

APR 25 2022

OFFICE OF THE CLERK

No. 21-7984

IN THE  
SUPREME COURT OF THE UNITED STATES

Emilio Gomez — PETITIONER  
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Emilio Gomez  
(Your Name)

P.O. 1034

(Address)

COLEMAN, FL 33521

(City, State, Zip Code)

(Phone Number)

**ORIGINAL**

QUESTION(S) PRESENTED

#1) IN THE FAIR INTEREST OF JUSTICE AND INTEGRITY OF THE LAW, MAY THE COURTS REFUSE TO CONSIDER A PETITION OR ITS MERITS, WHEN A PETITIONER HAS SHOWN FACTUAL INNOCENCE AND ACTUAL INNOCENCE?

#2) MAY A JURY'S VERDICT BE OVERTURNED WHERE THERE EXIST A CONFLICT OF LAW, AND THE JURY BASED ITS VERDICT ON CONSTITUTIONALLY INVALID GROUNDS (I.E. JURISDICTIONAL)?

## **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. NELSON PENA

UNITED STATES V. REYNALDO AVILES

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APPENDIX F OPINION OF THE UNITED STATES DISTRICT COURT.

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 is unpublished.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 \_\_\_\_\_ 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 is unpublished.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 is unpublished.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 is unpublished.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**

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

The date on which the United States Court of Appeals decided my case was FEBRUARY 15<sup>th</sup>, 2022.

[ ] 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 \_\_\_\_\_. 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**

U.S. CONST. AMEND. I

U.S. CONST. AMEND. VIII

U.S. CONST. AMEND. ~~XV~~

924(c)

18 U.S.C. § 924(c)

18 U.S.C. § 16(b)

## STATEMENT OF THE CASE

Petitioner Gomez alleges that the purported "Crime of Violence" supporting his § 924(c) conviction is not as a matter of law, a crime of violence. This error is jurisdictional, see St. Hubert, 909 F.3d at 340, and therefore cannot be foreclosed by procedural default. See, Bone, 948 F.3d at 1294.

The petitioner has proved more likely than not that he was convicted by a jury solely under § 924(c)'s Residual Clause and by a preponderance of the evidence that is unclear whether the jury based its verdict on a constitutionally invalid ground. In U.S. v. Peters, 310 F.3d 709, 713, 715 (11th Cir 2002), the 11th Circuit held that the district court committed a jurisdictional error by accepting a guilty plea to mail fraud, where the indictment alleged mail fraud but was actually conduct that was outside of the reach of the mail fraud statute, see 310 F.3d at 715. For the reason same, a challenge to a § 924(c) conviction on grounds that the purported "Crime of Violence" is not, as a matter of law - a "crime of violence", is a jurisdictional claim that cannot be waived. United States v. St. Hubert, 909 F.3d 335, 340-44 (11th Cir 2018), U.S. v. Davis, 139 S. Ct. 2319, 2323-35, 2336 (2019).

Clearly Petitioner was convicted on an unconstitutional ground. While the court in Granada found error complained of harmless, however, because it assumed the jury must also have relied on one or more additional valid grounds. This reasoning was in error, because such reasoning improperly invades the province of the jury and contravanes the plain language of 18 U.S.C. § 924(c), which requires that a single predicate offense attach to each count of conviction. Furthermore while petitioner has previously indicated that the jury instructions in his case allowed for the jurors to rely on multiple predicates, the statutory language of § 924(c) does not. In evaluating the basis of the conviction, therefore, the court must assume that the jury selected a single predicate offense. And if it had to pick, Hobbs Act Conspiracy is the most likely candidate. Because that offense is invalid the conviction must be vacated.

## REASONS FOR GRANTING THE PETITION

As a result of the United States Supreme Court's opinion in Johnson v. United States, 135 S.Ct. 2551 (2015), which was subsequently held to apply retroactively to cases on collateral review, see Welch v. United States, 136 S.Ct. 1257 (2016). In the district court, per Magistrate Judge Patrick A. White, noted that Petitioner Gomez received a sentence in this case as to count 5 for using and carrying a firearm, as well as possessing a firearm in connection with a drug trafficking crime and a crime of violence. under the residual clause per 18 U.S.C. § 924(c) as stated in the order of appointment and he may be entitled to relief pursuant to Johnson v. United States, 135 S.Ct. 2551 (2015) which the United States Supreme Court has held to apply retroactive to cases on collateral review. In Sessions v. Dimaya, *supra*, 138 S.Ct. 1204 (2018), the Supreme Court struck down the residual clause in 18 U.S.C. § 16(b) as unconstitutionally vague.

In United States v. Eshetu, 898 F.3d 36 (D.C. Cir. 2018), the District of Columbia Circuit sought vacatur of the defendant's § 924(c) conviction in light of Sessions v. Dimaya, *supra*. The defendants in Eshetu were originally were convicted by a jury of Hobbs Act robbery and § 924(c) violations. Originally a three Judge Panel of the circuit court affirmed the defendants § 924(c) convictions. See United States v. Eshetu, 863 F.3d 946 (D.C. Cir. 2017). On a Petition for panel rehearing, the court found that the residual clause invalidated by Sessions v. Dimaya was "Materially Identical" to the residual clause in 924(c) and vacated their § 924(c) convictions. Such should be the result for Petitioner Gomez.

Also, when default occurs, the default may be overcome if the Petitioner can show "Cause excusing his failure to raise the issue previously and prejudice from the alleged error." U.S. v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); or "a constitutional violation has probably resulted in a conviction of one who is actually innocent." Lynn, 365 F.3d at 1234. Under the actual innocence exception, as interpreted by the United States Supreme Court doctrine, "a procedural default is excused if petitioner can show that he is actually innocent, either of the crime of conviction or in the capital sentencing context, of the sentence itself." McKay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011). The Petitioner's claim is that his claims are not procedurally defaulted and also he is innocent of the charges involved in the underlying Federal criminal case.

In San Martin V. McNeil, 633 F.3d 1257, 1267-68 (11th Cir. 2011)

the appellate court held that courts may consider Habeas petitions despite procedural bars, "If by refusing to consider the petition..... the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned!" In resolving a conflict among circuit courts of appeal, including the McNeil decision, the Supreme Court held that "actual innocence, if proved, serves as a gate way through which a petitioner may pass whether the impediment is a procedural bar... [or] expiration of the statute of limitations." McQuiggin 133 S.Ct. at 1928. The court further explained that this rule, or fundamental miscarriage of justice exception, is grounded in the equitable discretion of Habeas courts to see that Federal constitutional errors do not result in the incarceration of innocent people.

Here, Petitioner Emilio Gomez is actually innocent of the §924(c) offence because his predicate offense is not a crime of violence. Because the predicate offense is not a crime of violence, it is impossible for the Government to prove one of the required elements of the 924(c) offense. U.S. v. Adams, 814 F.3d 178, 183 (4th Cir. 2016) defendant successfully showed factual innocence as contemplated by Bousley because he has shown that it is impossible for the government to prove one of the required elements of a §922(g) (1) offense, which is, that the defendant was a convicted felon at the time of the charge, which is, that the underlying offense was legally not a felony. Thus the government's assertion of procedural default rises and falls with the merits of the argument that the predicate offense is not a crime of violence. In the case of Petitioner Emilio Gomez, he is actually and factually innocent of the 924(c) offense and accordingly procedural default poses no bar.

Under the 1st Amendment of the United States Constitution, Petitioner Gomez is guaranteed the right to petition the government for a redress of grievances. Also the 8th & 14th Amendments guarantee the protection from "cruel and unusual punishment" and guarantees the right to "due process of law". Respectively, Petitioner's sentence should be vacated and remanded back to the lower court with instructions.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Cecilo Gomez

Date: 25 APRIL 2022