and "essential" in the alleged drug conspiracies against the petitioner. However, the prosecution inexplicably failed to call any co-defendant to testify against the petitioner, thus failed to establish the essential elements of a drug

conspiracy; a) An agreement to redistribute [the drugs in question] and; b) The intent to commit a criminal offense [Meeting of the Minds].

The government's case against the petitioner lacked constitutionally sufficient evidence to sustain a drug conspiracy conviction, but for the conduct of the prosecution adopting, shifting, and misleading facts of law, no conviction would have been obtained or successfully defended on appeal. (*See Siddiqi v. United States*, 98 F.3d 1427 (2nd Cir. 1999) (Conviction had no legitimate factual or legal basis and . . . but for the conduct of the prosecution in adopting, shifting, and at times misleading positions, no conviction would have been obtained or successfully defended on appeal.))"

The government's conduct during the prosecution of the petitioner so infected the trial with unfairness that it made the resulting conviction a denial of Due Process. (*See Darden v. Wainwright*, 477 U.S. 168 (1986).

REASONS FOR GRANTING THE PETITION

"The unjust deprivation, for a single hour of one man's liberty, creates a debt that can never be repaid." *Johnson v. United States*, 218 F.2d 578, 580 (9th Cir. 1954) (Stephens, J. concurring).

The Ninth Circuit court of appeals failed to correct the district court's violations of the petitioner's Constitutional Rights to Equal Protection of the Law, Due Process of Law and from being subjected to cruel and unusual punishment (false imprisonment), as guaranteed by the Fifth, Sixth and Eighth amendments of the United States Constitution. (Also *see Fiore v. White*, *supra.* (per curiam) granting federal habeas corpus relief because prosecution failed to present sufficient evidence to prove an element of the crime and therefore, petitioner's conviction was not consistent with the demands of the federal due process clause and *Jackson v. Virginia*, supra.).

Failure to correct these Constitutional violations, would result in the right to Equal Protection of the Law, Due Process of Law and protection from the infliction of cruel and unusual punishment, no longer being held as Constitutional guarantees, but mere conveniences to be indiscriminately extended to some and denied to others, based solely on the will of a particular judge or decisionmaker; thereby, inviting more mistakes in the application of laws to occur.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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