CASE No. 23-5616

ORIGINAL

In the

Supreme Court of the United States

United States of America *Respondent/Appellee*

V.

Isaac K. Biegon. *Petitioner/Appellant.*

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petition For A Writ of Certiorari

Respectfully submitted by:

Isaac K. Biegon

4154 W. Pioneer Dr, Apt. 2015 Irving TX, 75061

Phone: 682-234-4560

email: isaacbiegon@yahoo.com

QUESTIONS PRESENTED

This petition seeks a review of a wrongful alleged conspiracy conviction.

A. There are three foundational prerequisites which must be established to admit a coconspirator's statements under Rule 801(d)(2)(E): (i) that a conspiracy existed; (ii) that defendant was a member of the conspiracy; and (iii) that the declarant's statement was made during *the course* and *in furtherance* of the conspiracy. *United States v. Martinez de Ortiz, 907 F.2d 629, 631-32 (7th Cir. 1990)*

B. The law requires corroboration of a testimony to sustain a conviction, when no direct evidence connects a defendant to the crime and the evidence of the defendant's guilt beyond a reasonable doubt is supplied solely by circumstantial evidence, by the trial testimony of a codefendant, and by the out-of-court statements made by government witness. *United States v. Silverman*, 861 F.2d 571 (9th Cir. 1988).

Interpreting the United States Supreme Court's decision in *Bourjaily*, the Ninth Circuit holds that evidence of the defendant's participation in a conspiracy must be established by independent corroborating evidence which is "fairly incriminating" in itself.

C. In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Supreme Court held that the trial court may consider the out-of-court co-conspirator declaration which the government seeks to admit in deciding whether there was a conspiracy – a predicate for the admissibility of the statement before the jury. However, the Court also cautioned that such hearsay statements are presumptively unreliable and, therefore, while they may be considered in deciding whether there was a conspiracy involving the declarant and the defendant, there must be some independent corroborating evidence of the defendant's participation in the conspiracy.

D. The Supreme Court has long since held that the due process clause protects against convictions based on testimony that the prosecutor knew or should have known was false. See, e.g., *White v. Ragen*, 324 U.S. 760, 764 (1945) (acknowledging that obtaining conviction through knowing use of perjury violates due process).

Questions Presented:

1. Whether a preliminary finding of a conspiracy could be based *solely* on the contested hearsay statement.

2. Whether an accused can be convicted of a crime on the testimony of an accomplice, uncorroborated by independent evidence tending to connect the defendant to the commission of the crime.

3. Whether a trial court violates the Sixth Amendment by not instructing the jury on stipulated facts. Biegon did not knowingly and voluntarily stipulate facts comprising elements of the offense. (Stipulation denied Biegon the right to jury trial and suffered a *de facto* guilt). *United States v. Lyons*, 898 F2D 210, 215 1st Cir. 1991).

4. Whether Fed.R.Crim Pro. 11 should extend to stipulated facts.

5. Whether in the interest of justice, a layman *pro se* defendant has a right to the effective assistance of counsel at the post-conviction stage. Judge Schell didn't appoint counsel for Biegon to assist him with his 2255 motion. 18 U.S.C. 3006A(a)(2)(B).

Powell v. Alabama, 287 U.S. 45 (1932). The Supreme Court held:

Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

6. Whether the court erred by not conducting a hearing pursuant to rule 104 (c) that Biegon confessed to buying Lilian's ticket from Middle East travel. *Jackson v. Denno*, 378 U.S 368 (1964). A statement obtained in violation of Miranda is admissible for impeachment. *Haris v. New York*, 401 U.S 222,91 S. Ct. 643, 28 L.Ed.2d 1 (1971).

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CASE No.22 A 763

IN THE

SUPREME COURT OF THE UNITED STATES

United States of America Respondent/Appellee,

v.

Isaac K. Biegon Petitioner/Appellant.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Before I proceed, I ask the court to consider the fact that I am a layman *pro se* petitioner, so I ask the court to be lenient in its consideration of my petition and construe my arguments in their best light. *citing Alford v. United States,* 709 F2d 418, 425 9 (5th Cir.1983), the reviewing court held me to a higher level of a *pro se* who could establish his innocence. As I seek to demonstrate my factual innocence, my prayer is for this Honorable court to treat petitioner's evidence as the equivalence of an exonerating negative DNA test results not offered at trial and ask the question: what would have been the verdict?

OPINIONS BELOW

The Court of Appeal for the Fifth circuit's unpublished opinion on November 29, 2022 is attached as Appendix 1. A timely petition for extension of time to file Petition for rehearing en banc was filed on 12/12/2022 but denied on December 22, 2022.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit decided this case on November 29, 2022. A timely petition for rehearing was denied.

An extension of time to file the petition for a writ of certiorari was granted to and including April 28, 2023, on February 22, 2023, in Application No.22 A 763 and two extensions of (60 days each) to file the petition and a motion for leave to proceed in *forma pauperis* were granted putting the due date for petition on 9/12/2023.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, 5th Amendment-Due Process of Law, 6th Amendment –Free and Fair Trial, 18 U.S.C. § 371, 18 U.S.C. §2314.

STATEMENT OF THE CASE

Biegon and five others were indicted on April 12, 2000, by a Colin County, Texas federal grand jury for two counts:

Defraud Clause under18 U.S.C. § 371 and the Substantive Offense of Interstate Transportation of Stolen Property under 18 U.S.C. § 2314.

FACTUAL BACKGROUND.

1.Biegon operated as a ticket broker and ran Zooken travel when Millicent Okodo ("Millicent") approached him on a Sunday at Church and asked him to get two airline tickets to Kenya for her sister Lilian Okwany ("Lilian") and her son, Nikinde (both out of state).

2. Millicent gave Biegon Lilian's phone number and the relevant information for both Lilian and her son. Biegon called and talked with Lilian about what he and Millicent had discussed.

3. Lilian later wired ($1800) to Biegon and told him over the phone that her common-law husband Saul Mwakatapanya ("Saul") was going to pay for their son's air ticket. She also told Biegon to have Millicent send the tickets to her once they were ready.

4. Saul, who lived in Canada, called Biegon and gave him his American Express credit card number without the imprint to try and get his son's

ticket paid for. An *Imprint* is a signed authorization by the card owner to charge the card.

5.Biegon went ahead and booked the tickets with his consolidator Middle East Travel with the $1800 wired by Lilian.

6. Middle East Travel put the tickets on hold but later refused to issue them without an imprint and canceled the transaction. While Biegon was still waiting for Saul's decision about the imprint Millicent told him on a Sunday at church that Lilian wants her money back. Also, Saul was complaining about suspicious charges on his credit card. Biegon refunded the money (less cancellation fee) to Lilian through Millicent at Church the next Sunday.

7. Biegon called Saul afterwards about the issue and asked him to fax his financial statements related to those charges to Zooken travel. Biegon wanted to make sure that Middle East travel didn't charge the credit card because the tickets he had booked earlier with them had been canceled.

8. Record on Saul's financial statements showed that Marvin of Costa Azul Travel charged it ($1470 twice on 6/27/1997) and was authorized by Martin Osumba ("Martin"). Marvin instantly refunded Saul his

money. Biegon and Saul resolved the issue over the phone. After a while Biegon got a phone call from Philemon K'Osumba ("Philemon") that the prosecution ("FBI") had gone over to his place to investigate Lilian's ticket. Philemon and Martin are brothers, and each had a travel agency.

FBI Investigation led by Agent Valasquez.

One night in February 1999 Agent Valasquez and another FBI agent went to Biegon's apartment without a search warrant. Without *Miranda rights*[1] warning and inherently coercive, police-dominated atmosphere, they started questioning Biegon about what he knew about Lilian's ticket. Biegon initially asked them: Am I a suspect? Then he told them that he had nothing to do with the ticket. Agent Valasquez pressed Biegon further to accept that Lodhi was his

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[1] BERDON, J., dissenting. *State v. Fernandez*
In cases involving the admissibility of confessions, I am now convinced more than ever that our state constitution requires the state to prove two matters beyond a reasonable doubt: (1) the defendant did in fact make a confession; and (2) this confession was made voluntarily, knowingly and intelligently. I am also convinced that — absent extraordinary circumstances — the government can satisfy this burden only by electronically recording the entire encounter between the defendant and the agents of the state, starting with the administration of *Miranda* warnings.

consolidator otherwise he would be deported. Biegon affirmatively told them that Middle East travel was his consolidator. They left but called back a few days later wanting to record some statements but Biegon declined unless an attorney was present. They cancelled the arrangement but recorded that Biegon confessed to buying Lilian's ticket from Middle East travel. The investigation by the FBI was set off by a referral by Plano, Texas police. Dimension travel agency off Jupiter Rd. # 118 in Plano, TX had been burglarized and 3000 air tickets allegedly stolen and resold. Some of the tickets ended up in the possession of Lilian and her son.

Pre-trial Events

Biegon initially appeared, was arraigned and pleaded not guilty to both charges on May 23, 2000, before US Magistrate Judge Robert Faulkner and was conditionally released on bond.Bobbie J. Peterson was appointed to represent him, and a plea hearing was set for 8/4/2000 of which Biegon orally stated that he does not wish to enter a plea of guilty. At the plea hearing defense attorney had not investigated the case, had not identified defense witnesses and had not filed pre-trial motions as they were preparing for a jury trial set for 10/16/2000.

Bobbie J. Peterson came with a government offer: Accept Lilian's ticket charges against him. Biegon declined. On 7/10/2000 Biegon elected to replace Bobbie J. Peterson with his retained attorney Michael P. Heiskell who immediately advised Biegon to take the plea,

07/19/2000 Docket sheet Case No: 4:00-CR-31-06	80	Notice of Plea Agreement as to Isaac Kipkurui Biegon (sjs) (Entered: 07/20/2000)

He too, never investigated the case, deliberately declined to call defense witnesses[2], stipulated facts and offered no fair fight. *United States v. Cronic.*

Issues at Trial:

1. Whether Biegon was a member of conspiracy when Millicent approached him at Church on a Sunday, bought tickets from conspirator Burney and sold them to Lilian and her son.

2. Whether Biegon charged Saul's card for the sale of stolen ticket.

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[2] *United States v. Gray*, 878 F.3d 702 (3d Cir. 1989). Counsel was ineffective in failing to hire an investigator or conduct any pretrial investigation, including contacting potential witnesses. *United States v. Dawson*, 857 F.2d 923 (3d Cir. 1988). Remand for IAC determination where counsel failed to interview potential witnesses.

3. Whether Biegon sold a ticket (# **29486190753**) for $5148.75.

Witnesses who appeared against Biegon:

1. Karkabi-- Middle East travel owner who voided Lilian's ticket.
2. Lilian – Her air ticket was under investigation.
3. Saul-- His credit card was used to buy stolen air ticket for his son.
4. Burney- co-defendant who had an agreement for non-prosecution.

Witnesses for Biegon: Only character witness, his Pastor.

Tried to a judge and jury, a judgment obtained by fraud on the court, was pronounced against Biegon and a nine-month sentence imposed on him with eight thousand dollars restitution fine followed by three years of supervised release.

Fraud on the court: Willful conduct that is deceitful and obstructionist. Which injects false information into judicial process. *Baba Ali v. State of New York.*

Biegon maintains that he is actually and factually innocent but for the lies of the prosecutor. The factual evidence suppressed by the prosecutor preponderates heavily against the verdict and had there been a free and fair trial, Biegon would have been acquitted.

Mooney v. Holohan, 294 U.S. 103 (1935). (Stating that a "deliberate deception of the court" by the presentation of perjured testimonies is a deprivation of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States").

Evidence against Biegon: Wholly circumstantial.

Lilian's wire transfer of $1800 to Zooken travel, Saul's fax to Zooken travel and Barney's statements.

Relevant circumstantial evidence may include: the joint appearance of defendants at transactions and negotiations in furtherance of the conspiracy; the relationship among codefendants; mutual representation of defendants to third parties; and other evidence suggesting *unity of purpose* or common design and understanding among conspirators to accomplish the objects of the conspiracy." *United States v. Wardell, 591 F.3d at 1287-88.*

Burney entered into an agreement for non-prosecution and offered the following in exchange:

A. Barney's false statement that he recruited Biegon: Membership
The relevant part reads: .....Before receiving the tickets, **Burney recruited various** people to broker the stolen tickets, including Onyiego and **Biegon**. He instructed the brokers to **call him** with customer information so that he could then fill in the blank tickets. He further instructed the brokers that if anyone should inquire about the source of the tickets they should lie and claim they got the tickets through 1-800-flyer .. *USA v. Onyiego 2002.*

Indictment record shows that the prosecutor had: 1. Burney's pager number: 214-834-4649 (2). Biegon's Southwestern bell number: 817-265-5148 (3). Biegon's phone records for May, June, and July of 1997. **(Appendix 4)**. Nothing on record showed email exchanges or a conversation between Burney /other conspirators and Biegon, an agreement made, and eventual recruitment of Biegon. *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

B. False In furtherance offense against Biegon

The evidence against Biegon included (1) testimony that he purchased 10 to 12 tickets from Burney for $200 or $300 and **later sold those same tickets for upwards of $1400**; (2) testimony that he received, on one occasion, delivery of **the blank tickets** in the parking lot of Kroger; and (3) testimony that he knew that he should instruct customers to stick with the "1-800-flyer" story if they happened to be questioned about the validity of the tickets. *United States v. Onyiego (*286 F.3d 249 (2002).

The $1400 sale (actual amount was $1470): This is speculative extrapolation from a contested (Saul's son's) ticket which trial counsel didn't offer to inspect. Saul complained to Millicent about these charges. It is also the reason the prosecutor subpoenaed Saul's financial statements. This is discoverable *Brady* material. Biegon's financial statements were in prosecutor's possession at trial which is enough information to raise a concern about the testimony that Biegon sold tickets for $1400 but she willfully blinded herself to the falsity.

Blank tickets: This contradicts Burney's "*during the course of*" statement that he instructed brokers to call him with customer information. If Biegon was already a member, either coconspirator would call the other to inquire and arrange for delivery and not a fortuitous "*meet–and-deliver*" at a random Kroger parking lot. No tape records corroborated this testimony.

United States v. Daly, 842 F.2d 1380, 1387 (2d Cir. 1986) (admitting recorded telephone conversations when statements made "plainly" referred to continuing conspiracy). Appendix 3 page 1.

Mysterious ticket buyer of $ 5,148.75 ticket control # 29486190753

(i) On or about June 22, 1997, a **person known** to the grand jury purchased stolen airline ticket stock control number **29486190753** from defendant Isaac K. Biegon **(Appendix 3 page 2 & 4, and Appendix 4 page 1 item no. 27).**

Without any corroborating proof the prosecutor lied to the court that Biegon sold this ticket (only 1) for $5,148.75 to a ticket buyer who flew to Detroit, Michigan. (1). The ticket buyer wasn't available for cross-examination as guaranteed by the Sixth Amendment Confrontation Clause. (2). This inherently incredible testimony contradicts the testimony that Biegon was selling tickets for $1400. The prosecutor did not account for how the ticket was bought -cash or card.

Proving 18 U.S.C § 371

The prosecution must prove beyond reasonable doubt: 1). An *agreement,* 2). *Knowledge* and *intent* 3) An overt act *in furtherance* of the conspiracy and,.4) An unlawful object

United States v. Cart, 25 F.3d 1194, 1202-1203 (3d Cir. 1994) (holding that government must prove each element of conspiracy beyond reasonable doubt); *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir. 1994) (same);

Proving the existence of a conspiracy is the foundational element of

rule 801 (d)(2)(E), because it is a precondition to proving the other two elements "*during the course of*" and "*in furtherance of*"[3]

Hon. Judge Schell did not rule that the prosecutor has proven Biegon's membership of conspiracy[4] neither was there factual determination of Biegon's membership of conspiracy. It was correctly not proven during trial.

Co-conspirator statements are properly admitted if the trial court makes a factual determination that the government has established, by a preponderance of the evidence, that: 1). a conspiracy existed; 2). the declarant and the defendant were members of the conspiracy; and 3). the statements were made in the course and in furtherance of the conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175-176, 107 S.Ct

Biegon was not "Connected up" with the Underlying Conspiracy.

Biegon filed for a judgment of acquittal (for no proof of connection to conspiracy) on 10/17/2000 and for new trial (ineffective counsel) on

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[3] *United States v. Gil*, 604 F.2d 546, 547 (7th Cir. 1979) (existence of a conspiracy is an obvious necessary precondition before rule 801(d)(2)(E) comes into play)

[4] *United States v. Allegretti*, 340 F.2d 243, 245 (7th Cir. 1964) in which, as part of a jury instruction, the trial judge stated, "I now rule that the Government has sustained its avowed burden and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement out of the defendant's presence and the several defendants." The appellate court approved the instruction. 340 F.2d at 256 (7th Cir. 1964).

10/26/2000[5]. *Cooks v. State,* 240 S.W.3d 906, 908 (Tex. Crim. App. 2007). Mute counsel failed to put the government's case to meaningful adversarial test. *United States v. Cronic.* There was no non-hearsay proof of conspiracy, no *James' hearing* and the prosecutor didn't file a motion to connect Biegon to conspiracy.

United States v. Arroyo, Government failed to prove conspiracy, trial judge granted a new trial after concluding that no instruction could cure the error of admitting coconspirator statements.
Giglio v. United States, 405 U.S. 150,154 (1972).
A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."
The United States Supreme Court acknowledged that "declarations of co-conspirators are admissible . . . only if there is proof ***aliunde*** that he, the defendant, is connected with the conspiracy. Otherwise, hearsay would lift itself by its own "bootstraps" to the level of competent evidence. *Glasser v. United States*, 315 U.S. 60 (1942).

Pursuant to rule 104 (a) there are three options under *Vinson*, 606 F.2d at 152-53, for the court to utilize in making a determination as to the admissibility of hearsay statements under Rule 801(d)(2)(E):
(a) a pretrial hearing (*James*' hearing) may be held whereby the court, without the jury, hears the Government's proof of the conspiracy and makes a preliminary finding under *Enright;*
(b) the Government may be required to meet its initial burden by producing the non-hearsay evidence of conspiracy prior to making a finding pursuant to *Enright;* and
(c) the court may conditionally admit the hearsay statements subject to a later determination of the admissibility by a preponderance of the evidence. If the

[5] The same trial counsel wasn't going to raise ineffective counsel issue in Biegon's motion for new trial.

Government fails to meet its burden at the end of its case-in-chief, the Court should rule on the defendant's hearsay objection. If the Court finds that the Government failed to meet its burden, it should declare a mistrial upon motion by the defendant, unless convinced that a cautionary instruction would shield the defendant from prejudice.

Uncorroborated Lies that Biegon charged Saul's card and Withholding of *Brady/Giglio* Material by the prosecutor.

Biegon maintains that the prosecutor deliberately violated *Brady* rule by withholding material information. Who did Saul pay $1470 for the purchase of their son's ticket? This is the false foundation of the prosecutor's case i.e "*in furtherance*" of conspiracy. Saul didn't take the stand and directly accuse Biegon of the $1470 charges on his card.

> When the government seeks to establish a conspiracy by inference, it must prove each aspect of the alleged conspiracy. *United States v. Cardenas-Alvarado*, 806 F.2d 566, 569-70 (5th Cir. 1986) (holding that evidence which places defendant in "a climate of activity that reeks of something foul" is insufficient to prove conspiracy);

The prosecutor used leading questions during direct examination[7].

Lilian:

Prosecutor: "You bought this stolen ticket from Biegon, right?"
Lilian: Quickly responded yes out of fear.
This question is not the same as asking Lilian:
"Please tell the court about your air ticket which is under investigation."

Karkabi:

Without asking Karkabi if Biegon ever booked any tickets with him she directly asked Karkabi:
Prosecutor:Did Mr. Biegon buy this, Lilian's ticket, from you sir?
Karkabi: Replied No.

Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that suppression of exculpatory evidence by the prosecution violates due process when the evidence "is material either to guilt or to punishment"

The prosecutor also withheld *Giglio* material i.e Millicent's statements. Millicent was unavailable as a government witness during the trial, yet she was central to the case, the link between Biegon and Lilian and Saul (neither knew Biegon).

In *Giles v. Maryland*, 386 U.S. 66, 72-73 (1967), the Court granted relief because the prosecution deliberately suppressed evidence that would have impeached the testimony of the alleged rape victim.

Brady and *Giglio* are constitutional obligations, *Brady/Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

False confession: The prosecutor lied that Biegon confessed to buying Lilian's ticket from Middle East travel. *Sanders v. State*, 715 S.W. 2d 771, 776 (Tex App- Tyler 1986, no pet). In complete disregard to Fed. Rule of Crim.P 16 Counsel didn't object to voluntariness of confession

Fed. R Crim Pro 16, the government must disclose to the defendant, upon request:Any "relevant" oral statement made by the defendant in response to interrogation by a person the defendant knew was a government agent, if the government intends to use the statement at trial;

Prejudicial Joinder,Transfer of guilt and no jury verdict.

Biegon suffered transfer of guilt in a prejudicial joinder. With no specific jury instructions, *Carbo v. United States*, the prosecutor

infected the trial with lies that all defendants had a criminal background and filed a joinder *motion in limine*

10/10/2000 Docket sheet Case No: 4:00-CR-31-06	107	MOTION by USA as to Mahmood Khan Lodhi, Yophes Onyiego, Isaac Kipkurui Biegon in limine re: extraneous acts (tls) (Entered: 10/11/2000)

Also, the testimony that ticket brokers were willing to buy from Barney and resell or use the stolen tickets prejudiced Biegon. *United States v. Harris,* 8F.3d 943, 947 (2d Cir. 1993) (stating that substantial prejudice occurs if testimony of one conspirator prejudices jury mind against one who is not part of conspiracy). Codefendants did not contest stipulated facts that were offered as evidence, but Biegon contested. The jury did not prove the "*in furtherance*" offense i.e Biegon charged Saul's card for the sale of a stolen ticket for $1470.

Trial Judge's disbelief of the evidence against Biegon. The evidence didn't meet Jurisdictional element.

Judge Schell didn't see any clear evidence against Biegon. He is on record asking the prosecutor: Are you accusing him of only this (Lilian's) ticket? Where are the other tickets?

10/18/2000 Jury trial as to Mahmood Khan Lodhi, Yophes Onyiego, Isaac Kipkurui Biegon held. Third day. Deft Anyiego' motion for acquittal filed and denied. **Biegon's motion for acquittal filed (not ruled on)** Oral order entered denying

deft Lodhi and Anyiego's mo. for acquittal. Court recessed at 6:20 p.m to resume on 10/19/00 (sjs) (Entered: 10/23/2000) *United States v. Lodhi et al*

Federal Circuit Courts are split on how to instruct the jury on stipulated facts:

A stipulation, once entered into, filed and accepted by the court, is binding upon the parties and is a fact deemed adjudicated for purposes of determining the remaining issues in that case. A party who has agreed to a stipulation cannot unilaterally retract or withdraw it." *State v. McCullough, Putnam* App. No. 12-07-09, 2008-Ohio-3055

Biegon did not knowingly and voluntarily stipulate facts and waive his right to a jury trial. Without investigating the facts of the case and discussing it with Biegon counsel stipulated facts.

10/10/2000 Docket sheet Case no. 4:00-CR-31-06	110	Stipulation of Facts by Isaac Kipkurui Biegon, USA re: airline tickets contained in Government's Exhibits (tls) (Entered: 10/11/2000)

The stipulated facts were offered and admitted as evidence on 10/18/00 as contained in **301A,B & C** records. **Appendix 4.**

But what happens when there is no jury instruction to that effect?

Fourth Circuit stated that, for a guilty verdict to be valid under the Constitution, a jury must consider the stipulation of fact as evidence of the existence of the element during its deliberation and render a decision finding that the government has met its burden of proof on every element of the offense, including those established by stipulations of fact. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). Not only does a defendant have a constitutional right to trial by an impartial jury, but a jury also has an "'undisputed power' to nullify guilty verdicts.

Some courts of appeals explicitly refuse to address the issue of whether a stipulation of fact that an element of the offense violates the U.S. Constitution. see, e.g., *United States. v. Meade*, 175 F.3d 215, 223 n.2 (1st Cir. 1999) "We express no opinion on whether the government's duty to prove each element of a crime beyond a reasonable doubt is diluted impermissibly if the jury instructions do not submit the stipulation for the jury's consideration.

In *United States v. Lyons*, Judge conducted a colloquy in which he questioned the defendant about his understanding of the stipulation and directly warned that the court could find him guilty based on stipulations. The jury doesn't have the lawful power to reject the facts as it would conflict with the jurors' sworn duty to apply the law to the facts, regardless of outcome." *United States v. Mason.* (citing *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983).

Ineffective counsel

Failure to investigate: Counsel declined to call defense witnesses Marvin (owner of Costa Azul travel) and Martin both involved in $1470 charges on Saul's credit card.

State v. Thomas, 768 S.W. 2d 335, 336 {Tex. App-Houston (4th Dist.) 1998, *no pet.*} counsel's failure to interview and call witnesses was ineffective. *Richards v. Quarterman*, 566 F 3d 553 (5th Cir. 2009)-Ineffective assistance for failure to conduct pretrial investigation. Decision by counsel cannot be said to be reasonable or strategic absent a thorough investigation.

Conceding before trial: Trial counsel told Biegon, "Look, it is an all-white jury, there is no trial here. This trial is an empty process. The outcome is obvious. I already know they will convict you." Counsel did not offer a fair fight. *United States v. Cronic.*

Immigration consequences: Trial Counsel advised Biegon to take the plea without warning him of deportation consequences. *Padilla v. Kentucky*, 559 U.S. 356 (2010). Biegon was a subject of removal from United States until Lawyer Gary Davis intervened.

Biegon's 2255 Motion, The Lower Courts Decisions, the Circuit split.

With no legal skills and no counsel Biegon filed a defective 2255 motion. *Gordon v. United States,* 216 F.2d 495 (5th Cir 1954) that was denied for lack of clarity. The court's order to amend/correct the motion was returned because Biegon had been released by the time of delivery. Even with delivery the motion would still have been dismissed because Biegon didn't have the skills to amend it save for the case number. Page 2 # 5/14 Appendix.2.

To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Federal Circuit Courts are split on what is new evidence.

The Eight circuit asserts that "new" evidence must have not been available at trial and could not have been discovered earlier through due diligence.

The Seventh Circuit views new evidence standard to simply require that new evidence must not have been presented at trial and must be reliable. *Gomez v. Jaimet,* 350 F. 3D 673, 679 (7th Cir. 2003).

Some federal courts have permitted petitioners to seek *coram nobis* to challenge their federal conviction when §2255 is no longer available. *Blanton v. United States*, 94 F.3d 227,231 (6th Cir 1996).

District Court: Denied Biegon relief for lack of new evidence, *Schlup v. Delo*, 513 US 298, 327 (1995).

Fifth Circuit: Procedurally barred Biegon's claims and affirmed trial court's decision *citing Alford v. United States,* 709 F2d 418, 425 9 (5th Cir. 1983) for *pro se* petitioners. It should trouble the court that a wrongfully convicted alien, with no legal skills to establish his innocence is procedurally denied relief.

Procedural Default. An issue that could have been raised on direct appeal, but was not, is subject to procedural default. *United States v. Frady*, 456 U.S. 152, 162-67 (1982). Such claims are waived unless the prisoner can show either **actual innocence** or **cause** excusing the procedural default, and actual prejudice resulting from the error. Id. at 168.

Meritorious claims of actual innocence would be of no use when court officers strip them of their liberty then resort to procedural defenses. *Powell v. Alabama*, 287 U.S. 45 (1932).

Biegon has suffered reputational harm because of wrongful conviction. He was denied both entry to Purdue Global and SBA loan in 2021.

Prosecutor's response to appellate brief.

Questions not answered: 1). Who was paid by Saul $1470 for the purchase of a stolen air ticket for his son Nikinde ? 2). How can a one-way ticket (# 29486190753) to Michigan cost $5,148.75? The prosecutor exalted my ineffective counsel, highlighted Onyiego's involvement in the crime and resorted to procedural defenses.

Biegon was convicted based on perjured testimonies:

The trial wasn't free and fair. He was not a conspirator, did not sell a ticket for $5,148.75 nor to Lilian and did not charge Saul's credit card. A miscarriage of justice conviction occasioned by fraud on the court, exacerbated by constructive denial of counsel.

United States v. Farrell, 126 F.3d 484, 488 (3d Cir. 1997) (holding that 'corrupt persuasion' includes 'attempting to persuade someone to provide false information to federal investigators'); *United States v. Cruzado-Laureano*, 404 F.3d 470, 487 (1st Cir. 2005) ("Trying to persuade a witness to give false testimony counts as 'corruptly persuading' under §1512(b)").

I remain actually and factually innocent. Biegon prays that the Honorable court consider the factual evidence presented. *Gomez v. Jamet*

CONCLUSION: Grant petition and vacate the panels opinion.