ORIGINAL

23-5118

IN THE SUPREME COURT OF THE UNITED STATES

In re: Dustin Ray Braddock
Petitioner,

-V-

United States of America
Respondent.

ON PETITION FOR THE WRIT OF PROHIBITION PURSUANT TO THE ALL WRITS ACT 28 U.S.C. 1651(A) DIRECTED TO CHIEF JUSTICE ROBERTS UNDER SUPREME COURT RULE 22-1 TO THE UNITED STATE COURT OF APPEALS FOR THE FIFTH CRCUIT.

Petitioner Dustin Ray Braddock respectfully prays that a Writ of Prohibition issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Dustin Ray Braddock
Reg. No. 27459-180
FCI Milan
P.O. Box 1000
Milan, MI., 48160

QUESTIONS PRESENTED

(1) WHETHER REVIEW IS WARRANTED TO DETERMINE IF A DUAL- ROLE JURY INSTRUCTION IS REQUIRED, WHEN LAW ENFORCEMENT OFFICERS LIKE AGENT FUTCH AND CID STATE AGENT GOODMAN, TESTIFY AS BOTH AN EXPERT AND PRECIPIENT WITNESS.

(2) WHETHER BY REASON OF NUMEROUS CONSTITUTIONAL VIOLATIONS COMMITED BY THE DISTRICT COURT, SUCH AS INTERVENING IN BRADDOCK'S PLEA AGREEMENT IN VIOLATION OF RULE 11(C), CONSTRUCTIVE DENIAL OF COUNSEL(S), PROSECUTORIAL MISCONDUCT, OUTSIDE THE INDICTMENT PROCESS, AND A BIASED JUDGE WHO ABUSED HIS DISCRETION, BY NOT FOLLOWING THE CRIMINAL AND CIVIL LAWS OF PROCEDURE, THE COURT LOST SUBJECT MATTER JURISDICTION, FOR WHICH ONLY THE SUPREME COURT CAN REMEDY THE SITUATION, AND RIGHT THIS EGREGIOUS WRONG, THROUGH THE WRIT OF PROHIBITION.

(3) WHETHER THE CUMULATIVE EFFECT OF ERRORS COMMITTED BY PETITIONER BRADDOCK'S THREE ATTORNEYS IN (TWO TRIALS AND A PLEA AGREEMENT). THAT MAY BE HARMLESS BY THEMSELVES, COULD SO PREJUDICE THE DEFENDANT'S RIGHT TO FAIR JUDICIAL PROCEEDINGS, THAT THESE ERRORS RISE TO THE LEVEL OF CONSTRUCTIVE DENIAL OF COUNSEL, ONE OF THE SEVEN STRUCTURAL ERRORS, DESIGNATED BY THE SUPREME COURT OF THE UNITED STATES.

LIST OF PARTIES

In re: Dustin Ray Braddock

-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.

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STATEMENT OF JURISDICTION

The Supreme Court of the United States has original jurisdiction over the categories cases. First, the Supreme Court can exercise original jurisdiction over "actions proceeding to which ambassadors, other public ministers, consuls, or vice- consuls of foreign states are parties. "See, Maryland v. Louisiana, 451 U.S. 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 statute defining the Supreme Court's jurisdiction between "appeal" and "certiorari" as vehicles for appellate review of the decisions of state and lower courts. Where the statute provides for "appeal" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the statute 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 grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review was virtually entirely eliminated. Now almost all cases come to the Supreme Court by writ of Certiorari. Pub. L. N0. 100-352, 102 Stat.662 (1988).

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

(A) The Supreme Court and all courts established in aid of their respective jurisdictions, and agreeable to the usages and principles of law.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

In conducting harmless error analysis of constitutional violations, including direct appeals as specially 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)("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 errors have been held to harmless error analysis, some will always invalidate the conviction"(citations omitted) Id. at 183 (Rehnquist, C.J. concurring); United States v. Olano, 507 U.S. 725, 735 (1993); Rose v. Clark, 478 U.S. 478 U.S. 570, 577-78 (1986)("some constitutional errors require reversal without regard to the evidence in the particular case...because they render a trial fundamentally unfair."). Vasquez v. Hillery, 474 U.S. 254, 283-264 (1986); Chapman v. California, 38618, 23 (1967)("there are some constitutional rights so basic to a fair trial, that their infraction can never be treated as harmless error").

JUDICIAL NOTICE/STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 OF THE FEDERAL RULES OF EVIDENCE

The right to effective assistance of counsel. See, Kyles v. Whitley, 514 U.S. at 435, 436; United States v. Cronic, 466 U.S. 648, 654-57 (1984); Hill v. Lockhart, 28 832, 839 (8th Cir. 1994)("It is unnecessary to add a separate layer of harmless-error analysis to bar evaluation of whether a petitioner has presented a constitutionally significant claim for ineffective assistance of counsel).

LAW RELATED TO STRUCTURAL ERROR OR MANIPULATION OF EVIDENCE

Included in the right granted by he U.S. Constitution, is the protection against prosecutorial misconduct or manipulation of exculpatory evidence and other prosecutorial and judicial failures that amount to fraud upon the court. Failure to make available to defendant's counsel, information that could well lead to the assertion of an affirmative defense is material., when "materiality" is defined as at least a "reasonable probability that had the evidence been disclosed , the result of the judicial proceedings would have been different. Kyles v. Whitney, 514 U.S. at 435 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion), Id. at 685 (White J. concurring in judgment).

In addition to Bagley, which addresses claims of prosecutorial suppression of evidence, he decisions listed below all arising"what might be loosely called the area of constitutionally guaranteed access of evidence, "Arizona c. Youngblood, 488 U.S. 51, 55 (1988)(quoting United States v. Valenzuela-Bernal, 458 U.S. 867 (19822) or require proof of "materiality" or prejudice.

The standard of review adopted in each case is not at all clear, but if the standard requires at least "reasonable probability" of a different outcome, its satisfaction also automatically satisfies Bretch harmless error rule. See e.g. Arizona v. Youngblood, supra at 55 (recognizing due process violation based on state agency's refusal to turn over material social services records, "Information is material" if it "probably would have changed the outcome of the trial, "citing United States v. Bagley, supra at 685 (White J, concurring in judgement).

Ake v. Oklahoma, 470 U.S. 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. 479, 489-90)(destruction of blood samples might violate Due Process Clause , if there was more than slim chance that evidence would affect outcome, and there were no alternative means of getting relief.

TRULINCS 27459180 - BRADDOCK, DUSTIN RAY - Unit: MIL-A-A

FROM: 27459180
TO:
SUBJECT: Statement of the Case
DATE: 06/17/2023 06:46:15 AM

STATEMENT OF THE CASE.

. On November 14, 2018, A Federal Grand Jury in Midland Texas, returned a Sealed Indictment on Petitioner Braddock. On November 16, 2018, Petitioner Braddock was arrested By Texas DPS CID Agents and DEA Case Agent Matthew Futch. On May 22, 2019, Petitioner Braddock's Indictment was Superseded Charging him with Conspiracy to Possess with Intent to Distribute 50 grams or more of Actual Methamphetamine in Violation of Title 21, United States Code, Sections 841(a)(1),(b)(1)(a) & 846- the indictment contained a "Prior Serious Drug Felony" Enhancement. Jury trial began on June 3, 2019, which ultimately ended in a mistrial the next day, due to his Retained Defense Attorney Robert V. Garcia Jr, having a conflict of interest with a Melissa Preston.

The Court then appointed Braddock attorney Allen R. Stroder. The case proceeded to the second Jury Trial on July 29, 2019. The jury received the case the following day and was deadlocked several hours. After notifying the court by two notes declaring deadlock, the district court gave a "Allen Charge" in open court before the jury and movant. The jury resumed deliberations and deadlocked again. A exparte communication was sent from the jury to the judge, in which the District Judge replied without notifying the defense. Shortly there after mere minutes to be exact, the jury returned a guilty verdict. On August 12, 2019, Defense Counsel Allen R. Stroder, filed a motion pursuant to F.R.Cr.P. Rule 33 Motion for new trial based upon the exparte communication having a coercive effect on the jury reaching its verdict. The Court subsequently granted Defendant's motion for new trial on January 12,2020. Defendant's third Jury trial was set for August 31, 2020.

On the morning of August 26, 2020, Braddock had Final pretrial conference, where he announced ready for trial. Court concluded and Braddock in mid-transport was turned around and taken back to the United States Court house and over a six hour period went back and forth with his own attorney and attorney's for the Government in three failed attempts for Braddock to accept plea agreement. After these failed attempts and well into the afternoon attorneys for the government called court back into session, and engaged the District Court Judge in the plea negotiations. Ultimately resulting in Braddock reluctantly pleading guilty and was sentenced that same day to ten years imprisonment with an FRE(c)(1)(c) agreement. Petitioner did not appeal his sentence.

On September 17, 2021, Petitioner Braddock filed his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. Section 2255. Petitioner raised a claim of Improper Judicial Participation in the plea process in Violation of Rule 11(c)(1).The Court then ordered the United States to respond to Petitioners motion by December 7, 2021. The United States requested an additional month to respond, and the court granted the motion, giving a new response deadline of January 6, 2022. On December 6, 2021, Petitioner filed a supplemental brief for the Section 2255 motion. Mr. Allen Stroder was Petitioner's counsel of record for the relevant portions of Defendant's motion. Petitioner filed his Section 2255 motion Pro-se.

In Petitioner's supplemental brief, he raised a single point of error, namely that Counsel Stroder was ineffective. As a consequence, his plea was involuntary. In his supplemental brief, he also alleges other instances of ineffective assistance of counsel related to his second trial and as well as his re-arraignment and plea and sentencing hearing's.

REVIEW IS WARRANTED TO DETERMINE IF A DUAL-ROLE JURY INSTRUCTIONIS IS REQUIRED WHEN LAW ENFORCEMENT OFFICERS LIKE AGENT FUTCH AND CID STATE AGENT GOODMAN, TESTIFY AS BOTH AN EXPERT AND LAY

EXPERTS

As a threshold matter, Braddock avers that, In every federal district, prosecutors use law enforcement witnesses to provide expert testimony about the meaning of phone calls and other investigative measures utilized like recordings etc, during narcotics investigations. The same witnesses, Futch and Goodman as in this case were also called to provide lay testimony about their role in this particular investigation. In this instance, both Futch and Goodman wear two hats - expert and percipient witness.

From a Due Process standpoint, such dual-capacity witnesses create numerous fairness concerns:

(1)Futch and Goodman's status may lend him unmerited credibility when testifying as percipient witnesses;

(2) cross examination might be inhibited;

(3) jurors could be confused, and;

(4) Futch an Goodman might be more likely to stray from reliable methodology and rely on hearsay; See United States v. Dukagjini, 326 F.3d 45, 54-55 (2d Cir. 2003); United States v. York, 572 F.3d 415, 425 (7th Cir. 2009); United States v. Flores-De -Jesus, 569 F.3d 8, 21 (1st. Cir. 2009); United States v. Conner, 537 F.3d 480, 488 (5th Cir. 2008).

As a matter of common sense, these risks are reduced if jurors are given a jury instruction respect to their roles, and there is an explanation of how each piece of testimony should be evaluated. Thus, district courts should be required to instruct on the distinction, and the demarcation between lay and expert testimony. See United States v. Vera, 770 F.3d 1232, 1242-43 (9th Cir. 2014). Indeed, several courts of appeals have suggested such a rule. An example of such a rule is as follows.

You (have heard)(or are about to hear) testimony from(name) who(testified) (will testify) to both facts an opinions and the reasons for (his)(her)opinions.

Fact testimony is based on what the witnesses saw, heard or did. Opinion testimony is based on the education or experience of the witness.

As to the testimony about facts, it is your job to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. (Take into account the factors discussed earlier in these instructions that were provided to assist you in weighing the credibility of the witnesses.)

As to the testimony about the witness's opinion, this opinion testimony is allowed because of the education or experience of this witness. Opinion testimony should be judged like any other testimony. You may accept all of it, part of it, or none if it. You should give it as much weight as you think it deserves, considering the witness's education and experience, the reason given for the opinion, and all of the evidence in the case.

Ninth Circuit Model Instruction 4.15. The Seventh Circuit has noted, "the danger of unfair prejudice that results from an officer performing the dual role of eyewitness and expert can be minimized by cautionary instructions and by carefully constructed examination." United States v. Limpscomb, 14 F.3d 1236, 1242 (7th Cir. 1994).

While these statements are helpful, they do not go far enough. As this case demonstrates, district court omitted the instruction. and nfortuntely, the Fifth Circuit Court of Appeals affirmed Braddock's sentence and conviction. This Honorable Court, therefore.

must intervene and create a bright - line rule. Specifically, it should require that, when a single officer offers both lay and expert testimony, the district court must instruct the jury regarding the significance of the dual roles.

Such a simple rule will serve the interests of justice by furthering the ultimate goal of basic fairness. It will help guarantee due process by improving the accuracy of jury instructions. And it will make it a little easier for the lay jurors to do the job that is essential to the Ameican judicial system.

WHETHER BY REASON OF THE NUMEROUS CONSTITUTUONAL VIOLATIONS COMMITTED BY THE DISTRICT COURT, SUCH AS INTERVENING IN BRADDOCK'S COERCED PLEA AGREEMENT IN VIOLATION OF RULE 11 (C), CONSTRUCTIVE DENIAL OF COUNSEL(S), PROSECUTORIAL MISCONDUCT OUTSIDE THE INDICTMENT PROCESS, AND A BIASED JUDGE WHO ABUSED HIS DISCRETION, BY NOT FOLLOWING THE CRIMNAL AND CIVIL LAWS OF PROCEDURE, THE COURT LOST SUBJECT MATTER JURISDICTION, FOR WHICH ONLY THE SUPREME COURT CAN REMEDY THE SITUATION, AND RIGHT THIS EGGREGIOUS WRONG, THROUGH THE WRIT OF PROHIBITION.

The use of a petition for 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 abuse of discretion by the lower courts. Peersonette v. Kennedy) in re Midgard Corp, 204 B.R. 764, 768 (10th Cir. 1997).

Like the case at bar, 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 F.3d 850, 854 (10th Cir. 2008)(appellate review of trial court's decision on post judgment set aside voluntary dismissal with prejudice if it was not "free, calculated and deliberate choice."

EFFECT OF DISTRICT COURT'S ABUSE OF DISCRETION - The general rule that the writ of prohibition/ mandamus is not proper remedy for controlling lower courts in the exercise of their judicial discretion is subject to the all established limitation that the writ of prohibition may properly issue in the exceptional case of where, there is a clear abuse of that discretion. In that vein, the Supreme Court expressly recognized that exception. See Bankers Life and Casualty Co. v. Holland (1953) 346 U.S. 379, 98.

Petitioner Braddock's three trials was seriously infected by the following constitutional infirmities;

(a) the Indictment was hopelessly defective and based on hearsay evidence.

(b)there were numerous Brady violations that were prejudicial;

(c) the trial judge was biased and treated the government as a special client.

(d) there was constructive denial of trial counsel(s);

(e) the case was a thinly veiled malicious and vindictive prosecution.

(f) the district court violated a long line of Supreme Court cases, sentencing him on materially INCORRECT INFORMATION that may implicit loss or absence of subject matter jurisdiction. APPENDIX E.

See also Braunstein v. McCabe, 571 F.3d 108, 120 (1st. Cir. 2009)(giving courts broad discretion in preventing injustice or unfairness).

Given the totality of the claims raised by Braddock in this petition, one of the key issues at stake here is one of subject matter jurisdiction. Subject matter jurisdiction also refers to the competency of the court to hear or 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. With respect to the claim that the District Court may have lost subject matter jurisdiction, Braddock contends for the District Court to prove jurisdiction by a preponderance of the evidence.; see McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 56 S.Ct. 78, 80 L.Ed 1135 (1936)(must allege facts supporting subject matter jurisdiction). Vantage Trailers v. Bell Corp. 567 F.3d 745, 748 (5th Cir. 2009)(must show subject matter jurisdiction by preponderance of the evidence. Courts must examine two facets of subject matter jurisdiction;

(1) whether the allegations are sufficient to support a finding of subject matter jurisdiction (facial validity) and;

(2) whether the facts supporting subject matter jurisdiction are accurate (factual validity). When faced with a factual challenge (as here) over the subject matter, the court may move beyond the allegations or the complaint and consider relevant evidence including affidavits and testimony; Id.

Motions to dismiss for lack of subject matter jurisdiction fall into two categories;

A facial attack and a factual attack. A facial attack is a challenge to the sufficiency of the pleading itself. On such a motion, the court must take the material allegations of the petition as true and construed in the light most favorable to the non-moving party. A factual attack, as petitioner Braddock does here, is not a challenge on the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction.

On such a motion, no presumptive truthfulness is applied to the factual allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. Nicholas v. All Points Transport Corp of Michigan, Inc., 364 F. Supp. 2d 621, 627 (E.D. Mich., 2005)(quoting United States . Ritchie, 15 F.3d 582, 598 (6th Cir. 1994); cert. denied, 513 U.S. 868, 115 S.Ct. 188, 130 L.Ed.2d 121 (1994)(emphasis in original(citations omitted).

In addition, a court has always had jurisdiction to determine its own jurisdiction, over the substance of the controversy. Petitioner Braddock avers that the requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of judicial power of the United States and is "inflexible and without exception."Steel Co. v. Citizens for a better Environment, 523 U.S. 83, 93, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998).

Indeed, the issue concerns the fundamental constitutional question of the allocation of judicial power, between the Federal and state governments. "Wright & Miller, 13 Fed. Prac. & Proc, Juris, Section 3512 (3d ed), Grupo Dataflux v. Atlas Global Group, L.P. 541 U.S. 567, 574-576, 124 S.Ct. 1920, 1926-1827, 158 L.Ed.2d 210 (1998).

A Federal Court must presume that it does not have Subject Matter jurisdiction, and the party seeking to invoke its jurisdiction must affirmatively allege to support it. Vaden v. Discover Bank, 556 U.S. 49, 129 S.Ct. 1262, 1277-1278, 173 L.Ed.2d 206 (2009). The parties cannot waive subject matter jurisdiction.

No action by the parties can confer subject matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant. California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), principles of estoppel do not apply. American Fire and Casualty Co. . Finn, 341 U.S. 6, 17-18, 71 S.Ct. 534, 541-542, 95 L.Ed. 702 (1951), and a party does not waive the requirement by failing to challenge jurisdiction on its own motion. "(T)he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny jurisdiction, and, in the exercise of its appellate power, that all other courts of the United States. In all cases, where such jurisdiction does not affirmatively appear in the record."Mansfield, C&L.M.R. Co. v. Swan, 11 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884) (Insurance Corp. of Ireland Ltd. v. Compaigne des Buxures de Guinea, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)(emphasis added).

PIVOTAL QUESTIONS FOR THE HONORABLE SUPREME COURT TO CONSIDER IN DETERMINING LOSS OF JURISDICTION AND THE FIFTH CIRCUIT'S RUBBERSTAMPING THE ERRORS OF THE DISTRIT COURT'S GRAVE CONSTITUTIONAL VIOLATIONS, BY STATING NOT ENOUGH CIRCUIT JUDGES FAILED TO VOTE TO ADJUDICATE HIS PETITION FOR REHEARING EN BANC, A VIELED FORM OF RES JUDICATA.

Also, the Honorable Court should determine if the District Court and the Court of Appeals properly exercised the jurisdiction conferred on them by 28 U.S.C. 3231 an 28 U.S.C. Section 1291 respectively. Whether the constitutional prohibition against Double Jeopardy, includes within it, the right of petitioner Braddock (but not the state) to plead "collateral estoppel" and thereby preclude proof of some essential element(s) of the state's case found in the defendant's favor.

MEMORANDUM OF POINTS AND AUTHORITIES FOR THE PROPOSITION THAT, BECAUSE OF THE POSSIBLE LOSS OF JURISDICTION BY THE DISTRICT COURT THE ERRORS ARE SO PATENT, AND CANNOT BE CORRECTED ON APPEAL.

United States District Courts have only such jurisdiction as is conferred by an Act of Congress under the constitution U.S.C.A. Const. art 3, sec. 2; 28 U.S.C.A. 1344)(Hubbard v. Ammerman, 465 2d 1169 (5th Cir. 1972)(headnote 2. Courts).

The United States District Courts are not courts of general jurisdiction. They have no jurisdiction except a prescribed by Congress pursuant to Article 111 of the constitution (many citations omitted).

Graves v. Snead, 541 F.2d 159(6th Cir. 1976)

7.

The question of jurisdiction in the court either over the person, the subject matter or the place where the crime was committed can be raised at any time in the proceeding. It is never presumed, but must always be proved, and it is never waived by the defendant.

U.. v. Rogers, 23 F.658 (D.C. Ark. 1885)

In criminal proceeding, lack of subject matter jurisdiction cannot be waived and may be asserted at any time by collateral attack.

U.S. v. Gernie, 228 F. Supp. 329 (D.C.N.Y. 1964)

Jurisdiction of the court may be challenged after the conviction and execution by judgment by way of writ of Habeas Corpus.

Mookini et al, v. U.S. 201 (1936)
(emphasis added)

The words 'district court of the United States commonly describe constitution courts created which have long been the court of the territories.

In Longshoremen' an Warehousemen's Union et al, v. Juneau Spruce Corp, 342 U.S. 237 (1952)
(emphasis added)

The phrase 'Court of the United States' without more, means solely courts created by congress under Article 111 of the constitution an not territorial court.

In Longshoremen's and Warehousemen's union et al, v. Wirtz, 170 F.2d 183 (9th Cir. 1948)
(emphasis added)

Peersonette v. Kennedy (in re Midgard Corp.) 204 B.R. 764, 768 (10th Cir. 1997)(order is final under collateral order doctrine, if it (1) conclusively determines a disputed question completely separate from the merits of the action, (2) is effectively unreviewable on appeal from a final judgement, and (3) is too important to be denied review.

Pierce v. Underwood, 487 U.S. 552, 558, 108 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

Stave 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 Le Maire ex rel. LeMaire v. United States, 826 F.2d 949, 953 (10th Cir. 1991).

Warfield v. Allied Signal TBS Holdings, Inc., 267 F.3d 538, 542 (6th Cir. 2001)(court have discretion to set a voluntary dismissal with prejudice if it s not a "free, calculated and deliberate" choice).

Hackett v. Barnhart, 475 F.3d 1166, 1172 (10th Cir. 2007)(quoting Kiowa' Indian Tribe f Oklahoma v. Hoover, 150 F.3d 1163, 1165 (10th Cir. 1998) In re Graves, 609 F.3d 1153, 1156 (10th Cir. 2010).

WHETHER THE CUMULATIVE EFFECTS OF ERRORS COMMITTED BY PETITIONER BRADDOCK'S THREE ATTORNEYS IN (TWO TRIALS AND A PLEA AGREEMENT), THAT MAY BE HARMLESS BY THEMSELVES, COULD SO PREJUDICE THE DEFENDANT'S RIGHT TO FAIR JUDICIAL PROCEEDINGS, THAT THESE ERRORS RISE TO THE LEVEL OF CONSTRUCTIVE DENIAL OF COUNSEL, ONE OF THE SEVEN STRUCTURAL ERRORS DESIGNATED BY THE SUPREME COURT OF THE UNITED STATES.

STANDARD OF REVIEW AND STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 FEDERAL RULES OF EVIDENCE.

The cumulative effect of errors that are harmless by themselves, could so prejudice the defendant's right to a fair judicial proceeding. United States v. Ladson, 643 F.3d 1335, 1342 (11th Cir. 2011); United States v. Peciado-Cordoba, 981 F.2d 1206 (11th Cir. 1993); United States v. Adams, 74 F.3d 1093 (11th Cir. 1996); United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995); United States v. Pearson, 746 F.2d 787 (11th Cir. 1984)(assessing the cumulative errors, the court reviews all errors preserved for appeal and all plain errors. United States v. Ladson, supra.

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

Because a lawyer is presumed to be competent to assist the defendant, the burden is not on the accused to demonstrate the denial of the effective assistance of counsel. United States v. Cronic,, 466 U.S. 648, 658 (1984). Ineffective assistance of counsel may be grounds for vacating conviction;

BACKGROUND ON BRADDOCK'S LEGAL COUNSEL(S).

RICHARD ALVARADO

The first words uttered to Braddock by Counsel Richard Alvarado were "you have a very extensive criminal history", in spite of the fact that, Braddock only had one previous felony which was fourteen (14) years prior at that time. He immediately informed Alvarado that he believed he was being framed by TX DPS Agents and repeatedly asked him to move the court on such. Alvarado to all intents and purposes was unresponsive and made no efforts to acquire any Brady Material for Braddock's potential defense, which ostensibly was MALICIOUS OR VINDICTIVE PROSECUTION. On January 16, 2019, Doc. #82, Braddock articulated in a status conference, the fact that his journal had been confiscated by law enforcement officer namely TX DPS *Detailing* numerous unwarranted encounters with them. Beset with multiple suspects and the lack of information from the Federal Case Agents involving Braddock, there was an obvious overlap of the TX DPS's investigation. It is believed that there were potential Brady Materials, potent enough to exonerate Braddock. But Counsel Alvarado made no attempts to compel the Officers or file a Rule 16 motion to compel the government to produce Brady and other evidence. See, Braddock's Sworn Affidavit under penalty of perjury in APPENDIX E, for details of foibles committed by Braddock's three legal counsels, including Alvarado.

ROBERT VICTOR GARCIA JR.

Prior to Robert V. Garcia Jr. being paid in full by Braddock, the former strongly articulated the view that the Government's discovery was markedly contradictory with Agents reports and the unconstitutional methodology of how warrants were procured and executed. Fourth Amendment issues on how Braddock was arrested long after the conspiracy had ended. In contrast, once Garcia was he began peddling the idea that the conspiracy involved an unwieldy 30 Kilo of meth. At trial, on June 3, 2019, Garcia questioned Braddock who a Mr.. Preston was, because he was sitting on the prosecutor's side of the court with his Texas Deputy Star Concho on display, amongst the extra TX DPS agent spectators.

Garcia then stated to Braddock that Mr.. Preston was an Ector County Youth Probation Administrator, Mellissa Preston's father a friend of Garcia. He further stated that he had represented Mellissa in 2010 on a gun charge. As a consequence there was a conflict of interest and that he was going to ask her if she would be comfortable being cross-examined by him. Before the court recessed for the day, Garcia informed Braddock that Mellissa was okay being cross examined. APPENDIX E, also contains ample examples of how Garcia's representation was nothing short of constructive denial of counsel.

ALLEN STRODER

Braddock pleaded guilty a few days prior to having a third jury trial. He protested vehemently to counsel Allen Stroder that the trial date August 31, 2020, was highly prejudicial, because it was the one year anniversary of the horrible mass shooting that had the sister communities of Midland/Odessa commemorating that solemn tragedy. All the local law enforcement officers were being eulogized, preeminent among them was a state trooper and rightfully so, for his heroic efforts as well as be ing one of the victims of the tragedy. State Trooper incidentally was another Division of TX DPS, an integral part of Braddock's trial. In retrospect, the State Troopers could do no wrong. Perhaps just as important, a postal service worker had been shot and killed by the perpetrator that same day, and the U.S. Court is housed in the main Post Office in Midland Texas. Stroder's representation is a textbook example of constructive denial of counsel. His prejudicial foibles and numerous letters sworn under penalty of perjury by Braddock are contained in APPENDEX E.

(1) counsel's performance fell below an objective standard of reasonable assistance and;

(2) the defendant was prejudiced by the deficient performance. Strickland, 466 U.S. U.S. at 694. "There is no reason for a court deciding an ineffective assistance claim to address both components of the inquiry if, the defendant makes an insufficient showing in one. "Strickland, 466 U.S. at 690.

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

Furthermore, "(t)he burden of persuasion is on a petitioner to prove,by a preponderance of the evidence, that counsel's performance was unreasonable." Id. (citing Kimmelman v. Morrison, 477 U.S. U.S. 365 (1986).

"Judicial scrutiny of counsel's performance must be highly differential," and courts"must indulge (the) strong presumption "that counsel's performance was reasonable and the counsel made all significant decisions in the exercise of reasonable professional judgement." Id. (quoting Strickland, 466 U.S. at 689-90). Therefore, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken, might be considered sound trial strategy." Id. (quoting Darden v. Wainwright, 477 U.S. 168 (1986).

If the record Is incomplete or unclear about counsel's actions, then it is presumed that counsel exercised reasonable professional judgment. See Id. at 1314-15. Thus, the presumption afforded counsel's performance "is not, that one particular defense lawyer in reality focused on and then deliberately decided to do or not do a specific act." Id. Rather, the presumption is "that which the particular defense lawyer did.

Moreover, "the reasonableness of a counsel's performance is an objective inquiry."Id. at 1315. For a petitioner to show deficient performance, he "must establish that no competent counsel would have taken the action that his counsel did take... Based on the above, clearly there Is "no other adequate means to attain the relief Braddock desires, a condition designed to ensure that the writ of prohibition which he has applied for, will not be used as a substitute for the regular appeals process; and to demonstrate if Braddock shows that "the writ is appropriate under the circumstances. "Cheney v. United States District Court, 542 U.S. 367, 380-381 (2004)(citations omitted).

DISCUSSION

The critical issue is whether Braddock's three lawyers conducted an objectively reasonable investigation on mitigating evidence. Porter v. McCallum, 558 U.S. 30, 40, 130 S.Ct. 447, 452-53, 175 L.Ed.2d 398 (2009); Kramer v. Kemna, 21 F.3d 305, 309 (8th Cir. 1994)(failure to interview witnesses or discovering mitigating evidence may be a basis for finding ineffective assistance of

counsel). Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1996)(a lawyer who also fails adequately to investigate, and to introduce new evidence, records that demonstrate his client's factual innocence)."

AN ABUNDANCE OF INVESTIGATIVE AND TRIAL RELATED PREJUDICE WITH RESPECT TO BRADDOCK'S REPRESENTATION

The Third Circuit in United States v. Kaufman, 109 F.3d 186, 191 (3d Cir. 1997), also held that in the context of a claim that counsel failed to conduct an 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 TO BRADDOCK.

Generally, claims of ineffective assistance of counsel are analyzed pursuant to Strictland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on such a claim. Movant must show;

(1) deficient performance - counsel's performance fell below the unprofessional errors, the result of the proceedings would have been different. Errors such as Braddock's lawyers not having a trial strategy, from which the court will issue an instruction to the jury. See, Matthews v. United States (Supreme Court)(citations omitted).

Petitioner also alleged that his three attorneys provided ineffective assistance of counsel, bordering on constructive denial of counsel, pursuant to the two-prong test set by Strickland v. Washington. See also, United States v. Willis, 273 F.3d 592, 598 (5th Cir. 2001). To prevail, a movant must show;

(1) his counsel(s) performance was deficient, in that it fell below an objective standard of reasonableness., and;

(2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 689-94.

As a corollary to the ineffective of counsel inquiry, a movant must show that counsel's performance was outside the broad range of what is considered reasonable assistance, and that this deficient performance led to an unfair and unreliable conviction and sentence. United States v. Dovalina, 262 F.3d 472, n 474-75 (5th Cir,. 20010. "(Counsel's assistance is deficient, if it falls 'below an objective standard of reasonableness.'" United States v. Conley, 349 F.3d 837, 841 (5th Cir. 2003)(quoting Strickland, 466 U.S. at 688).

"*(T)o prove prejudice, 'defendant must show 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. quoting United States v. Bass, 310 F.3d 321, 325 (5th Cir. 2002). If movant fails to prove one prong, it is not necessary to analyze the other. See Carter v. Johnson, 131 F.3d 452, 463 (5th Cir. 19970("Failure to prove either deficient performance or actual prejudice to an ineffective assistance of counsel claim, "), Armstead v. Scott, 37 F.3d 202, 210, 210 (5th Cir. 1994).

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

Petitioner Braddock respectfully invokes 28 U.S.C. 1651(a) for the proposition that the Supreme Court and all courts established, in aid of their respective jurisdictions and agreeable to the usages and principles of law. Braddock further avers that, an alternative writ or law may be issued by a justice (Chief Justice Roberts) to whom an application for a Writ of Prohibition, is submitted may refer it to the Court for determination. As a threshold matter, Braddock contends that the Supreme Court has original jurisdiction of a Writ of Prohibition, pursuant to the All Writs Act, 28 U.S.C. 1651(a). An extraordinary Writ under 28 U.S.C.1651(a) may be appropriate to prevent the U.S. Court in Midland Odessa and the Court of Appeals for the Fifth Circuit from making discretionary decisions where the Statute effectively removes those decisions from the realm of discretion. See In Estelle (1975, CA5) 516 F.2d 480).

PETITIONER BRADDOCK'S CONTENTION THAT THE ALLEGATIONS HE MAKES, CONSTITUTE "EXCEPTIONAL CIRCUMSTANCES."

CONSTRUCTIVE AMENDMENT OF BRADDOCK'S INDICTMENT - When the charging terms of an indictment are changed after its return, by the trial judge and the prosecutor, a constructive amendment or fatal variance occurs. A constructive amendment, in Braddock's case is a more extreme form of variance and is prejudicial intrinsically, because it violates the Sixth Amendment and Fifth Amendment Grand Jury Clause, which guarantees an 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), Fischer supra at 462; United States . Roshko, 969 F.2d 1, 5 (2nd. Cir. 1992)(prosecutor's trial presentation constructively amended the possession with intent to distribute charge by expanding its object; United States v. Kellar, 916 F.2d 628 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991)(trial judge rewrote the indictment to add facts and theories; United States v. Leisure, 844 F.2d 1347 (8th Cir.)(reversed where judge instructed the jury on elements of crime different from the crime charged in the indictment), cert.. denied, 488 U.S. 932 (1988).

In Braddock's case, the reasonable doubt instruction given by the court, the lack of a defense strategy presented to the court, and the failure of the court to issue a jury instruction on Braddock's defense was highly prejudicial and violates the constitution. with the Government and Probation Officer incorporating materially incorrect information in the Pre-sentencing report, that the Court ignored, including constructive denial of counsel, that not only permeated Braddock's three trials. The errors were so prejudicial and outrageous.

ACTS OF CLEAR ERROR, MISTAKES OF LAW AND ABUSE OF DISCRETION.

These errors originated with the District Court in Midland, Texas and later in the Fifth Circuit Court of Appeals, where both courts abused their discretion to Braddock's detriment. Hon. Judge Counts was clearly a biased judge, who would not follow Supreme Court Precedents and the Constitution, and had the government as a special client. Included in the definition of structural errors, is the right to an impartial judge, i.e.. the right to judge who follows the constitution and upholds the oath of office. See e.g.. Neder v,. United States, supra, 527 U.S. at 8 ("biased trial judge is "structural error" and is subject to automatic reversal)" Edwards v. Basilok, 520 U.S. 461, 469 (1997); Sullivan v. Louisiana, 508 U.S. t 279; Rose v. Clark, 478 U.S. 570, 577-78 (1986); Tunney v. Ohio, 273 U.S. U.SW. 510, 523 (1927). Further, these errors (structural) were committed by the lower courts. Errors the Constitution and the Supreme Court consider to be ministerial acts that compels the lower courts, to the fulfillment of determining, if jurisdiction lies to subject Petitioner Braddock to a lawful prosecution. Through application of the Plain Error Standard of Review this Honorable Court would discover the deep seated legal infirmities present in this case.

WHY ADEQUATE RELIEF CANNOT BE RECEIVED FROM ANY OTHER COURT, EXCEPT BY THE SUPREME COURT.

The authority to issue writs of prohibition/mandamus derives from the All Writs Act, which grants federal courts the power to issue all writs in aid of their jurisdiction. Section 1651(a); In re Gee, 941 F.3d 153, 157 (5th Cir. 2019). Petitioner Braddock is not utilizing the Rule of Equitable Prospective Application or the Writ of Prohibition to only attack a void judgment. Home v. Flora, 557 U.S. 433, 447, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009). Instead, he is moving this Honorable Court, in addition, to vacate the judgment in his case by reason of abuse of discretion and the gross departure from the law of the land, which if rendered continued enforcement, is detriment to the public interest. "Id". (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S.

12.

Because of the gross, irregular and flagrant error manifest in Braddock's judicial proceedings (see Appendices), highlighted by Hon. Judge Counts literally and figuratively coercing Braddock into signing a plea agreement; See Rule 11 colloquy;

Braddock avers he is aware of the proscription against the use of this extraordinary writ to perform office of appeal or writ or error. This principle finds express recognition in the following Supreme Court cases involving the propriety of mandamus to control lower federal courts conduct,. Bank of Columbia v. Sweeny (1828)26 U.S. 567, 7 L.Ed.2d 265; Ex Parte Perry (1879) 102 U.S. 183, 26 L.Ed 43; Bankers Life Casualty Co. v. Holland (1953).

Braddock seeks the extraordinary remedy, which the courts have often used in special circumstances, to avoid a miscarriage of justice. See Henley v. Mun. Ct. 411 U.S. 345, 35, 36 L.Ed.2d 294, 93 S.Ct. 1571 (1973). Most of the discussion about the potential expansion of the grounds for the writ actually turns on how egregious the lower courts have sought to usurp judicial power. The biased judge, prosecutorial misconduct, marked by egregious constitutional violations that were highly prejudicial, ranks very high among the infirmities that undermine the principles of Anglo-American jurisprudence. In spite of it being the only route to cure a lower court's abuse of discretion and usurpation of power, the writ is not an ordinary writ, not an appeal by right. See, Fernandez, 268 U.S. at 312.

For the above reasons, the Writ of Prohibition may not be a substitute for the Writ of Certiorari or any other petition. However, this application is made for the writ of prohibition. primarily because Congress has 'bestowed the courts with broad remedial powers to grant relief." Boumediene v. Bush, 553 U.S. 723, 776, 128 S.Ct. 1119, 171 L.Ed.2d 21 (2008). It is uncontroversial...that this privilege entitles Petitioner Braddock, to a meaningful opportunity to demonstrate that he deserves relief and is being held pursuant to "the erroneous application and interpretation of the law. Id at 779, quoting INS v. St. Cyr, 553 U.S. 289, 302, 121 S.Ct. 2271, 150.

CONCLUSION

The issue of a petition for a Writ of Prohibition/Mandamus 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 he writ of prohibition to correct an abuse of discretion by the lower courts, especially the district court. Peersonette. v. Kennedy); & In re Midgard Corp) 204 B.R. 764, 768 (10th Cir. 1997). In the case at at bar, the lower courts "displayed a persistent disregard of the criminal and civil rules of procedures," Mootharrt v. Bell, 21 F.#d 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 set aside 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 unfairness).

In conducting Harmless Error analysis of constitutional violations such as Braddock alleges, the Supreme Court has repeatedly reaffirmed that "(s)ome constitutional violations, ..by their very nature, cast so much doubt on the fairness of the trial process that, as a matter of law, 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)("W)e have recognized a limited class of fundamental constitutional rights that defy "harmless error" analysis. 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.").

WHEREFORE, Petitioner Braddock moves this Honorable Court, premises permitted to grant this extraordinary writ in the interest of justice.

Date: June 30, 2023

Respectfully Submitted,

Dustin Ray Braddock