21-6840 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

SANDRA LEE BART,

Pro Se Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was defendant deprived of due process when H2 Guest Worker regulatory violations of a co-defendant for the years 2010 to 2013 were made dispositive of the criminally charged conspiracies of fraud regarding false attestations on forms submitted to Departments of State and Labor when co-defendant and defendant did not sign nor even see the forms because, as was the customary and acceptable policy, the co-defendant's agent signed as Power of Attorney and no Fair Warning Notice was given?

2. Did the District Court and the Eighth Circuit Court of Appeals rule contrary to other appellate circuits regarding restitution and forfeiture being foreclosed in a 28 U.S.C. 2255 petition even though the District Court recharacterized Petitioner's pro se motion as a 2255 (filed after appellate counsel refused to appeal these issues); did the District Court deny due process when it failed to issue a Preliminary Order of Forfeiture; and did the Courts fail to vacate forfeiture contrary to the United States Supreme Court's ruling that joint and several is impermissible?

3. Did the Eighth Circuit rule contrary to eight other appellate circuits, state courts, and the opinion of the United States Supreme Court when it approved the District Court's failure to consider the Cumulative Error Doctrine in a trial permeated with errors so numerous and egregious that it deprived defendant of a fair and just trial?

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JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its Order denying rehearing and affirming the judgment of the United States District Court of Minnesota on September 2, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), since the Petitioner was a party to a criminal case in which judgment was rendered and affirmed by the Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE

U.S. Constitution, Article I, Section 9

> No Bill of Attainder or ex post facto law shall be passed.

5TH Amendment

> No person shall be ... deprived of life, liberty or property without due process of law ...

6TH Amendment

> In all criminal prosecutions the accused shall ...have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Sandra Lee Bart, was a 69 year old grandmother with no previous legal trouble when she was charged and convicted in the United States District Court of Minnesota on COUNT 1, Conspiracy to Commit False Swearing in an Immigration Matter (18 U.S.C. 371) under penalty of perjury under 28 U.S.C. 1746 all in violation of 18 U.S.C. 1546; COUNT 2, Conspiracy to Commit Fraud in Foreign Labor Contracting in violation of 18 U.S.C. 1351; and COUNT 3, Conspiracy to Commit Wire and Mail Fraud in violation of 18 U.S.C. 1349.

The Government alleged that Petitioner's co-defendant, John Svihel, for the years 2010 through 2013, knowingly subscribed as true, false statements on Form 9142A and Form I-129 that were submitted to the Department of Labor and the Department of Homeland Security. The Government also alleged that since Petitioner was also a Guest Worker employer, she would know Svihel's submissions were false.

The Guest Worker Program is an agency-regulated program that allows employers to hire foreign, seasonal workers. Employers hire agents at a cost of thousands of dollars to complete and submit the above-indicated forms. Petitioner and co-defendant each hired their own agents to complete the process to become certified.

A. Facts Giving Rise to This Case Related to False Attestations

The Government should not be permitted to transmogrify Federal statutes so as to prosecute mere regulatory violations as criminal charges and, in the process, also violate Ex Post Facto and Fair Notice Clauses.

The indictment charged that co-defendant Svihel signed and submitted false forms for the years 2010 through 2013. However, he never signed or even saw the forms for the years 2010, 2011, and 2012 because his agent signed as Power of Attorney as was customary. Petitioner Bart's agent also had Power of Attorney to sign Bart's forms. In 2013, employers were required to sign the forms but even then the agents only sent the signature page, as Petitioner testified at trial: "...but when she would have me sign, she would only send me the signature page for signature. Nothing else."

It was further clarified upon cross-examination of Bart's agent that the forms were completed solely by the agent on behalf of Petitioner and on behalf of all the agent's clients when she was asked, "...you fill out those documents yourself, correct? I mean, they don't write it in? You write it in on their behalf?" The agent answered, "Yes."

And, when Svihel's agent was asked at trial, "And at the end of the certification section, who is signing the certifications?" Her answer was "I signed as power of attorney for Mr Svihel." Both agents confirmed that

neither Petitioner nor the co-defendant saw or signed the forms and when they had to sign in 2013, only the signature page was seen.

The jury instructions stated:

> "To act with intent to defraud means to act knowingly and with intent to deceive someone for the purpose of causing some financial loss to another or bring about some financial gain to oneself or another to the detriment of a third party. With respect to false statements, defendant must have known the statement was untrue when made or have made the statement with reckless indifference to its truth or falsity."

There was no way Bart would know if Svihel had made false statements because she never saw his forms. Again, this was confirmed when his agent upon redirect examination was asked , "...would you also send the I-129's and the labor certifications to Ms. Bart?" to which the agent replied, "I don't believe so." The prosecutor continued asking if she sent Petitioner the temporary labor certifications in any way and Svihel's agent replied, "No."

Even Svihel did not see the forms as his agent stated at trial, "Again, he doesn't see them before submission..." And she confirmed that he doesn't see the rest of the document; only the signature page.

Svihel actually paid the workers the correct wage and reimbursement for transportation; but on the last day of work before returning to their home country, a guest worker would collect from his fellow workers and give Svihel money. Svihel never asked for money, never coerced the workers,

never paid them less, never made deductions, and never told them what he wanted given to him. His only involvement was accepting the money, no doubt thinking they were "gifting" it in gratitude to be earning in six months more than ten times their annual income in the Dominican Republic. Bart never knew of or saw these transactions and received none of this money.

Neither Bart nor Svihel saw restrictions regarding kickback because no forms were given to them to review. The checklist provided by the agents does not mention kickbacks, does not require a signature, and does not indicate criminal penalties for regulatory violations. (App. E, 27a) It is questionable why agents would not provide the forms but instead provide a checklist.

This case is the Nation's first criminal prosecution of work-visa fraud since instituting the program in 1952 and, though there were approximately 12,000 violations of the guest worker program last year alone, none were criminally prosecuted. Petitioner, however, was sentenced to 60 months in prison. There was No Fair Warning.

B. Facts Related to Restitution and Forfeiture

The District Court erroneously foreclosed on the Restitution and Forfeiture issues. There have been no cases where a 28 U.S.C. 2255 could

not raise these issues for ineffective assistance of counsel along with claims relating to a prisoner's custody. Only 2255's that contain no claim relating to custody have been denied. This does not apply to Petitioner's case because her 2255 did not solely address non-custodial punishment and is similar to *Weinberger v. United States,* 268 F. 3d 346 (6th Cir 2001) (permitting review of forfeiture and restitution in a 2255).

When Trial and Appellate Counsel refused to object to restitution and forfeiture orders, Bart proceeded to file motions pro se. In answer to these motions, the District Court recharacterized them as 28 U.S.C. 2255. (App. E, 29a). Bart withdrew her motion to file a 2255 until all her claims were able to be presented. (App. E, 30a & 31a) Though the District Court had recommended a 2255 filing, the court reversed itself and foreclosed on those issues when presented in a 2255.

The issue regarding restitution is the fact that the District Court permitted the Government to garnish the full amount of Bart's restitution obligation contrary to the oral order at sentencing. "Where an oral sentence and the written judgment conflict, the oral sentence controls." *United States v. Glass,* 720 F. 2d 21, 22 n.2 (8th Cir. 1983)(citing *Johnson v. Mabry,* 602 F.2d 167, 170 (8th Cir. 1979)); see also *United States v. Tramp,*

30 F.3d 1035, 1037 (8th Cir. 1994) ("The oral pronouncement by the sentencing court is the judgment of the court.").

The issue regarding forfeiture is two-fold. First, no Preliminary Order of Forfeiture was made to permit Petitioner to object in violation of 28 U.S.C. 1655. As per Federal Rules of Criminal Procedure 32.2(b)(1)(B), *Rule 32.2(b)(4)(A), and 32.2(b)(1)(B), "relief must be granted to a defendant who was not personally notified of said action."

Second, and most importantly, the District Court and the Eighth Circuit Court of appeals refused to vacate Bart's Forfeiture Order contrary to the United States Supreme Court decisions in *Honeycutt v. United States,* 137 S. Ct. 1626, 1635 (2017); *United States v. Chittenden,* 138 S. Ct. 447-48 (2017); and *Brown v. United States,* 138 S. Ct. 468 (2017). In these indicated cases, joint and several was barred by the United States Supreme Court.

This refusal by the District Court and the Eighth Circuit is contrary to the Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits who have all vacated forfeiture cases where joint and several had been ordered.

C. Facts Related to Cumulative Error Doctrine

Many of the egregious errors in Petitioner Bart's case were due to ineffective assistance of counsel, some of which in other cases in the Eighth Circuit have been cause for reversal or other action by the Courts. Such related cases and Counsel's deficient performance are as follows:

Trial Counsel failed to interview and call a witness who would have testified for Petitioner establishing that the "Good/Bad" List referred to workers fighting and not what the Government insisted throughout the trial that "bad" indicated workers telling the truth to the Government. Trial Counsel was incompetent and constitutionally ineffective and failed to cross-examine a state's witness. Counsel failed to investigate and impeach two government witnesses and investigate other impeachment material. Because she failed to investigate and prepare for trial, she did not submit a trial brief to the District Court. A trial brief is of the utmost importance as it informs the Court of the petitioner's defense and gives an opposing view. This no doubt prejudiced Bart. (*Chambers v. Armstrout,* 907 F. 2d 825 (8th Cir. 1990); *Hill v. Lockhart,* 894 F. 2d 1009 (8th Cir. 1990); *Driscoll v. Delo,* 71 F. 3d 701 (8th Cir. 1995); *Hawkman v. Parratt,* 661 F.2d 1161, 1168 (8th Cir. 1981).)

Additionally, in an action that is inexcusable and cannot be explained, Bart's own trial counsel redacted all Government discovery in its entirety barring Bart from viewing the discovery even though there was no Protective Order and the Government had given all discovery unredacted to defense counsel. Neither the District Court nor the Court of Appeals addressed defense counsel's prejudicial action.

Though trial counsel saw the discovery, she failed to interview several witnesses. As stated in *Henderson v. Sargent,* 926 F. 2d 706, 710-11 (8th Cir. 1991), "the decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial". Trial Counsel also failed to engage an interpreter when interviewing two Spanish-speaking defense witnesses.

A defendant is entitled to have her counsel effectively cross-examine government witnesses, including by impeaching the testimony of such witnesses. *See California v. Trombetta,* 467 U.S. 479, 486 n.6 (1984) ("criminal defendants are entitled...to cross-examine witnesses who have testified on the government's behalf"). Bart's counsel failed to do so.

Trial Counsel failed to call expert witnesses such as a Tax Expert and an H2 Program Expert. *See Washington v. Schriver,* 255 F. 3d 45, 56 (2d Cir.

2001) ("The right to call witnesses in order to present a meaningful defense at a criminal trial is a fundamental constitutional right secured by both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment"); *Trombetta,* 466 U.S. at 486 n.6 ("criminal defendants are entitled to call witnesses on their own behalf").

The District Court recognized Trial Counsel's performance and noted it several times in its Order. (See App. B, 12a, 14a, & 19a):

"....even if Wold's performance was deficient...."

"....even if the Court assumes that Wold was deficient...."

"Even if Wold could have or should have done more....."

The Third Circuit stated two or more separate errors may not be cause for reversal, but when combined would be and the Court decided that the defendant was denied a fundamentally fair trial in *Albrecht v. Horn,* 485 F. 3d 103 (3d Cir. 2007).

In addition to the above errors, Defense Counsel impliedly admitted Petitioner's guilt when stating "and she took fees she shouldn't have." Petitioner consistently stated she was not guilty and her personal service fees for helping the workers while they were in the United States with medical

issues, getting Social Security Numbers, filing income taxes, etc. were all permissible and legal. The H2 Expert would have explained that services for the personal benefit of the worker can be charged. Defense Counsel did not inform herself of the regulations and laws.

Defense Counsel also failed to request a Credibility – Cooperating Witness Jury Instruction. This applies to the four Government witnesses from the Dominican Republic who were cooperating and had much to gain because they were promised money, green cards, and a guarantee of no prosecution for their illegal actions. The jury needed this instruction when weighing their testimonies. (*United States v. Kroh,* 904 F. 2d 450 (8th Cir. 1990)

The Government's Trial Brief informed Defense Counsel that it did not intend to call any expert witnesses but was going to call Government agency workers as witnesses and their testimonies were being offered "not as 'expert' testimony, but rather direct knowledge of these witnesses' knowledge based on their own familiarity with the programs." No Opinion Instruction was given the jury and the jury, no doubt, considered their testimonies as expert testimonies and they were not. The Government presented five such lay witnesses who made incorrect statements and

omitted pertinent facts. An H2 Expert witness for the defense was needed to correct, expand, and clarify the testimony of the government lay witnesses so that the jury would have correct information and proof that Bart's actions were legal, which would have changed the outcome of the trial. Employment within an industry alone is insufficient to qualify as an expert. (*Ahlberg v. Chrysler Corp.*, 481 F. 3d 630 (8th Cir. 2007).

A limiting instruction was also needed because the Government alleged repeatedly that Bart violated regulations and substantial time was devoted to falsely stating Bart had violated regulations with workers other than Svihel's. There was an obvious risk that the jury could have concluded Bart was guilty based on a regulatory violation. However, it is the law that violating regulations does not equal the commission of a crime and the government must limit its references to civil violations. In *United States v. Shetty,* 76 F. App'x 842, 845 (9th Cir. 2003), the Court's jury instruction clarified that the regulatory violations alone were not fraud.

There was a great risk in this instant case that allegations of regulatory violations subsumed the proof required to establish a criminal offense. Bart's trial counsel, however, requested no instruction that would have

placed evidence of purported regulatory violations in proper context for evaluating Bart's guilt or innocence. Many courts have recognized there is substantial risk of jury error when a jury is left without guidance in evaluating evidence probative for one purpose but not others, especially when the evidence relates to regulatory violations. *See United States v. Brechtel,* 997 F. 2d 1108, 1115 n.27 (5th Cir. 1993) ("we and our colleagues in other circuits have recognized the value of limiting instructions in attenuating any improper effect of such evidence when used for a

permissible purpose"). Bart was prejudiced when Trial Counsel did not ask for a simple limiting instruction.

Similarly, Bart's Defense Counsel was also ineffective for not requesting a limiting instruction for other conduct evidence admitted under Rule 404(b). The law is clear; where the government uses Rule 404(b) evidence,

a limiting instruction is warranted. (*United States v. Anwar,* 428 F.3d 1102, 1111 (8th Cir. 2007). However, the instruction must be requested.

Trial Counsel's failure to require limiting instructions fell below an objective standard of reasonableness. Appellate Counsel also failed to raise these issues. These failures are deficient performance of counsels. The jury

may have convicted Petitioner for conspiracy based on improper consideration of alleged regulatory violations or other bad acts.

In this very complicated case, a total of four important and necessary jury instructions should have been requested by the Trial Counsel. The omission of these instructions was prejudicial to Petitioner.

Assistance of counsel is deemed ineffective if: (1) counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have performed under the same set of circumstances; and (2) the ineffectiveness prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). It is easy to see that both prongs of *Strickland* have been satisfied. Also, prejudice is established by the United States Supreme Court in *United States v. Cronic,* 466 U.S. 648, 658, 104 S. Ct. 2039, 2046 80 L.Ed 2d 657,667 (1984) where:

1. There is a "breakdown of the adversarial process,"
2. denial of such basics as the right to effective cross-examination, or
3. failure of Counsel to subject the prosecution's case to meaningful adversarial testing.

All of the above are applicable to the case herewith.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. Review is Warranted Because The Conviction Violates Constitutional Rights Regarding Ex Post Facto and Fair Notice And False Attestations.

The Eighth Circuit Court of Appeals has sanctioned a departure by the District Court regarding Constitutional and United States Supreme Court decisions regarding Ex Post Facto and Fair Notice Clauses that conflicts with relevant decisions of this court as to call for an exercise of this Court's supervisory power.

For 63 years until 2015, violations of H2 regulations were punishable by only fines, revocation, or debarment and mostly just warnings. However, effective April 2, 2015, Congress broadened 18 U.S.C. 1351, Fraud in Foreign Labor Contracting, to prosecute false representations on Forms I-129 and 9142 regarding terms and conditions of employment, housing, fees to labor brokers, food and transportation, ability to work for other employers, and material aspects of work arrangement. The intention of this action was to help control human trafficking not to criminally punish mere regulatory violations of farmers. (Fed. Reg. 77,527, Dec. 24, 2014).

However, the Government, in its zeal to criminally prosecute the Nation's first work-visa fraud, violated the Ex Post Facto and Fair Notice Clauses by prosecuting for violations prior to the year 2015. The "unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an Ex Post Facto Clause." (*Bouie v. Columbia,* 378 U.S. 347, 353-54 (1964); (*Niederstadt v. Nixon,* 465 F.3d 843 (8th Cir. 2006) conviction reversed.))

Article I, Section 9, of the Constitution of the United States of America specifically states "No Bill of Attainder or ex post facto law shall be passed." Not only was 18 U.S.C. 1351 broadened effective 2015, but the words "or causes another person to recruit, solicit or hire a person outside of the United States..." were added effective 2013. In the years prior, the law applied only to recruiters or employers. Bart was neither in this case.

The Government also violated Fair Notice. Two Supreme Court decisions have affirmed regulated industries' right to fair notice of federal agencies' interpretations of the laws they implement. (*Christopher v. SmithKline Beecham Corp.* 132 S.Ct. 2156, 2167 (2012) and *FCC v. Fox*

Television Stations, Inc., 132 S.Ct. 2307 (2012)). No Fair Notice was given by the Government that H2A violations would be criminally prosecuted and the forms still do not warn of criminal prosecution under 18 U.S.C. 1351.

It is true that federal agencies may change their policies, but they cannot enforce those changes without providing adequate notice. Regulated industries need fair warning of the conduct a regulation prohibits or requires.

As the United States Supreme Court stated in the above case, due process demands "that regulated parties should know what is required of them so they may act accordingly [and] precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 2317. And "where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute." *Christopher,* 132 S.Ct. at 2168.

Prosecutors' broadening of interpretations of statutes, designed for other purposes, to criminalize non-criminal actions is exactly why Executive Order of January 18, 2021, "Protecting Americans From Over-criminalizing Through Regulatory Reform", was issued.

Petitioner's Count I, 18 U.S.C. 1546 (Fraud and Misuse of Visas, Permits, and Other Documents) has been indicated on Forms only recently, but it is not applicable in this instant case. As noted by the Ninth Circuit Court of Appeals's statutory interpretation, only documents that can be used to enter, stay, or work in the United States can be prosecuted under 1546. Conviction was vacated in *United States v. Thomsen,* No. 13-50235 (9th Cir. 2016) because forms, as here, were not applicable.

The forms in Petitioner's case, I-129 and 9142, cannot be used in this manner and the final document, I-797B, Petition for a Nonimmigrant Worker, states on the form "THIS FORM IS NOT A VISA AND MAY NOT BE USED IN PLACE OF A VISA." (App. E, 32a)

Not surprisingly, Count II, 18 U.S.C. 1351, (Fraud in Foreign Labor Contracting), as of 2021, still has not been referenced on Forms I-129 nor 9142, no doubt because Congress intended to apply it only in regards to human trafficking.

Recently, employers violating H2 regulations have not been criminally prosecuted. On May 12, 2021, Wage and Hour District Director, Daniel Cronin of Miami, stated "Employers who fail to comply are subject to

payment of back wages, civil penalties, and debarment from program participation." There was no mention of being criminally prosecuted.

Even in Minnesota in May of 2021, where Petitioner was criminally prosecuted, Valdes Lawn Care and Snow Removal, paid fines, back wages, and was debarred for their violations but not criminally prosecuted even though their violations were similar to those in this case; and their actions were only considered civil violations. Of 431 recent cases of H2A violations, none were prosecuted criminally. Selective prosecution should not and cannot be tolerated.

When Petitioner saw only a checklist, there was no reason to think the forms contained anything other than what was on the checklist. It is unthinkable to ease the path to convicting persons who are not aware of the possibility of strict regulation in the form of statutes such as 18 U.S.C. 1546 and/or 18 U.S.C. 1351. There must be restraint in the reach of a criminal statute.

This cases raises questions of exceptional importance of law and the administration of law as to agency enforcement of regulations and affects every regulated industry of the United States which includes the

approximately 14,000 employers who participate in the H2 Guest Worker Program.

"Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity". (*Rewis v. United States,* 808, 812 (1971)). Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the courts in defining criminal activity.

As Justice Breyer stated in *Marinello v. United States,* No. 16-1144, (3/21/2018), the infirmity of the government's view is that no one, having committed such a minor offense, "would believe he [could] fac[e] a potential felony prosecution....".

In other words, the problem was the penalty's severity or more exactly, the mismatch between the penalty's severity and the conduct's relative harmlessness. When the gap is extreme, it should be resolved in favor of ordinary people, not in favor of the government.

Further, both statutes that Petitioner was charged under and also the jury instructions refer to "knowingly". There was no way Petitioner acted

knowingly when neither she nor her co-defendant saw the forms. There was no evidence that Bart had any knowledge of false statements because the forms were filled out, signed, and submitted by agents. (*United States v. Hayes,* 594 F.3d 460 (8th Cir. 2009) Petitioner should not have been convicted on the impermissible grounds that she should have known an illegal act was taking place merely because she employed guest workers in her own company. (*United States v. Beckett,* 724 F.2d 855, 856 (9th Cir. 1984)

II. Review is Warranted Because an Injustice Would Occur if a Defendant Would Have No Recourse Regarding Restitution and Forfeiture Issues Due to the Ineffective Assistance of Counsels and Due to Rulings of The Court That Are Contrary to Other Appellate Circuits and the United States Supreme Court.

The District Court and the Eighth Circuit Court of Appeals has decided important federal questions regarding restitution and forfeiture that conflicts with courts in its own district, conflicts with other United States court of appeals, and also conflicts with decisions of the United States Supreme

Court. The Eighth Circuit Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court regarding important federal questions; and, therefore, calls for an exercise of the United States Supreme Court's supervisory power.

Petitioner's issues are about the illegal procedure of garnishment by the Government for restitution; illegally not providing a Preliminary Order of Forfeiture; and the Courts' refusal to follow the law as enunciated by the United States Supreme Court in *Honeycutt* and later cases that joint and several is impermissible when seven Appellate Circuits, as noted previously, have vacated cases being so charged. When a judge does not follow the law, he then loses subject matter jurisdiction and the judge's orders are void---of no legal force or affect.

The District Court also impeded Petitioner from seeking justice when it denied a certificate of appealability stating, "....the court is convinced that Bart's claims do not entitle her to relief..." (App. C, 24a) This reason is completely opposite what the United States Supreme Court stated specifically in *Miller-El v. Cockrell,* 537 U.S. 322 S. Ct. 2003 that a court

"should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief." It is evident that a jury would conclude that the many issues presented by Petitioner herewith are adequate to deserve encouragement to proceed further and it was not for the court to decide the merits of the case.

In *United States v. Shakur,* 691 F.3d 979 (8th Cir. 2012), there was no Preliminary Order of Forfeiture. The Eighth Circuit stated, "There can be no criminal forfeiture in this case." Without a Preliminary Order of Forfeiture the court was without power to enter the Forfeiture Order and this is a prejudicial legal error. It is questionable why the District Court and the Eighth Circuit Court of Appeals did not apply its own precedent in *Shakur* and in *United States v. Smith,* 656 F.3d 821, 827, (8th Cir. 2011) to Bart's case and vacate her criminal forfeiture as well. Bart was denied a meaningful opportunity to contest the deprivation of her property.

III. Review is Warranted Regarding Cumulative Error Because There is a Split Between Circuits With Eight Circuits Recognizing the Doctrine and Three Who Do Not.

The District Court and the Eighth Circuit Court of Appeals has confirmed an important question of federal law that has not been, but should be, settled by this Court regarding the Cumulative Error Doctrine. A parties' rights should not depend on where a case is litigated. The First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits all recognize Cumulative Error. As Judge Gorsuch wrote for the Tenth Circuit, "prejudice can be accumulated on habeas review."

The Fourth, Sixth, and Eighth Circuits do not conduct cumulative-error analysis on habeas review. The Sixth Circuit reasoned that "because the Supreme Court has not spoken on this issue," "cumulative error claims are not cognizable on habeas." Not only is this issue divided among the circuits, but it is also divided among the State Courts. Florida, Idaho, Illinois, Minnesota, Montana, New Jersey, and Utah all accumulate the prejudicial effects of separate errors on habeas review in their state courts.

A Minnesota state court recognized that "An appellant will be entitled to a new trial if the errors, considered cumulatively, had the effect of denying him a fair trial." (*State v. Radke,* 821 N.W.2d 316, 330 (Minn. 2012)) In *People v. Jackson,* 793 N.E.2d 1, 23 (Ill. 2001), the court stated "This court

has recognized that individual errors may have the cumulative effect of denying a defendant a fair hearing***."

"Cumulative error can serve as a basis for reversal, even when individual errors alone would not serve as a sufficient basis for reversal." (*Vernon Kills on Top v. State,* 928 P.2d 182, 187 (Mont. 1996)).

Similarly to Petitioner's case, in *United States v. Riddle,* 103 F.3d 423 (5th Cir. 1997), the Court stated that the trial court erred in permitting a government lay witness to offer expert testimony, excluded a defense expert, admitted improper Rule 404(b) evidence, and admitting evidence that should have been excluded pursuant to Rule 403. While none of these errors viewed in isolation would have been reversible, when considered cumulatively, the net effect was the denial of the defendant's right to a fair trial so stated the Court.

Petitioner's trial had five Government lay witnesses offer "expert" testimony and multiple errors such as: Trial Counsel refused to call two expert witnesses for the defense, deprived Bart of viewing Government's discovery by illegally redacting all pertinent information before giving it to Petitioner, four limiting jury instructions were not requested, no request for the jury to be retained to decide forfeiture, no Preliminary Order of Forfeiture was issued, the oral order of restitution was ignored, no cross-

examination of a Government witness by defendant's counsel due to lack of investigation and failure to inform herself of the regulations and laws, no interpreter when interviewing two Spanish-speaking defense witnesses, and failure to impeach two government witnesses with their prior statements.

The aggregation of nonreversible errors, i.e., plain errors that do not individually necessitate a reversal and harmless errors, can yield denial of conviction. (*United States v. Baker*,432 F.3d 1189 (11th Cir. 2005))

The ruling of the Court of Appeals affirming the District Court's Order denying the 2255 request to vacate and denying a certificate of appealability should be reversed. This Court should grant certiorari to bring the circuits into alignment and to address these important issues.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Date November 23, 2021