

21-5997

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

SEP 21 2021

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Jeremiah Ybarra — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jeremiah Ybarra/Reg#55024-280
(Your Name)

FMC ROCHESTER/PMB 4000
(Address)

Rochester, MN, 55903-4000
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

WHETHER APPELLANT WAS DENIED HIS FIFTH AMENDMENT RIGHT TO A
GRAND JURY PRESENTMENT OR INDICTMENT

WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO
EFFECTIVE ASSISTANCE OF COUNSEL

WHETHER APPELLANT WAS AMBUSHED AT TRIAL

WHETHER APPELLANT WAS PREJUDICED BY THE ACTIONS OF THE PROSECUTOR

WHETHER THE INDICTMENT WAS AMENDED BY THE JURY INSTRUCTIONS

WHETHER THE DISTRICT COURT HAD JURISDICTION TO CONVICT APPELLANT

WHETHER APPELLANT'S ACTIONS WOULD BE CONSIDERED A VIOLATION OF 21
U.S.C. 841(a)(1)

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Jeremiah Ybarra, No. 4:16-CR-523-1
U.S. District Court for the Western District of Texas
Judgment entered May 31, 2017

Jeremiah Ybarra v. United States, 4:19-CV-6
U.S. District Court for the Western District of Texas
Judgment entered on May 2021

Jeremiah Ybarra v. United States, No. 21-50593
U.S. Court of Appeals for the Fifth Circuit
Judgment still pending

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
M'Kinney v. Carroll, (1838) 37 U.S. 66, 9 L.Ed 1002.....	7
Brige Proprietors v. Hoboken Co., (1864) 68 U.S. 116, 17 L.Ed 571.....	7
McDonald v. City of Chicago, 561 U.S. 742, 765 n. 13, 130 S.Ct. 3020, 177 L.Ed 2d 894(2010).7	7
Trois v. Long, 362 F.App'x 399, 401(5th Cir. 2010).....	7
United States v. Arlen, 947 F.2d 139, 144(5th Cir. 1991).....	7
Renigar v. United States, 172 F.646(1909)).....	7
STATUTES AND RULES	
28 U.S.C.S. §556 [predecesser to Rule 52(a)]	
Cases	Page Number
Bauman v. United States, 156 F.2d 534(5th Cir. 1946).....	8
Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed. 2d 604(1978).....	8
Smith, 50 F.3d. 801 at 829-830.....	8
Bowen v. Maynard, 799 F.2d 593, 612-13(10th Cir. 1986).....	8
Bagley, 473 U.S. at 676.....	8
United States v. Ramos, 933 F.2d 968, 974(11th Cir. 1991).....	8
OTHER	
Williamson v. Tucker, 645 F.2d 404, 414(5th Cir. 1981).....	9
United States v. Spruill, 118 F.3d 221, 227(4th Cir. 1997).....	10

TABLE OF AUTHORITIES CITED CONTINUED

CASES	PAGE NUMBER
United States v. Hooker, 841 F.2d at 1232(4th Cir. 1988).....	10
Clay v. United States, 326 F.2d 196, 198(10th Cir. 1963).....	10

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-6
REASONS FOR GRANTING THE WRIT	7-12
CONCLUSION	13

INDEX TO APPENDICES

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

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 A&B to the petition and is

reported at _____; 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.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was STILL PENDING.

[] 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). and 28 U.S.C. §2101(e)

[] 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 INVOLVED

Fifth Amendment states in relevant part:

"No person shall be held to answer for a Capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,"

Sixth Amendment states: "no person may be imprisoned for any offense unless person was represented by counsel at trial".

The Constitution of the United States is considered to be protected by the people that take an oath to protect the rights given under it.

The rights given by the Constitution are given equally to both rich and poor alike.

Statute 21U.S.C. §841(a)(1) states it is unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENT OF THE CASE

On November 15, 2016, petitioner was arrested under a criminal criminal complaint, which stated that on July 29, 2016, an undercover agent successfully purchased 45.2 grams of methamphetamine from petitioner. When petitioner started to question the accusation, appointed counsel stated there was no lab test done and that he was submitting a not guilty plea. Then on December 13, 2016, a grand jury indicted petitioner. When counsel took the indictment to petitioner in the county jail, petitioner questioned the indictment due to the way it was drawn up. It stated that on or about July 29, 2016 in the Western District of Texas, petitioner and others, aiding and abetting one another, knowingly and intentionally possessed with intent to distribute 5 grams or more but less than 50 grams of methamphetamine, its salts, isomers, and salts of its isomers, a controlled substance. Petitioner asked his then counsel (Louis Correa) about what was said at the Grand Jury. He stated that the Grand Jury found that I should be charged. I then asked him about the aiding and abetting and where the other people that were involved were at. He stated that they are charging me with selling the undercover methamphetamine. Petitioner then requested the lab results and the chain of custody and counsel said that they did not have it. Petitioner then asked how they (the Grand Jury) charged an offense without first receiving the lab results to know exactly what the supposed substance was? Counsel said that they could do whatever they want. Petitioner fired his appointed counsel and was then appointed Mary Ellen Smith. At first Mrs. Smith was finding out that the agents involved were editing recordings and also dry firing there weapons. Petitioner asked for the other people named in the one police report to

be there to testify on petitioners behalf. Counsel failed to do the only thing that would have shown the lies of the agents. Petitioner requested counsel to have an independent test done on the supposed substance that was involved, she failed to that as well. At trial, counsel stated that it would be best to testify and defend that you did not sell anything. Then on appeal that was what made petitioner look bad in the eyes of the judges. The recordings that was used was never examined by an expert to see if that to was edited. The only reason that the other recordings were not used was because it would have shown petitioner was not guilty of possession and would have also shown that petitioner was not wanting to help these people. Subsequently, since the trial was not fair and some of the evidence was a total suprise, petitioner was found guilty of possession. On appeal, the appeals court affirmed that petitioner was guilty of aiding and abetting possession with intent to distribute. At trial, when there was no proof of petitioner having actual possession, the government changed its theory and stated the aiding and abetting.

The jury instructions were deficient due to the fact that at first the jury was instructed to the elements that the government had to prove at trial. Then at the end they were instructed differently to the charge. The argument was constructive possession when that was not ever proven. Petitioner never knew exactly what was being sold to the undercover. The petitioner only introduced a person that was supposedly going to help gain whatever the undercover wanted. Petitioner has the evidence where the agents involved begged petitioner for four months prior to help find someone that would help gain the substances they wanted. Petitioner was not able to show this due to the fact that petitioner was never allowed to leave detention.

Counsel also failed to submit evidence of the police report and also the evidence where the evidence was tainted and unreliable. On the indictment, it has the signature of the prosecutor Monty Kimball. Through out petitioner's incarceration, he has been fighting for his liberty due to the injustice that was caused by the government. In petitioners §2255 petition, he gained an affidavit by the prosecutor Monty Kimball where he states that he never presented the case before the grand jury. The indictment never showed what petitioner had to actually defend to. At trial, there was a recording that was not ever heard by the petitioner. The recordings that were heard were never showed to the jury. The evidence that petitioner was induced and was actually innocent were never shown to the jury due to the counsel being ineffective and also petitioner was not allowed bail in order to procure his evidence. Counsel never requested an independent test done on the evidence of the controlled substance. She never requested a voice exemplar on the recording that was shown to the jury to even know if the person speaking was petitioner. At trial, the jury was instructed on the elements that the government needed to prove beyond a reasonable doubt, then at the end of the case, the judge amended the elements to include aiding and abetting and constructive possession. There was evidence of others involved and the prosecutor failed to show that to the jury. The prosecutor also with held evidence favorable to the defense, which was the phone records of the agent Bustamante. Prosecutor also with held all of the police records involved in the case. Counsel failed to show the lab report and the chain of custody to petitioner before trial to question and examine for himself the documents that were going to be shown to the jury.

REASONS FOR GRANTING THE PETITION

In numerous cases the Supreme Court has ruled, in varying language, that it would consider the question of a federal court's jurisdiction of the subject matter, whether its own or that of the courts below, even though that question was not, or not properly, raised by the parties. M'Kinney v. Carroll, (1838) 37 U.S. 66, 9 L.Ed 1002. If there is a question of a defect in jurisdiction of the Federal Circuit Court, The United States Supreme Court is bound to reverse the judgment, although the defendant has not pleaded in abatement to the jurisdiction of the lower court. Bridge Proprietors v. Hoboken Co., (1864) 68 U.S. 116, 17 L.Ed 571. If this case was not presented to a grand jury, then the petitioners Fifth Amendment was violated and the power was in the hands of the government and the prosecutor. Petitioner has a Fifth Amendment right to a grand jury. See McDonald v. City of Chicago, 561 U.S. 742, 765 n. 13, 130 S.Ct. 3020, 177 L.Ed 2d 894(2010). If a case is not presented to the Grand Jury then probable cause was not established. "A Grand Jury establishes probable cause." Trois v. Long, 362 F.App'x 399, 401(5th Cir. 2010). "The Fifth Amendment guarantees that a criminal defendant will be tried only on charges alleged in the grand jury indictment." United States v. Arlen, 947 F.2d 139, 144(5th Cir. 1991). Grand Jury presentment not made in established mode of procedure is mere question of irregularity as referred to in former 28 U.S.C.S. §556 [predecessor to Rule 52(a)]; paper purporting to be indictment which is handed by foreman to clerk when court is not in session and in absence of grand jury is no indictment, as grand jury presentment must be made publicly and in open court, all of the grand jurors being present and answering to their names. Renigar v. United States, 172 F.646(1909)).

If a Federal Court is without jurisdiction of the offense, judgment of conviction is void on its face. Bauman v. United States, 156 F.2d 534 (5th Cir. 1946). A prosecutor enjoys broad discretion in determining whom to prosecute for what crime, and such pre-trial charging decisions are presumed to be legitimate. Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed. 2d 604 (1978). Nonetheless, a prosecutor violates due process when he or she withholds favorable evidence that may sway the jury in favor of the defendant. The prosecution's failure to disclose police reports of alternate suspects with connections to the defendant is Brady violation as that evidence is potentially exculpatory, impeachment of the quality of a police investigation, and aids a defense investigation. See Smith, 50 F.3d. 801 at 829-830 see also Bowen v. Maynard, 799 F.2d 593, 612-13 (10th Cir. 1986). For evidence to be considered material, it does not have to "reflec[t] upon the culpability of the defendant. Impeachment evidence is evidence that can be used to challenge the credibility of a prosecution witness or that can be used to challenge the prosecution's case. Bagley, 473 U.S. at 676. The trial judge instructed the jury on the essential elements of the crime and the jury found the petitioner guilty. The indictment, however failed to allege the essential element that the defendant had possession or was in constructive possession of any controlled substance. The Sixth Amendment to the United States Constitution guarantees defendants the right to have "compulsory process for obtaining witnessess in his favor". U.S. Const. Amend. VI; see also United States v. Ramos, 933 F.2d 968, 974 (11th Cir. 1991).

The Court of Appeals for the Fifth Circuit affirmed petitioners conviction under the recording that was not even heard by the petitioner before trial and was not given a chance to give a voice exemplar on the recording to show it was not him. The Court of Appeals also erroneously affirmed due to the past conviction of petitioner. If the evidence to show that the supposed substance was not a controlled substance at all it would have brought into question the evidence presented. The evidence was never in a heat sealed bag when the agent supposedly acquired it. This case is a public interest due to the Federal Court not establishing Subject Matter Jurisdiction. The fact that the prosecutor states that he never presented the case to the grand jury should be enough for this Honorable Court to Grant Writ Of Certiorari. In cases involving factual challenges to the court's subject matter jurisdiction, "the court must give the petitioner an opportunity for discovery". Williamson v. Tucker, 645 F. 2d 404, 414(5th Cir. 1981). Through appellants due diligence, in his §2255 he filed a Rule 33 motion of interrogatories that the government failed to answer or acknowledge. The indictment did not contain the essential elements and facts. The necessity of providing both the essential elements of the crime charged and sufficient facts regarding the offense is grounded in the Fifth and Sixth Amendments to the United States Constitution and Federal Rule of Criminal Procedure 7(c)(1). The government must sufficiently apprise the defendant of the charges against him so that he may have enough information regarding the charge to prepare a defense, plead double jeopardy in a subsequent prosecution, and be tried only upon the charges found by the grand jury. If the indictment does not provide enough information to enable the defendant to prepare a defense, the indi-

ctment is considered vague, offending the Due Process Clause of the Fifth Amendment. Courts have uniformly held that the written indictment must contain all the essential elements of the crime charged, or it is subject to dismissal. The essential elements of the offense in the written indictment generally track the language of the statute, regulation or other provision of law which the government alleges the defendant has violated. An offense charged in the language of the statute without any facts surrounding the allegation is not sufficient to apprise the defendant of what he or she is to defend to. "Failure of the indictment to allege all the essential elements of an offense ... is a jurisdictional defect requiring dismissal" and "the absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment." *Id.* at 1505; see also United States v. Spruill, 118 F.3d 221, 227 (4th Cir. 1997). If an essential element is not charged in the indictment, "a defendant is required to answer to a charge that was not brought by a grand jury, thus violating the express language of the Fifth Amendment that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury'". United States v. Hooker, 841 F.2d at 1232 (4th Cir. 1988). These cases demonstrate that the failure to allege an essential element of a crime is a fatal error. While indictments first challenged after trial are reviewed under a more liberal standard, that standard nevertheless requires that "the necessary facts appear in any form or by fair construction can be found within the terms of the indictment." See Clay v. United States, 326 F.2d 196, 198 (10th Cir. 1963).

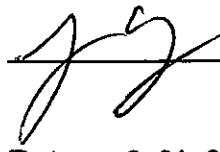
The pre-sentence report has impeachment evidence that if counsel would have cross-examined the agent that was put on the stand, it would have shown that his story changed from the day of the incident and his testimony at trial. Agent Ruckman stated that he saw petitioner hand a bag over to under cover agent Bustamante and that "he saw a clear bag with a crystalline substance inside". At trial, the evidence showed that the supposed controlled substance was inside of a black bag. Again, in the prosecutors affidavit, he states that there were others involved as driving petitioner to and from the place where the transaction took place, but that there was not enough evidence to charge these other people. On the pre sentence report, it states these other people as Blake Ramey and Stella Crespin. The question is this, If these other people were witnesses to the transaction, would it not be better to know exactly what they saw or witnessed? These other people that were mentioned in the police report and the pre sentence report, were requested by petitioner to be witnesses at his trial. Petitioner has stated time and time again that he did not give anything to anyone. Petitioner was not wanting to help these agents at all but after 4 months of pestering and hasseling the petitioner in finding someone that would sell them drugs he found someone that said that they would sell them anything they wanted. Petitioner never had any dealings with these people or ever actually knew if what they said they could sell was true, The prosecution never showed that petitioner even had past transactions with these people..It's like this, If a person is asking for help in finding health insurance and you knew of someone that said that they sold insurance without actually buying insurance from that person, should you be held responsible if the person you

knew that stated that he sold insurance sold that person fake insurance? Should you and you alone be charged with insurance fraud? All you did was tell the person looking for insurance that you knew of someone that said that they sold insurance. Is it Justice to charge the one only directing you to someone with insurance with insurance fraud without charging the one that actually sold you the fraudulent insurance? If this person was the one that sold the insurance that was fake, would it not be proper justice to hear from this person? That is what happened here. All the people involved were not charged or cross examined. If these other people were there to testify, they would have stated that it was never a controlled substance at all. Petitioner has the evidence where they stated that what was given to the undercover agent Bustamante was rock salt. If any Justice would look at the evidence that was presented and the testimony given by the governments witnesses, they would agree with petitioner and see that it was a trial by ambush. Petitioner has already done 5 years for something he did not do. He has lost both of his parents and is losing time to be there for his kids. Petitioner is requesting that this Honorable Court just look at the evidence. Petitioner has a 12 year old daughter that is in foster care and he has tryed to be released to be a father and care for his child.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 9-21-2021