IN THE

SUPREME COURT OF THE UNITED STATES

21-5808

IN RE TOMMY LEE RUTLEDGE

PETITIONER

ORIGINAL

PETITION TO ISSUE A WRIT OF MANDUMUS

TO ENFORCE A MANDATE OF THIS COURT

TO THE DISTRICT COURT OF THE CENTRAL DISTRICT OF ILLINOIS

TOMMY LEE RUTLEDGE - 08829-026
MEDICAL CENTER FOR FEDERAL PRISONERS
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PRISONER, NO TELEPHONE

QUESTION PRESENTED

When a District Court Judge has executed a mandate of the United States Supreme Court by vacating a charge and its sentence, can that same Judge reinstate that vacated charge and sentence 2-years and 3 months after he had obeyed the Court's vacatur order?

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IN THE SUPREME COURT
OOF THE UNITED STATES OF AMERICA
WASHINGTON, D.C.

IN RE: TOMMY LEE RUTLEDGE)
PETITIONER)

PETITION TO ISSUE A WRIT OF MANDAMUS
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JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1651.

"The Act to establish this judicial courts of the United States authorizes the Supreme Court to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Marbury v. Madison, 1 Cranch 137, 2 Led. 60 (1803).

HISTORY OF THE CASE

Rutledge and three individuals were initially convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. § 846. Rutledge was also convicted of conducting a continuing criminal enterprise, 21 U.S.C. 848; distribution of cocaine in violation of 21 U.S.C. § 841(a)(1); possession of a firearm by a felon in violation of 18 U.S.C. § 922(g); and two counts of using or carrying a firearm during the commission of a drug felony, in violation of 18 U.S.C. § 924(c).

The Court sentenced Rutledge to life in prison on this continuing criminal enterprise charge (Count 1); life without the possibility of release on the conspiracy to distribute narcotics charge (Count II); and life

imprisonment without the possibility of release on the distribution count (Count III). The Court sentenced Rutledge to 10 years on Count IV, possession of a firearm by a felon. The judge ordered that the three life sentences and the 10-year term were to run concurrently. The judge further sentenced Rutledge to 5-years on Count V and to 10-years on Count VI, both for being an armed drug trafficker and ordered the two latter Counts to run consecutively to one another, and to the other charges.

Rutledge filed a direct appeal with the Seventh Circuit Court of Appeals; The Seventh Circuit denied the appeal and affirmed, United States v. Rutledge, 40 F.3d 879 (7th Cir. 1994).

Rutledge filed for a writ of certiorari and it was granted, Rutledge v. United States, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed 2d 419 (1996). The Supreme Court, in a unanimous decision delivered by Mr. Justice Steven's, held that the conspiracy to distribute controlled substances (Count II) is a lesser included offense of Count I, the continuing criminal enterprise charge. The Supreme Court remanded the case and ordered that either Count I, the continuing criminal enterprise count, or Count II, the conspiracy count be vacated. The district court judge chose to vacate Count II, the conspiracy Count II. (Ex. 2); Rutledge v. United States, 22 F.Supp. 2d 871, 874 (1998).

On April 24, 1997, Rutledge filed a timely motion pursuant to 28 U.S.C. § 2255, The court appointed counsel to represent him on November 12, 1997; counsel filed a supplement on March 26, 1998. The 2255 was granted in part and denied in part; 22 F.Supp. 2d at 885. Judge Mihm ordered that:

> "In conclusion. Count I (CCE) is vacated. Count II (conspiracy to distribute) is reinstated. Count III, (distribution) remains viable, but the sentence imposed should be reduced to 30 years. Count IV (felon in possession of a firearm) remains. Count V (armed drug trafficker) is vacated but can be retried.

Count VI (armed drug trafficker) is vacated" 22 F.Supp. 2d at 885.

Judge Mihm was obligated by law to vacated Count I, the continuing criminal enterprise and that forced decision did not sit well with him, for he also had to reduce the one remaining life-sentence from life to 30-years. The Judge reached back in time; he reached back 2-years and 3-months to the conspiracy count this Court had ordered to be vacated, (the judge was given the option of vacating Count I, the continuing criminal enterprise count, Count I, or the Count II, conspiracy count; the judge chose to vacate Count II). The Judge, without jurisdiction or authority of the Supreme Court, re-instated the conspiracy count he had vacated 2-years and 3-months earlier.

After the Seventh Circuit affirmed the direct appeal, United States v. Rutledge, 40 F.3d 879 (7th Cir. 1994). The Supreme Court granted certiorari and the Court reviewed the issue presented, in 517 U.S. 292, 307, 116 S. Ct. 1241, 134 L.Ed. 2d 419 (1996).

ARGUMENT

The Supreme Court, in a unanimous decision delivered by Mr. Justice Stevens; Court held that conspiracy to distribute controlled substances (Count II) is a lesser included offense of the continuing criminal enterprise charge (CCE)(Count I). This Court reversed the Seventh Circuit and remanded the case. The Court mandated that either the continuing criminal enterprise charge (Count I) or the conspiracy to distribute controlled substances (Count II), be vacated. Rutledge, 517 US 307.

The Court held that one of Petitioner's convictions, as well as its concurrent sentence, "is vacated under Ball," 470 US 856, at 84 LEd 2d 740,

105 S. Ct. 1668 (1985). Holding in brief part, Rutledge, supra.

> "A guilty verdict on a § 848 charge necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846; Conspiracy is therefore a lesser included offense of CCE. Because the Government's arguments have not persuaded us otherwise, we adhere to the presumption that Congress intended to authorize only one punishment. Accordingly, "[O]ne of [Petitioner's] convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense "and must be vacated," Ball v. United States, 470 U.S. 856, 864, 84 Led 2d. 740, 105 S. Ct. 1668 (1985). The judgement of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. it is so ordered," Rutledge v. United States, 517 U.S. 292, 307, 116 S. Ct. 1241, 134 L. Ed 2d 419 (1996).

The district court judge followed the Supreme Court mandate, initially; in its opinion of September 25, 1998, the district court judge said, "This Court vacated Count II on May 29, 1996." Rutledge v. United States, 22 F.Supp. 2d 871, 874 (C.D. Ill. 1998). (ex.2).

Two-years and three months after the district court carried out the Supreme Court's order to vacate Count I or II, the Court, having vacated Count II (conspiracy), heard Rutledge's 28 U.S.C. § 2255, petition. It had been timely filed on April 24, 1997. The Court-appointed counsel filed a supplement to the 2255 on March 26th, 1998. The district court granted the motion in part and denied it in part; 22 F.Supp. 2d 885.

The judge ordered that:

> "In conclusion, Count I (CCE) is vacated. Count II (conspiracy) to distribute is reinstated. Count III (distribution) remains viable, but the sentence imposed should be reduced to 30-years. Count IV (felon in possession of a firearm) remains. Count V (armed drug trafficker) is vacated but can be retried. Count VI (armed drug trafficker) is vacated." 22 F.Supp. 2d 885. (ex.3).

It is Count II, Ante, that keeps Rutledge unconstitutionally confined in prison. When this Court remanded the case it ordered that either the continuing criminal enterprise charge, Count I, or the conspiracy count, Count II, had to be vacated, however, the choice of which one of those charges would be vacated, was left for the judge to decide. The district judge elected to vacate Count II aud he did that, ante; (ex.2).

The district Court judge did not have authority nor the jurisdiction to reverse the decision of the Supreme Court.

> "But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Hutto v. Davis, 454 US 370, 375, 102 S. Ct. 703, 70 L.Ed 2d 556 (1982).

> When the Supreme Court have executed their power in a case before them, and their final decree of judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it, 24 sec. Judiciary Act. I Story's laws, 61. Whatever was before the Court, and is disposed of, is considered as finally settled, The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot very (sic) it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded." Sibbald v. United States, 12 Peters 488, 492, 9 Led 1167 (1838).

No court has the jurisdiction, nor the authority, to resurrect a charge that was vacated by Supreme Court decree, nor to sua sponte, reinstate that vacated charge on no more than a whim. Yet, two-years and three-months after that vacated conspiracy count, Count II was vacated by Supreme Court mandate, Rutledge, 517 US at 307, the judge disregarded the Court's order and reins-

tated that count, Rutledge v. United States, 22 F.Supp. 2d. 871, 885. (ex2,3).

> "Needless to say, only this Court may overrule one of its precedents." Thurston Motor Lines v. Rand, 460 US 533, 535, 103 S. Ct. 1343, 75 L. Ed 2d 260 (1983).

> "The Court of Appeals was correct in applying that principle despite disagreement with Albrecht [Albrecht v. The Herald Co., 390 U.S. 145 (1968)] for it is the Court's prerogative alone to overrule one of its precedent's," State Oil Co. v. Khan, 522 US 3, 20, 118 S. Ct. 275, 139 L. Ed 2d 19999 (1997).

The district court did not have jurisdiction to set aside a Supreme Court decision, regardless of the time elapsed between vacatur and reinstatement of the Court.

> "Every act of a court beyond its jurisdiction is void. Nash ("Cornett") v. Williams, 20 wall, 226, 22 L. Ed 254 (1874)' Windsor v. McVeigh, 93 US 274, 23 L.Ed 914 (1876); 7 Writ, Act, and Def, 181," Exparte Reed, 100 US 13, 23, 25 Led 538 (1879).

Rutledge has exhausted remedies in this matter

Rutledge first filed a motion in the Seventh Circuit Court of Appeals, Pursuant to 28 U.S.C. § 2106 and 28 U.S.C. § 2241. That motion never reached a judge for the clerk's office "trashed" the motion instructing Rutledge to file in the district where he is. (App. A)

As instructed to do, Rutledge refiled under 28 U.S.C. § 2241 in the Western District of Missouri, (App. B). The Western District of Missouri decided not to hear the 28 U.S.C. § 2241, reclassified the petition as a 28 U.S.C. § 2255; and then transferred the case to the original trial court, the district court for the Central District of Illinois. (App. b).

Rutledge was not heard by the Seventh Circuit Court of Appeals because the person in the clerk's office denied Rutledge access to the Court by

refusing to file it. The question of legal jurisdiction was a question of law the court ought to have decided that, not an individual in the clerk's office.

As Rutledge was instructed to do by the clerk's office, Rutledge refiled the petition as a 28 U.S.C. § 2241, petition in the district court of Western Missouri, (App. B). The district court for western Missori transperred this case to the district court for the Central District of Illinois.

The Chief Judge denied the renamed petition that had been transferred to the Central District of Illinois. The judge sternly repremanded Rutledge for filing "another" 2255. Of course, that was not Rutledge's doing; He filed a 2241, a remnant of Article 1, Sect. 9. CL.2 of the Constitution.

> "The Fifth Amendment's Due Process Clause forbids the Government to "Depriv[e]" any person ... of ... liberty without due process of law." Freedom from imprisonment from Government custody, detention, or other forms of phusical restraint-lies at the heart of the liberty that clause protects. See Foucha v. Louisiana, 504 US 71, 80, 118 L. Ed 2d 437, 112 S. Ct. 1780 (1992)." Zadvydas v. Davis, 533 US 678, 690, 121 S. Ct. 2491, 150 L. Ed 2d 653 (2001).

> "For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints, its root principle is that in a civilized society, Government must always be accountable to the judiciary for a man's imprisonment: If the imprisonment cannot be shown to conform with fundamental requirements of the law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today Habeas Corpus in the federal courts provides a mode for the denials of due process of law. Vindication of due process is precisely its historic office." Fay v. Noia, 372 US 391, 401, 402, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

> "This Court has held that at a minimum, the clause "Protects the writ as it existed in 1789" when the constitution was adopted. INS v. St. Cyr, 533 US 289, 301, 121 S. Ct. 2271, 150 L. Ed 2d 347. Habeas has traditionally provided a means to seek release

from unlawful detention." Dept. of Homeland Sec. v. Thuraissigiam, 591 US __, 140 S. Ct. 207 L. Ed 2d 427, __, (2020).

The Petitioner, Rutledge, has run out of options, he has sought to lawfully find just relief within the courts, however, he has been denied due process, the right to be heard.

Rutledge is being held without a lawful charge, without indictment or trial; Has served his lawfully imposed sentences and has no other lawful charges. He ought to be freed now.

THE PLEA FOR MANDAMUS AND BRIEF RECAP

Rutledge respectfully represents that he has demonstrated that this Court granted certiorari in this case in 1996. In deciding the case the Court remanded it and ordered that either Count I or Count II must be vacated. Rutledge, 517 US 307. Subsequently, Rutledge filed a timely petition pursuant to 28 U.S.C. § 2255, in the trial court on April 24, 1997.

The district court judge granted that 2255 in part and he denied it in part. Rutledge, 22 F.Supp. 2d at 285. After bringing Rutledge's sentence into compliance with the law, the 3-life sentences were no more. The judge vacated Count I for lack of sufficient participants to comprise a continuing criminal enterprise; This Court vacated Count II the conspiracy count; and the Court reduced the life sentence it had imposed for Count III, from life to 30-years. The judge was not finished he made an unconstitutional move, he re-instated the conspiracy count formerly vacated by the district judge while obeying the mandate in Rutledge, 517 US at 307.

At the conclusion of the 2255 hearing, Rutledge was left with the

previously vacated charge, Count III, and a 10-year sentence for violating § 922(g), to run concurrently with the other charges.

The 30-year dispensing charge, Count III, has been fully served, as has been the § 922(g) charge that ran concurrently with Count III. That leaves the life sentence for conspiracy, Count II, that was vacated (ex.2) in accordance with this Court's order. Rutledge, 517 US at 307; and which the district court judge reinstated in defiance of the Supreme Court order.

Rutledge would have been released and would have been free now except for the judge's failure to adhere to the law set down by this Court, 183 years ago, in Sibbald, supra.

> "The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person ... of ... liberty without due process of law." Freedom from imprisonment-from Government custody, detention, or other forms of physical restraint-lies at the heart of the liberty that clause protects. See Foucha v. Louisiana, 504 US 71, 80, 118 L. Ed 2d 437, 112 S. CT. 1780 (1992)." Zadvydas v. Davis, 533 US 678, 690, 121 S. Ct. 2491, 150 L. Ed 2d 653 (2001).

> "However strong may have been the convictions of the district judge that injustice would be done by enforcing the judgment, he could not set it "aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. The power of the court to set aside its judgment ended with the term," Re Metropolitan Trust Co., 218 US 312, 329, 54 LEd 1051, 1054, 31 Sup. Ct. Rep, 18." Delaware, L & W.R., Co. v. Bell Stab, 276 US 1, 72 L.ED 439, 48 S. Ct. 203 (1928).

> "The very essence of civil liberty consists in the right of every individual to claim the proctection of the law, whenever he receives an injury. One of the first duties of Government is to afford that protection," Marbury v. Madison, 1 Cranch 137, 163, 2 L.ed 60 (1803).

In the Declaration of Independence our founders in terminating our allegiance to the Crown, told the world:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." Gulf, C & S.F.R. Co. v. Ellis, 165 US 150, 159, 160, 4 L.Ed 666 (1897).

While that declaration is not held out as law, those words do provide the bedrock upon which the due process clause rests, in the Fifth amendment. That amendment assures us that no one will be deprived of life, liberty, or property without due process of law. The trial court judge had no regard for due process when he disregarded the decree of the Supreme Court or when he, sua sponte, reinstated count II the conspiracy charge he formerly vacated in compliance with that mandate.

> "It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." Will v. United States, 389 US 90, 95, 19 L.Ed 2d 305, 88 S.CT. 269 (1967).

This such an extraordinary situation: Rutledge is being held in prison without a lawful charge, without a lawful sentence, on the arbitrary decision of a district judge who took it upon himself to set aside the mandate of the Supreme Court, two years and three months after he intially followed the order of the Supreme Court. (ex. 2,3,). The judgments (those exhibits) show the precise dates of the judge's actions. The judge did not have jurisdiction to overrule a decision of this Court. Once he executed the mandate of the Supreme Court the case was finlly closed, he could not reopen it. Sibbald, 12 Peters at 492.

> "The Court of Appeals was correct in applying that

> principle despite disagreement with Albrecht [Albrecht v. The Herald Co., 390 US 145 (1968)] for it is this Court's prerogative alone to overrule one of its precedents." State Oil Co. v. Khan, 522 US 3, 20, 118 S. Ct. 275, 139 L.Ed 2d 199 (1997).

Thus, Rutledge turns to the Court to compel compliance,

> "The traditional use of the writ in aid of Appellate jurisdiction both at common law and in federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction. Roche v. Evaporated Milk Assn, 319 US 21, 26, 87 L.Ed. 1185, 63 S. Ct. 938 (1943)." Cheney v. United States Dist. Court, 542 US 367, 380, 124 S. Ct. 2576, 159 L.Ed 2d 459 (2004).

The federal district judge, the trial judge, had jurisdiction nor authority to do anytime but to carry the Supreme Court mandate to execution. Once the mandate was executed, the case was finally closed, Sibbald, supra, 12 Peters at 492. Rutledge is not aware of any case in which a trial judge could overturn the order of the Supreme Court and, thereby, reopen an Appellate case closed in 1996. (ex.2).

> "But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Hutto v. Davis, 454 US at 395.

> "But when a court has no judicial power to do what it purports to do-when its action is not mere error but usurpation of power- The situation falls precisely within the allowable use of § 262.* We proceed, therefore, to inquire whether the district court is empowered to enter the order under attack." DE Beers Consol. Mines v. United States, 325 US 212, 217, 65 S. Ct. 1130, 89 L.Ed 1566 (1945).

The Supreme Court ought to note, that since the judge took it upon himself to reinstate the formerly vacated Count II conspiracy charge,

* [928 U.S.C. § 262, March 3, 1911)] now 28 U.S.C. § 1651 (06/25/1948).

Rutledge v. United States, supra, 517 US at 307, has been cited many times, including 5 times by the current Supreme Court (According to a Lexis search). The decision has been referenced in at least two law journals.

As far as Rutledge has determined, no other district court judge in the history of this Court has successfully reversed a Supreme Court mandate.

> "In the same vein, Glasser v. United States, 315 US 60, 86 Led 680, 62 S. Ct. 457 (1942), warned that "[s]teps innocently taken may one by one, leap to the irretrievable impairment of substantial liberties." Id. at 86, 86 Led 680, 62 S, Ct. 457," Illinois v. Gates, 462 US 213, 103 S. Ct. 2317, 76 Led 2d 527 (1983). (Justice Brennan with whom Justice Marshall joins, dissenting).

> "The Constitutional rights of criminal defendants are granted to the innocent and the guilty alike." Kimmelman v. Morrison, 477 US 365, 380, 106 S. Ct. 2574, 91 L.Ed 2d 305 (1986). See also, Weeks v. United States, 232 US 383, 392, 58 Led 652 (1914); McDonald v. United States, 335 US 451, 453, 93 L.Ed 153 (1984).

> "The mandate required the execution of the decree. The district court could not vary it, or give any further relief. Re Sanford Fork & Tool Co., 160 US 247, 255, 40 LEd 414, 416, 16 Sup. Ct. Rep. 291 (1895)" (other citations omitted0. Kansas City S.R. Co. v. Guardian Trust Co., 281 US 1, 11, 74 LEd 659 (1930).

> "The Court of Appeals invoked against the commission the familiar doctrine that a lower court is bound to respect the mandate of an Appellate tribunal and cannot reconsider questions which the mandate laid at rest. See, Re Sanford Fork & Tool Co., 160 US 247, 255, 256, 40 L.Ed 414, 416, 417, 16 S, Ct. 291 (1891)." Federal C. C. v. Pottsville Broad Casting Co., 309 US 134, 140, 84 L.Ed 656 (1946).

Wherefore Rutledge respectfully prays that this Court will grant this writ of mandamus, and, further, order that Rutledge, now in prison without a lawful statutorial or constitutional sentence, be released from custody forthwith.

Further Rutledge prays naught.

Date: 8/24/21

Respectfully submitted,

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