

UNITED STATES DISTRICT COURT

for the

DISTRICT OF COLUMBIA

Crim. No. 1:11-cr-00129 (CKK)

Civ. No. 23-1618 (CKK)

GEZO G. EDWARDS et al.

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

Now comes Petitioner, pro se, and hereby moves this Court to relate back this amendment to his timely 28 USC 2255, to vacate, set aside or correct his sentence, or hold an evidentiary hearing. Wherefore, based on the following, this motion must be Granted.

STANDARD OF REVIEW

The pleadings of a pro se litigant are held to less stringent standards than formal pleadings drafted by lawyers. Pro se litigants are entitled to a liberal construction which can be drawn from them. Courts must liberally construe the filing of a pro se litigant. Haines v. Kerner, 404 US 519, 92

## INTRODUCTION

Petitioner adopts his procedural history, outlined in his reconsideration motion signed on 11-29-2023, USPS number 9589071052701475721657.

Petitioner hereby seeks to amend his timely filed 2255 under Federal Rules of Civil Procedure 15(c).

Out of an abundance of caution, Petitioner has reorganized his motion without the use of the 2255 form, because it seems the Court has misconstrued his 15(c) motion, Document 1085, and supplement, as a second or successive. Petitioner is attempting to cure any defect which has led the Court to misinterpret his filing. Fed.R.Civ.P 15(b).

## MEMORANDUM OF LAW

An amendment "relat[ed] back to the date of the original pleading ... [because it] asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - or attempted to be set out - in the original pleading." An otherwise untimely pleading that satisfies this test will be considered to have been filed on the date of the original pleading for timeliness purposes. Fed.R.Civ.P. 15(c), also see *Mayle v. Felix*, 545 US 644, 654 - 55, 125 S Ct 2562, 162 L Ed 2d 582 (2005); *United States v. King*, 2022 US Dist LEXIS 33733, 10 (Feb. 25, 2022) (relation back depends on the existence of common 'core of operative facts' uniting the

original and newly asserted claims." ). A petitioner's "2255 must be denied unless his amended petition ... qualifies for some alteration in computation of the limitation period," relation back being among those alterations. Id. at 8 & 9. "Even if defendant's claims were brought outside the limitation period, the Court could have considered them if they related back to timely claims. *United States v. Martin*, 2022 US Dist LEXIS 92278 (May 23, 2022). "Section 2255's 'period of limitation is a statute of limitations like any other is subject to the principles of relation back." *Hicks*, 283 F.3d at 387 (DC Cir. 2002).

A criminal defendant claiming ineffective assistance of counsel must prove both incompetence and prejudice. *Kimmelman v. Morrison*, 477 US 365, 385, 106 S Ct 2574, 91 L Ed 2d 305 (1986). In order to prevail on a constitutional claim of ineffective assistance of counsel, a defendant must demonstrate both a deficient [professional performance on the part of counsel and prejudiced by counsel's inadequacy]. *Strickland v. Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984). In applying *Strickland* the court may dispose of an ineffective claim if a defendant fails to carry his burden on either of the two prongs. The court need not address the performance prong if the defendant can not meet the prejudice prong or vice versa.

In determining whether counsel's conduct was deficient, courts must, with such deference, consider whether counsel's assistance was [un]reasonable considering all the circumstances. To show counsel's performance was unreasonable, a defendant must establish that no competent



counsel would have taken that action that his counsel did. The fact that a particular defense ultimately proved to be unsuccessful does not demonstrate ineffectiveness.

With regards to the prejudice requirement, a defendant must establish that, but for counsel's deficient performance, the outcome of the proceedings would have been different. The likelihood of a different result must be substantial, not just conceivable. For the court to focus merely on the outcome determination, however is insufficient; to set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him. *Lockhart v. Fretwell*, 506 US 364, 378, 113 S Ct 838, 122 L Ed 2d 180 (1993).

A motion under 2255 will be granted if the sentence results "in a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 US 424, 428, 82 S Ct 468, 7 L Ed 2d 417 (1962).

Numerous cases have held that the government's answer and affidavits are not conclusive against the movant, and if they raise disputed issues of facts a hearing must be held. *Machibrado v. United States*, 368 US 487, 494, 495 (1962). As under Rule 5 of the 2255 rules, there is no intention here that a traverse be required, except under special circumstances. See advisory note to Rule 9. Further, there is no requirement in the language of 28 USC 2255 that the district court conduct a live hearing with the movant present.

when the evidentiary hearing is required to rule on a 2255 motion. See 28 USC 2255 ("A court may entertain and determine such motion without requiring the production of the prisoner at the hearing"); *Sanders v. United States*, 373 US 1, 20 -21, 83 S Ct 1068, 10 L Ed 2d 148 (1963). Attached are affidavits and expert testimony, among other things, for the Court's consideration.

The Supreme Court held, "that a state offense constitutes a 'felony punishable under the Controlled Substance Act' only if it proscribes conduct punishable as a felony under the federal law. [*Lopez v. Gonzales*, 549 US 47, 60, 127 S Ct 625, 166 L Ed 2d 462 (2006)] ... (Unless a state offense is punishable as a federal felony it does not count) [*Id.*, at 55, 127 S Ct 625, 166 L Ed 2d 462]". *Carachuri-Rosendo v. Holder*, 560 US 563, 130 S Ct 2577, 177 L Ed 2d 68, 80, 2010 US LEXIS 4764 (2010).

A prisoner in custody under sentence of a court claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack fall under 2255. "Any discussion of the purpose served by a grand jury indictment in the administration of federal criminal law must begin with the Fifth and Sixth Amendments to the Constitution". *Russel v. United States*, 369 US 749, 760, 82 S Ct 1038, 8 L Ed 2d 240 (1962). Courts have long held that an indictment that omits an essential element of an offense is defective. *Apprendi v.*



New Jersey, 530 US 466, 500 - 18, 120 S Ct 2348, 147 L Ed 2d 435 (2000). The due process clause protects an accused against conviction except proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. See Fourteenth Amendment, *Miles v. United States*, 26 L Ed 481, 103 US S Ct 304 (1881); *Brinegar v. United States* 338 US 160, 93 L Ed 1879, 69 S Ct 1302 (Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Fourteenth Amendment of the Constitution, has crystallized into rules of evidence consistent with that standard), and *Coffin v. United States*, 162 US 664, 683, 685, 40 L Ed 1109, 1116, 1117, 16 S Ct 943 (1896).

The Supreme Court has left open the possibility that an individual could have a constitutional right to effective counsel in collateral proceedings when those proceedings provided the first opportunity to raise a claim of ineffective assistance of trial counsel. *Martinez v. Ryan*, 566 US 1, 8, 132 S Ct 1309, 182 L Ed 2d 272 (2012) describing *Coleman v. Thompson*, 501 US 722, 755, 111 S Ct 2546, 115 L Ed 2d 640 (1991). Relatedly, the Court has held that the ineffective assistance of post-conviction counsel can serve as "cause" to overcome procedural default on an ineffective assistance of trial counsel claim, where the individual did not have a meaningful opportunity to bring his claim alleging ineffective assistance at trial on direct appeal. *Trevino v. Thaler*, 569 US 413, 429, 133 S Ct 1911, 185 L Ed 2d 1044 (2013); *Martinez*, 566 US at 10, 17; *United States v. Scurry*, 987 F.3d 114 (DC Cir. 2021).

The Supreme Court held that 21 USCS 841(a) required the United States to establish that a defendant knew he was dealing with a controlled substance. *McFadden v. United States* 576 US 186, 135 S Ct 2298, 192 L Ed 2d 260 (2015).

#### MCFADDEN ISSUE

The following *McFadden* claim relates back to the transaction, occurrence, and/or conduct set out - in Petitioner's original 2255 deficient indictment claim. See: Original 2255 motion -- "Petitioner's counsel was ineffective for not challenging the efficiency of the indictment in order to properly defend against the charge".

The Supreme Court in *McFadden*, declared that 21 USCS 841(a) required the United States to establish that a defendant knew he was dealing with a controlled substance. This holding was further supported recently by the Supreme Court which clarified the mens rea canon. Under this canon, the Court interprets criminal statutes to require a mens rea for each element of an offense. *Ruan v. United States*, 597 US \_\_\_, 142 S Ct \_\_\_, 213 L Ed 2d 706 (2022). Where a general scienter provision is found in a statute, the mens rea canon applies to each element of the offense "even where 'the most grammatical reading of the statute' does not support" that interpretation. *Rehaif*, 588 US at \_\_\_ (quoting *United States v. X-Citement Video, Inc.*, 513 US 64, 70 (1994)). "[T]he most natural reading [of] 841(a)(1) creates an offense that has as its elements (1) knowingly or intentionally (2) distributing or dispensing (3) a controlled substance." *Ruan*, pg 726.

There can be no dispute -- the indictment failed to state an offense because it omitted the mens rea controlled substance element; the government presented little to no evidence at trial to prove this element; nor did the jury find Petitioner guilty beyond a reasonable doubt as to the mens rea controlled substance element. Both trial and direct appeal counsels were incompetent for not challenging the defective indictment.

Petitioner was actually and substantially placed at a disadvantage as a result of the failure to raise his McFadden claim at an earlier stage, which prejudiced him. Counsel knew or should have known, that a defendant in a criminal case should move to dismiss an indictment before trial for "failure to state an offense," Fed.R.Crim.P. 12(b)(3)(B)(v), including because the statute under which he is charged does not apply to his alleged conduct. *Hamling v. United States*, 418 US 87, 117, 94 S Ct 2887, 41 L Ed 2d 590 (1974) (explaining that an indictment must "set forth all the elements necessary to constitute the offense intended to be punished"). Petitioner was indicted and convicted of "unlawfully, knowingly and intentionally distribut[ing] and possess[ing] with intent to distribute mixtures and substances containing a detectable amount of cocaine[.]" See Indictment, Doc. 673. The indictment is merely a regurgitation of the statute and does not give notice that Petitioner must defend against having knowledge that the mixture or substance contained a detectable amount of cocaine. For example, adverbs describe verbs, adjectives or other adverbs. The adverbs "knowingly" and "intentionally", modify the verbs "distribute" and "possess". Ruan, 597 \_\_\_\_ (2022) (Alito, J., concurring judgment). In



essence, the indictment does not identify unlawful conduct on the part of Petitioner. Because the indictment did not provide the constitutional protections that an indictment must, Petitioner's rights were substantially affected. Courts have long held that an indictment that omits an essential element of an offense is defective. There was no attempt to cure or mitigate the defect in the indictment at any point in the criminal proceedings.

Petitioner's substantial rights were also violated by the failure to instruct the jury that it had to find that Petitioner knew the mixture or substance contained a detectable amount of cocaine, and the government's failure to present sufficient evidence on that point at trial. Further, Petitioner was unable to contest the controlled substance knowledge element because as stated above, he was not given proper notice in the indictment. It is inappropriate to speculate how Petitioner might have defended the element in the counterfactual scenario where he was presented with the correct charge against him. What is clear is that the government presented no direct evidence germane to whether or not Petitioner knew the mixture or substance in question contained a detectable amount of cocaine. For example, there was no evidence presented which claimed that Petitioner had the knowledge or training to detect cocaine in a mixture or substance. Nor did the government present any drug testing kits, controlled substance training manuals, et cetera, found in Petitioner's possession. In fact, the lack of evidence with regard to Petitioner's knowledge as to what was in the mixture or substance is striking, and also consistent with the

defective indictment and erroneous jury instructions.

Even though the indictment and trial errors independently violated Petitioner's substantial rights, it is worth further stating that the cumulative effect of those errors were also prejudicial.. Here, the errors occurred at the inception of the government's case against Petitioner and continued throughout. The error was not just a single, simple procedural error; but a combination of errors that tainted many of the basic protections that permit a court and public to regard a criminal punishment as fundamentally fair. First, the government failed to provide Petitioner with adequate notice of the charges. Second, Petitioner's conviction was predicated on an indictment that fails to allege an essential element of the offense and on a verdict by a jury that was not instructed on that element. Third, scant evidence regarding the omitted element was presented at trial. Finally, Petitioner had no reason to contest the omitted element at any point in the proceedings and, therefore, did not contest the element. The compilations of these errors affected Petitioner's substantial rights.