

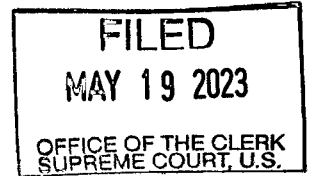
22-7621

No. _____

Application No 22 A 930

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



JERRY ELKINS--PETITIONER

VS.

UNITED STATES--RESPONDENT
ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
PETITION FOR WRIT OF CERTIORARI

Jerry Elkins
F.C.I. Englewood
9595 West Quincy Ave.
Littleton, CO 80123

QUESTIONS PRESENTED

1. Whether the convictions of Petitioner, to include twenty-one (21) other Defendants, was in violation of the U.S. Constitution as the instant indictment failed to properly establish federal jurisdiction by not properly including the jurisdictional element of the "affect on interstate commerce" within its four corners.
2. Whether the conviction of Petitioner to include seven (7) other trial Defendants was proper as the trial judge failed to include the jurisdictional element of the "affect on interstate commerce" and its charge within the four corners of the Court's drafted petit jury instructions.
3. Whether the convictions of Petitioner, to include seven (7) trial Defendants, was proper as the trial judge "constructively amended" the indictment by listing within the jury instructions statutes of convictions of which was not listed within the four corners of the indictment.
4. Whether the conviction of Petitioner, to include seven (7) trial defendants, was proper as the trial judge "constructively amended" the indictment by not providing the federal jurisdictional element of the "affect on interstate commerce or its charge to the petit jury.
5. Whether the convictions of Petitioner, to include seven (7) other Defendants was proper as the trial judge comm-

itted a "Hazel-Atlas" violation of "fraud on the Court" when it failed to insert the most crucial and essential element and charge needed for a federal RICO violation within its jury instructions; but did, however, insert the remaining four (4) elements within the petit jury instruction in its entirety.

RELATED CASES

United States v. Smith et al, No.: 4:11-cr-00246-SEP-12, United States District Court for the Eastern District of Missouri, Judgment of Guilty Entered Dec. 7, 2012.

United States v. Elkins, No.: 13-1941, U.S. Court of Appeals for the Eighth Circuit, Judgment Affirmed Sept. 10, 2014.

United States v. Elkins, No.: 13-1941, United States Supreme Court, Petition for Writ of Certiorari Denied May 28, 2015.

United States v. Elkins, No.: 4:16CV00645, U.S. District Court for the Eastern District of Missouri, Motion to Vacate Under 28 U.S.C. 2255 May 6, 2016.

United States v. Elkins, No.: 21-3693, U.S. Court of Appeals for the Eighth Circuit, Motion to File a Successive Habeas Application Denied March 12, 2019.

United States v. Elkins, No.: 21-3693, U.S. Court of Appeals for the Eighth Circuit, Motion for Authorization to File Successive Habeas Application Denied Jan. 18, 2022.

United States v. Elkins, No.: 22-1592, U.S. Court of Appeals for the Eighth Circuit, Petition for Writ of Mandamus Denied April 4, 2022.

United States v. Elkins, No.: 22-1592 U.S. Court of Appeals for the Eighth Circuit, Notice of Appeal--Final Judgment: Petition for Rehearing Denied May 10, 2022.

United States v. Elkins, No.: 22-2687, U.S. Court of Appeals for the Eighth Circuit, Case is Summarily Affirmed in Accordance with 8th Circuit Rule 47A Nov. 11, 2022.

United States v. Elkins, No.: 2687 U.S. Court of Appeals for the Eighth Circuit, Petition for Rehearing Denied Jan. 18, 2023.

United States v. Elkins, No.: 2687, U.S. Court of Appeal for the Eighth Circuit, Motion to Recall Mandate Denied Feb 13, 2023.

JURISDICTION

This case was summarily affirmed in accordance with Eighth Circuit Rule 47A on November 7, 2022. A Petition for Rehearing by Panel was filed by Petitioner on December 21, 2022. The Petition for Rehearing by Panel was denied on January 11, 2023. A Mandate issued on January 18, 2023. Petitioner filed a Motion to Recall Mandate on February 7, 2023. An Order denying the Motion to Recall Mandate was issued February 13, 2023.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a). Jurisdiction of this Court is also equitably asserted pursuant to Sup. Ct. R. 13(2) and 28 U.S.C. sec. 2101(c). The 90-day deadline for seeking review of a criminal judgment may be waived because the procedural rules adopted by the U.S. Supreme Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion. **United States v. Buckles**, 647 F.3d 883, 2011 U.S. App. LEXIS 11058 No. 08-36031 (9th Cir. 2011). The purpose of the equitable tolling doctrine "is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having his day in court," and to "prevent the unjust technical forfeiture of causes of action." **Bowles v. Russell**, 551 U.S. 205, 212, 127 S.Ct. 2360, 168 L.Ed. 96 (2007). "[C]ourts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which if strictly applied, threaten the evils of archaic rigidity. **Hazel-Atlas Glass Co. v. Hartford-Empire Co.**, 322 U.S. 238, 248, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944).

STATEMENT OF THE CASE

The indictment underlying this case is from the results of a two-and-one-half-years investigation of a motorcycle club called Sin City Titans. The U.S. Government had a paid informant infiltrate the Titans. The Titans motorcycle club disbanded and some of its members joined the Wheels of Soul Motorcycle Club, to include the Government's informant. The Government's investigation shifted to an investigation of the Wheels of Soul motorcycle club. The initial and superseding indictments together listed 22 Wheels of Soul members. Of the 22 defendants, all but eight either assisted the Government or entered plea agreements. Petitioner was one of the eight defendants to reach trial. Petitioner's charges were Conspiracy to Commit Murder In Aid of Racketeering Activity and Racketeering Conspiracy. The charges arose out of an alleged murder scheme at a national motorcycle club party being held in East St. Louis, IL, with over 500 attendees and witnesses. Testimony was also elicited about an unrelated/unindicted murder scheme in relation to Petitioner that was told by an ex-member of the Wheels of Soul Motorcycle Club within his chapter who was upset that Petitioner had barred him from the Club. Petitioner was convicted as charged.

Throughout the trial, Petitioner's court-appointed conflict counsel labored in a medicated stupor after undergoing surgery to treat and remove a cancerous tumor from his head. Additionally, counsel was undergoing chemo and radiation therapy and was under the influence of strong pain pills. Petitioner's Direct Appeal and Writ of Cert were denied on topics

other than the topics raised for the instant case. Petitioner's 2255 also challenged topics other than the instant case as Petitioner was not aware of the Constitutional violations due to the Government and Court opposing Petitioner the new court related documents until after submitting the original 2255.

ARGUMENT SUMMARY

Petitioner asserts the Assistant United States Attorney provided an incomplete indictment to the trial court. Specifically, the AUSA failed to include the essential element of affect on interstate commerce within the four corners of the indictment. Petitioner was prosecuted and convicted under Count Irs and Count XIIIrs of a 34-count criminal indictment. The substantive counts were Racketeering Conspiracy and Conspiracy to Commit Murder in Aid of Racketeering Activity, respectively. Petitioner proceeded to trial on the Indictment with eight codefendants and was found guilty by a petit jury of the charged counts. The trial court prepared and presented the petit jury instructions that did not include the essential elements of affect on interstate commerce. By avoiding the essential element, the trial court constructively amended the statute and set a lower hurdle for the AUSA to clear to obtain a conviction. Petitioner argues that the AUSA was cognizant of the missing elements in the Indictment and in the subsequent jury trial and petit jury instructions. The AUSA, Petitioner further argues, committed a fraud on the trial court. The trial court further sustained this fraud in presenting the incomplete petit jury instructions that resulted in Petitioner's conviction. But for the malfeasance of the AUSA and imprimatur of the trial court, Petitioner would not have been convicted.

Petitioner respectfully requests this Honorable Court unwind the clock and reverse his illegally obtained conviction.

REASONS FOR GRANTING THE PETITION

Petitioner hereby requests this Honorable Court set aside the findings of guilty to Count I and Count XIIIrs of the revised superseding indictment entered by the jury in the above-referenced matter on December 7, 2012. As grounds therefore, Petitioner sets forth the following argument. Petitioner initially argues the charging indictment was defective pursuant to the Fifth Amendment of the United States Constitution. Pursuant to the Fifth Amendment, a defendant's right to be tried on charges found by a grand jury is violated if an essential element is omitted from an indictment. In order to ensure that a defendant will not be brought to trial except for charges found by a grand jury, a facially invalid document cannot be cured by amendments or additions. Petitioner hereby asserts that the original indictment, the superseding indictment, and the revised superseding indictment were facially defective in that they failed to set forth the elements of interstate commerce necessary for the court to have subject matter jurisdiction.

An indictment must set forth each element of the crime that it charges. **United States v. Resendiz-Ponce**, 549 U.S. 102, 107, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007) (quoting **Almendarez-Torres v. United States**, 523 U.S. 224, 228, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998)). Under Rule 7(c)(1) of the Federal Rules of Criminal Procedure, an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Counts in the indictment "may incorporate by reference an allegation" in other counts. *Id.* "An indictment is sufficient if it (1) contains elements of the charged offense and fairly informs the defendant of the charge against which he or she must defend and (2) enables him or her to plead double jeopardy as a bar to further pro-

secution," **United States v. Stands**, 105 F.3d 1565, 1575, (8th Cir, 1997)(following **United States v. Just**, 74 F.3d 902, 903-904) (8th Cir. 1996); see also **Hamling v. United States**, 418 U.S. 87, 117, 94 S. ct. 2887, 41 L.Ed 2d 580 (1974).

In this instance, Petitioner has a Fifth Amendment right to be tried on charges found by a grand jury. Petitioner's right to be tried on charges found by a grand jury is violated if an essential element is omitted from an indictment. **United States v. Camp**, 541 F.2d 737, 740 (8th Cir. 1976). If the elements are clearly set forth in the indictment in the words of the statute itself, that is sufficient to state an offense. See **United States v. Zangger**, 848 F.2d 923, 925 (8th Cir. 1988. Simply citing the charging statute, however, does not cure the omission of an essential element of the charge because that citation does not ensure that the grand jury has considered and found all essential elements of the crime. Petitioner's Fifth Amendment right to be tried on charges found by the grand jury was violated because the grand jury failed to consider a missing element.

The indictment in this matter was defective as it failed to establish subject matter jurisdiction. Rather, the indictment was silent regarding the affect on interstate commerce, thus the Court was not vested with subject matter jurisdiction. Count One of the indictment alleged violation of 18 U.S.C. 1962(D). The indictment failed to list the Federal Statute for 18 U.S.C. 1962(D), which would have advised Petitioner of the elements of the offense. This relevant information is missing from the original and the superseding indictments, thus Petitioner was unable to marshal a defense to the indictment.

Petitioner further moves this Honorable Court to dismiss count I and Count XIIIrs of the indictment under Federal Rule of Criminal Procedure 12(b)(3)(B) because the allegations of the Indictment are insufficient to state a claim. The central focus of any challenge to the sufficiency of an indictment under Rule 12(b)(3)(B) is the indictment itself--nothing more. See Fed. R. Crim. P. 12(b)(3)(B)(providing for a motion alleging a defect in the indictment....") A court may only consider the four corners of the indictment to determine whether it states an offense. See **United States v. Sharpe**, 438 F.3d 1257, 1263 (11th Cir. 2006)("the sufficiency of a criminal indictment is determined from its face.") The Federal Rules of Criminal Procedure provide that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1).

In this instance, the Indictment is insufficient on its face. The allegations of the Indictment fail to state the essential facts of affect on interstate commerce." The superseding indictment was a document of 39 pages with 34 criminal counts. Within that document, affect on interstate commerce was mentioned three times and never in relationship to evidence that would support such an allegation. Without this relationship, the jury was left without the means to determine the crucial jurisdictional element even though the jury was presented with the remaining elements of the alleged crimes. Ordinarily, an indictment will be held sufficient unless it is so defective that it cannot be said, by any reasonable construction, to charge the offense for which the defendant was convicted. **Carter** at 736. Here, no reasonable

construction is available to fill in the void left in the Indictment by leaving out the crucial element of affect on interstate commerce.

Petitioner asserts the defective Indictment represents a pattern of fraud upon the court perpetrated by the Assistant United States Attorney assigned to this matter. Nowhere within the Indictment or Superseding Indictment was the full and entire Federal Statute 18 U.S.C. 1962(C) or 18 U.S.C. 1962(D) set forth. The AUSA conducted fraud upon the court by circumventing and not providing or accurately stating the elements for a Federal RICO violation. Petitioner sets forth that but for the fraud on the court of the fatally defective Indictment, which led to fatally flawed jury instructions, the conviction never would have occurred. Petitioner further sets forth that the fraud instituted on the court was acceded by the court. The court's imprimatur on the proceedings resulted in the erroneous conviction of Petitioner. Under no stretch of the imagination can the insufficiency of the indictment be considered a harmless or unintentional error.

The court in this matter proceeded throughout the case under the assumption that all the elements necessary for the Federal RICO conviction were established within the four corners of the indictment, and further, were supplied in the petit jury instructions. As is earlier cited, an indictment is insufficient on its face if a substantial element is omitted. That the trial court allowed such an indictment to constitute the basis of the case, much less form the basis for the petit jury instructions is per se evidence that the proceedings were improper, therefore the conviction cannot stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mr. Jerry Elkins

Date: 19 May 2023

BECAUSE THE GOVERNMENT, DISTRICT + APPEALS COURT HAVE ALL ACQUIESCED ON THESE SUBJECT MATTERS THIS HAS CAUSED A SPLIT WITHIN THE CIRCUITS TO INCLUDE AN INTERNAL SPLIT WITHIN THE EIGHTH CIRCUIT OF WHICH ONLY THIS HONORABLE COURT CAN RECTIFY.