

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LAURO ABEL GRIMALDO,
Petitioner,
vs
UNITED STATES OF AMERICA,
Respondent.

On Petitioner for Writ of Certiorari
to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Lauro Abel Grimaldo, pro se
Reg. #82728-179
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720-6020

QUESTIONS PRESENTED

QUESTION I

IN LIGHT OF THE FLORES-FIGUEROA V UNITED STATES, 556 U.S. 646 (2009), AND ABRAMSKI V UNITED STATES, 573 U.S. ___, 134 S.Ct. 189 L.ED 2d 262 2014 LEXIS 4170 (2014) DOES THE "KNOWINGLY OR INTENTIONALLY" MENS REA CONTAINED IN 21 U.S.C. § 841(a) APPLY TO THE OFFENSE ELEMENTS OF DRUG TYPE AND DRUG QUANTITY FOUND IN 21 U.S.C. § 841(b), AND U.S.C. § 846?

Finally the importance of the issue presented here is underscored by the fact that drug type and quantity may elevate the statutory maximum for a drug trafficking offense under § 841 from one year in prison all the way up to life imprisonment. "Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to [the type and quantity gradations found in § 841(b)], the distinction ... between [those gradation] may be of greater importance than the difference between guilt or innocence for many lesser crimes." Mullaney v Wilbur, 421 U.S. 684, 698 (1975). That being the case, the offense elements of drug type and drug quantity in § 841(b) are truly the tail wagging the dog of the "verb" elements found in § 841(a) (distributing, manufacturing, etc.), and it is perverse to assign a mens rea to the latter but not to the former. In sum, one commentator has noted:

[t]he Court's decision [in Flores-Figueroa show that lower courts should not automatically interpret any criminal statute in a broad manner, totally disregard defendant's relative degrees of culpability. thus, the Court's holding has the potential to bring punishment closer to the defendants' blameworthiness. Lower courts should follow the Court's lead in Flores-Figueroa and examine a statute's

language to determine the type of behavior targeted by the statute at issue to ensure that harsh minimum sentence are not applied more broadly than conduct requires.

Mens Rea Requirement, 123 Har.L.Rev. 312, 322 (2009).

Because, however, the lower courts remain unclear about how to apply the teachings of Flores-Figueroa to the interpretation of other criminal statutes, this Court should grant this petition in order to bring needed clarity to the field.

QUESTION II

IS A CONVICTION AND SENTENCE UNDER 21 U.S.C. § 841 (a)(1), AND 21 U.S.C. § 846 A VIOLATION OF FIFTH AMENDMENT NOTICE RIGHTS AND SIXTH AMENDMENT DUE PROCESS RIGHTS BECAUSE THE JURY VERDICT, CONVICTION AND SENTENCE ARE BASED ON JURY INSTRUCTIONS THAT ALLOW FOR THE PRESUMPTION OF INTENT THEREBY LESSENING THE GOVERNMENT'S BURDEN OF PROOF?

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LIST OF PARTIES

- [X] All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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The Court should grant certiorari to address important issue whether, especially in light of Flores-Figueroa v United States, 556 U.S. 646 (2009), the "knowingly or intentionally" mens rea contained in 21 U.S.C. § 841(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 841(b)....

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PRAYER

Petitioner, Lauro Abel Grimaldo, request that a writ of certiorari be granted to review the judgments of the United States Court of Appeals for the Fifth Circuit in their respective cases.

OPINION BELOW

The opinions of the United States District Court and the United States Court of Appeals for the Fifth Circuit entered in petitioner's cases are attached to this petition as Appendices A through E.

JURISDICTION

This petition is filed within 90 days after entry of judgment of the Fifth Circuit denying COA. See Supreme Court R.13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the statutes under which petitioner was convicted and sentenced - 21 U.S.C. §§ 841, and 846 are reproduced in Appendices F through G, respectively.

STATEMENT OF THE CASE

A. Lauro Abel Grimaldo (hereinafter "~~Petitioner~~") filed his First 28 U.S.C. § 2255 Motion (Civil Action No. 4:13-cv-00347-RAS-DDB) on June 6, 2013. The Government was ordered to file a response to Petitioner's Motion; subsequently Petitioner attempted to file an amended 28 U.S.C. § 2255 Motion raising the following issues: (filed on July 31, 2015).

- 1). Issue One: Petitioner's self-incriminating statements made during an uncounseled interrogation, following Petitioner's indictment and arrest should have been suppressed;
- 2). Issue Two: Petitioner's Sixth Amendment right to a fair trial was violated when the trial court denied Petitioner's Motion for severance; and
- 3). Issue Three: Petitioner's sentence is procedurally unreasonable.

The District Court Denied Petitioner's Motion for Leave to File an Amended 28 U.S.C. § 2255 Motion on March 29, 2016; basing the denial on a finding that:

- (i) "Motion for leave to amend falls outside the on year statute of limitations"; and
- (ii) "Movant did not file his motion... until after the Government had filed its response...".

The Original 28 U.S.C. § 2255 Motion was timely filed and raised the following grounds for relief:

- (i) Petitioner's Attorney, Garland Don Cardwell's (Atty. Cardwell) representation was ineffective by failing to investigate Petitioner's case facts and prepare for trial;
- (ii) Atty. Cardwell provided ineffective

assistance of counsel at the plea stage of the proceeding, by failing to negotiate a plea in light of Petitioner's statements to law enforcement agents;

- (iii) Petitioner's Sixth Amendment due process rights were violated by the Government, as a result of the Government suppressing Brady material;
- (iv) Atty. Cardwell failed to effectively cross examine Government witnesses to expose perjury (original issue 4 & 5); and
- (v) Atty. Cardwell failed to advocate to suppress Petitioner's pretrial statements; Atty. Cardwell failed to properly assess the need to sever Petitioner's trial from his co-defendants denied Petitioner a fair and impartial trial.

B. The District Court's denial of Petitioner's Motion for Leave to file Amended 28 U.S.C. § 2255 Motion, and denial of acceptance of the Amended Motion is an abuse of discretion as under Rule 15(a) of the Federal Civil Rules of Procedure and Fifth Circuit precedent Petitioner's issues presented in the Amended 28 U.S.C. § 2255 Motion relate back to the original filing and are thus not outside of the one year statutes of limitations. (See Madaio v United States, 397 Fed.Appx 568, 2010 U.S.App. LEXIS 19833 (11th Cir 2010) (See also Mayle v Felix, 545 U.S. 644, 662-64, 125 S.Ct. 2562, 2573-47, 162 L.Ed.2d 582 (2005) dealing with habeas proceedings.)

The issues raised in this Application for Certificate of Appealability are issues that restate and/or subsets of the broadly stated issues in the Original 28 U.S.C. § 2255 Motion and are issues that reasonable jurist have found debatable.

In addition to the District Court's abuse of discretion by

denying Petitioner's Motion for Leave to file an Amended 28 U.S.C. § 2255 Motion, and thus not giving consideration to the Amended 28 U.S.C. § 2255 Motion, the District Court plainly erred in regards to denying Petitioner's Grounds One (1) and Six (6).

In as much as Petitioner was represented by Atty. Cardwell at trial the obligation to preserve Petitioner's constitutional rights is in the domain of Atty. Cardwell. Because the evidence demonstrated and the Fifth Circuit confirmed that Oscar Cantu-Ramirez (OCR) was the organization's "kingpin" and that Raul Cantu-Ramirez (RCR) was OCR's brother, whose testimony from statements given to law enforcement was presented to the jury, appellant under circuit precedent was clearly entitled to a trial separate from the Cantu-Ramirez brothers. The above grounds for relief and argument are clearly within the broadly stated Grounds One (1) and Six (6) in the Original 28 U.S.C. § 2255. This argument was more fully briefed and clarified in the proposed Amended 28 U.S.C. § 2255.

C. The Fifth Circuit held that the District Court erred at sentencing but, the Petitioner's counsel, Atty. Cardwell, failed to preserve the error at sentencing, thus the error was subject to "plain error" review. The Fifth Circuit held that:

"Grimaldo's sentence falls at the bottom of the guideline range, and he fails to show that an explanation would have changed his sentence."

Thus, Petitioner did not demonstrate that his substantial rights were affected. This error on the part of Atty. Cardwell infects the entire sentencing process, in that Atty. Cardwell

did not object to and offer rebuttal evidence to the Court's determination of relying solely on the Presentence Investigation Report (PSR). In this case the evidentiary basis for quantity of drugs was at trial related to Petitioner;s co-defendants, not Petitioner, yet the District Court's logic of assuming that the testimony directed at Petitioner's co-defendants somehow carried over to establish a preponderance of evidence regarding quantity of drugs is in conflict with the directive of Gall v United States, 552 U.S. 38, 49, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), as well as Peugh v United States, 133 S.Ct. 2072, 2083, 186 L.Ed.2d 84, 98 (2013), and Molina-Martinez v United States, 136 S.Ct. 1338, 194 L.Ed.2d 444, 2016 U.S. LEXIS 2800 (2016).

D. The District Court's refusal to sever Petitioner from trial, on its own motion, is evidence of the District Court's bias against Petitioner, and constitutes a denial of the Sixth Amendment right to a fair and impartial trial. The error is a structural error and may be raised at any time and is prejudicial per se.

PRIOR PROCEEDINGS

<u>Date</u>	<u>Event/Occurrence/Judgment</u>
May 13, 2009	Judgment entered against Petitioner
May 18, 2009	Petitioner' s Notice of Appeal;
February 6, 2012	United States Court of Appeals for the Fifth Circuit Affirming District Court's Judgment and Sentence
June 18, 2012	Supreme Court of the United States denied Petition for Writ of Certiorari

June 20, 2013	Petitioner filed his First Original 28 U.S.C. § 2255 Motion;
March 29, 2016	Order Denying Motion for Leave to Amend 28 U.S.C. § 2255 Motion See Docket Sheet -
April 18, 2016	Report and Recommendation (Magistrate Judge) (<u>Appx.</u> "A");
June 29, 2016	District Court Order Denying 28 U.S.C. § 2255 Motion for Relief (<u>Appx.</u> "B" & "C";
September 26, 2016	District Court Order Denying Petitioner's Application to Proceed In Forma Pauperis (<u>Appx.</u> "D");
August 2, 2017	Fifth Circuit Order Denying COA (<u>Appx.</u> "E"). Appendix "F" -- Relevant part of 21 USC Sec. 841(a)(1), (b)(1)(A)-(C) Appendix "G"-- 21 USC Sec. 846

REASONS FOR GRANTING THE WRIT

QUESTION I

IN LIGHT OF THE FLORES-FIGUEROA V UNITED STATES, 556 U.S. 646 (2009), AND ABRAMSKI V UNITED STATES, 573 U.S. ___, 134 S.C.T. 189 L.ED 2d 262, 2014 LEXIS 4170 (2014) DOES THE "KNOWINGLY OF INTENTIONALLY" MENS REA CONTAINED IN 21 U.S.C. § 841(a) APPLY TO THE OFFENSE ELEMENTS OF DRUG TYPE AND DRUG QUANTITY FOUND IN 21 U.S.C. § 841(b), AND U.S.C. § 846 ?

- D. Flores-Figueroa casts serious doubt on how the lower courts have interpreted the mens rea requirements of 21 U.S.C. §§ 841(b) and 846.

In United States v Betancourt, 586 F.3d 303 (5th Cir 2009), the Fifth Circuit - notwithstanding this Court's intervening decision in Flores-Figueroa v United States, 556 U.S. 646 (2009) - adhered to its pre-Flores-Figueroa, precedent holding that the "knowingly or intentionally" mens rea found in 21 U.S.C. § 841(a) does not apply to the offense elements of drug type and drug quantity found in 21 U.S.C. § 841(b). See Betancourt, 586 F.3d at 308-09. In Petitioners' cases, the Fifth Circuit followed Betancourt (and hence its pre-Flores-Figueroa, precedent) to hold the same thing.

For the reasons that follow, this Court should grant certiorari to decide the important question whether - especially in light of Flores-Figueroa - the "knowingly or intentionally" mens rea contained in 21 U.S.C. § 841(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 841(b) and § 846.

In Flores-Figueroa, the Court was tasked with deciding whether the "knowingly" mens rea of 18 U.S.C. § 1028(a)(1) (the

federal aggravated identity theft statute) applied to the statutory requirement that the means of identification unlawfully used was "of another person" See Flores-Figueroa, 556 U.S. at 647-48. The Court concluded that it did.

As the Court explained in Flores-Figueroa. "[the] federal criminal statute forbidding '[a]ggravated identity theft' imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes if during (or in relation to) the commission of those other crimes, the offender 'knowingly transfers, possess, or uses, without lawful authority, a means of identification of another.'" Flores-Figueroa, 556 U.S. at 647 (quoting 18 U.S.C. § 1028A(a)(1); emphasis added by Flores-Figueroa Court).

Significantly for present purposes, the Court explained that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." Id. at 652 (citing United States v X-Citement Video, 513 U.S. 64, 79 (1994) (Stevens, J. concurring)). Moreover, the Court implicitly rejected the government's argument that such a rule should be limited only to elements that mean the difference between innocent conduct and wrongful conduct. See United States v Burwell, 690 F.3d 500, 529-30 (DC Cir 2012) (en banc); (Kavanaugh, J. dissenting) (notion that this Court has not cabined the presumption of mens rea so that it applies only when necessary to avoid criminalizing apparently innocent conduct and that the government's argument for such a limitation in Flores-Figueroa garnered zero votes).

Indeed, had the Court accepted that argument, Flores-Figueroa could not have been decided as it was.

The question of mens rea for drug type and drug quantity is an oft recurring question in federal drug prosecutions, which are a large part of the federal criminal prosecutions.

In sum, as one commentator has noted:

[t]he Court's decision [in Flores-Figueroa] shows that lower courts should not automatically interpret any criminal statute in a broad manner, totally disregarding defendants' relative degrees of culpability. Thus, the Court's holding has the potential to bring punishment closer to the defendant's blameworthiness. Lower courts should follow the Court's lead in Flores-Figueroa and examine a statute's language to determine the type of behavior targeted by the statute at issue to ensure that harsh minimum sentences are not applied more broadly than conduct requires.

Mens Rea Requirement, 123 Har.L.Rev. 312, 322 (2009).

Because, however, the lower courts remain unclear about how to apply the teachings of Flores-Figueroa to the interpretation of other criminal statutes, this Court should grant this petition in order to bring needed clarity to the field.

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The District Court's Jury Instructions are stated in such a manner to allow the jury to presume intent, without definition of what conduct from which intent may be inferred. Specifically

with regard to jury charge/instructions, the jury may presume a "mens rea" from the simple act of using a telephone to converse with one of the admitted members of the conspiracy. Such an instruction lessens the burden of proof on the government and violates the Petitioner's Sixth Amendment due process rights. See Sullivan v Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993) holding:

A constitutionally deficient jury instruction in a criminal case as to the definition of reasonable doubt, for the purposes of the prosecution's burden of proving guilt beyond a reasonable doubt, is not amenable to harmless error analysis on appeal and will always invalidate a conviction, because (1) assuming that such a jury-instruction error has occurred, there has been a jury verdict within the meaning of the Federal Constitution's Sixth Amendment guarantee to an accused of a right to a jury trial in a criminal prosecution; ..

In Petitioner's case, the Jury Instructions do not require that Petitioner's intent (mens rea) be proven beyond a reasonable doubt and leave open to speculation as to what conduct prove Petitioner's state of mind.

Further, Sullivan holds:

"Sullivan's Sixth Amendment right to a jury trial was denied by the giving of a constitutionally deficient beyond-a-reasonable-doubt instruction. The Fifth Amendment requirement of proof beyond a reasonable doubt, see, e.g., In re Winship, and Sixth Amendment requirement that the jury, rather than the judge, reach the requisite finding of "guilty," are interrelated: The required jury verdict is a verdict of guilt beyond a reasonable doubt. The Court's opinion in Cage, which held that an instruction of the sort given here does not produce such a verdict, is controlling."

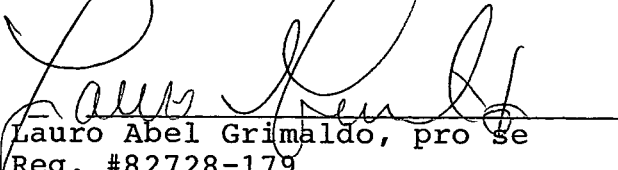
"The giving of a constitutionally deficient reasonable-doubt instruction is among those constitutional errors that require reversal of a conviction, rather than those that are amenable to harmless-error analysis. See Chapman v California, 386 U.S. 18, 24, 17 L.Ed.2d 705 (1967)."

Petitioner's flawed jury instructions warrant granting the Petition for Certiorari.

CONCLUSION

Based on the foregoing authorities and argument, Petitioner prays that this Court Grant the Petition for Writ of Certiorari and in that regard Vacate Petitioner's Judgment, Remand to the Fifth Circuit, with instructions to issue and Appellant Acquittal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lauro Abel Grimaldo', is written over a horizontal line.

Lauro Abel Grimaldo, pro se
Reg. #82728-179
FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720-6020