No. 21-7007

IN THE

SUPREME COURT OF THE UNITED STATES

Amador Rodriguez ProSe — PETITIONER
(Your Name)

vs.

U.S. District Ct. Norther Dist. of Tx. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals For the 5th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Amador Rodriguez
(Your Name)

21 F.M. 247 Byrd Unit
(Address)

Huntsville Tx. 77320
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1.) How does the Prosecution bare the burden of Proving a Crime that was Not Alleged in Indictment returned by The Grand Jury?

2.) Is this Indictment - The Origional Indictment?

3.) Does A deadly Weapon have to be used or ethibited (in the Crime which I was Convicted) in order To Enter AFFirmative Finding in Judgment?

4.) Was This Indictment 2nd Count Presented To The Proper Court?

5.) Could The State Prove 2nd Count of Indictment As It was Returned by the Grand Jury?

6.) Does The 2nd Count TRACK The Language of Any offense under LAW?

7.) Did The Language in Courts Charge To The Jury "That The defendant used or Exhibited a deadly weapon, to-wit: a Motor Vehicle, during the Commission of The offense" Not broaden what was Actually Alleged in Origional Indictment.

Question(s) Presented

8.) Does a person not have to be under arrest at some point, in order to be convicted for "Evading arrest" in a Motor Vehicle, and the arrest is Made without a warrant and Probable Cause?

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:

Lorie Davis, Director,
Texas Department of Criminal Justice
Correctional Institutions Division
Respondent

Ali M. Nasser *
Assistant Att'n Gen.
P.O. Box 12548,
Capital Station
Austin Tx 78711

* Lead Counsel For Respondent

RELATED CASES

Rodriguez v. State, No. 07-14-00407-CR, 7th Court of Appeals
Judgment Entered August 8, 2016

Rodriguez v. State, No PD-1014-16 Court of Criminal Appeals of Texas
Judgment Entered December 7, 2016

Ex Parte Rodriguez, No. 2014-402,814-A 140th dist. Court Lubbock Tx.
Judgment Entered August 18, 2017

Rodriguez v. Davis, No. 5:17-CV-0266-C U.S. District Court For
The Northern District of Texas Judgment Entered Dec. 14, 2020

Rodriguez v. Lumpkin No. 20-11272 U.S. Court of Appeals
For The 5th Circuit. Judgment Entered October 27, 2021.

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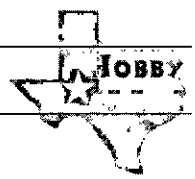

IN THE

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 A to the petition and is

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

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

[ ] reported at _____; 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 C 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 7th Cir. Court of Appeals Rodriguez, 2016 WL4254388@7 court appears at Appendix E to the petition and is

[✓] reported at RODRIGUEZ, 2016 WL4254388@7; 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 October 27, 2021.

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

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

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

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

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

The date on which the highest state court decided my case was Sept. 20, 2017. A copy of that decision appears at Appendix E.

[X] 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

U.S. Const. Amend. V
U.S. Const. Amend. VI
U.S. Const. Amend. XIV

Case Law Federal

State Statutory Law

STATEMENT OF THE CASE

On June 28, 2013, I was Charged in A Single Count Indictment, Cause No. 2013-439260 That was Presented on July 23, 2013 For Evading Arrest or Detention (using A Vehicle) Under Tx. Penal Code § 38.04(b)(2)(a). On July 2, 2014 - while Still In Custody, The State Returned with a superseding Indictment For The Same OFFence of Evading Arrest or Detention in A Vehicle that Occurred on June 28, 2013. Cause No: 2014-402814. However This Time it was a 2 Count Indictment and it had a different OFFicers NAme as to who was Attempting To Arrest or Detain. The 2nd Count of This Indictment is Mainly what this Appeal is About. I was Convicted on November 18, 2014, The Jury also Made an AFFirmative Finding on The 2nd Count, and I was Sentenced To

Statement of The Case

45 years T.D.C.J. Institutional Division.

The 2nd Count of Indictment Alleges the Following: And the defendant did then and there use and exhibit a deadly weapon, to-wit: Motor Vehicle, that in the Manner of its use and intended use was capable of Causing death and serious bodily injury; These allegations were on Superseding Indictment that Came a year Later. what changed 1 year later? I have No Victim in My Conviction For Evading Arrest. In The Courts Charge to the jury paragraph 4. States the Following in Part- The

Prosecution has the burden of proving "the defendant used or exhibited a deadly weapon, to-wit: a motor vehicle, DURING THE COMMISSION OF THE OFFENSE." The Indictment Alleges no such thing. The Courts Charge to the jury joined these 2 offenses, and Abanded how the vehicle became a deadly weapon in the first Place. Both Federal Law and Texas Law Permit that A disjunctive statute be plead conjunctively (And) and proved disjunctively (or) U.S. v. Pigrum 922 F. 2d 249, 253 (5th Cir. 1991) Kossie v. Thaler, 423 Fed. Appx. 434, 434-438 (5th

Circuit 2011) Kossie's indictment stated that he "used and exhibited" a deadly weapon in the Course of the robbery, while evidence from trial only showed "Kossie" exhibited" a Firearm - and was Sufficient evidence of Aggravated Robbery Under Texas Law. In Kitchen v. State 823 S.W. 2d [250, 258] his indictment stated in Part that he Committed Murder in the Course of Kidnapping, robbery and Sexual Assault. So all the State had to prove was that he Kidnapped, robbed, or Sexually assaulted his Victim in the Course of the Murder and it became Capitale Murder. In U.S Pilgrum and Allen,

922 F. 2d 249, 253 (1991 5th Cir.), sec. B.

Allens indictment alleged that he carried "and" used a Firearm "during and in relation to a drug trafficking Crimes. The origional indictment and proper jury instructions, Allen could have been convicted if the jury found "either" that he carried "or" used a Fire arm. See U.S. v. Webb (5th Cir. 1984) Under the Amended indictment, the jury could convict Allen only if it Found that he carried a firearm during and in relation to a drug trafficking Crime, and not that he ~~used and carried a Firearm~~. carried or used a Fire arm. In All These Cases that A

deadly weapon was used or exhibited or that the Murder took place have Something in Common. They have this Language that Constitute an act.... In the Course of the Robbery . . . Murder In the Course of Kidnapping Robbery and Sexual Assault ... Carried and used a Firearm "During & in relation to a drug trafficking Crime" Texas Penal Code 12.35(c)(1), art. 42.12(3)(g)(a)(2) of The Texas Code of Criminal procedures are both related to deadly weapon, The only difference is that one 12.35(c)(1) is a State Jail Punishment enhancement, and 42.12(3)(g)

(a)(2) is a punishment provision. However both have this Similar Language in there Provisions. "That a deadly Weapon as defined in Section 1.07, Penal Code, Was used or exhibited during the Commission of a Felony offense, or during Immediate Flight therefrom. In my Case Penal Code 12.35(c)(1) is what They Used to trigger the entry of The Affirmative Finding in My judgment. However that Penal Code does Not State that if that Finding is Made that the trial Court "Shall" enter that Finding in judgment. The State is Under the impression that the indictment alleges an offense in the

conjunctive "And" and proved one of their Theories "or". in the disjunctive. ~~The~~ Even then, the State did Not return a general Verdict. See Courts Charge (Special Issue). The 5th U.S.C.A. forbids Amendment of an indictment by the Court, whether actual or Constructive. U.S. v. Wacker, 72 F. 3d 1453, 1474 (10th Cir. 1995).

2) Is this the Origional Indictment? or did The Courts New Charge in Special issue become official Indictment? If the Origional indictment remains official, the 2nd Count is Not an offense nor a Crime by itself, And in

That Case it is impossible for the state or Anyone else to prove anything. See Indictments. All These indictments are 2 Count indictments with 2nd Count being Some Form of deadly weapon. These indictments 2nd Count State in Part: That it was further "Presented in and to said Court," and that the deadly Weapon was used or exhibited - During the Commission of the offense. My Indictment No 2014-402814 exhibit B has NO Such Language. Texas Law Permits the Amendment OF an indictment. See Tex. Code Crim. Proc. art 28.10 and 28.11. All amendments must be made

with the Leave of the trial court, and under its discretion Tx. Code Crim. Proc. art. 28.11. The State must request the trials court's permission before amending a charging instrument. Ward v. State 829 S.W. 2d 787 (Tex. Crim. app. 1992) overruled on other grounds, Riney v. State 28 S.W. 3d 561 (Tex. Crim. App. 2000). A motion for leave to amend is an appropriate vehicle to put the Amending process in Motion. Id. In this case, NO such Motion was Filed, ~~therefore~~ A written Amendment must be submitted to the trial court and included in the record to be valid. See Tata v. State, 446 S.W. 3d 456 (Tex. App - Houston [1st Dist.] 2014 pet ref'd)

HOBBY

If the State could of Plead the offense that was supposedly returned by the grand jury, there would of have been no need to change the offense in the courts change Special Issue. See paragraph 1.) of Special issue, and Count 2 of "OFFicial indictment."

3.) Does a deadly weapon, (a Motor Vehicle) have to be used in the transaction from which the Felony conviction was obtained in order to trigger the provisions of Penal Code 12.35(c)(1) or art 42.12 (3)(g)(a)(2)? 18 U.S.C. § 924(c)(1) is a Federal Firearm (deadly weapon) offense That is like 12.35(c)(1) and 42.12 3g(2)(a)?

18 U.S.C § 924 (c)(1) - As explained in U.S. v. Combs, 369 F.3d 925 (2004) contains two Seperate offenses: "One For possesion of a Firearm "In Furtherance of" a drug trAFFicking crime" and one For using or carrying a firearm: during and in relation to a drug trAFFicKing crime. "Use" we explained, is a higher standard of conduct than "possesion" but "in Furtherance of" is a higher standard of Participation than "during and in relation to" In Combs it was held that the district court "Constructively Amended" Count 4 of his indictment when the defendant was charged with the

possesion crime but the jury instructions mired in the lower standard of participation From the use offense Id. @ 396. Thus the district court "literally altered" the indictment and Combs was convicted of a crime that was not the subject of his indictment. We held this to be plain error because it directly violated the 5th U.S.C.A guarantee that a defendant be held to Answer only For the Charges levied by the grand jury. Ex Parte Jones, 957 S.W. 2d 849 (Tx. Crim. App. En banc) held that: The deadly Weapon "Must" have been used during transaction from which Felony conviction arose in order to trigger entry of affirmative finding. See Also

Narron v. State, 835 S.W. 2d @642, The Court of Criminal Appeals of Texas En Banc held that 1.) That the defendant was provided sufficient Notice that the state intended to seek a deadly weapon Finding and 2.) defendant could not be subject to Affirmative Finding of a deadly weapon use, "where there was no associated Felony facilitated" by the defendant's possesion of the Firearm, Narron's ground For review was sustained - Because there was no associated Felony by appelants short barrel Firearm, and the affirmative Finding from the judgment was deleted. This case is also controled by Narron, and Ex Parte Jones Because according to the Charge that was returned

by the grand jury - There is No associated Felony in between those 2 offenses. Therefore the affirmative Finding should be deleted from the judgment.

4.) Was this indictment 2nd Count Presented To Proper Court? art. 21.02 (2) Must show that the same was presented in the district Court of the county where the grand jury is in session. art. 27.09(1) states that an exception to an indictment or information is authorized on the grounds that it "does not appear to have been "presented" in the proper court as required by law." This indictments 2nd Count, does not have Language that all these other indictments

have "That it was Further Presented in to said Court". See Exhibits

6. does the 2nd Count track any offense under Texas Law? If it is, then it should of remained The same in Courts jury Charge. The 6th Amendment gives every defendant "The right... to be informed of the nature and Cause of the accusation"

7.) Did the Language in Court Charge Not broaden what was actually alleged in orisional ~~indictment~~ indictment? The indictment alleged 1 thing, paragraph 1 of the court's charge added "That in Committing the offense" - and changed all the "And's" to "or" paragraph 2 stated if you Find the

defendant guilty of "evading arrest" you must determine whether or not I used "or" exhibited the deadly weapon "During the Commission of the offense" They were instructed that I had to be found guilty of evading arrest, They were not instructed how the vehicle become a deadly weapon, The 2nd part of allegation in indictment was abanded: "That in the Manner of its use "And" "intended use" was capable of Causing death "and" Serious bodily injury." The State said it does not have to prove intent. Are the States not bound by what was alleged? paragraph 7 of the Special issue which is the Application paragraph.

Allowed the jury to make this affirmative finding on a theory or an offense that was not alleged in the indictment. The theory in the indictment alleged one things, and the theory for which I was convicted alleged something else. Paragraph 7 alleges in part: the defendend used or exhibited a deadly weapon, to-wit: a Motor Vehicle, during the Commission of the offesse for which he has been convicted. The State is under the impression that it alleged the offense in the indictment in the Conjunctive, "and" and proved one of thier theory's in the disjunctive. "or". That is not

what happen in this case. The deadly weapon is not an element of the evading arrest offense See Penal Code 38.04(B)(2)(a). However- There has to be a Manner how the Vehicle becomes a deadly weapon, and the State has to prove that beyond a reasonable doubt as well. In this case the 2nd Part of The deadly weapon (Vehicle) was abanded. The 3rd Paragraph of Courts charge State That "Deadly weapon" and Serious Bodily injury have been defined For you in Numbered paragraph 2 and both have the same meaning here. "Serious bodily injury, Was incorrectly defined.

how could those 2 definitions have the same meaning and I was incorrectly defined? This case is just like Stirone v. U.S. 361 U.S. 212, 217-219 (1960). There the defendant was indicted for obstructing the interstate movement of sand in violation of the Hobbs act, 18 U.S.C. § 1951. The district court had allowed a conviction based on a factual finding that the defendant had obstructed a shipment of steel in interstate commerce. The court reversed and held that the variation between the jury instructions and the indictment "DESTROYED" the defendants substantial rights to be tried only on charges

presented in an indictment returned by the grand jury. In this case the trial court allowed the prosecution to amend what the indictment alleged, it allowed the prosecution to join a misjoined offense, and to enter an affirmative finding to be entered in a judgment, (See Tx. Code Crim. Proc. art. 42.01(21) 2013, State's in part that: affirmative findings entered pursuant to Subdivision (2) of Subsection (a) of Section 3g of art 42.12 of this code.) that Texas Penal Code 12.35(c)(1) provision does not State that if that finding is made that it shall be entered in the judgment. It clearly

States that if the Finding is made....

Then the State jail Felony will be punished as a 3rd degree. art. 42.12 3g (a)(2) has this Language "On an affirmative Finding under this subdivision, the trial court "shall" enter the finding in the judgment of the court." art. 42.01 (21) 2013.

8) Was I under arrest the exact minute That officer Pulled in behind me? Both officers stated they did not have a warrant, nor probable Cause to arrest me. However I was convicted for evading arrest in a Vehicle without a Conviction of any other crime that caused the arrest

I was not convicted for evading "arrest or detention," Nor for evading detention. The Statute has the "or" in between arrest and detain. Two different theorys or Manner or Means. In my situation - The States Theory was that I evaded arrest. See Reporter Records pgs 35, and 80 where both officers testified that I was not yet under arrest, Nor was probable cause established. I had not been taken into custody nor had I Submitted to the Police officer's authority. See California v. Hadari D. 499 U.S. 621 (1991)

REASONS FOR GRANTING THE PETITION

This Petition Should be granted for the following reasons:

If 2nd Count Could of been proved as alleged in the Indictment - The State Would of Incorporated Word for Word in the courts charge what the official Indictment alleged - It could of tried to prove one of there theories. The trial Court allowed the State to Constructively Amend Count 2 of Indictment in Violation of 5th, 6th United States Constitutional Amendments, and articles 28.10 and 28.11 of The Texas Court of Criminal Appeals. The State admitted to Amending ~~indicted~~ indictment in there Facts finding and conclusion of Law. However the State believes that the indictment was plead in the conjunctive and proved in the disjunctive - That is not the case. If this indictment was not amended Then 2nd Count is not an offense Period - State or Fed. Nor does it qualify to be an indictment.

This Petition Should Also be granted and in the # Alternative delete the deadly weapon finding because as alleged There is No Associated Felony between deadly weapon Allegation, and evading arrest. that was made without a Warrant and without probable Cause. This Petition Should be granted because I was Convicted of a Crime that was not the Subject of My Indictment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Amadeo Rodriguez

Date: _____