NO. _____

In The
Supreme Court of the United States

DIOSME FERNANDEZ HANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: September 23, 2019

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in holding that the indictment was returned within the limitation period under 18 U.S.C. § 3297.

2. Whether the Eleventh Circuit erred by disregarding this Court's Jurisprudence, in conflict with *US v. Santos*, 449 F. 3d 93 (2d Cir. 2006) and the decisions of other circuits in finding that the District Court did not err in denying Hano's Motion for a Judgment of Acquittal and for a New Trial.

3. Whether the Eleventh Circuit erred by disregarding this Court's Jurisprudence, in conflict with *United States v. Thompson*, 615 F.2d 329 (5th Cir 1980) and the decisions of other circuits when finding that the District Court did not err when it permitted Borrego-Izquierdo to testify.

PETITIONER'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 the following individuals/entities have an interest in this litigation.

Hano, Diosme Fernandez Defendant/Petitioner
Arrastia-Cardoso, Reinaldo Co-Defendant
Chappell, Hon. Sheri Polster United States District Judge
Davidow, Joseph A. Attorney for Defendant-Appellant
Michelland, Jeffrey Asst. U.S. Attorney
Eth, Simon R. Asst. U.S. Attorney
Frank de la Grana Attorney for Co-Defendant

RELATED CASES

The are no proceedings directly related to this case as required by Supreme Court Rule 14(1)(b)(iii)

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PETITION FOR A WRIT OF CERTIORARI

COMES NOW, Petitioner, Diosme Fernandez Hano ("Petitioner"), by and through undersigned counsel, and respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order and opinion of the Eleventh Circuit Court of Appeals that is sought review of is in No. 18-10510[1] (App. 1a) published in 922 F.3d 1272 (11th Cir. 2019).

JURISDICTION

The United States District Court for the Middle District of Florida asserted subject matter jurisdiction pursuant to 18 U.S.C.S. § 3231. The district court entered a Judgment in a Criminal Case on January 31, 2018 (App. 45a) to which Hano timely appealed to the United States Court of Appeal for the Eleventh Circuit.

The Eleventh Circuit had jurisdiction to hear Hano's appeal pursuant to 28 U.S.C.S. § 1291 and 18 U.S.C. § 3742(a)(1).

This Petition seeks the review of an Eleventh Circuit's Judgment dated April 30, 2019. (App. 1a). This Honorable Court has Jurisdiction pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

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[1] Reference to Petitioner's Appendix before this Honorable Court is made as "APP. #a".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 3282(a) provides:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282(b) provides:

(1) In general. - In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

(2) Exception. - Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to—

18 U.S.C. § 3297 provides:

> In a case in which DNA testing implicates an identified person in the commission of a felony, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period.

Pub. L. 108–405, title II, § 204(c), Oct. 30, 2004, 118 Stat. 2271, provides:

> The amendments made by this section [enacting this section] shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section [Oct. 30, 2004] if the applicable limitation period has not yet expired.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

On March 16, 2016, defendant/petitioner, Diosme Fernandez Hano ("Petitioner" or "Hano") and co-defendant Reinaldo Arrastia-Cardoso were charged by Superseding Indictment by a federal grand jury on two counts:

Count I charged that

> From a date unknown to on or about November 30, 2009, in Lee County, in the Middle District of Florida, and elsewhere, the defendants herein, did knowingly and willfully combine conspire, confederate, and agree together or with other persons, known or unknown to the jury, to obstruct, delay and affect commerce […] by robbery […] by an unlawful taking of United States currency from the person and presence of a Brink's employee. In violation of Title 18, United States Code section 1951(a).

Count II charged that

> on or about November 30, 2009, […] defendants herein, did knowingly and unlawfully obstruct, delay and affect commerce […] and the movement of articles and commodities […] by robbery […] in that the defendants did knowingly and unlawfully take and obtain the property of another, that is United States currency, from the person or presence of an armed guard employed by Brink's, who at the time of said robbery, **was *working as the driver*** of a Brink's armored van**,** against the employee's will by means of actual and threatened force, violence, and fear of injury, immediate and future, to the employee's person. In violation of Title 18, United States Code, Section 1951(a) and Section 2. [2]

[APPX26-APPX28]

On May 31, 2016, Hano filed a Motion to Dismiss the Superseding Indictment. [APPX32]. On July 20, 2016, the district court entered an Order

[2] All references to Appellant's Appendix filed in the United States Court of Appeals for the Eleventh Circuit are designated "APPX" plus the relevant page numbers

denying Hano's Motion to Dismiss the Superseding Indictment. [APPX36-APPX41].

On October 10, 2017, Hano filed a consolidated motion containing five motions in limine. [APPX43-APPX59]. On November 1, 2017, the district court ruled on Hano's motions in limine and entered an Order holding as follows: (1) Hano's first motion in limine was granted in part, and denied in part; (2) Hano's second motion in limine was denied as moot; (3) Hano's third motion in limine was granted in part, and denied in part; (4) Hano's fourth motion in limine was denied; and (5) Hano's Fifth motion in limine was denied as moot. [APPX66-APPX75].

Beginning October 23, 2017, a 7-day jury trial was conducted before the Honorable Sherri Polster Chappel. At the conclusion of the trial, Hano and his co-defendant were convicted on all counts. [APPX89].

On November 14, 2017, Hano filed Defendant's Renewed Motion for Judgment of Acquittal or in the Alternative, Defendant's Motion for New Trial. [APPX77-APPX83]. On November 20, 2017, the district court entered an Order denying the same. [APPX85-APPX87].

On January 29, 2018, Hano's sentencing was held and judgment was entered. [APPX89]. Hano was sentenced to 121 months incarceration, followed by three years of supervision, and $1,773,395.11 in restitution. [APPX89-APPX94].

On February 9, 2018, Hano filed a Notice of Appeal as to the Order denying Hano's Motion to Dismiss the Superseding Indictment; the Order denying in part Hano's motions in limine; the Order denying Hano's Motion for a New Trial; the jury verdict; and Hano's judgment, conviction, and sentence. Hano is currently incarcerated.

On April 11, 2019, oral argument was heard by the United States Court of Appeals for the Eleventh Circuit.

On April, 30, 2019 the Eleventh Circuit entered an Opinion affirming the district court. (App. 1a-44a). On June 25, 2019, the Eleventh Circuit entered an Order denying Hano's Petition for Rehearing and Rehearing En Banc. (App. 70a-71a)

B. Statement of Facts

On November 30, 2009, Bernard Meaney ("Meaney") was the driver of a Brink's armored truck conducting a route in Lee County, Florida which is within the Middle District of Florida. Jimmy Ortiz ("Ortiz") was the "messenger" of the armored truck. A messenger is an individual assigned to the cab portion of the armored truck. The messenger was the supervising authority of the truck and was the one who made determinations regarding making stops and other route adjustments such as taking lunch time and breaks.

On November 30, 2009, Ortiz made the decision to change the scheduled route of the Brinks truck and directed Meaney to stop for lunch at a Burger

King at an unusually late hour in the afternoon prior to making the final stop of the day at a Fifth Third Bank.[3] (V2, P.27, L.20-25 and V2, P.136, L.6-23 and V2, P.198, L.1-10). After leaving the Burger King, Meaney and Ortiz proceeded in the Brinks truck to the Fifth Third Bank location. (V2, P.137, L.7-13). The Brinks truck was carrying a considerable amount of cash and when it arrived Meaney stopped the truck alongside the ATM drive-through lanes. (V2, P.141, L.4-23). Meaney was in the Driver's compartment of the Brinks truck. As Ortiz exited the messenger door it appeared to Meaney that Ortiz was then greeted by a masked individual who led him back into the Brinks truck. (V2, P.142, L.16-21). Meaney drew his firearm as he believed that the masked individual had a firearm and Ortiz ordered Meaney to put his gun down and Meany obeyed his messenger. (V2, P.142, L.22-24). It appeared to Meaney that Ortiz had been hit in the head with a gun, however, according to the evidence and acknowledged by Government's theory, it was most likely that Ortiz was actually part of an elaborate act and was in fact an inside man working with the perpetrators. In fact, the Government stated that this theory was "likely" to the jury during its closing arguments. (V6, P.99, L.4-5). The sentencing court stated that Ortiz was an inside individual and that the fact that he was an inside individual was one of the things it relied on in finding that the crime

[3] This Petition uses the following conventions in referencing transcript materials forwarded to the Eleventh Circuit Court. "(V#, P#, L#)" refers by volume, page, and line in the record transcripts of the jury trial. "(Sentencing Hearing, P#, L#)" refers by volume, page, and line in the record transcript of the sentencing hearing.

was committed in a sophisticated and planned manner. (Sentencing hearing, P.91, L.23-25).

During the trial, FBI agent Roncinske testified that he viewed photographs of Ortiz at the time immediately after the incident and that they depicted no blood, no lacerations, and no bruising. (V4, P.177, L.1-14).

There was a glass separation between Meanie and Ortiz. (V2, P.144, L.9-15). At Trial, Meanie was questioned as to whether he ever perceived that he was actually threatened as to his person, the questioning went as follows:

> Government: Were you afraid at that time?
> Meanie: Only for Jimmy's safety.
> Government: **Were you afraid for your own safety, since you put your hands up**?
> Meanie: **No**, my reason was to try to ensure that --- his abductor that I wasn't going to try to interfere with him again.

(V2, P.143, L.1-7)(emphasis added).

Meaning viewed through the glass separation what appeared to him to be an assault on Ortiz. Ortiz did not fight back. (V2, P.161, L.4-5). A second masked individual purportedly proceeded to the back of the Brink's truck and took two black bags of money. Both masked individuals then proceeded back to a red Pontiac. At that time, Meanie put the Brinks truck in reverse and rammed the red Pontiac. (V2, P.162, L.15-18). He then drove the truck forward and rammed the red Pontiac again. (V2, P.165, L.22-25). Despite Meaney's attempts, both perpetrators were able to leave the scene in the red Pontiac with approximately 1.7 million dollars of currency.

During the incident, a ski-mask fell off of one of the perpetrators and was left at the scene. Meaney was able to observe the facial features of the now maskless man. He provided a description to FBI agent Roncinske and a sketch was created. (V2, P.179, L.8-14). At trial, Roncinske testified that the sketch created based upon Meaney's description did not resemble Appellant. (V4, P.170, L.16-20 and V4, P.171, L.9-22).

Thereafter, Lee County Sheriff's Office Corporal, Raquel Scott ("Cpl. Scott") responded to the Fifth Third Bank location at approximately 4:45 pm. Cpl. Scott recovered the aforementioned black and green camouflage mask on the ground in close proximity to the Brink's truck. (V3, P.112, L.19-23). The mask was introduced at trial as Government's Exhibit 113. (V3, P.193, L.15-16).

At approximately 6:10 pm., Lee County Sheriff's Office Crime Scene Investigator, Elaine Flaherty ("Flaherty") responded to the scene. Flaherty photographed (#69) photo marker #8 which was a plastic gun grip at the scene. Flaherty examined the gun grip and noted that it did not have any screws on it and that it most likely came from a fake gun. (V3, P.185, L.5-18). The gun grip was later introduced into evidence as Government's Exhibit 114. (V3, P.196, L.17-18).

Further, Flaherty recovered numerous fingerprints from the Brinks truck and from the later discovered red Pontiac as well as a DNA swab from the truck. All of the results that Flaherty recovered were negative. Notably,

hairs that were recovered from the red Pontiac were never submitted for testing. (V3, L.225, L.10-20).

Florida Department of Law Enforcement Crime Laboratory analyst Peterjen McAnany performed STR DNA analysis on Government's Exhibit 113 and Exhibit 114; respectively the ski-mask and the toy gun plastic grip. The outside of the ski-mask had a mixed DNA profile of at least two individuals and potentially more. (V4, P.40, L.7-17). The inside of the ski-mask had a mixed DNA profile consistent with three or more individuals. (V4, P.62, L.1-9) On the toy gun grip, a partial DNA profile for a major contributor was found to be a match to the Appellant's co-defendant. (V4, P.87, L.21-24).

Camilo Martin Hernandez's testimony identified Appellant's co-defendant as the individual who purchased a red car matching Government's Exhibit 102 for $1,500.00. (V4, P.123)

Further, during the investigation, it was discovered that Ortiz's sister, Ana Ortiz, was married to a Mariano Cardoso ("Cardoso"). Cardoso is the cousin of Reinaldo Arrastia-Cardoso, Hano's co-defendant. (V3, P.144, L.18-22). A search of Cardoso's home lead to a recovery of a toy gun, gloves, and a ski-mask. Shortly after the incident, Ana Ortiz purchased a new car with cash and Cardoso fled to Peru. Cardoso was never apprehended or indicted.

Ruben Borrego Izquierdo ("Izquierdo") was listed as a Government witness. Izquierdo alleged that Hano told him that "he had robbed an armor truck with a so-called 'Reinaldo'" and that it was a "plot with a cousin of

Reinaldo to rob an armored truck." (V5, P.45). Izquierdo claimed that Hano stated that they left the scene in a vehicle that Hano purchased. (V5, P.48). Izqueirdo further asserted that Hano told him that after the incident Hano purchased a car, a house, and a house for his mother.

During cross examination, Izquierdo testified that he told the Grand Jury that Hano told him that Hano had to shoot one of the Brinks trick guards in the leg. (V5, P.65, L.15-20). It is undisputed that neither Meaney nor Ortiz was ever shot. Izquierdo also testified that the getaway car was abandoned on I-75. (V5, P.67, L.22-24). The getaway car was actually discovered at an office building at 12290 Treeline Avenue, Fort Myers, FL, as was testified to by witness, John Skipper, who discovered it and called law enforcement. (V2, P.110-111).

Prior to trial, Hano objected Izquierdo's anticipated testimony for several reasons, including that the testimony's probative value was outweighed by its danger of unfair prejudice under Federal Rule of Evidence 403; and that Izquierdo had pending felony charges to which he later pled and received a sentencing reduction based upon his "cooperation" with the FBI.

On May 13, 2015, FBI Special Agent Louis Bronstein executed a search warrant in Hialeah, Florida and collected a DNA sample from Hano. (V5, P.109).

A number of tests were done to compare the physical evidence with Hano's DNA and fingerprints. Lee County Sheriff's Office Senior Latent

Examiner Amy Conrod analyzed 57 latent prints that had been obtained from the Brink's truck and the red Pontiac. Nine of the prints were sufficient for comparison. Those nine were compared to prints from Hano without any positive match result. (V5, P.124).

FDLE Crime Laboratory Analyst Supervisor Jennifer Licata ("Licata") received Hano's and his co-defendant's buccal swabs for testing. Licata obtained DNA profiles for each swab and compared them to the DNA profiles obtained years earlier by Peterjen McAnany from Government's Exhibit 113 and Exhibit 114. Licata testified as to random match probabilities that Hano's DNA was on the outside of the mask, that Hano's co-defendant's DNA was on the toy gun grip, and that there was a mixture of DNA on the inside of the mask which generally encompassed one out of every six people. (V5, P.192-194). On cross-examination, Licata stated that she could not determine how DNA was deposited on an item, when DNA was deposited on an item, or in what order DNA was placed on an item in relation to other DNA.

In closing arguments, addressing the DNA evidence, AUSA Michelland suggested to the jury that the DNA evidence was extremely compelling and went on to state "and while the burden of proof is not on the defendants to prove anything, there was actually no evidence introduced during the trial explaining an alternative reason why the DNA was on the items." (V6, P.113, L.1-6).

At the conclusion of the trial, Hano and his co-defendant were convicted on all counts. (App. 72a-73a).

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING 18 U.S.C. § 3297 THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This Court's Opinion affirming the lower court's denial of Hano's Motion to Dismiss the Superseding Indictment is contrary to United States Supreme Court precedent and presents a precedent-setting question of exceptional importance and first impression thereby warranting a writ of certiorari.

On May 31, 2016, Hano filed a Motion to Dismiss the Superseding Indictment on two grounds: (1) the superseding indictment is invalid because it falls outside the five-year statute of limitations pursuant to 18 U.S.C. § 3282(a); and (2) the Government failed to expressly set forth an exception to the § 3282(a) limitation period in the indictment. [APPX32-APPX34].

On July 20, 2016, the district court entered an Order denying Hano's Motion and finding that 18 U.S.C. § 3297 provides an extension to the 18 U.S.C. § 3282(a) statute of limitations. [APPX36-APPX41].

On April 30, 2019, the Eleventh Circuit entered an Opinion affirming the district court. (App. 1a). The Eleventh Circuit recognized that the statute of limitations issue before it was one of first impression in the Eleventh Circuit (App. 2a) and determined the district court did not err in denying Hano's Motion to Dismiss the Superseding Indictment. (App. 10a-17a). The Eleventh

Circuit reasoned that the language of 18 U.S.C. § 3297 served to toll the limitations period even though DNA implication occurred after the applicable limitation period already expired. (App. 10a-17a).

The district court erred as the 18 U.S.C. § 3297 exception to a statute of limitations only applies to the prosecution of an offense **when the applicable limitation period has not yet expired**. The Eleventh Circuit's Opinion affirming the district court is contrary to this Court's precedent.

It is well-settled that a defendant may file a motion to dismiss an indictment as barred by the statute of limitations pursuant to Rule 12, Fed. R. Crim. P. *See also United States v. Grimmett*, 150 F.3d 958, 961 (8th Cir. 1998); and *United States v. Engle*, 676 F.3d 405, 415 (4th Cir. 2012)("A district court may dismiss an indictment under Rule 12 where there is an infirmity of law in the prosecution[.]").

The review of a "district court's determination regarding sufficiency of the indictment is a question of law subject to *de novo* review." *U.S. v. McGarity*, 669 F.3d 1218, 1232 (11th Cir. 2012). Further, "the district court's factual findings on a motion to dismiss an indictment for clear error, but we review its legal conclusions *de novo*." *United States v. Perry*, 757 F.3d 166, 171 (4th Cir. 2014).

As such, a "district court [must] dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense." *U.S. v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983).

In this case, the district court, in denying Hano's Motion to Dismiss the Superseding Indictment, reasoned that "the subject offense occurred over six years prior to the date of the superseding indictment. But this time period is not fatal to the indictment. To be sure, DNA testing did not implicate Defendant Hano until June 26, 2015, which means that the limitation period under § 3282(a) did not begin to run until this date. Accordingly, both the indictment and superseding indictment are well within the five-year limit." (App. 67a).

The district court and Eleventh Circuit's holding rely on a tortured application of the plain language in 18 U.S.C. § 3297 in order to create a revival of statutes of limitations when in fact 18 U.S.C. § 3297 is only a tolling statute.

In analyzing the legal effect of 18 U.S.C. § 3297, the Court must discern Congress's intent and begin with the language of 18 U.S.C. § 3297. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). A cardinal canon of statutory construction is that the court "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If the language of a statute is clear and unambiguous, "in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *United States v. Turkette*, 452 U.S. 576, 580 (1981). *See also Ex Parte Collett*, 337 U.S. 55, 61 (1949) ("there is no need to refer to the legislative history when the statutory language is clear").

The applicable statute of limitations, Section 3282(a), is five years. *See* 18 U.S.C. § 3282(a). 18 U.S.C. § 3297 provides a tolling of the statute of limitations stating that "no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period." 18 U.S.C. § 3297.

As is clear from the language of 18 U.S.C. § 3297, prior to DNA implication, the applicable statute of limitations begins to run from the commission of the crime. Section 3297 does not replace a statute of limitation, but rather serves as an exception to the expiration of a statute of limitation, in this case 18 U.S.C. § 3282(a), only where DNA testing implicates an identified person in a case.

Critically, the application note to Section 3297 limits the application of Section 3297 to cases where the applicable limitation period has not yet expired at the time of DNA implication, providing "[t]he amendments made by this section [enacting this section] shall apply to the prosecution of any offense committed **before, on, or after** the date of the enactment of this section [Oct. 30, 2004] **if the applicable limitation period has not yet expired**." 18 U.S.C. § 3297 (emphasis added).

The limitation on the application of Section 3297 unambiguously provides that Section 3297 applies to offenses committed after the Statutes'

enactment only if the applicable limitation period has not yet expired at the time of DNA implication. *See U.S. v. Martinez*, 505 F. Supp. 2d 1024, 1030 (D. N. M. 2007)(quoting 18 U.S.C. § 3297)("the application of 18 U.S.C. § 3297, however, **is limited**; the statute was enacted on October 30, 2004, and the statute's application provision states that it '**shall** apply to the prosecution of any offense committed before, on, **or after** the date of the enactment of this section **if the applicable limitation period has not yet expired**.'")(emphasis added); and 118 Stat. 2271.

As such, the language of 18 U.S.C. § 3297 clearly and unambiguously provides that the Section only applies **if DNA implicates an identified person before expiration of the applicable limitation period**. *See Springs v. Stone,* 362 F. Supp. 2d 686, 697 n. 7 (E.D. Va. 2005)(holding that a statutory note is not limited in its application as "[t]he laws of the United States are evidenced by the Statutes at Large, not by their placement within the United States Code"); *Conyers v. Merit Systems Protection Bd*., 388 F.3d 1380, 1382 n.2 (Fed. Cir. 2004)(holding "the fact that this provision was codified as a statutory note is of no moment. The Statutes at Large provide the evidence of the laws of the United States"); and *United States v. Welden*, 377 U.S. 95, 98 n. 4 (1964) (noting that a provision of an Act must be read "**in the context of the entire Act**, rather than in the context of the 'arrangement' selected by the codifier")(emphasis added).

As set forth below, an analysis of the relevant dates clearly shows that the Section 3282(a) limitation period expired prior to the DNA implication of Hano rendering Section 3297 inapplicable to toll the statute of limitations. The offense for which Hano was indicted occurred on November 30, 2009. [APPX26]. The Section 3282(a) limitation period for prosecution of the offense expired on November 30, 2014. Hano and the Government both agreed, and the district court found, that the FDLE lab report did not implicate Hano until June 26, 2015 (App. 66a), some seven months after the expiration of the statute of limitation. As such, because the DNA implication of Hano regarding the subject offense occurred after the expiration of the Section 3282(a) limitation period, Section 3297 does not apply and the lower court committed an error of law in the application of Section 3297.

In its Opinion, the Eleventh Circuit determined the district court did not err in denying Hano's Motion to Dismiss the Superseding Indictment pursuant to the language of 18 U.S.C. § 3297. (App. 10a-17a). The Eleventh Circuit found that 18 U.S.C. § 3297 served to toll the limitations period even though DNA implication occurred after the applicable limitation period already expired. (App. 10a-17a).

In reaching its holding, the Eleventh Circuit reasoned that the temporal refence of the Application Note is the date of enactment of 18 U.S.C. § 3297, October 30, 2004. (App. 13a). The court further reasoned that using the time of DNA implication as the temporal reference point is inapposite to statutory

interpretation as the time of implication is described in Section 3297, but not in the Application Note, and that "[s]uch a reading might make sense if the application note incorporated section 3297 by reference in a way that also incorporated its temporal framework." (App. 14a).

The Eleventh Circuit's Opinion defies logic and long-standing cannons of statutory interpretation and serves to usurp the power of the legislature in contradiction of the "fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department." *Mugler v. Kansas*, 123 U.S. 623, 662 (1887).

Contrary to the Opinion, the plain language of Section 3297, when read as a whole as written by Congress, requires reversal of the district court's denial of Hano's Motion to Dismiss and the Eleventh Circuit's affirmance.

The language of 18 U.S.C. § 3297, as set forth in the Statutes as large, provides as follows:

> SEC. 204. **TOLLING** OF STATUTE OF LIMITATIONS.
> (a) IN GENERAL.—Chapter 213 of title 18, United States Code, is amended by adding at the end the following:
> "§ 3297. Cases involving DNA evidence
> "In a case in which DNA testing implicates an identified person in the commission of a felony, except for a felony offense under chapter 109A, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following **the implication of the person by DNA** testing has

> elapsed that is equal to the otherwise applicable limitation period.".
>
> […]
>
> "3297. Cases involving DNA evidence.".
> (c) **APPLICATION**.—The amendments made by this section shall apply to the prosecution of any offense committed before, **on, or after the date of the enactment of this section if the applicable limitation period has not yet expired**.

118 Stat. 2260, 2271 (2004) (emphasis added).

A plain reading of Section 3297, as a whole, clearly supports Hano's argument that Section 3297 tolls an applicable statute of limitations so long as such statute of limitations has not yet expired at the time a defendant is implicated by DNA testing.

The Eleventh Circuit's Opinion rejected Hano's interpretation and read the Application Note, Sec. 204(c), in isolation, reasoning that the phrase "if the applicable limitation period has not yet expired" is only temporally anchored by "the date of the enactment of this section." (App. 13a). This interpretation reads portions of Section 3297 in isolation and renders portions as surplusage.

It is a well-settled "cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'" *Williams v. Taylor*, 529 U.S. 362, 404 (2000). "As such, it is this Court's "duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001). As such, this Court should be "'reluctan[t] to treat statutory terms as surplusage' in any setting." *Duncan*, 533 U.S. at 174.

In rejecting Hano's interpretation, the Eleventh Circuit reasoned that the time a defendant is implicated by DNA testing:

> is described in section 3297, **not the application note**, so it would be unusual if it supplied the temporal reference point for the present-perfect verb in the application note. **Such a reading might make sense if the application note incorporated section 3297 by reference** in a way that also incorporated its temporal framework. But the application note does not do so. To be sure, the application note defines the circumstances in which section 3297 "shall apply." **But the point is that the application note is a distinct sentence and stands on its own temporal ground**.

(App. 14a) (emphasis added).

The Eleventh Circuit's Opinion reads the Application Note, Sec. 204(c), in isolation in stark dereliction of the well-settled "cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Section 3297 and its Application Note must be read as a whole. *See Springs,* 362 F. Supp. 2d at 697 n. 7 (holding that a statutory note is not limited in its application as "[t]he laws of the United States are evidenced by the Statutes at Large, not by their placement within the United States Code"); and *Conyers*, 388 F.3d at 1382 n.2 (holding "the fact that this provision was codified as a statutory note is of no moment. The Statutes at Large provide the evidence of the laws of the United States").

The Eleventh Circuit is correct in that Hano's interpretation "makes sense if the application note incorporated section 3297 by reference[.]" (App. 14a). The fact that the Application Note makes no specific refence to the time

of DNA implication is of no consequence. The Statute was passed as a whole statute and must be read as a whole statute and no amount of word placement or grammatical gymnastics should allow the Eleventh Circuit to cartwheel around it.

Read as a whole with Section 3297 and in context, the only logical reading of the Application Note to Section 3297 is that it governs Section 3297's application with regard to offenses that occurred before, on, or after the date of enactment. Section 3297 is only applicable in a case, in the first instance, where DNA implicates an individual. As such, before DNA implication, the normal statute of limitations begins to run on the date of offense. *Pendergast v. United States*, 317 U.S. 412, 418 (1943)(holding "[s]tatutes of limitations normally begin to run when the crime is complete."). When application of Section 3297 is trigged by DNA implication, it is limited to cases in which the applicable limitation period has not yet expired at the time of DNA implication.

Further, the Eleventh Circuit's use of the date of enactment as the temporal reference of the Application Note renders the phrase "on, or after", in the Application Note, surplusage. Determining the application of Section 3297 to a crime that occurs on or after the date of enactment based on whether that concurrent or not yet occurred crime's limitation period has expired on the date of enactment is nonsensical.

In addition to Hano's clear interpretation of Section 3297, the title of the Statute, "**Tolling** of Statute of Limitations" lends additional support to Hano's

interpretation. Section 3297 is titled as a tolling of statute of limitations, not as a "revival" of statute of limitations, as the Court seemed to indicate at oral argument. The U.S. Supreme Court in *Artis* in no uncertain terms defined tolling a limitations period to mean "to hold it in abeyance, i.e., to stop the clock." *Artis v. District of Columbia*, 138 S. Ct. 594, 598 (2018). *See also Rashid v. Khulmann,* 991 F. Supp. 254, 259 (S.D.N.Y. Jan. 8 1998)(holding "[t]he tolling provision [28 U.S.C. § 2244(d)(2)] does not, however, 'revive' the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run.").

The *Artis* Court further reasoned that "'tolled,' in the context of a time prescription […] means that the limitations period is suspended (stops running)[.]" *Id*. at 601 (citing Black's Law Dictionary 1488 (6th ed. 1990) ("toll," when paired with the grammatical object "statute of limitations," means "to suspend or stop temporarily")). The Black's Law Dictionary "definition captures the rule generally applied in federal courts." *Id*. As such, United States Supreme Court "decisions employ the terms 'toll' and 'suspend' interchangeably." *Id*. 601-602.

As such, if DNA implicates a person after a statute of limitations has already expired, as in Hano's case, Section 3297 is not applicable as the statute of limitations clock has already run and there is nothing to toll or suspend.

Despite the Eleventh Circuit's perceived distaste of such "tolling" application and clear intent to view a **Tolling** statute as a "revival" statute, it

is not within the Eleventh Circuit's jurisdiction to rewrite the law to fit within its pique and to match the prior wrongful applications of the same. Perhaps Congress will amend the Statute, but until such time, the Court has the obligation to rely on the words as written and as plainly read. *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008)("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted[.]"); and *Dodd v. United States*, 545 U.S. 353, 359 (2005)("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted.").

Lastly, the Opinion buttresses its brittle interpretation as being in line with the holding in *Stogner v. California*, 539 U.S. 607 (2003). However, the note to Section 3297 is not limited to prosecutions that occurred prior to the enactment of the Statute, but places the same tolling limitation on offenses that occur after. The Opinion is simply guessing that the note is only concerned with the *Stogner* holding and implies that Congress made a mistake in writing Section 3297 the way they did, to include "on, or after," because they were only concerned with the *Stogner* case from a year prior. There is nothing to even remotely indicate that the Legislature considered *Stogner* when Section 3297 was passed. Such alliteration is nothing more than conjecture.

As is evident from a plain reading of Section 3297 as a whole and within context, Hano's interpretation is the only logical interpretation. The Eleventh Circuit's Opinion seeks to read the note and even its individual words in

isolation, running afoul of this Court's well-settled principles of statutory interpretation, rendering parts of the Statute superfluous, and stretches to re-write what the Legislature has codified.

The plain language of Section 3297 and this Court's precedents cast serious doubt on the Eleventh Circuit's holding. This Court should grant this Petition to resolve this issue of first impression.

II. THE ELEVENTH CIRCUIT'S OPINION AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

The Eleventh Circuit's Opinion affirming the lower court's denial of Hano's Motions for Judgment of Acquittal and for a New Trial is contrary to this Court's precedent and decisions of other United States Courts of Appeals.

In the Opinion in which Hano seeks review, the Eleventh Circuit determined the district court did not err in denying Hano's Motion for Judgment of Acquittal reasoning: (1) that the evidence was sufficient to support a conviction despite inconsistencies in the testimony of government's witnesses, (2) that the testimony of a government witness who was receiving a sentencing benefit for his testimony, and testified to facts known to be false, was a question of credibility for the jury, (3) that the evidence presented was sufficient to meet Hobbs Act robbery requirement of "by means of actual or threatened force, or violence, or fear of injury" despite the only testimony relating to that element being from a government's witness who stated that he was not afraid and that he was simply following the instructions of his co-

worker, and (4) that there was circumstantial evidence sufficient to establish a conspiracy. (App. 33a-38a).

The Eleventh Circuit rejected Hano's assertion that inconsistencies in government witnesses' testimony did not support a conviction and stated "in light of the DNA evidence, Borrego Izquierdo's testimony, and one apparently positive witness identification, the jury could have reasonably found that Hano was one of the robbers even if it discounted Meaney's identification." (App. 33a-34a).

"The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). To that end, Federal Rule of Criminal Procedure 29(a) provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Further, "[i]n deciding a Rule 29 motion for judgment of acquittal, a district court must `determine whether, viewing all the evidence in the light most favorable to the Government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict, a reasonable trier of fact could find that the evidence established guilt **beyond a reasonable doubt**.'" *United States v. Grigsby*, 111 F.3d 806, 833 (11th Cir. 1997) (emphasis added).

Critically, the inquiry is "not whether there was *any* evidence to support a […] conviction, but whether there was sufficient evidence to justify a rational

trier of the facts to find guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 313. To be clear, the standard of proof beyond a reasonable doubt:

> operates to give "concrete substance" to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. At the same time, by impressing upon the factfinder the need to reach a subjective state of **near certitude of the guilt** of the accused[.]

Jackson, 443. U.S. at 315 (citations and quotations omitted) (emphasis added).

Further, "**caution must be taken that the conviction not be obtained by piling inference on inference**." *United States v. Jones*, 44 F.3d 860, 865 (10th Cir.1995) (emphasis added).

The Eleventh Circuit's Opinion essentially determined there was some evidence to support a conviction, but it did not determine that such conviction was properly upheld as beyond a reasonable doubt. (App. 33a-38a). Moreover, in support of the Opinion, the Eleventh Circuit made inferences not supported by the record. For example, the Eleventh Cricuit reasoned that Hano admitted to committing the crime to Borrego Izquierdo, when in fact only the impeached testimony of Borrego asserted Hano made such a statement. Further, the Eleventh Circuit placed reliance on Hano's DNA profile being found on the ski mask and that Hano traveled to Cuba under "suspicious circumstances." Hano's DNA being on the ski mask does not mean he was ever at the scene or that he even touched the mask and nothing about a Cuban national traveling to Cuba renders it a "suspicious circumstance".

Notably, the Government presented three eyewitnesses to the robbery at trial, all of whom observed an unmasked individual commit the robbery. Critically, not one of the three eyewitnesses to the robbery identified Hano as the unmasked robber, despite the fact that it was the very same mask with Hano's DNA on it. Most notably, Meaney's description of the unmasked robber contained no resemblance whatsoever to Hano and Meaney did not identify Hano in Court as the unmasked robber he viewed during the robbery – a critical flaw in the Government's case in light of Meaney's vantage point. In resolving this critical flaw, the Eleventh Circuit's Opinion, reasoning out of whole cloth, essentially brushes it aside as inconsequential to the determination of guilt beyond a reasonable doubt. (App, p. 35a).

Hano's conviction was based on evidence that was purely speculative and does little more than to place Hano's DNA on a mask that was recovered at the location where a crime was committed. While this alone may place Hano in the realm of potential suspects, it cannot be said that reasonable doubt has been eliminated as required by the Constitution and under *Jackson*.

Moreover, Hano challenged his conviction under the Hobbs Act arguing that "[i]n Hobbs Act robbery conspiracy cases, it is the government's burden to establish that defendant knowingly and willingly agreed with two or more individuals to obstruct, delay, or affect interstate commerce, by unlawfully taking property '**by means of actual or threatened force, or violence, or**

fear of injury.'" *U.S. v. Santos*, 449 F.3d 93, 97 (2d Cir. 2006) (emphasis added).

It is black-letter law that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt **of every fact necessary to constitute the crime with which he is charged**." *In re Winship*, 397 U.S. 358, 364 (1970)(emphasis added).

> Count II of the Superseding Indictment asserted that Hano:
> did knowingly and unlawfully obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951(b)(3), and the movement of articles and commodities in such commerce, by **robbery**, as that term is defined in Title 18, United States Code, section **1951(b)(1)**, in that the defendants did knowingly and unlawfully take and obtain the property of another, that is United States currency, from the person and in the presence of an armed guard employed by Brink's, who, at the time of said robbery, was working as **the driver of** a Brink's armored van, against the employee's will by means of **actual or threatened force, violence, and fear of injury,** immediate and future, **to the employee's person.**

(App. 73a)(emphasis added).

Critically, regarding robbery as defined in Section 1951, "[i]f the element of violence is not present, **no conviction under section 1951 can occur**." *U.S. v. DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991)(emphasis added). Further, the definition of robbery under the most common criminal law definitions is generally limited to the crime of larcenies committed by force or threat of force. *See, e.g.*, 3 *Wayne R. Lafave, Substantive Criminal Law* § 20.3 (2d ed.2003)(common law robbery requires force or threat thereof); and Model Penal Code § 222.1 (in addition to theft, robbery conviction requires either

actual or threatened infliction of serious bodily injury on another, or actual or threatened commission of another serious felony).

The Eleventh Circuit's Opinion is in conflict with the Second Circuit's holding in *U.S. v. Santos*, 449 F.3d 93 (2d Cir. 2006). In *Santos*, the Second Circuit held that "[i]n Hobbs Act robbery conspiracy cases, it is the government's burden to establish that defendant knowingly and willingly agreed with two or more individuals to obstruct, delay, or affect interstate commerce, by unlawfully taking property '**by means of actual or threatened force, or violence, or fear of injury**.'" *Santos*, 449 F.3d at 97 (quoting 18 U.S.C. §§ 1951(a)-(b))(emphasis added). In *Santos*, the court dealt with a case where "the relevant 'perpetrators' were disguised as DEA agents and, based on what they knew at the time, the 'victim' was an individual engaged in a high stakes drug deal. As defense counsel aptly stated at oral argument, in this case, '"the cops were criminals and the criminals were cops."' *Id* at 101. "[W]hen viewing the immediate response to the flashing of the badge alone, which is what we are asked to do in this case, we do not find Hobbs Act force." *Id*.

In this case, the Government did not meet the elements of the Superseding Indictment as it failed to present any substantive evidence that the property of another was taken against Meaney's will, who was located behind a glass division, by means of actual or threatened force, violence, and fear of injury, to his person. In fact, what was entered into as substantive evidence was to the contrary. Meaney testified to the jury that he was was not

in fear and that he was only concerned for Ortiz's safety (although unbeknownst to him, Ortiz an inside man acting) and that he was following Ortiz's directions, not the directions of any perpetrator. Critically, Hano was charged under the Superseding Indictment that did not include language about fear of injury to another.

Moreover, pursuant to the requirement of an elements of actual or threatened force, Hano argued that there wasn't any substantive evidence that the property of another was taken against Meaney's will, by means of actual or threatened force, violence, and fear of injury, to his person. The Eleventh Circuit's Opinion attempts to resolve this glaring deficiency by speculating that the robbers "at least implicitly threaten[ed] his safety by threatening Ortiz's life[.]" (App. 36a). Further reasoning that "in any event, so long as Meaney reasonably believed that Ortiz's personal safety was threatened, it does not matter whether Ortiz was really in danger or not." (App. 37a).

The Eleventh Circuit's reasoning is an unsupported expansion of the elements necessary to convict a defendant under the Hobbs Act. The Government failed to present evidence of an element necessary for conviction and as such a judgment of acquittal was warranted.

Hano's alleged involvement in the robbery can only be found by impermissible piling inference on inference in order to reach a verdict of guilt beyond a reasonable doubt.

Accordingly, the evidence presented was insufficient to sustain a conviction for Counts I and II as the Government failed to establish each element thereof. As such, the Eleventh Circuit's Opinion affirming the district court's denial of Hano's Motion for Judgment of Acquittal and New Trial is in conflict with the decisions of other United States Courts of Appeals. This Court should grant this Petition to resolve this circuit conflict.

III. THE ELEVENTH CIRCUIT'S OPINION AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S EVIDENTIARY CHALLENGES IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

The Eleventh Circuit's Opinion affirming the lower court's denial of Hano's evidentiary challenges is contrary to decisions of other United States Courts of Appeals.

In the Opinion, the Court determined that admission of Borrego-Izquierdo's testimony was proper. "For his part, Hano offers a third challenge to Borrego Izquierdo's testimony, arguing that it should have been excluded as prejudicial under Federal Rule of Evidence 403, but his argument fails as well." (App. 24a). In reaching its conclusion, the Eleventh Circuit misapplies and expands the holding of *United States v. Thompson*, 615 F.2d 329 (5th Cir. 1980) holding that "Rule 402 does not permit exclusion of evidence because the judge does not find it credible." (App. 24a).

The facts of *Thompson* were that a district court judge had stated to the jury, after a witness had taken the stand and in the jury's presence, "[t]his Court finds this witness unworthy of belief. I direct the jury not to consider

anything she has said as having any bearing on the case and direct the United States Attorney to hold her in contempt." *Thompson*, 615 F.2d at 331. The Opinion expands the decision in *Thompson* beyond the *Thompson* court's holding. Under the Opinion, the precedent of the Eleventh Circuit will now change to mean that a district court judge cannot analyze, under the FRE 403 balancing test, whether a witness's not only uncorroborated, but also demonstrably false testimony can be weighed by the district court as part of its role as a gatekeeper to evidence under FRE 403.

Moreover, the Eleventh Circuit also misapplies the holding of *United States v. Feliciano*, 761 F.3d 1202, 1206 (11th Cir. 2014). In *Feliciano,* the issue presented before the court was not a challenge of the admissibility of false testimony under a 403-balancing test, or the circuit court judge's ability to do so, but was instead a challenge of the sufficiency of the evidence in determining the verdict. *Feliciano,* 761 F.3d at 1206. The Opinion changes current Eleventh Circuit precedent by significantly expanding *Feliciano*'s holding.

The Eleventh Circuit's Opinion now prohibits a district court from conducting a 403-balancing test to determine if false or misleading testimony should be excluded from a trial. *Felicano* was a case that had no mention whatsoever of the district court's gatekeeping function under the 403-balancing test, and was neither briefed nor argued by either party in *Felicano*, regarding application of Rule 403. The Opinion as issued by the Eleventh

Circuit fundamentally alters current Eleventh Circuit precedent under *Feliciano* and *Thompson*.

Further, the Eleventh Circuit reaches beyond precedent by stating that district courts are not to weigh the potential prejudicial effect of uncorroborated testimony under Rule 403. The Opinion states that "Rule 403 does not license exclusion of evidence for want of corroboration, and 'evidence of wealth or extravagant spending may be admissible when relevant to the issues in the case and where other evidence supports a finding of guilt. […] The evidence of Hano's expenditures was relevant because it buttressed the inference that Hano had recently come into a large sum of money when he set sail for Cuba." (App. 25a).

The Opinion is in error for several reasons. First, it fails to take into account that under a 403-balancing test that uncorroborated testimony is inherently less probative in weight than corroborated testimony. In doing so the Opinion relies on *United States v. Bradley*, 644 F.3d 1213 (11th Cir. 2011).

However, the evidence in *Bradley* was corroborated, and even being corroborated, the court still held "[w]e are of the view that this evidence was probative of the defendants' motive, **even if only slightly so**." *Bradley,* 644 F.3d at 1272 (emphasis added). In the present case "evidence of Hano's expenditures" that the Opinion refers to, was solely and exclusively, Borrego-Izquierdo's testimony for which he had a justification to fabricate a lie, and for which he received a substantial benefit. He testified to real estate and cars

purportedly purchased by Hano in Cuba, despite the fact that he could provide no details as to the description of any house or description of any car, and there was nothing else to corroborate this accusation. The unsubstantiated imagination of a government incentivized witness should not be sufficient to overcome the prejudicial effect on a defendant of having to rebut the non-occurrence of an event under the 403-balancing test. Under Rule 403 nothing could be more misleading or confusing for a jury than requiring a defendant to rebut such a non-probative and prejudicial assertion.

In addition, the Opinion is the first amongst the Federal Circuit Courts of Appeal to hold that under 403-balancing test a defendant's immigration status can be admissible in a criminal case that does not involve an immigration charge. Hano's position that allowing the Government to introduce testimony about his immigration status has a prejudicial effect the outweighs its probative is supported by numerous state court decisions. In *Avendano-Lopez*,

> This irrelevant line of inquiry improperly implied that Suarez-Bravo was unreliable and probably possessed cocaine simply because he was a Hispanic living in a high-crime neighborhood and working as a farm laborer. The court found this and other prosecutorial misconduct rose to a level of "flagrant misconduct."

Washington v. Avendano-Lopez, 904 P.2d 324, 331 (Wash. Ct. App. 1995). *See also Salas v. Hi-Tech Erectors,* 168 Wash. 2d 664 (2010) ("Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation.");

and *Gonzalez v. City of Franklin*, 403 N.W.2d 747, 760 (1987) (noting that evidence of the possibility of the defendant's deportation if found guilty would have an "obvious prejudicial effect" for the defendant).

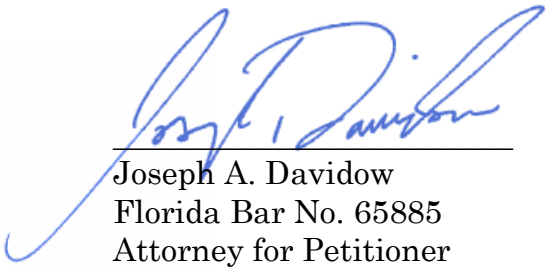
Furthermore, the Opinion creates the new binding precedent allowing for the introduction of evidence of a defendant's immigration status and national origin where the defendant is charged with an offense unrelated to immigration.

Accordingly, the Opinion affirming the lower court's decisions regarding the aforementioned evidentiary issues is in direct conflict with the decisions of other United States Courts of Appeals. This Court should grant this Petition to resolve this circuit conflict

CONCLUSION

For the foregoing reasons, the Supreme Court should grant Diosme Fernandez Hano's Petition for Writ of Certiorari.

Respectfully submitted,



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