No._____

IN THE
SUPREME COURT OF THE UNITED STATES

EMMANUEL I. MEKOWULU,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Emmanuel I. Mekowulu was a licensed Florida pharmacist who was convicted of conspiracy to knowingly distribute controlled substances (oxycodone) not in the usual course of professional practice. At trial, the government introduced the testimony of an expert witness in the field of pharmacy who testified as to his opinion of "red flags" that would cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose. The questions presented in this Petition are:

1. Whether the government's expert's after-the-fact opinion of the applicable standard of care of Florida Pharmacists is an *ex post facto* interpretation of the criminal standard of conduct resulting in an unconstitutional conviction based on an *ex post facto* law.

2. Whether the government's expert's after-the-fact opinion rendered the standard of criminal conduct unconstitutionally vague.

3. Whether in this § 2255 Motion Petitioner is barred by the doctrine of procedural default for failure to raise these issues on direct appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Emmanuel I. Mekowulu ("Mekowulu") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case denying a Certificate of Appeal from Orders of the United States District Court for the Middle District of Florida denying Petitioner's Motion pursuant to 28 U.S.C. § 2255.

INTRODUCTION

This Petition arises from the denial of Mekowulu's § 2255 Motion for relief from the conviction of Mekowulu, formerly a licensed Florida pharmacist, on one count of conspiracy to knowingly distribute controlled substances not in the usual course of professional practice, 21 U.S.C. § 841 (a) (1). The conviction resulted in large part from the testimony of the government's pharmacy expert who testified as to the standard of care of a pharmacist to investigate and take affirmative action when presented with "red flags" of diversion of prescriptions. The expert's opinion included "red flags" not in existence as of the date of Mekowulu's acts that constituted the underlying crime, the "red flags" were not included in the then-applicable Florida Administrative Code articulating the applicable standards for Florida pharmacists, and there was no testimony that Mekowulu was, or could have been, on notice of the expert's opinion at the time of the acts that resulted in the criminal charges. In this Petition, Mekowulu asks this Court to consider whether the government's expert's opinion created a

standard of criminal conduct that is unconstitutionally vague and resulted in a conviction based on an unconstitutional *ex post facto* law through the government's expert's *ex post facto* interpretation of the standard of care and conduct applicable to Florida pharmacists when filling prescriptions for controlled substances. These issues have not been raised in the context of pharmacy and health care experts and Meknowulu contends that his failure to raise the issues on direct appeal should not bar the review of these novel and important claims not previously presented in any court.

OPINIONS BELOW

The opinion of the Court of Appeals denying Petitioner's Request for Certificate of Appealability is *Mekowulu v. United States*, No. 18-11255-C, 2018 U.S. App. LEXIS 22578 (11th Cir. Aug. 14, 2018) (App., *infra.,* Appendix P. 1). The opinion of the United States District Court denying Petitioner's Request for Certificate of Appealability is *Mekowulu v. United States*, No. 8:15-cv-1158-T-27MAP, 2018 U.S. Dist. LEXIS 36497 (M.D. Fla. April 8, 2018) (App. Infra., Appendix P. 6). The opinions of the United States District Court denying Petitioner's § 2255 Motion are *Mekowulu v. United States*, No. 8:15-cv-1158-T-27MAP, 2018 U.S. Dist. LEXIS 36497 (M.D. Fla. Mar. 6, 2018) (App. Infra., Appendix P. 12) and *Mekowulu v. United States*, No. 8:15-cv-1158-T-27MAP, 2017 U.S. Dist. LEXIS 208598 (M.D. Fla. Dec. 19, 2017) (App. Infra., Appendix P. 31). The opinion of the Court of Appeals affirming the original conviction is *United*

States v. Mekowulu, 556 F. App'x 865 (11th Cir. 2014) (App. Infra., Appendix P.64).

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2018. On November 2, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including January 11, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841- Prohibited acts A

(a)Unlawful acts
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
(1)to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2)to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

United States Constitution
Article 1, Section 10, Clause 1

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts;

pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT

a. Facts.

At trial, the Government introduced the testimony of a pharmacy expert, to testify as to "red flags" that cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose. The government's expert included criteria not pubished in the Florida regulations, Rule 64B16-27.831, Florida Administrative Code, which a listed criterion, at the time of the events charged in the indictment (2009-2010) as follows:

(2) The following criteria shall cause a pharmacist to question whether a prescription was issued for a legitimate medical purpose:
(a) Frequent loss of controlled substance medications,
(b) Only controlled substance medications are prescribed for a patient,
(c) One person presents controlled substance prescriptions with different patient names,
(d) Same or similar controlled substance medication is prescribed by two or more prescribers at same time,
(e) Patient always pays cash and always insists on brand name product.

At trial, the government's expert testified about "indicators," the expert called, "red flags," beyond the

published criteria of the Florida Administrative Code.

Accordingly, Doering [the government's expert] was permitted to testify about "indicators," including, based on hypothetical facts, "pattern prescribing," cash payments, presenting prescription from distant sites, multiple prescriptions for different patients from one doctor presented by one individual, multiple prescriptions for different patients from a distant source, the delivery of prescriptions to a person in a parking lot or on the side of a road or interstate highway, and the receipt of two prescriptions for the same drug for the same person simultaneously or within a day of each other." *United States v. Mekowulu*, Case No. 8:15-cv-00158, December 19, 2017, Doc. 33 (App. Infra., P. 31).

These "red flags" were largely the basis for the conviction. In the direct appellate opinion affirming the conviction, the Eleventh Circuit held that:

The Government presented sufficient evidence to support the jury's conclusion that Mekowulu was guilty beyond a reasonable doubt. The jury heard evidence of numerous "red flag" indicators of illegal drug diversion that Mekowulu's coconspirators presented to him. The jury also heard evidence of Mekowulu's own suspicious conduct, including: accepting only cash payments for the prized-on-the-street "blue" Oxycodone pills (R. 101 at 142, 145); charging $1 to $3 per blue Oxycodone pill when he purchased each pill wholesale for 40 cents to 45 cents per pill (R.102 at 155); and dropping off large quantities of Oxycodone to his coconspirators in

various parking lots at various times of day not typically associated with legitimate pharmaceutical transactions. *United States v. Mekowulu*, 556 Fed. Appx. at 867.

As observed by the district court in denying Petitioner's § 2255 Motion, the criteria listed by the Eleventh Circuit as "Mekowulu's own suspicious conduct," were identified as "red flags," by the government's expert. Those "red flags" were not criteria listed in the Florida Administrative Code, *United States v. Mekowulu*, Case No. 8:15-cv-001158, December 19, 2017, (Appendix P. 67).

The Petitioner now asks this Court to consider are whether the government's expert's after-the-fact opinion resulted in an unconstitutional conviction based on a vague *ex post facto* interpretation of the applicable criminal standard of conduct applicable to Petitioner, as a licensed Florida pharmacist.

b. Proceedings Below

On April 26, 2012, an indictment was returned against Mekowulu, a Florida licensed pharmacist, Case No. 8:12-cr-00170-JDW-MAP, charging one count of conspiracy to knowingly distribute controlled substances not in the usual course of professional practice, 21 U.S.C. § 841 (a) (1). After jury trial, on December 11, 2012, the jury returned a guilty verdict. On March 18, 2013, Mekowulu was sentenced to a period of incarceration of 120 months and is currently in custody at the Federal Correctional Institution at Estill, South Carolina. Mekowulu filed a notice of

appeal on March 22, 2014, and on February 26, 2014, the Eleventh Circuit affirmed, *United States v. Mekowulu*, 556 F. App'x 865 (11th Cir. 2014). Mekowulu did not file a Petition for Writ of Certiorari to the United States Supreme Court. On May 8, 2015, Mekowulu filed a timely Motion for Relief pursuant to 28 U.S.C. § 2255 in Case No. 8:12-cr-00170-JDW-MAP (the "§ 2255 Motion"). On May 13, 2015, the § 2255 Motion was converted to a civil case, 8:15-cv-01158-JDW-MAP. In December 2017, the Court entered an order denying in part the § 2255 Motion and scheduling an evidentiary hearing on certain issues, App. 490. The Court conducted an evidentiary hearing on February 20 and 21, 2018, Transcript at App. 1714, and on March 6, 2018, the District Court denied the § 2255 Motion, Order at App. 515. On March 28, 2018, Mekowulu filed in the District Court a Motion for Issuance of Certificate of Appealability, App. 573, and a Notice of Appeal, App. 531, and on April 9, 2018, the District Court entered an order denying the motion for Certificate of Appealability, 598. On June 6, 2018, this Court entered an Order construing the Notice of Appeal to be a Motion for Certificate of Appealability. This Court has jurisdiction pursuant to 28 U.S.C. § 2255 (d).

REASONS FOR GRANTING THE PETITION

1. The issues are extremely important because litigants and courts of appeal have not addressed the ex post facto and vaguenss issues created through after-the-fact expert opinions of government experts testifying as to the standard of care of medical

professionals in prescribing scheduled pharmeceuticals.

As occurred here, prosecutions of medical professionals for distribution of controlled substances not in the usual course of professional practice may rely on expert witness testimony for evidence as to the standard of care applicable to the Defendant. "For expert testimony to be admissible under Rule 702, a four-part test must be met: (1) a qualified expert; (2) testifying on a proper subject; (3) in conformity to a generally accepted explanatory theory; (4) the probative value of which outweighs any prejudicial effect." *United States v. Sims-Robertson*, Nos. 92-1076, 92-1080, 92-1082, 92-1090, 92-1094, 92-1096, 92-1115, 1994 U.S. App. LEXIS 1146, at *49-50 (6th Cir. Jan. 18, 1994), citing *United States v. Kozminski*, 821 F.2d 1186, 1194 (6th Cir. 1987) (en banc), rev'd in part on other grounds, 487 U.S. 931, 936 n.2 (1988) (stating that the Court was not addressing the issue of the admissibility of expert testimony under Rule 702).

The Tenth Circuit, in *United States v. Miller,* 891 F.3d 1220 (10th Cir., 2018), dealt with a similar prosecution and also allowed the after-the-fact opinion of an expert on "red flags,":

> Dr. Parran testified that he had reviewed several of Defendant's medical files and concluded, based on his training and experience, that Defendant's drug prescriptions relating to each of the counts of the indictment were outside the scope of usual professional practice and not for a legitimate medical purpose. Dr.

Parran testified, for instance, that Defendant would "not uncommonly" increase dosages of narcotics for patients whose condition was described as "stable," with no indication in the records as to why the dosage was being increased, contrary to the typical medical practice. (R. Vol. IX at 1144.) Dr. Parran testified that Defendant failed to document the types of basic physical exams, medical histories, and requests for patients' past medical records that even medical students would know to do "as part of the routine course . . . of medical practice." (Id. at 1146.) With respect to one patient, he testified: "Anyone who knows anything about opiate pharmacology and about how to evaluate a patient for the presence or absence of tolerance to the life-threatening effects of opiates knows that before seeing a patient, that [there are certain] things that have to be done, and . . . they were not done here." (Id. at 1372.) Moreover, Defendant continued prescribing narcotics to patients despite the presence of clear red flags of drug abuse, such as regular requests for early refills and concerned phone calls from family members or from pharmacists who refused to fill any more narcotic prescriptions for a particular patient because the patient was so clearly overmedicated. He prescribed controlled substances when there were contraindications against use, such as pregnancy or respiratory ailments, and he prescribed multiple drugs that were dangerous in combination. He "relentlessly continued" prescribing controlled

> substances to a patient who had been admitted to the hospital with an overdose. (Id. at 1250.) Dr. Parran testified that, based on these and similar deficiencies in Defendant's approach to and treatment of his drug-seeking patients, it was his expert opinion that Defendant's conduct was outside the course of usual medical practice and not for a legitimate medical purpose. *United States v. Miller,* 891 F.3d 1220, 1226-27 (10th Cir. 2018) (Emphasis Added).

The government's use of "red flags," through after-the-fact analysis of the criminal conduct of the defendant is a common occurrence, *See United States v. Johnston,* 322 F. App'x 660, 664 (11th Cir. 2009) ("The government called two expert witnesses: Dr. Richard Hood . . . also explained that a patient illegally buying prescription drugs is a "red flag . . . [for] diversion and addiction." . . . [Dr. Sherri] Pinsley . . . noted that she was troubled by the red flags raised by the undercover agents, including traveling a long distance to see Johnston, lack of previous medical records or tests, buying medications illegally, and requesting more medications too quickly."); *United States v. Green*, 818 F.3d 1258, 1268-69 (11th Cir. 2016) ("[T]he government called expert witness Robert Parrado to testify about Gulf Coast's standards of professional practice. . . .[t]o "determine if a prescription is written for a legitimate medical purpose," a pharmacist must "evaluate any red flags" that arise when a customer attempts to fill a prescription."; *United States v. Boccone*, 556 F. App'x 215, 223 (4th Cir. 2014) ("The government also introduced testimony and a report of an expert

witness . . . [who] identified "red flags" indicating patients with problems with addiction, abuse, or diversion of medication, which would signal to a provider that there is not legitimate medical purpose for prescriptions. These include traveling long distances to receive medications, early refills, frequent calls, lost prescriptions, violent behavior, and receiving treatment from multiple providers. She also described the significance of 80 milligram OxyContin pills, which is a high dosage amount that she had never prescribed in her twenty-five years of pain management practice."); *United States v. Brown*, 553 F.3d 768, 779 (5th Cir. 2008) ("Another pharmacist, Fred Emmite, testified for the government about pharmacists' "corresponding responsibility" to insure the dispensing of drugs pursuant to valid medical purposes and that the prescriptions would have raised red flags and cause any pharmacist to be suspicious."); *United States v. Katz*, 445 F.3d 1023, 1031 (8th Cir. 2006) ("Dr. Parran testified at length regarding his opinions of the standard of care to be followed by physicians in treating persons suffering from pain or anxiety. Dr. Parran also testified, after reviewing the medical records of four of Dr. Katz's patients, that the prescriptions written for these patients "[did] not appear to have been for a legitimate purpose."); *United States v. King*, 898 F.3d 797, 804 (8th Cir. 2018) ("A medical expert, Dr. Carlos Roman, testified regarding standards of practice in the field of pain management, guidelines for prescribing medications, and "red flags" that indicated potential painkiller abuse. . . Dr. Roman testified that he believed the records indicated a failure to pursue a legitimate medical purpose.); *United States v. Joseph*, 709 F.3d

1082, 1090 (11th Cir. 2013) ("Dr. Straus testified about the warning signs that should alert a physician that his patients are either abusing their drugs or selling their drugs to drug abusers. Dr. Straus testified that among these warning signs are patients who lose their medication or run out of their medication early, patients who travel long distances to see a particular physician, and phone calls from family and friends stating that a patient is abusing his or her prescription drugs. Dr. John Holbrook, an expert in pharmacology and the prescription of controlled substances, testified about the warning signs that should alert a pharmacist that a patient is abusing or selling his drugs or that a patient's prescription was not written for a legitimate medical purpose. Dr. Holbrook testified that among these red flags are patients who are unduly anxious to have their prescriptions filled, have their prescriptions filled at pharmacies located far from their homes, and wear long-sleeved clothing during warm weather seasons to conceal "track marks" on their arms."

a. The post-crime opinion of an expert results in an unconstitutional conviction based on an ex post facto law.

Where an expert is allowed to render a post-crime opinion based on the expert's post-crime analysis of a defendant's acts that constitute the crime, the defendant is being subjected to an ex post facto criminal prosecution. As recognized by the district court:

> Consistent with *Gonzalez v. Oregon*, 546 U.S.

> 243 (2006), the applicable standards of professional practice in this case are to be judged based on the professional standards in Florida. *United States v. Mekowulu*, Case No. 8:15-cv-00158, December 19, 2017, Doc. 33 (App. Infra., p. 53)

The fact that the post-crime standard of behavior is rendered by an expert instead of being enacted by a state legislative body does not change the fact that the acts constituting the crime were not articulated or known to the defendant as of the date of the criminal activity. Instead, the expert was allowed to analyze the defendant's activities, and opine, after-the-fact, as to whether or not the defendant's knowledge of "red flags" as opined by the expert constituted "red flags" that would put the Petitioner on notice that the prescriptions were being diverted.

This Court has foundationally guarded against the use of *ex post facto* laws.

> I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction.
> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798)

The use of after-the-fact expert opinions to review the actions of medical practioners and list unpublished "red flags" that place practitioners on notice of diversion of prescriptions "creates" the crime. The so-

called "red flags" are simply an experts opinion of indicators of possible diversion. Without the expert's opinion, and the admission of the opinion and the evidence of the breach of the opinion, there is no crime. Reviewing the above cases, and reviewing the Petitioner's conviction, it is clear that the Petitioner was convicted largely, if not solely, on the expert's after-the-fact pronouncement of the activity that the expert deemed to be the standard of criminal conduct. This Court has also made clear that the prohibition against *ex post facto* laws does not require a legislative act. "[O]ur precedents make clear that the coverage of the Ex Post Facto Clause is not limited to legislative acts," *Peugh v. United States*, 569 U.S. 530, 545, 133 S. Ct. 2072, 2085 (2013).

The critical question [for an ex post facto violation] is whether the law changes the legal consequences of acts completed before its effective date. *Carmell v. Texas*, 529 U.S. 513, 520, 120 S. Ct. 1620, 1626 (2000), citing *Weaver v. Graham*, 450 U.S. 24, 31, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981).

Here, since the prosecution is based on an after-the-fact expert's opinion of "red flags" that the expert, as opposed to published regulations in existence at the time of the crime, considers as of the date of trial, as opposed to the date of the crime, to be indicators that placed Petitioner on notice of criminal activity, and made the filling of prescriptions in light of the expert's "red flags" criminal, the Petitioner's conviction is an unconstitutional *ex post facto* conviction.

b. The government's expert's after-the-fact

opinion rendered the standard of criminal conduct unconstitutionally vague.

"[T]he standard for criminal liability under § 841(a) requires more than proof of a doctor's intentional failure to adhere to the standard of care," *United States v. Feingold*, 454 F.3d 1001, 1011 (9th Cir. 2006). As is made clear in the string cite of red-flag cases above, the government's various experts do not necessarily agree on the "red flags." A red flag to one expert may not be a red flag to another expert.

This Court recently articulated the standards to analyze a void-for-vagueness analysis of a statute, where the statute, "devolv[ed] into guesswork and intuition," invited arbitrary enforcement, and failed to provide fair notice. Id., at ___, 135 S. Ct. 2551, 2559, 192 L. Ed. 2d 569, 580. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018), quoting *Johnson v. United States*, 135 S. Ct. 2551, 2559 (2015).

The Petitioner, and all defendants facing expert "red flag" testimony, are not on notice at the time of the crime as to what expert the government will use to attempt to prosecute them, and what the government's expert's opinion will be at the time of trial. There is no "fair notice" of the standard of conduct that will be used to convict the defendant, and the after-the-fact "red flag" opinion is therefore unconstitutionally void for vagueness.

c. Procedural default for failure to raise on direct appeal should not bar review.

This Court has never taken up the question of the government's use of after-the-fact expert testimony of "red flags" that should have placed a practicing pharmacist on notice of the possible diversion of prescriptions and whether or not such after-the-fact opinions violate the *ex post facto* and "void-for-vagueness" arguments presented in this Petition. Moreover, the Petitioner here is raising these issues as a matter of first impression. The fact that Petitioner's appellate counsel did not raise the issues on direct appeal should not bar consideration now, since these issues have never before been raised in the context of challenging pharmaceutical expert opinions of "red flags" as resulting in unconstitutional convictions for the reasons in this Petition.

The Petitioner is seeking, for the first time in U.S. criminal jurisprudence, to articulate and advocate the constitutional issue that when a professional pharmacist is charged with conspiracy to distribute and dispense controlled substances not for a legitimate medical purpose in violation of 21 U.S.C. § § 841 (b)(1)(C), and whether (1) Mekowulu's conviction based on the government's expert's after-the-fact testimony is a violation of the prohibition of convictions based on ex post facto laws and (2) whether the government's expert's after-the-fact opinion is unconstitutionally vague rendering the conviction unconstitutional.

Undersigned counsel has found no pharmacist cases where the conviction was challenged on the basis that the pharmacy expert's opinion created an unconstitutionally vague standard that was applied

as an ex post facto law. A "novel," claim is one not previously addressed to a court:

See *Reed v. Ross*, 468 U.S., at 18 ("[Where] a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"). . . . But . . . the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was "available" at all. As petitioner has candidly conceded, various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal. *Smith v. Murray*, 477 U.S. 527, 536-37, 106 S. Ct. 2661, 2667 (1986).

No cases have been "percolating," to use the *Smith v. Murray* terminology. Whether an issue is sufficiently "novel," to avoid a procedural default for failure to raise the claim on direct appeal is not based on whether Mekowulu's prior attorney could have theoretically articulated the issue. Petitioner has met the standard for presentation of a novel issue stated by *Hargrave v. Dugger*, 832 F.2d 1528, 1531 (11th Cir. 1987):

In order to establish the novelty of a constitutional claim sufficient to provide cause, a defendant must initially demonstrate that his situation is one where a court has "articulated a constitutional principle that has not been previously recognized but which has been held to have retroactive application." Id. at 17.

Hargrave was sentenced to death in 1975. Two years later, the Supreme Court held that under the Eighth and Fourteenth Amendments, a sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978).
Lockett is the articulation of a constitutional principle that had not been previously recognized by the Supreme Court and this Court has concluded that it is to be retroactively applied. *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (in banc), cert. denied, 481 U.S. 1041, 107 S. Ct. 1982, 95 L. Ed. 2d 822 (1987).

A new retroactive decision must be a sufficiently "clear break with the past," so that an attorney representing the defendant would not reasonably have had the tools for presenting the claim in the state courts. *Hargrave v. Dugger*, 832 F.2d 1528, 1531 (11th Cir. 1987).

Mekowulu's contention is that he stands at the same threshold as did the Defendant and the Defendant's attorneys presenting the argument in *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978). This is a pre-Hargrave case, where the Petitioner is asking this Court to consider a clear break with the past as it releates to the use of government's expert's "red flag" testimony to create an after-the-fact standard to convict pharmacists. All constitutional issues are presented, at some point, for the first time. A "novel" issue for purposes of avoiding procedural default, does not require a showing that

the issue has never been presented, but instead, a showing that the doctrine has not been previously recognized by the United Stated Supreme Court. Here, Mekowulu is, to the knowledge of undersigned counsel, advancing theories that have never been presented in prior cases. Should these theories ultimately be accepted, then those defendants attempting to follow that theoretical future precedent will be the "novel" class of litigants defined by the Court in *Hargrave v. Dugger*, 832 F.2d 1528, 1531 (11th Cir. 1987). Petitioner's status is a pre-*Hargrave* status as being the first litigant to attempt to articulate and present these unique constitutional claims as a matter of first impression. Mekowulu's effort to present this issue is a matter of first impression, and meets the "novel" requirement to avoid procedural default.

As stated by this Court in discussing when a claim is sufficiently "novel" to consider it outside of direct appeals:

In *United States v. Johnson*, 457 U.S. 537 (1982), we identified three situations in which a "new" constitutional rule, representing "'a clear break with the past,'" might emerge from this Court. *Id.*, at 549 (quoting *Desist v. United States*, 394 U.S. 244, 258-259 (1969)). First, a decision of this Court may explicitly overrule one of our precedents. *United States v. Johnson,* 457 U.S., at 551. Second, a decision may "[overturn] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Ibid.* And, finally, a decision may

"[disapprove] a practice this Court arguably has sanctioned in prior cases." *Ibid. Reed v. Ross*, 468 U.S. 1, 17, 104 S. Ct. 2901, 2911 (1984)

The Petitioner Mekowulu is attempting to have this Court consider whether the Court should review criminal convictions based on a government's expert's after-the-fact opinion of the defendant's actions constituting the criminal acts, and rendering an opinion of whether the expert's individual list of "red flags" should have placed the defendant on notice of possible diversion of prescriptions.

Since this constitutional challenge has not previously been made, the Petitioner should not be procedurally defaulted because Petitioner's appellate counsel did not raise these issues on direct appeal.

CONCLUSION

This Case presents the needed review by this Court of the current practice of government's prosecution of health care professionals in the introduction of expert testimony that is an after-the-fact analysis and review of the defendant's conduct, and an expert opinion as to "red flags" known to the defendant that, in the expert's opinion, placed the defendant on notice of possible criminal activity. This Case presents the opportunity to articulate that expert testimony on "red flag" indicators must be based on "red flags" in existence at the time of the crime, and for which the defendant is on reasonable notice that a failure to consider such "red flags" may result in prosecution and conviction. This is an important issue affecting health care

professionals, and for this reason, this Court should grant this Petition.

Dated: January 10, 2019

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