NO. 21-7364

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

In Re: David Lopez

PETITIONER

(Your Name)

VS.

United States of America

RESPONDENT(S)

ON PETITION FOR A WRIT OF PROHIBITION PURSUANT TO ALL WRITS ACT 28 U.S.C. 1651(a) DIRECTED AT THE ASSOCIATED JUSTICE WITH SUPERVISORY CONTROL OVER THE FIFTH CIRCUIT UNDER SUPREME COURT RULE 22-1

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON YOUR CASE)

PETITIONER FOR THE WRIT OF PROHIBITION

DAVID LOPEZ - FED. REG. # 17702-180

(Your Name)

FEDERAL CORRECTIONAL INSTITUTION LA TUNA

(Address)

P.O. BOX 3000
ANTHONY, NM 88021

(City, State, Zip Code)

List of Parties:

In re: David Lopez
-V-
United States of America

THE NAMES OF ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE THERE ARE NO ADDITIONAL PARTIES.

TABLE OF CONTENT

INDEX TO EXHIBITS

EXHIBIT 1: On November 17, 2020 the Hon. Judge Phillip R. Martinez was served for fraud on the court by Chief Judge Lee H. Rosenthal of the Southern District; Case no: 4:20-CV-0292

The Hon. Judge Phillip R. Martinez (now deceased) died on February 26, 2021.

EXHIBIT 2: Fraud case no: 21-50317-Terry-V-Hon. Judge Phillip R. Martinez et.al. now pending in the Fifth Circuit Court of Appeals.

EXHIBIT 3: On October 7, 2021 voluntary "dismissal" of forfeiture which Hon. Judge Kathleen Cardone "deemed meritorious"; Case no: EP-16-CV-10-KC.

EXHIBIT 4: On March 3, 2020 Solicitor General Francisco J. Noel waived its rights to file response to petition on this case, unless requested to do so by Court.

Enhancement charges for Count 1 and Count 2 of the indictment on January 25, 2017.

STATEMENT OF JURISDICTION

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

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

The court takes the case if there are four votes to grant "certiorari". Effective September 25, 1988, the distinction between "appeals" and "certiorari" as a vehicle for Supreme Court review was virtually eliminated. Now almost all cases go to the Supreme Court by "writ of certiorari". Pub. L. No. 100-352, 102 Seat, 662 (1998).

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

In conducting harmless error analysis of constitutional violations, including direct appeals and especially habeas, generally the Supreme Court repeatedly has reaffirmed that "some constitutional violations...by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." Safferwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999). The standard of materiality adopted in each case is not always clear, but if that standard required at least a "reasonable probability" of a different outcome, its satisfaction also automatically satisfied the Utrecht harmless error rule. See, e.g. Arizona v. Youngblood, supra at 55 (recognizing the due process violation based on state's loss or destruction before trial of material evidence); Pennsylvania v. Ritchie, 480 U.S., 39, 57-58 (1987) (recognizing due process violation based on state agency's refusal to turn over material social services records "information material" if it "probably would have changed the outcome of his trial" citing United States v. Bagley, supra at 6785 (White, J. concurring in judgment)).

Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (denial of access by indigent defendant to expert psychiatrist violates due process clause when defendant's mental condition is "significant factor" at guilt-innocence or capital sentencing phase of trial); California v. Trombetta, 467 U.S. 4899-90 (1984) (destruction of blood samples might violate due process clause, if there were more than a slim chance evidence would affect outcome of trial and if there was no alternative means of demonstrating innocence). United States v. Valenzuela-Bernal, supra at 873-874 ("As in their cases concerning the loss by states or government of material evidence sanctions will be warranted for deportation of alien witness only if there is reasonable likelihood that the testimony could have affected the judgment of the Trial of Fact." Chambers v. Mississippi, 40 U.S. 284, 302 (1973) (evidentiary process)); Washington v. Texas, 388 U.S. 14, 16 (1967) (violation of compulsory process clause when it arbitrarily deprived defendant of "testimony [that] would have been relevant and material, and...vital to his defense.").

LAW RELATED TO STRUCTURAL ERROR WITH RESPECT TO THE FAILURE OF THE COURT TO DETECT FROM THE JUDICIAL PROCEEDINGS THAT IT MAY HAVE BEEN DIVESTED OF SUBJECT MATTER JURISDICTION.

Included in the definition of structural error is the right to an impartial judge, i.e. the right to a judge who follows the Constitution and Supreme Court precedent and upholds the oath of the office. See, e.g. Neder v. United States, supra at 8 (biased trial judge is "structural error" and this is subject to automatic reversal); Edward v. Balisok, 520 U.S. 461, 469 (1997); Sullivan v. Louisiana, 508 U.S. 279; Rose v. Clark, 478 U.S. 570, 577-078 (1986); Tunney v. Ohio, 273 U.S. 510, 523 (1927).

STATEMENT OF CASE

On May 18, 2016 David Lopez, also referred to as movant, was charged by a sealed indictment in the western district of Texas, El Paso division, in Case No: EP-16-CR-896-PRM. The two count sealed indictment charged him with conspiracy to Possess a Controlled Substance with intent to distribute which is a violation of Title 21 U.S.C. section 846 and 841(a)(1)(count two). See ECF No. 3. On May 18, 2016 the government also filed a sealed indictment seeking an enhancement of punishment pursuant to 21 U.S.C. Section 851 for movant's prior conviction of Felony Possession of Controlled Substance in the Circuit Court of Green County Missouri. See ECF No. 4. On May 18, 2016 an arrest warrant was issued pursuant to the indictment. See ECF No. 8. On June 23, 2016 movant was arrested and the indictment was unsealed.

On January 20, 2017 voir dire of movant's jury began. On January 23, 2017 the government started to introduce evidence. On January 25, 2017 the jury found movant guilty as to counts one and two of the indictment. See ECF No. 100. On April 26, 2017 movant's attorney, Roland Henry (now deceased), filed a motion to withdraw as attorney. See ECF No. 119. On May 3, 2017 the court entered an order instructing the movant to retain a new attorney to make an entry of appearance in the case by My 18, 2017. See ECF No. 125.

On May 19, 2017 the court set a hearing for movant to show cause for why he failed to comply with the Court's order to have newly retained counsel enter an appearance by May 18, 2017. See ECF No. 144. On May 25, 2017 when the movant failed to comply with the Court's order, a United States Magistrate Judge appointed Richard Jewkes to represent movant at sentencing. See ECF No. 147.

REASONS FOR GRANTING

HOW THE WRIT WILL BE IN AID OF THE COURT'S APPELLATE JURISDICTION IN GRANTING A WRIT OF PROHIBITION

As a threshold matter David Lopez avers that the Writ of Prohibition, which he has applied for, is an extraordinary writ under the All Writs Act 28 U.S.C. 1651(a) which, in the pertinent part, states that all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 FEDERAL RULE OF EVIDENCE IN AID OF DAVID LOPEZ'S CONTENTION THAT THE DISTRICT COURT JUDGE ABUSED HIS DISCRETION IN RUBBER-STAMPING THE GOVERNMENT'S CONTENTION, AND THE FIFTH CIRCUIT COURT OF APPEALS FURTHER ENDORSED THIS INDICTMENT OF CONSPIRACY RATHER THAN A BUY/SELL AGREEMENT.

DAVID LOPEZ WAS NOT INVOLVED IN A SO-CALLED CONSPIRACY

To establish a conspiracy against David Lopez the government must prove, but failed to prove, the following. That:

(1) an agreement existed between two or more persons to violate federal narcotics law

(2) the defendant knew of the existence of the agreement

(3) the defendant voluntarily participated in the conspiracy. "The government does not have to prove that the defendant intended to commit the underlying offense himself/herself." Salina v. United States, 522 U.S. 52, 64, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997).

While a conspiracy statute is broad and far-reaching, a conspiracy requires more than just a buyer-seller relationship between the defendant and another person. A drug user who buys illegal drugs does not enter into a conspiracy with the seller of illegal drugs simply because the buyer resells drugs to others, even if the seller knows that the buyer intends to resell the drugs.

Even a drug purchase of large quantities of illegal drugs may not be enough to establish a conspiracy. It is not enough for the evidence to merely establish a climate of activity that reeks of something foul. United States v. Galvan, 693 F.2d 417, 419 (5th Cir. 1982) quoting United States v. Weishcenberg, 604 F.2d 326, 332 (5Th Cir. 1979). Similarly, an allegation of conscious parallelism or parallel business conduct, without factual allegations suggesting agreement, does not state a claim with respect to antitrust conspiracy and mere proof of "conscious parallelism" or parallel business behavior is insufficient to prevail on a claim of antitrust conspiracy. Occasional credit sales are not necessarily inconsistent with a buyer-seller relationship. Evidence of sporadic purchases on credit would not create a de facto conspiracy.

To prove conspiracy the government must prove an "agreement" between the defendant and the seller that would characterize their relationship as more than a "buyer-seller" arrangement. To establish such an agreement the government must prove that the defendant and the had a deliberate, knowing, specific intent to join and work for the conspiracy. Evidence of the agreement may be direct or circumstantial and can rely on a variety of sources including telephone and bank records, buying patterns, personal relationships with the seller, and evidence of profit sharing or person use.

Multiple buyer-seller transactions are typical for drug users, but such transactions do not prove that a defendant participated in a conspiratorial agreement to distribute drugs. Courts have held that a buyer-seller arrangement cannot by itself be the basis of a conspiracy conviction because there is no common purpose; the buyer's purpose is to buy and the seller's purpose is to sell. United States v. Long, 748 F.3d 322, 325 (7th Cir. 2014)(internal quotation marks omitted). Based on the record of David Lopez's judicial proceedings, the government and the judge amended the indictment from a simple buyer-seller relationship to what it characterized as a conspiracy case.

Also, in Wiggins v. Smith, 539 U.S. 510, 522, 156 L.Ed.2d 471 (2003), the Court held that American Bar Association standards used as a guide in assessing whether attorney's failure to investigate in the Fifth Circuit, the following cases inexorably demonstrate why the government's argument is unavailing. See Woodard v. Collings, 898 F.2d 1027, 1029 (5th Cir. 1990) "When a lawyer who advises his client to plea bargain to an offense which the attorney has not investigated, such conduct is always unreasonable"; Bower v. Quarterman, 497 F.3d 459, 467 (5th Cir. 2007) "defense counsel has a duty to independently investigate the charges against his client"; Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) "a defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial".

The government ignored the two important questions of Prejudice and Reasonable Probability. See Neely v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985).

The third circuit in United States v. Kaufman, 109 F.3d 186, 191 (3rd Cir. 1997) also held that in the context of a claim that counsel filed to conduct adequate investigation prior to the entry of a guilty plea, prejudice is demonstrated by showing that the defendant would have insisted on going to trial instead of pleading guilty.

APPLICABLE LAW APPLICABLE TO PETITIONER DAVID LOPEZ

Generally, claims of ineffective assistance counsel are analyzed pursuant to Strickland v. Washington, 466, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on such a claim movant must show:

Deficient performance - But for counsel's unprofessional errors, the result of the proceeding would have been different. Errors such as not leaving on the record and not filing pre-trial motions for dismissal of the case for constructively amending the indictment from a simple buy-sell to a conspiracy as well as not filing a notice of appeal despite repeated requests to do that. In the denial of his Section 2255 petition the Hon. Judge Phillip R. Martinez mentioned inter alia that the defendant did not subpoena his mother and brother to the evidential hearing when these individuals had nothing to do with making that critical decision.

WHAT CONSTITUTES A "REASONABLE PROBABILITY" IN THE CONTEXT OF PETITIONER LOPEZ'S CLAIMS

The circuits have all been very vocal on this issue. In Ward v Dretke, 420 F.3d 479, 487 (5th Cir. 2005) the court held "prejudice inquiry where the defendant claims that he would not have pled guilty and insisted on going to trial but for counsel's deficient performance partially depends on what that outcome of the trial might have been"; see also Trottie v. Stephens, 720 F.3d 231, 251 (5th Cir. 2013) "materiality exists if there is a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'".

WHETHER THE MALICIOUS PROSECUTION OF THE LOPEZ FAMILY FOLLOWING THE CONVICTION OF DAVID LOPEZ IS UNAMERICAN AND IS A CLEAR CASE OF A GROSS MISCARRIAGE OF JUSTICE, THE BREED OF WHICH IS NOT OFTEN ASSOCIATED WITH THE LETTER AND SPIRIT OF THE RULE OF LAW AND THE UNITED STATES CONSTITUTION.

As a threshold matter, David Lopez avows the following:

"A fundamental promise of our constitution is that it is not what a man 'really' does that can be punished, but only that conduct which is proven at trial. The mandate of the United States constitution is simple and direct. If the law identifies a fact that warrants a deprivation of a defendant's liberty, such a fact must be proven to a jury of their peers beyond a reasonable doubt. See Constitution Art 222, Section 2 of 3. The rule has three essential components: 1) every fact necessary to punishment; 2) proven to a jury; 3) beyond a reasonable doubt."

David Lopez's spouse and their children did not have their day in court. Thirty years ago Terry Lopez bought a home with an inheritance. Following David Lopez's arrest in 2017 Terry's home was confiscated though it bore no nexus to any criminal activity. The "innocent owner" doctrine was thrown out the window. She filed a civil rights violation against the late Hon. Judge Martinez and ADA Kristal M. Wade, both of whom decided to shove the law aside believing they had both judicial and prosecutorial immunity. The Lopez family had to be driven to the ground in a manner of speaking. Without a valid judicial order U.S. Marshals threw Terry Lopez and her three daughters out in the streets of El Paso at the height of the pandemic.

As David Lopez files this writ of prohibition to the Supreme Court, his wife is still homeless. See the following case numbers of Terry M. Lopez v. Hon. Judge Phillip R. Martinez et.al.

On September 9, 2020 District Attorney Kristal M. Wade N.M. was TERMINATED as to case 16-CR-896-PRM and was replaced by District Attorney Robert Almonte II. Hon. Judge Phillip R. Martinez (now deceased) died February 26, 2021.

On November 17, 2020 the Hon. Judge Phillip R. Martinez was served for fraud on the court by the Southern District Chief Judge Lee H. Rosenthal; Case no: 4:20-CV-0292
See: Exhibit# 1

Fraud Case No: 21-50317 Terry M. Lopez v. Hon. Judge Phillip R. Martinez et. al. now pending in the Fifth Circuit Court of Appeals
See: Exhibit# 2

On October 7, 2021 the government seeing the error of its was voluntarily dismissed the forfeiture which Hon. Judge Kathleen Cardone "deemed meritorious". Dismissal of forfeiture order Case No: EP-16-CV-10-KC. This order rendered by Hon. Judge Kathleen Cardone is yet to be enforced by the United States District Attorney of the western district of El Paso, Texas division. The delinquent amount is $53,000 and tractor and trailer that were supposed to be returned to David Lopez! But they have not! Case No: 16-CR-896-KC
See: Exhibit# 3

It is worthy of note that the Alleyne Court announced a new constitutional rule by redefining what a "crime" is. Acknowledging that the historic relationship between crime and punishment compels that any fact which by law increases the range of punishment to which a criminal defendant is exposed "IS AN ELEMENT OF A NEW OFFENSE, A DISTINCT AND AGGRAVATED CRIME." These elements are entitled the full panoply of constitutional protections under the Sixth Amendment "in conjunction with due process".

The following facts are relevant to the issue as to whether Terry Lopez and her daughters and grandchildren are deserving of resuming a normal life free from injustice. The home at 396 Pendale Rd. in El Paso, Texas was confiscated on April 20, 2021 by U.S. Marshals. The Hob. Judge Phillip R. Martinez was served for fraud on the court on November 17, 2020 (Case No: 4:20-CV-0292). The Hon. Judge Phillip R. Martinez's order (who died on February 26, 2021) order for confiscation of 396 Pendale Rd. in El Paso, Texas was and is "moot"!

WHETHER CUMULATIVE ERRORS COMMITTED BY COUNSEL RONALD HENRY AMOUNTED TO CONSTRUCTIVE DENIAL OF COUNSEL THAT PREJUDICED DAVID LOPEZ AND RENDERED THE TRIAL AS ONE WHOSE RESULTS COULD NOT BE RELIED UPON.

The Sixth Amendment right to counsel is the right of effective assistance. McMannv. Richardson, 397 U.S. 759, 771 n. 14 (1970). The benchmark for judging any claim of ineffective assistance of counsel, however, is whether counsel's conduct undermined the proper functioning of the adversarial process, so much so that the trial cannot be relied on as having produced a just result. Strickland v. Washington, 466 U.S. 668, 688 (1984). Also see Boykin v. Wainwright, 737 F.2d 1539, 1542 (11th Cir. 1984).

To prevail on an ineffective assistance claim a defendant must show that both: 1) trial counsel's performance was deficient and 2) that the deficient performance prejudiced the defense. United States v. Hayes, 532 F.3d 349, 353 (5th Cir. 2008)quoting United States v. Mullins, 315 F.3d 449, 453 (5th Cir. 2008); see also Strickland v. Washington, 466 U.S. 668, 687-94 (1984). "It is insufficient for a defendant merely to prove that counsel's conduct was deficient; a defendant must have been prejudiced by this ineffectiveness. The record of the judicial proceeding would show several egregious errors like counsel Ronald Henry suffered from a fatal cancerous tumor that affected his representation and his subsequent death. The state drug charge that was fatally defective was used to enhance David Lopez's sentence by way of the 851 enhancement: the quantity of drugs (35 grams) was substituted to 1000 kilograms.

This error was discovered after the jury had been dismissed. The testimony of 1000 kilograms was highly prejudicial. The factual statements by the government claimed a David Lopez, bearing the same name as defendant David Lopez, but hailing from Mexico perpetrated the drug crimes. David Lopez is a full fledged American and not a citizen of Mexico. Counsel Ronald Henry was aware of these egregious errors which the government perpetrated during the trial but was not mentally able or coherent enough to ask for a mistrial or the dismissal of the defective indictment. This was a clear case of constructive denial of counsel which tainted the trial as one whose findings could not be relied on. It was also an impermissible denial of access to the courts falling short of the Strickland v. Washington case (citation omitted) standard for measuring wither or not counsel was effective by weighing the prejudice and performance prongs of representation.

Because a lawyer is presumed to be competent to assist a defendant, the burden is not on the accused to demonstrate the denial of effective assistance of counsel. United States v. Cronic, 466 U.S. 6.48, 658 (1984). Ineffective assistance of counsel may be grounds for vacating conviction:

(1) Counsel's performance bell below an objective standard of reasonableness

(2) The defendant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. at 687, 684 (1984) "There is no reason for a court deciding an ineffective assistance of counsel claim without determining counsel was deficient". See Coulter v. Herring, 60 F.3d 1499, 150 n.8 (11th Cir. 1995) for performance to be deficient; it must be established that in light of all the circumstances counsel's performance was outside the wide range of professional competence.

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

Furthermore "the burden of persuasion is on a petitioner to prove, by a preponderance of the evidence, that counsel's performance was unreasonable". Id, (citing Strickland v. Washington, 466 U.S. at 688 (1984)). The burden of persuasion, though not insurmountable, is a heavy one. See Id at 1314 (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)).

AN ABUNDANCE OF INVESTIGATIVE AND TRIAL RELATED PREJUDICE WITH RESPECT TO PETITIONER DAVID LOPEZ'S REPRESENTATION.

The government proffered the following statement in its reply brief in Petitioner's 2255 brief. The government not only engaged in Constitutional Issue Avoidance, but also Jurisprudential Alchemy. The Supreme Court on the subject of failure to investigate had this to say in Stricklan v. Washington, 466 U.S. 691, 80 L.Ed.2d 674 (1984). "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary". This did not happen.

The government must prove agreement between seller and buyer to further distribute the drugs. United States v. Morris, 863 F.2d 1371 (D.C. Cir. 1988); a simple buyer-seller relationship does not establish a conspiracy, even if the item to be sold is contraband. There is no evidence that David Lopez had knowledge or formed intent to promote conspiracy with the other unnamed individuals. United States v. Baker, 905 F.2d 1100 (7th Cir.) (prosecution failed to prove agreement because a single purchase of drugs does not automatically make one a

conspirator) cer. denied, 111 S.Ct. 206 (1990); United States v. Burroughs, 830 F.2d 157, 158 (11th Cir. 1987) where buyer's purpose is merely to buy and the seller's purpose is merely to sell, and no prior or contemporaneous agreement existed even though both are aware of the illegal nature of the transaction.

The general rule is an indictment may not be amended except by re-submission to the grand jury that returned it unless the change is merely a matter of form and not substance. Russell v. United States, 369 U.S. 749, 770 (1962). Although Rule 7(e) literally deals only with amending information, the rationale has been extended by the courts to include amendments to indictments where the changes go to matters of form and not substance.

David Lopez contends that although he was charged with a conspiracy the factual proof of the case shows at best his involvement is "Aiding and Abetting" which is not really a crime. A buyer and seller relationship does not rise to the level of a conspiracy but leads to a constructive amendment of the indictment. When the charging terms of indictment is altered, after it is returned by either a judge or prosecutor, a constructive amendment occurs.

A constructive amendment is a more extreme form of variance and is intrinsically prejudicial because it violates the Fifth Amendment Grand Jury Clause which guarantees the accused the right to be tried on the indictment returned by the grand jury. Williamson, supra; United States v. Koen, 31 F.3d 722 (8th Cir. 1994); Fisher, supra at 462; United States v. Rushko, 969 F.2d 1, 5 (2d Cir. 1992) (prosecutor's trial presentation constructively amended the conspiracy count by expanding its object); United States v. Keller, 916 F.2d 628 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991); United States v. Zingano, 858 F.2d 94 (2nd Cir. 1988); United States v. Marcello, 876 F.2d 1147 (5th Cir. 1989) (trial judge rewrote the indictment to add new facts and theories); United States v. Leisure, 844 F.2d 1347 (8th Cir.) (reversed where the trial judge instructed the jury on elements of crime different from the crime charged in the indictment), cert. denied, 488 U.S. 932 (1988).

In sum, the prosecutor in all prosecutions should prosecute earnestly and with vigor, but must not utilize fould means in order to affect a conviction. This is what happened in this case.

WHETHER BY REASON OF THE ABOVE SENTENCE IMPOSED ON PETITIONER WAS SUBSTANTIALLY UNREASONABLE BECAUSE THE DISTRICT COURT DID NOT SUFFICIENTLY ARTICULATE OR FAIRLY ADDRESS A REVIEWABLE BASIS FOR IT OR WHY A SENTENCE OF 293 MONTHS IS JUSTIFIABLE GIVEN THE INCONSISTENCIES AND CUMULATIVE ERRORS IN DAVID LOPEZ'S JUDICIAL PROCEEDINGS.

STANDARD OF REVIEW

Whether the sentence was substantially reasonable is reviewed under the "deferential abuse-of-discretion" standard. United States v. Manning, 738 F.3d 937, 947 (8th Cir. 2014) quoting United States v. Beasley, 688 F.3d 523, 535 (8th Cir. 2021). "Such an abuse of discretion may occur if a sentence court ignores a relevant factor, or commits clear error of judgment even when weighing only appropriate factors. If the district court imposes a within guideline sentence the court presumes the sentence is reasonable and the defendant bears the burden to rebut the presumption." Id. (citing United States v. Beasley, 688 F.3d at 535 (8th Cir. 2021)).

The court's interpretation of the guidelines is reviewed de novo. United States v. Bevin, No. 15-3986, slip op. (8th Cir. Feb. 14, 2017); United States v. Markert, 774 F.3d 922, 923 (8th Cir. 2014). The district court as here imposed a sentence based upon "erroneous facts" or by "failing to adequately explaining the chosen sentence". Bevins, slip op. at p. 2 quoting Gall v. United States, 552 U.S. 38, 51 (2007). The district court's ultimate sentence of 180 months does not meet this appeal.

The guidelines, nowadays at least, are not the right starting point. For instance, in 2015, 52.6% of the Eighth Circuit cases sentence below the guidelines range, with 27.2% being sentenced below the guidelines range without government sponsorship, e.g. 5k.1 motion. U.S. SENTENCING COMMISSSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, COMPARISON OF SENTENCE IMOSED AND POSITION RELATIVE TO THE GUIDELINE RANGE BY CIRCUIT, FISCAL YER TABLE N-8 (2015).

PETITIONER'S PROFFER OF ACTUAL INNOCENCE

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

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

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

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

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

Article 3, Section 2 of the United States constitution states (in pertinent part) that United States District Courts have only such jurisdiction as is conferred by an Act of Congress under the Constitution. See 28 U.S.C.A. 1334; Hubbard v. Ammerman, 465 F.2d 1169 (5th Cir. 1972) (head note 2. Courts).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In conducting harmless error analysis of constitutional violations including direct appeals and especially habeas generally, the Supreme Court repeatedly has reaffirmed that "some constitutional violations...by their very nature are so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless". Satterwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999). We directed to the Associate Justice in charge of the Fifth Circuit to right this egregious wrong. "Under the doctrine of procedural default a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a Section 2255 proceeding." Mackay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011) (internal citations omitted).

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

David Lopez further avers that this Honorable Court in the exercise of its discretion must be satisfied that the merit is appropriate under the circumstances. Kerr, supra at 403, 48 L.Ed.2d 725, 86 S.Ct. 2119 (citing Schlagenhauf v. Holder, 379 U.S. 104, 112 n.8, 13 L.Ed.2d 152, 85 S.Ct. 234 (1964)).

In conclusion, the Supreme Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrassing the executive arm of the government"; Ex Parte Peru, 318 U.S. 578, 588, 87 L.Ed 1014, 63 S.CT. 793 (1943) or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations." Will, supra at 95, 19 L.Ed.2d 305, 88 S.Ct. 269 (citing Maryland v. Soper (No. 1), 270 U.S. 9, 70 L.Ed.2d 305, 88 S.Ct. 269 (1926).

QUESTIONS PRESENTED

(1)

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

(2)

WHETHER DAVID LOPEZ'S INVOCATION OF ACTUAL INNOCENCE AND THE CAUSE AND EFFECT DOCTRINE ALLOWS THE SUPREME COURT TO ENTERTAIN ANY PROCEDURAL CLAIMS NOT RAISED ON DIRECT APPEAL.

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

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

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

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

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

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

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

Petitioner's case also implies Will v. United States, 389 U.S. 90, L.Ed.2d 308, 885 S.Ct. 269 (1967) where the Supreme Court on the same language utilized in cases like La buy that essentially laid the foundation of Justice Brennan's dissent.

Conclusion

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

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

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

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

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

WHEREFORE, David Lopez respectfully moves that this Honorable SUPREME COURT OF THE UNITED STATES to set aside his sentence and conviction and grant the requested relief in the interest of justice.

Date: MARCH 7, 2022

Respectfully Submitted,

DAVID LOPEZ