

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2020

CASE NO. _____

Eleventh Circuit Court of Appeals No. 17-14370
Southern District of Florida No. 16-cr-20836-PCH

BERNARD MOORE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT
WITH INCORPORATED APPENDIX

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Five Questions Presented

Questions One and Two

In *Rehaif v. United States*, this Court held that 18 U.S.C. §§ 922(g) and 924(a)(2) require the government to prove that “the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.” 139 S.Ct. 2191, 2194 (2019). One “relevant status” is that the defendant have a prior conviction for “a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 922(g)(1).

There is a direct split in the Circuits in cases that were tried to a jury and were pending on direct appeal when this Court decided *Rehaif*. The first two questions presented by this petition are:

First, whether in determining if the defendant’s substantial rights were affected by the failure of the indictment to charge, and the government to prove to the jury, that the defendant knew his relevant status, the courts of appeals may consider the “entire” record, including a presentence report containing facts about the defendant’s prior convictions that were not admitted or offered to be admitted at trial?

Second, whether, even if the courts of appeals may consider the entire record, a court of appeals errs by considering only certain non-trial evidence, and not considering evidence on the record tending to show that the defendant lacks the requisite knowledge of his status, all of which violated due process guaranteed by the Fifth Amendment ?

Questions Three and Four

Whether in affirming Bernard Moore's conviction and sentence, the United States Court of Appeals for the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that it violates every notion of reasonableness, fairness, due process, and common sense, *third*, to affirm where the Eleventh Circuit violated Moore's right to due process under the Fifth Amendment by failing to adhere to its own precedent, and precedent of this Court concerning his entitlement to relief while his case was pending on direct review to a change of law? *And fourth*, to affirm where there was a warrantless search in violation of the Fourth Amendment?

Question Five

Fifth, whether the Eleventh Circuit reversibly erred and so far departed from the essential requirements of law as to require supervision and correction by this Court because the First Step Act was enacted while Moore’s direct appeal was pending and Moore brought it to the attention of the Court; and in affirming the sentence, and failing to grant relief on First Step Act grounds, the Eleventh Circuit violated Moore’s due process rights and ignored this Court’s clear and binding precedent on a change in law while an appeal is pending?

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PETITION FOR WRIT OF CERTIORARI

PARTIES TO THE PROCEEDINGS

The Petitioner Bernard Moore was a defendant, charged, tried, and convicted in the Southern District of Florida in Case No. 16-cr-20836-PCH-3. He was an appellant in the Eleventh Circuit Court of Appeals. The respondent is/was the prosecution. There were three defendants charged in the indictment, Bernard Moore, Derrick Miller, and Michael Fonseca (with whom Moore had no contact whatsoever). Miller was tried together with Moore, was convicted and sentenced, and was a co-appellant in the Eleventh Circuit.

OPINION BELOW

This petition is addressed to the decision of the Eleventh Circuit Court of Appeals entered on March 31, 2020, *United States v. Moore*, 954 F.3d 1322 (11th Cir. 2020), affirming both Moore's and Miller's convictions and sentences in the Southern District of Florida on charges of narcotics trafficking and firearm possession.

Following a jury trial, final judgment was entered in the district court on September 27, 2017 (DE-194). Copies of the Eleventh Circuit opinion, the judgment of the district court, and the Eleventh Circuit order denying Moore's timely-filed petition for rehearing, all are in the appendix filed with this petition.

STATEMENT OF JURISDICTION

Final judgment against Bernard Moore was entered in September 2017. The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. §3231. A notice of appeal was timely filed pursuant to FRAP 4(b). The Eleventh Circuit had jurisdiction over the appeal under 28 U.S.C. §1291, and authority to review Moore's challenge to his sentence under 18 U.S.C. §3742(a).

The opinion of the Eleventh Circuit, entered on March 31, 2020, is published at 954 F.3d 1322. Moore timely filed a petition for rehearing that was denied on September 10, 2020. This petition is timely filed pursuant to Supreme Court Rule 13.1 and the Order of March 19, 2020, extending the time to file due to the Covid emergency. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). Moreover, this Court has subject matter jurisdiction pursuant to Supreme Court Rule 10(a).

CONSTITUTIONAL and STATUTORY PROVISIONS

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

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 to the same offense to be twice put 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.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTORY PROVISIONS

Section 922(g) of Title 18 of the United State Code provides in relevant part that: It shall be unlawful for any person – (1) who has been convicted in

any court of, a crime punishable by imprisonment for a term exceeding one year to possess in or affecting commerce, any firearm or ammunition.

Section 924(a)(2) of Title 18 provides: Whoever knowingly violates subsection ...(g) of section 922, shall be fined as provided in this title, imprisoned not more than 10 years, or both.

First Step Act, Title IV, Section 401: Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies, (1) Controlled substances act – the Controlled Substances Act, 21 U.S.C. 801, *et seq.*, is amended (1) in section 102 (21 U.S.C. 802), by adding at the end of the following: (57) The term “serious drug felony” means an offense described in section 924(e)(2) of title 18, United State Code, for which (A) the offender served a term of imprisonment of more than 12 months; and (B) the offender’s release from any term of imprisonment was within 15 years of the commencement of the instant offense. (58) The term “serious violent felony” means (A) an offense described in section 3559(c)(2) of title 18, if the offense were committed in maritime and territorial jurisdiction of the U.S for which the offender served a term of imprisonment of more than 12 months; and (2) in section 401(b)(1) (21 U.S.C. 841(b)(1) – (A) (i) and (ii) by striking the minimum mandatory term and inserting a lower term of imprisonment.

STATEMENT OF THE CASE AND FACTS

On January 10, 2016, DEA agents executed a federal search warrant for 5645 Northwest 5th Avenue in Miami, Florida (the stash house) and confiscated three firearms, ammunition, cocaine, heroin, ethylene, hydrocodone, and marijuana.

It was later alleged that from December 2, 2015 through April 19, 2016, Michael Fonseca acquired heroin in the Southern District of Florida and sold it to various individuals, including a confidential informant (CI); and that from December 2, 2015 through April 19, 2016, the Miami-Dade Police Department and the FBI

processed 13 controlled purchases of cocaine, heroin, and marijuana in or around Fonseca's Miami residence at 5538 NW 5th Avenue in Miami. Said controlled buys involved 83.48 grams of marijuana, 2.74 grams of cocaine base, 27.95 grams of cocaine, and 4.2 grams of heroin.

On April 25, 2016, a CI allegedly placed a controlled phone call to Fonseca to arrange the purchase of a firearm and ammunition, which the CI purchased later that day for \$200.00.

Surveillance footage from January 10, 2016, showed someone who appeared to be Bernard Moore leaving the stash house shortly before agents arrived to execute the search warrant. DNA analysis of the Glock firearm found in the residence revealed Moore's DNA on the trigger. Generally, surveillance footage showed that the person who appeared to be Moore had dominion and control of the residence.

It must be noted that Bernard Moore has an identical twin brother. They share the same DNA, they look alike, and they even have very similar tattoos.

On November 2, 2016, codefendant Derrick Miller was arrested at his residence. During the arrest, agents recovered 348.57 grams of marijuana, 4.21 grams of heroin, and 2.74 grams of cocaine base from his residence. On that same

day Moore was arrested at his residence. During his arrest, agents recovered 27.95 grams of cocaine and 71.5 grams of marijuana from the residence. On November 3, 2016, Fonseca was arrested in Miami-Dade County, Florida.

In November 2016 Fonseca, Miller, Moore were charged in a nine-count indictment in the Southern District of Florida, with firearm and drug offenses. In January 2017, Fonseca pleaded guilty to one count and was sentenced to 120 months incarceration.

Subsequently, First and Second Superseding indictments were returned. The Third Superseding Indictment was returned in April 2017 charging Miller and Moore in eight counts plus a forfeiture allegation:

Count 1 alleged that from December 2, 2015 to January 10, 2016, Miller and Moore conspired to possess with intent to distribute cocaine base, heroin, cocaine, marijuana, ethylene, and hydrocodone, in violation of 21 USC §§841 and 846;

Moore was not charged in Count 2; Count 3 charged Miller and Moore with the substantive offense of possession on January 10, 2016, of the six controlled substances named in Count 1, with intent to distribute, in violation of 21 USC §§841(a)(1), 841(b)(1)(B), 841(b)(1)(C), and 18 USC §2;

Count 4 alleged that Miller and Moore, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed firearms and ammunition in and affective interstate and foreign commerce in violation of 18 USC §922(g)(1), specifically (a) a Glock 33, 357 caliber firearm; (b) a Kahr P45, .45 caliber firearm; (c) a Beretta PX4 Storm, 9 mm caliber firearm; and ammunition, specifically (d) 16 rounds of .357 caliber; (e) 27 rounds of .45 caliber; and (f) 12 rounds of 9 mm;

Count 5 charged both Miller and Moore with knowingly possessing a firearm in furtherance of drug trafficking crimes referenced in Counts 1 and 2, in violation of 18 USC §§924(c)(1)(A)(i) and 2; Moore was not charged in Counts 6 and 7;

Count 8 charged that on November 2, 2016, Moore knowingly possessed with intent to distribute cocaine and marijuana in violation of 21 USC §§841(a)(1) and (b)(1)(c), and 18 USC §2 (Moore was acquitted on this charge); and

finally, the forfeiture allegation as to the three firearms, 69 rounds of ammunition, and \$2,098 in United States currency.

Moore filed a motion *in limine* to exclude DVR video surveillance evidence from January 6, 2016, purporting to show Moore and Miller holding handguns as they exited the efficiency apartment, known as the stash house. The Motion averred that Counts 4 and 5 charged Moore with possession of a firearm by a con-

victed felon, and with possession of a firearm in furtherance of a drug trafficking crime on January 10, 2016. A videotape of activity on January 6 was irrelevant to a firearm offense alleged to have been committed on January 10. Moore asked the Court to preclude the government from introducing the January 6 video in its case, because it was not probative for an offense alleged to have occurred on January 10. The government responded. The motion *in limine* was denied one week before trial began.

Miller filed a motion to suppress evidence seized during execution of the search warrant on January 10, 2016. Moore adopted Miller's motions, objections, and arguments. The motion to suppress was denied as to both defendants, as were Miller's motions to compel disclosure of the CI, and for severance based on misjoinder. Jury selection was on June 13, 2017. The trial was conducted on June 13, 14 and 19. Deliberations began on the 19th and continued through the 20th.

On the second day of deliberations the jury sent out seven notes with comments and questions. Note 6 was especially unusual. Certain jurors were worried about their safety after trial. After speaking with jurors and conferring with counsel, the district court concluded, and so informed the jurors, that there was no need to be concerned. Miller and Moore both moved to strike two jurors on grounds of their being fearful, and to replace them with alternates, but the motion was denied.

Thereafter, the jury reached a verdict finding Moore guilty as charged on Counts 1, 3, 4 and 5 of the Third Superseding Indictment and not guilty on Count 8 (possession with intent to distribute cocaine and marijuana at time of his arrest).

Moore filed a motion for new trial alleging that "jury misconduct tainted the case;" and that the "guilty verdicts were contrary to the weight of the evidence;" the evidence did not support the allegations in Counts 4 and 5 that specified firearms offenses committed on January 10, 2016; and that even though jury instructions allow prosecutorial flexibility in not having to pinpoint a crime to an exact date, the instruction that was given allowed the prosecution the unfair and unlimited ability to prove a crime without specificity. Counts 4 and 5 were substantive charges. The issue was clear: did the defendant possess a firearm as charged on a date certain. The conclusion of insufficient evidence should be certain. Surveillance video showed someone appearing to be Moore possessing a firearm on January 6, 2016. There was no evidence of possession of a firearm by Moore on January 10, the actual date of the offense charged in the Third Superseding Indictment. The Motion for New Trial argued that the government elected to charge an offense on a specific date. The government's evidence showed something that occurred on a different date. The evidence did not support the verdict, *ergo*, the convictions on Counts 4 and 5 should have been vacated.

The government responded that the charged offense was "on or about January 6." The motion was denied. The court agreed with the government that for a charge of firearm possession "on or about January 10, 2016," evidence of possession on January 6, four days earlier, was "reasonably near" and thus was sufficient.

Moore responded to the PSI. On September 25, 2017, he was sentenced to 240 months incarceration, four years of supervised release, and ordered to pay an assessment of \$400.00. That same day a notice of appeal and motion to proceed *in forma pauperis* were filed. Undersigned was appointed to represent Mr. Moore for purposes of his appeal.

On August 29, 2018, undersigned filed Moore's Initial Brief raising meritorious issues Eleventh Circuit Case No. 17-14370, including *inter alia*, that the evidence was insufficient; that the district court deprived Moore of his Fourth and Fifth Amendment rights to due process, a fair trial and the right to be free of unreasonable searches and seizures when it denied the motion to suppress and the motion *in limine*, and permitted the government to introduce at trial DVR-video footage of events that occurred at the so-called stash house on January 6, 2016; and that the district court erroneously relied on Moore's prior Florida drug convictions to impose an enhanced mandatory minimum sentence, rendering the sentence pro-

cedurally and substantively unreasonable. and should be vacated and the cause remanded for a new sentencing hearing. Additionally, the PSR should be corrected to reflect the Court's findings at the Sentencing Hearing.

In November 2018, a reply brief was filed on behalf of Bernard Moore. In January 2019, Moore Supplemented his Brief with the First Step Act, Title IV Section 401, because his priors no longer qualified for sentence enhancement. In September 2019, the district court ordered that all mention of Fonseca be removed from Miller's PSR (as codefendant, coconspirator, or participant in any offense).

On September 12, 2019, Moore filed a supplemental brief citing two recent decision of this Court, that entitle him to sentencing relief: *United States v. Davis*, 139 S. Ct. 782 (2019) applying to Moore's 924(c) conviction requiring reversal, and *Rehaif v. United States*, 139 S.Ct. 1291 (2019) requiring reversal or vacatur of his 922(g)(1) conviction.

On January 28, 2019, the District Court corrected Moore's PSR, ordering the removal of all references to Fonseca, specifically paragraphs 3 through 9 and 15.

On March 31, 2020, the Eleventh Circuit AFFIRMED the Judgment. On May 20, 2020, Moore filed his Petition for Rehearing requesting reconsideration of the following:

No relief for defendants being shackled through their trial; note from jurors, fearful for their safety after the trial; the *Rehaif* question; and that none of Moore's other issues were addressed in the opinion and were dismissed in footnote 1, as "meritless," specifically: insufficient evidence; unreasonable search and seizure; misjoinder in violation of F.R.Cr.P. 8(b).

On September 10, 2020, the petition for rehearing was denied. Petitioner now respectfully files this Writ of Certiorari for good cause.

Reasons For Granting The Writ

Reason One

Bernard Moore joins other petitioners in asking this Court to resolve the circuit split, as well as to resolve important and recurring questions arising from it. A petition for writ of certiorari is pending in *United States v. Reed*, No. 8679, June 8, 2020, presenting a circuit split in trial cases in light *Rehaif*; and a petition in *United States v. Ross*, NO. 20-5405, August 14, 2020, representing a circuit split in guilty-plea cases in light of *Rehaif*.

There is a fundamental issue whether the underlying statute, 18 U.S.C. § 922(g) exceeds Congress' power under the Commerce Clause. In this, as in most cases the government relied on the firearm's manufacture in some other jurisdiction and its appearance in Florida, a connection to interstate commerce having nothing to do with Mr. Moore, to prosecute him for later possessing the firearm in Florida in 2016. His case challenges Congress' power to criminalize, and the federal government's authority to prosecute purely local conduct. *See, Gamble v. United States*, 139 S.Ct. 1960, 1980 n.1 (2019) (Thomas, J. Concurring) ("Indeed, it seems possible that much of Title 18, among other parts of the U.S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the State's general criminal jurisdiction and an imposition on the People's liberty").

The Circuits are split on whether, in light of Rehaif, a defendant's conviction may be affirmed even though the indictment did not charge, and the government did not prove at trial, that the defendant knew his felon status, an essential element of the 18 U.S.C. § 922(g) offense.

Prior to *Rehaif*, the courts of appeals had uniformly held that the government had to prove the defendant's knowledge only as to possession, not his status. *See, e.g., Rehaif*, 139 S.Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing opinions

including the Eleventh Circuit's decision in *Jackson*). Indictments and jury trials pre-dating *Rehaif* accordingly neither charged nor required the government to prove knowledge of status as an essential element of the offense. Following *Rehaif*, however, the circuits are divided on whether these convictions should be vacated on direct appeal. The Fourth Circuit vacated such convictions in *United States v. Medley*, No. 18-4789 (4th Cir. August 21, 2020); as did *United States v. Cook* (No. 18-1343) (7th Cir. August 17, 2020); *United States v. Green*, (No. 19-4348) (5th Cir. August 28, 2020); *United States v. Qazi* (No. 18-10483) (9th Cir. September 17, 2020).

The Eleventh, and other circuits, have disagreed. There is a clear circuit split. *See. United States v. Reed*, 941 F.3d 1018 (11th Cir. 2019), *cert. filed*, No. 19-8679; *United States v. Lara*, __ F.3d __, 2020 WL 4668535 (1st Cir. Aug. 12 , 2020); *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020); *United States v. Huntsberry*, 956 F.3d 949 (7th Cir. 2020); *United States v. Ward*, 957 F.3d 691 (6th Cir. 2020); *United States v. Maez*, 960 F.3d 949 (7th Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410 (8th Cir. 2019), *cert. denied*, No. 19-7630, 2020 WL 1326060); *United States v. Benamor*, 937 F.3d 1182 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 818 (2020); *see also, United States v. Nasir*, No. 18-2888 (3d Cir. Mar 4, 2020) (*sua sponte* decision to consider case *en banc*).

Reason Two

This Court should resolve the split in the circuits as to whether an appellate court may not use extraneous information that was not pled or proven at trial, to determine that the defendant had to know, or must have known, that he knowingly met the status element of the charge of felon-in-possession of a firearm.

At the heart of the circuit split is whether appellate courts may affirm § 922(g)(1) convictions by relying on facts about a defendant's prior convictions, which were not admitted or proven to a jury at trial, on facts about defendant's prior convictions which were not admitted or proven to a jury at trial to find that the defendant must have known his felon status. *See, Maez*, 960 F.3d at 960 ("The circuits have taken different approaches to the record for plain-error review of jury verdicts in light of *Rehaif*."); *Huntsberry*, 956 F.3d at 284 ("We note that our sister courts have taken different paths on this issue" concerning "what sources of evidence we, as an appellate court, may properly consider in determining whether the [*Rehaif*] errors affected [the defendant's] substantial rights").

The Fourth Circuit found it "inappropriate to speculate how [the defendant] may have defended" against the knowledge-of-status element had that element been charged in the indictment and a trial, recognizing that "appellate judges are especially ill-equipped to evaluate a defendant's state of mind on a cold record."

Medley, 2020 WL 5002706, at *11. The Fourth Circuit thus declined to rely on evidence not admitted at trial to affirm the defendant’s conviction, explaining:

Although the Government has not had to prove the knowledge-of-status element beyond a reasonable doubt, it has provided substantial post-trial evidence supporting [defendant]’s knowledge of his prohibited status, signifying that [defendant] was incarcerated for over sixteen years after being convicted of second-degree murder. However, the “essentially uncontroverted” requirement has not been satisfied. It would be unjust to conclude that the evidence supporting the knowledge-of status-element is “essentially uncontroverted” when [defendant] had no reason to contest that element during pre-trial, trial, or sentencing proceedings.

Id. at *13 (applying the standard set forth in *United States v. Cotton*, 535 U.S. 625 (2002); *Neder v United States*, 527 U.S. 1 (1999); *Johnson v. United States*, 520 U.S. 461 (1997)).

The Eleventh Circuit, in contrast, relied on facts about Moore’s convictions that were not admitted at trial, including the length of a prior sentence, to surmise that Moore must have known that he was a felon when he possessed the firearm. In *Maez*, 960 F.3d at 960, the Seventh Circuit discussed that four circuits including the Eleventh, freely consult materials not before the jury, in particular, criminal histories from the presentence investigation reports without mentioning the propriety of expanding the record; and also discussing *Ward*, 957 F.3d 691, 695 & n.1 (6th Cir. 2020); *Hollingshead*, 940F.32d at 415-16; *Benamor*, 937F.3d at 1189; and *Reed*, 941 F.3d at 1021. The decision to affirm Moore’s conviction conflicts

with the ruling of the Fourth Circuit. Had his case been prosecuted in the Fourth Circuit, his conviction would have been vacated.

The Eleventh Circuit did not address the Sixth Amendment implications of its decision to affirm based on information that was not presented to the jury. The fact of a defendant's prior conviction and his knowledge of it, are elements of the felon-in-possession offense. *See, Rehaif*, 139 S.Ct. at 2194-96; and *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998) (noting that unlike other statutes, § 922(g)(1) makes recidivism "an offense element"). But the facts about Moore's prior convictions that the Eleventh Circuit relied on to infer knowledge of status, and to affirm his conviction, were not proven to a jury beyond a reasonable doubt. Nor moreover was Moore afforded an opportunity to present a defense as to whether he had the requisite knowledge of status at the time of the firearm possession. *See, Medley*, 2020 WL 5002706 at *11-13. Thus, Moore requests that this Court review and resolve this important issue that divides the circuits. Alternatively, Moore asks that the Court hold his petition in abeyance pending resolution of other petitions raising the same issue.

Reason Three

The Eleventh Circuit Reversibly Erred in Affirming Because Fonseca was Removed From all Facts set out in the PSR, and Accordingly, Without Fonseca's Actions and Participation There was no Conspiracy Involving Bernard Moore.

The record shows that Moore objected to "factual statements" in his PSR, that "the incidents with Michael Fonseca should not be applicable to him. During trial, no substantial evidence was offered that proved a conspiratorial relationship among the two." *See, United States v. Spears*, 443 F. 3d 1358, 1361 (11th Cir. 2006), wherein the Eleventh Circuit stated that, generally, that Court reviews a district court's application of Rule 32 *de novo*; but if the defendant failed to preserve the objection in the district court, it will review only for plain error. Also see Fed. R. Crim. P. 52(b) and *United States v. Owen*, 858 F. 2d 1514, 1517 (11th Cir. 1988). Defendants must assert challenges to factual statements in the PSR "with specificity and clarity" which is what Moore did. *U.S. v. Bennett*, 472 F. 3d 825, 832 (11th Cir. 2006). Furthermore, where a determination turns primarily on the evaluation of facts that are more accessible to the district court than the court of appeals, the appellate court will defer to the district court's application of the law to those facts and apply "clear error" review. *United States v. Rothenberg*, 610 F. 3d 621, 624 (11th Cr. 2010); and *United States v. Williams*, 340 F. 3d 1231, 1239 (11th Cir. 2003).

Fonseca's alleged conduct is what was said to have started the alleged Miller-Moore conspiracy. Without the activities on December 2, 2015, there is no conspiracy within the FBI's investigation. Therefore, there is no starting event that the Eleventh Circuit could consider as beginning a conspiracy on that date between Miller and Moore, proving that Moore should never have been charged with a conspiracy that began with conduct from the Fonseca/FBI case. Therefore, during Moore's sentencing hearing the district court first agreed and sustained the objections by specifically ordering paragraphs 3 through 9 and 15, to be removed and stricken from the record. Despite the district court's order to remove those references, the Probation Office failed to comply and remove those paragraphs.

Thereafter, while his direct appeal was pending, Moore filed a Motion to Correct Clerical Error; the district court issued an order granting the motion and directing that said paragraphs be removed. Later, on September 9, 2019, while the direct appeal was still pending, the district court expanded its previous order that the record should "clearly reflect that Michael Fonseca is not a codefendant, coconspirator; or participant in any of the offenses of conviction by [Miller] nor Bernard Moore." Since that order, Moore's PSR reflects only what took place on January 10, and that should have been the only part of the narrative considered under the

reconsideration/rehearing. Without the information concerning Fonseca, Moore never could have been indicted in this case.

Subsequent to the above-mentioned Court Order, while the direct appeal was still pending, Moore filed a supplement in the Eleventh Circuit to inform that Court of the changes in the PSR which affected certain claims raised on appeal.

It is, of course, the function of the district court to make factual findings on issues by a preponderance of evidence, as it did during the Moore's sentencing hearing. Thereafter, the Eleventh Circuit should have adopted the district court's factual findings and removed the Fonseca/FBI investigation from the "background" and any narratives in Moore's appellate record. Thus, the Eleventh Circuit should not have considered any conduct that the district court ordered to be removed from the record. Due process allowed Moore to make objections concerning the "factual statements" pursuant to Rule 32. The government agreed, and the court granted or sustained the objections. For the Eleventh Circuit to simply ignore this as if it never took place, violated Moore's constitutional rights.

Moreover, codefendant Miller was acquitted of that conduct. And, as this Court ruled in *United States v. Watts*, 519 U.S. 148 (1997), perhaps controversially, a jury verdict of acquittal does not necessarily prevent the Sentencing Court from considering conduct underlying an acquitted charge, so

long as that conduct has been proven by a preponderance of evidence. Here, the district court determined by a preponderance of evidence that the subject information should not be used. Yet, the Eleventh Circuit failed to consider that references to the FBI-Fonseca investigation should not be considered in Moore's case.

Fonseca's alleged conduct is what was said to have started the Miller-Moore conspiracy. Had the Eleventh Circuit taken into consideration the district court's finding that Fonseca was not a codefendant, coconspirator, or participant in the offenses, and without allegations of December 2, 2015, that were based solely on Fonseca's conduct, there was no conspiracy shown. Therefore, there was no starting event that the Eleventh Circuit could consider as beginning a conspiracy on that date between Miller and Moore. It further proves that Moore should not have ever been charged with a conspiracy that began with conduct from the Fonseca/FBI case. Ultimately, the Eleventh Circuit is bound by precedent. Even if a panel of judges disagrees with precedent, they still are obligated to follow it.

See, United States v Vega Castillo 540 F.3d 1235 (11th Cir. 2008) (clarifying the prior precedent rule).

Here, the Eleventh Circuit failed to follow precedent. There is no *en banc* decision overruling existing circuit precedent. Furthermore, the Eleventh Circuit also is bound by this Court's precedent.

This Court may take judicial notice that the relief that Moore requested, to correct and revise the PSR to reflect the Court's findings at sentencing, was granted by the district judge who ordered that the PSR be corrected and revised. Had the Eleventh Circuit recognized that all references to Michael Fonseca were ordered by the district court to be removed from the facts in the PSR, that would have had a direct impact on at least two of the issues, specifically the sufficiency of the evidence and the Rule 8(a), 8(b), and 14(a) severance issues.

Wherefore, the Eleventh Circuit violated Moore's due process and therefore, this Court should vacate and reverse the Eleventh Circuit's judgment, and remand for *de novo* review with specific instructions to apply the law stated above.

Reason Four

The Eleventh Circuit has Reversibly Erred by Affirming a Serious Fundamental Constitutional Error, Upholding the District Court's Grossly Erroneous Admission Into Evidence of the DVD of Video Surveillance on January 6, 2016, Because it Clearly Violated Moore's Fourth Amendment Rights as it was Outside the Scope of the Warrant.

As the probable cause section of the DEA-sought search warrant for DVR footage sets forth beginning in paragraph 5, the FBI was only supposed to review footage of January 8, 2016 and January 10, 2016 - together with the DEA - in order to determine whether those dates were related to and substantiated their investigation. The FBI's Lead Agent Justin Spence testified that his investigation had nothing to do with The House or the DEA's execution of the search warrant (DE-241: 111-13).

According to the trial testimony of Forensics Examiner Charles Castillo, the DEA was able to identify the footage they were authorized to seize easily because said footage was date- and time-stamped (DE-239:222). Nevertheless, the Government knowingly used footage from dates other than January 8, 2016 and January 10, 2016. Indisputably, the Government used December 2, 2015; December 4, 2015; December 12, 2015; December 18, 2015; December 29, 2015; January 1, 2016; and January 6, 2016 – all of which were outside of the scope of the warrant (DE-240:46, 47, 76, 77, 78).

Agent Picone of the DEA only made copies of the two days targeted in the warrant (See: DEA 6 Report of Investigation, prepared by DEA Agent Picone on January 27, 2016). But Agent Spence, who had no nexus to the DEA investigation, submitted an additional 36 days of DVR footage as evidence, based on the DEA-sought warrant. It is obvious that the FBI clearly and intentionally exceeded the scope of the DEA-sought warrant in order to make a false connection with the FBI/Fonseca investigation. A search and seizure outside the scope of a warrant is a warrantless search, outside judicial process, and lacking prior judicial approval. It is *per se* unreasonable under the Fourth Amendment of the United States Constitution. *See, Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967).

Without that illegal footage, there was no other evidence to substantiate a conspiracy that began on or about (by the FBI) on December 2, 2015 and ended on January 10, 2016. Agent Spence testified that Moore was not a part of his investigation of the drug related activities (DE-240; 80, 81). Therefore, the Government clearly violated Moore's protection under the Fourth Amendment.

This Court has frequently held that the admission of evidence through an unreasonable search and seizure constitutes good grounds for reversing a conviction, especially where such evidence was the sole or primary basis for the

conviction, or at least was regarded as having been highly damaging to the defendant. This Court also has held that that it was not concerned with whether there was sufficient evidence on which the Defendant could have been convicted without the evidence complained of, but *the question was whether there was a reasonable possibility that the evidence complained of might have contributed to the conviction.* See, *Fahy v. Connecticut*, 375 U.S. 85, 11 L. Ed. 2d 171 (1963).

As to this Reason for Granting the Writ, Moore requests that this Court vacate the conviction and sentence and remand the cause to the Eleventh Circuit with instructions to remand to the district court for a new trial without admission of the illegally obtained DVD videos and because of the fact that without that tainted evidence the outcome of the case Moore would be acquitted.

Reason Five

The Eleventh Circuit has reversibly erred and so far departed from the essential requirements of law as to require supervision and correction by this Court because the First Step Act was enacted while Moore's direct appeal was pending; so by affirming Moore's sentence, and failing to grant relief on First Step Act grounds, the Eleventh Circuit violated Moore's due process rights and ignored this Court's clear and binding precedent.

The record shows that on February 7, 2019, after a reply brief had been filed on behalf of Bernard Moore in the Eleventh Circuit Court of Appeals, a notice of supplemental authority was filed with the Clerk of Court to direct the court's attention to the recent enactment of the First Step Act, Title IV, Section 401, which was directly applicable to the fourth issue raised in Moore's initial brief. The Fourth issue on appeal addressed the sentence, specifically challenging the enhanced minimum mandatory term that was imposed based on Moore's prior Florida drug convictions. Section 401 of Title IV of the Act, directly applied to Moore's sentence;. Because his direct appeal was pending, he was entitled to sentencing relief.

Moore notified the Eleventh Circuit that because the criteria for an enhancement pursuant to 21 U.S.C. Section 802 had changed, that enhancement no longer applied to him due to the fact that after the First Step Act the prerequisite "drug offenses" now were required to be not simply a felonious offense, but rather "serious drug offenses" involving more than a certain quantity of drugs; punishable

for more than ten years; and the individual had to have served more than one year for the offense, not simply a felonious offense.

The record shows that Moore served approximately four months for one of his prior offenses, and mere days for the other two. Additionally, Moore no longer qualified based on the required quantity of drugs involved in the prior offenses.

Additionally because he notified the Eleventh Circuit of this applicable supplemental authority while his appeal was pending, he was entitled to consideration and application of that new law, the First Step Act, to his case. *See, Griffith v. Kentucky*, 479 U.S. 314, 316 (1987) holding that ***a new constitutional rule must be applied retroactively.***

In the case of *Wheeler v. United States*, 204 L.Ed.1067 (2019), the government took the position that the First Step Act was not applicable to a case that was pending on appeal. This Court disagreed and sent the case back to the circuit court. Case No. 18-7187; Granted, Vacated, and Reversed on First Step Act grounds. This Court traditionally rules that parties are not limited to the precise argument made below; but may present any argument in support of an issue that was properly presented in the court of appeals. *See, also, Richardson v. United States*, 139 S.Ct. 2713 (2019); and *Jefferson v. United States*, 205 L.Ed.2d 450 (2020).

Had Section 401 been considered and applied when the Eleventh Circuit decided Moore's fourth issue on direct appeal, his sentence would have been remanded to the district court for resentencing without consideration of the subject Section 924(e), or the U.S.S.G. 4B1.1 enhancement. The outcome would have been different, of course, and would have resulted in imposition of a more reasonable sentence.

Because the Eleventh Circuit failed to adhere to its own precedent in such matters, and failed to adhere to this Court's precedent, it violated Moore's most fundamental constitutional due process right. Therefore, this Honorable Court should Grant this petition, Vacate the sentence, and Remand the cause to the Eleventh Circuit with instructions to vacate and remand to the district court with appropriate instructions to resentence without improper, illegal enhancements.

Conclusion

Petitioner respectfully prays that this Honorable Court will Grant relief in this matter, will issue its most gracious writ, and in the exercise of its supervisory power over the Eleventh Circuit will vacate and reverse the judgment of the Eleventh Circuit affirming Bernard Moore's conviction and sentence, and remand the cause with instructions to vacate and reverse and to order that Moore be discharged; alternatively to remand to the Eleventh Circuit with instructions that the cause be remanded for a new trial or in the alternative for a new sentencing hearing in accordance with the First Step Act.

Respectfully submitted,

/s/ Sheryl J. Lowenthal

Sheryl J. Lowenthal, Atty at Law
CJA Counsel for Bernard Moore
on Petition for Writ of Certiorari

Dated: December 16, 2020

APPENDIX TO THE PETITION

**United States v. Bernard Moore
954 F.3d 1322 (11th Cir. 2020)**

**Final Judgment in a Criminal Case
Southern District of Florida No. 16-cr-20836
Docket No. 194
Entered on September 27, 2017**

**Order of the Eleventh Circuit Court of Appeals
Denying Moore's Timely-Filed
Petition for Rehearing
Entered on September 10, 2020**