No. _____

In The
Supreme Court of the United States

ABEL DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE DISTRICT COURT HAD JURISDICTION UNDER THE SAVINGS CLAUSE OF 28 U.S.C. § 2255(e) TO ADJUDICATE THE MERITS OF PETITIONER DIAZ'S § 2241 PETITION WHERE DIAZ'S SENTENCE EXCEEDED THE STATUTORY MAXIMUM FOR HIS DRUG OFFENSE WITHOUT A JURY FINDING OF THE DRUG QUANTITY.

LIST OF PARTIES

Abel Diaz, Petitioner

United States of America, Respondent

STATEMENT OF RELATED CASES

- *United States of America v. Abel Diaz*, No. 1:00-cr-74-FAM, U.S. District Court, Southern District of Florida, Miami Division (Judgment entered 11-30-2000);
- *United States of America v. Abel Diaz*, No. 00-16413, U.S. Court of Appeal, Eleventh Circuit (direct appeal) Mandate issued 3-7-2002;
- *Abel Diaz v. United States of America*, No. 1:12-cv-22711, U.S. District Court, Southern District of Florida, Miami Division (2241), order denying issued 12-6-2012;
- *United States of America v. Abel Diaz*, No. 11-10958, U.S. Court of Appeal, Eleventh Circuit;
- *United States of America v. Abel Diaz*, No. 11-12313, U.S. Court of Appeal, Eleventh Circuit;
- *United States of America v. Abel Diaz*, No. 12-12685, U.S. Court of Appeal, Eleventh Circuit;
- *Abel Diaz v. United States of America*, No. 12-16498, U.S. Court of Appeal, Eleventh Circuit (appeal of denial of 2241, 1:12-cv-22711), vacated and remanded 11-5-2014;

STATEMENT OF RELATED CASES—Continued

- *United States of America v. Abel Diaz*, No. 15-11000, U.S. Court of Appeal, Eleventh Circuit (appeal of denial of 3582);
- *In re: Abel Diaz*, No. 16-11717, U.S. Court of Appeal, Eleventh Circuit;
- *In re: Abel Diaz*, No. 20-13451, U.S. Court of Appeal, Eleventh Circuit;
- *Abel Diaz v. Warden, Bennettsville FCI*, No. 4:15-cv-237, U.S. District Court, South Carolina, Florence Division (2241) (transferred from SD FL - 1:12-cv-22107), opened as new case number;
- *Abel Diaz v. Warden, Bennettsville FCI*, No. 4:19-cv-2423, U.S. District Court, South Carolina, Florence Division (2241);
- *Abel Diaz v. Warden, Bennettsville FCI*, No. 16-7167, U.S. Court of Appeal, Fourth Circuit (application denying second or successive 2255);
- *Abel Diaz v. Warden, Bennettsville FCI*, No. 20-7713, U.S. Court of Appeal, Fourth Circuit.

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The Petitioner, Abel Diaz, respectfully prays that a writ of certiorari issue to review the decision of the Fourth Circuit Court of Appeals entered September 20, 2021 affirming by unpublished per curiam opinion the decision of the United States District Court for the District of South Carolina, at Florence dismissing Diaz's 28 U.S.C. § 2241 petition.

OPINION BELOW

The decision of the Fourth Circuit Court of Appeals as well as the underlying District Court order are included in the Appendix, *infra*.

JURISDICTION

This Court has jurisdiction to review the September 20, 2021 decision of the Fourth Circuit Court of Appeals affirming the lower court's order dismissing Diaz's 28 U.S.C. § 2241 petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence 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.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241—Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2255—Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the

sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by

motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of

counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

Twenty-two-year-old Abel Diaz was caught up in a sting operation which federal law enforcement had created and used repeatedly throughout the United States. The sting was built around a law enforcement officer posing as a drug courier who had knowledge where a stash house was located at which a very large quantity of cocaine and cash could be stolen. The undercover officer would disclose the location of the stash house to young would be robbers in exchange for a cut of the proceeds of the robbery. Of course there was no stash house and were no drugs. It was all just a story that someone made up, which only the youngest and

most gullible would believe. The concept was so incredible that the result was that the typical operation ensnared very young, naive and unsophisticated persons. This operation was no different.

Abel Diaz had fled Castro's Cuba on a raft as a teenager and came to the United States after being interned at Guantanamo Bay and then paroled into the United States. He eventually found his way to Miami and the Cuban community there, although he had no immediate family in Miami to turn to for support. He came to the United States with a tenth grade Cuban education and did not speak English.

He had no father to look to for moral guidance and found himself associated with a group of similarly situated aimless youths. Starting at age 18 he began to get in trouble. He was arrested for a grand theft shoplifting offense from a Miami department store (sentenced to probation), and another arrest for a misdemeanor shoplifting of a Tommy Hilfiger cap from another retail outlet (probation), then another misdemeanor attempted theft at a department store, then a burglary of a commercial structure (probation), and another grand theft charge, shoplifting at another department store (four months in jail), then a grand theft auto (probation and community control, later revoked and served six months jail), then a fight in a nightclub charged as misdemeanor disorderly conduct (probation), and then a driving under the influence of alcohol charge (apparently a fine only), followed by driving on suspended license (36 days jail), then

possession of a false drivers license and resisting an officer without violence (6 months jail).

It was while he was in jail for this last driving related offense that he was approached about this sting operation and ended up agreeing to participate. He was told that there was 25 kilograms of cocaine and $500,000 cash in this stash house, his for the taking. Kilograms of cocaine in Miami in 2000 cost at least $20,000 uncut, so the lure here was $500,000 of cocaine and $500,000 cash, a million dollars total. For a shoplifter whose last haul was six dresses out of Burdines Department Store, this was a temptation too great to resist.

The other participants all pled guilty for relatively low sentences, but Mr. Diaz felt that he was not guilty because he believed that he had been entrapped. He went to trial on an entrapment defense and was found guilty. His guidelines were determined to be 30 years to life (this was November 2000, shortly after *Apprendi* but before *Booker*). The district judge on these facts sentenced Mr. Diaz to life imprisonment.

PERTINENT PROCEDURAL AND LEGAL FACTS

Mr. Diaz was indicted before *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was decided. The original indictment charged four counts: count one, conspiracy to possess with intent to distribute a mixture and substance containing a detectable amount of cocaine;

count two, attempt to possess with intent to distribute a mixture and substance containing a detectable amount of cocaine; count three, knowing use and carrying of a firearm during and in relation to a drug trafficking crime; and count four, conspiracy to possess, use and carry firearms during and in relation to a drug trafficking crime. Before trial but after *Apprendi* issued, the Government obtained a superseding indictment which modified the charges in counts one and two to add the phrase "that is, five kilograms or more" before the reference to the mixture or substance containing cocaine.

At the charge conference the Government, with *Apprendi* in mind, requested the Court require a special jury verdict on drug quantity but the court refused. The instructions given the jury did not advise the jury that drug quantity was an element of the offense as to which they must reach a unanimous verdict.

The jury returned a not guilty verdict on count two, attempt to possess five or more kilograms of cocaine, but general guilty verdicts on counts one, three and four.

On appeal, Mr. Diaz raised the *Apprendi* drug quantity issue. The Eleventh Circuit, in an unpublished decision denied relief finding (1) that there was no *Apprendi* error, and (2) even if there were, it was not plain error because it did not affect Mr. Diaz's substantial rights.

> In his fifth and final contention, Diaz argues that his life sentence on Count I violates the

Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), because the district court did not properly instruct the jury to find the specific drug quantity involved in the conspiracy beyond a reasonable doubt and, as a result, there was no quantity determination by the jury. Because Diaz did not object on this ground, we review his claim only for plain error. *See United States v. Swatzie*, 228 F .3d 1278, 1281 (11th Cir. 2000), cert. denied, 121 S. Ct. 2600 (2001).

. . .

After the guilty verdict was returned on Count I, Diaz was sentenced under § 846(b)(l)(A)(ii)(II) to life imprisonment. Under § 841(b)(l)(C), the maximum sentence Diaz could have received without a quantity finding was twenty years. . . .

The district court, in its instructions to the jury, told them that "Count I charges the defendant with knowingly and intentionally conspiring or agreeing with others to possess with intent to distribute five or more kilograms of cocaine, in violation of federal law. . . ." The court also stated that "What the evidence in the case must show beyond a reasonable doubt is: First, that two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment; and second, that the defendant,

> knowing the unlawful purpose of the plan, willfully joined in it."
>
> The government argues that from these instructions, the jury reasonably understood that it could not convict Diaz unless it found that at least five kilograms of cocaine were involved in the offense, and the jury verdict of guilty necessarily encompassed that finding. Thus, there was no constitutional error. We agree.
>
> Moreover, even if the instructions had not been adequate to ensure that the jury verdict encompassed a finding as to the five kilograms, that error would not have affected Diaz's substantial rights because the evidence before the jury firmly established that the object of the conspiracy involved more than five kilograms and that Diaz was well aware of this fact. A jury, therefore, could not have found Diaz guilty of the conspiracy to possess with intent to distribute without also finding that five or more kilograms were involved in the conspiracy. *Swatzie*, 228 F.3d at 1284. The fact that the drugs involved were fictitious does not affect our analysis. Thus, no plain error occurred.

[A copy of the unpublished opinion of the Eleventh Circuit can be found in the district court docket for the Southern District of Florida, in case number 1:00-cr-74, Doc. 106]

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

WHETHER THE DISTRICT COURT HAD JURISDICTION UNDER THE SAVINGS CLAUSE OF 28 U.S.C. § 2255(e) TO ADJUDICATE THE MERITS OF PETITIONER DIAZ'S § 2241 PETITION WHERE DIAZ'S SENTENCE EXCEEDED THE STATUTORY MAXIMUM FOR HIS DRUG OFFENSE WITHOUT A JURY FINDING OF THE DRUG QUANTITY.

The Eleventh Circuit erred in Diaz's direct appeal when it concluded that there was no *Apprendi* Constitutional error in Diaz's case. *Apprendi* requires both that the sentencing factor which increases the statutory maximum sentence (here from twenty years up to life, and life was imposed), must not only be charged in the indictment, but also be found by the jury after proof beyond a reasonable doubt. The jury was expressly told by the district court in its instructions to the jury that the *only elements* that the Government had to prove were that the defendant had conspired to violate the law. The jury was *not* instructed that the Government must prove that the drug quantity at issue was five or more kilograms of cocaine. Including language in the indictment when the jury is not told that the language is anything more than surplusage cannot satisfy a Sixth Amendment jury verdict requirement. The district court itself expressly refused to submit the issue to the jury. The Government requested that the jury be given a special verdict to find drug quantity and this request was denied by the district court. A general

verdict standing alone would have satisfied *Apprendi* had the jury been instructed that drug quantity was an element of the offense, but because the district court failed to instruct on drug quantity as an element of the offense, the general verdict likewise failed to satisfy *Apprendi*'s requirement that drug quantity be proved beyond a reasonable doubt as determined by a unanimous jury verdict. The district court's denial of the requested jury instruction, an instruction mandated by *Apprendi*, undermines and contradicts the Eleventh Circuit's conclusion that there was no *Apprendi* error. This was *Apprendi* Constitutional error.[1]

Similarly, the Eleventh Circuit erred in finding that any error did not affect Mr. Diaz's substantial rights. In support of its conclusion the Eleventh Circuit only had this to support it: "because the evidence before the jury firmly established that the object of the conspiracy involved more than five kilograms and that Diaz was well aware of this fact. A jury, therefore, could not have found Diaz guilty of the conspiracy to possess with intent to distribute without also finding that five

[1] Mr. Diaz's opinion was unpublished. Just one month later in a published opinion on identical operative facts the Eleventh Circuit found that it was *Apprendi* error to simply include drug quantity in the indictment but not charge the jury with drug quantity as an element of the offense. *United States v. Acevedo*, 285 F.3d 1010 (11th Cir. 2002). In *Acevedo*, the error was found to be harmless because Acevedo was sentenced to less than twenty years imprisonment, the statutory maximum had no drug quantity been established. Mr. Diaz was sentenced to life imprisonment.

or more kilograms were involved in the conspiracy." The Eleventh Circuit plainly overlooked that the jury had found Mr. Diaz *not guilty* of count two of the indictment, which charged Mr. Diaz with attempt to possess with intent to distribute the same cocaine charged in count one. Although inconsistent verdicts standing alone are not enough to vacate a conviction, it is enough to call into doubt whether the error was harmless. The same evidence and same jury could not even convict on count two, on facts which the Eleventh Circuit found harmless on count one. This is logically impossible. Indeed, what might explain the apparent inconsistency in the verdicts is the very matter at issue under *Apprendi*. Assuming, as we must, that the jury abided by its instructions, it was instructed as to the conspiracy count, that all it had to find the Government had proved was an agreement involving Mr. Diaz to violate the law. Whereas as to count two, the jury had to find that the Government had proved that Mr. Diaz attempted to possess with intent to distribute cocaine, and the problem there for the jury was that there was no cocaine. There did not have to be any cocaine for the gravamen of the crime of conspiracy to have been committed but the jury must have concluded using common sense that to be guilty of distributing cocaine, *there must be some amount of cocaine to distribute*, and there was none, much less not five kilograms or more. So, in light of these inconsistent verdicts, the conclusion is compelling that in fact the *Apprendi* error in this case affected Mr. Diaz's substantial rights, and his statutory maximum sentence for count one, conspiracy to distribute cocaine, must be

capped at the statutory maximum when the Government has failed to prove five or more kilograms of cocaine, that is, twenty years.

THE SAVINGS CLAUSE AND § 2241 RELIEF

28 U.S.C. § 2255(e) (the savings clause), provides as follows:

> (e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Mr. Diaz raised this issue in his direct appeal, which was, as demonstrated above, wrongly decided under the law of the Fourth Circuit *See United States v. Surratt*, 797 F.3d 240, 269 (4th Cir. 2015) (discussed *infra*) and wrongly decided under now controlling law of the Eleventh Circuit. But because the issue had been raised and denied on direct appeal, he could not relitigate the issue in a motion under 28 U.S.C. § 2255. His only means of challenging the constitutionality of his life sentence is by way of a habeas petition under 28 U.S.C. § 2241, which he now pursues.

In *United States v. Surratt*, 797 F.3d 240 (4th Cir. 2015) the Fourth Circuit stated:

> We also stress that our decision today is limited to the particular facts of this case. We do not decide whether, for instance, a federal prisoner might bring a § 2241 petition claiming that the district court unlawfully sentenced him to a term of imprisonment exceeding the statutory maximum.

United States v. Surratt, 797 F.3d 240, 269 (4th Cir. 2015), rehearing *en banc* granted *United States v. Surratt*, 2015 U.S. App. LEXIS 20881, thereafter appeal dismissed as moot, *United States v. Surratt*, 855 F.3d 218 (2017).

The District Court denied relief in reliance upon the Fourth Circuit's holding in *United States v. Wheeler*, 886 F.3d 415, 429 (4th Cir. 2018). The District Court wrote:

> The Fourth Circuit has identified specific circumstances when a federal prisoner may use a § 2241 petition to contest his sentence pursuant to the savings clause. Specifically, § 2255 is inadequate or ineffective when:
>
> > (1) at the time of the sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on

> collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

U.S. v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018). The savings clause is a jurisdictional provision; if a petitioner cannot satisfy the savings clause, the district court lacks jurisdiction to consider the petition. Id. at 423. Here, Magistrate Judge Rogers determined that Petitioner cannot meet the second prong of the *Wheeler* test because there was no subsequent change of law deemed to apply retroactively on collateral review subsequent to Petitioner's direct appeal and first § 2255 motion. (*See* ECF No. 31 at 8.) The Report states:

> *Apprendi* was decided prior to Petitioner's trial and direct appeal. . . . Petitioner relies on the Eleventh Circuit case of *United States v. Acevedo*, [285 F.3d 1010 (11th Cir. 2002)], asserting that the Eleventh Circuit *Apprendi* law changed. The Eleventh Circuit case that Petitioner relies was decided in 2002, prior to Petitioner's § 2255 motion in 2003. Additionally, *Acevedo* did not make *Apprendi* retroactive. Therefore, this argument

> fails and Petitioner fails to meet the second prong of *Wheeler*.

(ECF No. 31 at 8.)

. . . Petitioner concedes that "*if* the four prong *Wheeler* test were to govern his case without exception, that the [Report] is correct. However, Diaz argues for an exception to *Wheeler* for his case, the procedural posture of which *Wheeler* did not anticipate nor resolve." (ECF No. 32 at 1 (emphasis added).)

. . . There does appear to be tension between the Eleventh Circuit's decision affirming Petitioner's life sentence on direct appeal—finding (1) that there was no *Apprendi* error, and (2) even if there had been error, it would not have affected Diaz's substantial rights (*see* ECF No. 1-1 at 12–14 (quoting relevant language from Eleventh Circuit ruling))—and the Eleventh Circuit's opinion in *Acevedo*—stating, "Sentencing a defendant in excess of twenty years (the statutory maximum allowed without a drug quantity determination pursuant to Section 841(b)(1)(C)), without a jury determination of drug quantity constitutes plain error." 285 F.3d at 1012. Of course, the Court does not have the authority to declare that the Eleventh Circuit's ruling in Petitioner's direct appeal was "wrongly decided," and the Court declines to express any opinion on the matter. The Court is not unsympathetic to Petitioner's procedural plight. But the Court is neither at liberty to invent, in contravention of controlling Fourth Circuit precedent,

> its own rubric for when a § 2241 petition is permitted to collaterally attack a federal sentence, nor to act as a de facto supervisory court to the Eleventh Circuit Court of Appeals. If Petitioner were to be allowed to pursue his current claim in this Court by way of a § 2241 petition, the jurisdictional law would have to change.

United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018). Diaz agrees that if the four prong *Wheeler* test were to govern his case without exception, that the Government's argument holds. However, Diaz argues for an exception to *Wheeler* for his case, the procedural posture of which *Wheeler* did not anticipate nor resolve.

It is a truism and true, that Article III judges have no jurisdiction other than to decide concrete cases and controversies and have no authority to establish general legislative principles or policies. The *Wheeler* facts and issue did not involve a petitioner whose issue had been wrongly decided on direct appeal, but which because, (in Diaz's case) his appeal was wrongly decided (as indisputably established by *Acevedo*), he was barred from relitigating the issue in his first § 2255 petition.

> The requirement of "actual injury redressable by the court," *Simon*, supra, at 39[2], serves several of the "implicit policies embodied in

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[2] *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

> Article III," *Flast*, supra, at 96.[3] It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The "standing" requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472, 102 S. Ct. 752, 758-59 (1982).

> As we had occasion to observe in *California v. San Pablo & Tulare Railroad*, 149 U.S. 308, 314 (1893), "the duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.

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[3] *Flast v. Cohen*, 392 U.S. 83 (1968).

> No stipulation of parties, or counsel, whether in the case before the court, or in any other case, can enlarge the power or affect the duty of the court in this regard." *See also Lord v. Veazie*, 8 How. 251;[4] *Cleveland v. Chamberlain*, 1 Black, 419;[5] *Kimball v. Kimball*, 174 U.S. 158 [(1899)].

Tyler v. Judges of Court of Registration, 179 U.S. 405, 408-09, 21 S. Ct. 206, 208 (1900).

> [T]his Court "is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409 (1900). *See also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982).

Webster v. Reprod. Health Servs., 492 U.S. 490, 506-07, 109 S. Ct. 3040, 3050 (1989).

Diaz argues that it violated Article III of the Constitution to apply the *Wheeler* test to a case whose facts were not adjudicated in *Wheeler* and which are clearly distinguishable from those presented to the *Wheeler* court. *Wheeler* did not address the unique procedural circumstances presented by Diaz's case therefore its

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[4] *Lord v. Veazie*, 49 U.S. 251 (1850).

[5] *Cleveland v. Chamberlain*, 66 U.S. 419 (1861).

four prong test does not and cannot apply to Diaz's case.[6]

Wheeler's four prong standard does not even have the weight of *dicta* when applied to a case and controversy outside the scope of the *Wheeler* case.

In Diaz's case he raised his *Apprendi* claim in his direct appeal. *Apprendi* applied to his direct appeal because it had been decided before he was sentenced. There is no issue of retroactivity for collateral relief purposes in Diaz's case, hence the irrelevance of the second prong of the *Wheeler* standard.

We now know that the Eleventh Circuit wrongly decided his appeal. Wrong or not, the fact that the *Apprendi* issue had been adjudicated in his direct appeal prohibited him from raising it in his § 2255 proceeding at the time he filed his first § 2255 petition.

> Upon review of the present motion, the district court concluded that, despite Nyhuis' protestations to the contrary, his Section 2255 due process claim is based upon the same alleged plea agreement violation resolved

[6] *Surratt*, on the other hand, would have opened the door to Diaz to litigate his claim via a § 2241 petition. *United States v. Surratt*, 797 F.3d 240, 269 (4th Cir. 2015), rehearing *en banc* granted *United States v. Surratt*, 2015 U.S. App. LEXIS 20881, thereafter appeal dismissed as moot, *United States v. Surratt*, 855 F.3d 218 (2017). *Surratt* was withdrawn by the granting of rehearing *en banc* and was not reinstated when *Surratt* was dismissed as moot based on Surratt having had his sentence commuted by President Obama. However the withdrawn *Surratt* opinion can certainly be seen as giving guidance for the application of § 2241 on Diaz's facts.

> against him by this court on direct appeal of his conviction. We agree with the district court. We can discern no fact or other evidence underlying the present due process claim which was not raised by Nyhuis and considered by us in his prior immunity claim. The district court is not required to reconsider claims of error that were raised and disposed of on direct appeal. *United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981). "Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255." *United States v. Natelli*, 553 F.2d 5, 7 (2d Cir. 1977). Nyhuis has merely re-characterized his prior immunity claim as a due process claim. A rejected claim does not merit rehearing on a different, but previously available, legal theory. *Cook v. Lockhart*, 878 F.2d 220, 222 (8th Cir. 1989). Accordingly, we hold that the district court did not err in denying the motion to set aside the verdict as a violation of due process.

United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000).

Thus, Diaz's failure to raise the *Apprendi* issue in his § 2255 petition was not a procedural default on his part, but was a procedural bar under then Eleventh Circuit precedent.

THE CONSTITUTIONAL DUE PROCESS VIOLATION

The imposition of a sentence that exceeds the punishment Congress has authorized a court to impose on a convicted offender violates basic notions of due process[7] because it deprives a defendant of liberty without prior congressional authorization. *See Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432 (1980). This fundamental constitutional principle, which traces its roots to *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1874), was also at issue in *Whalen*, which reaffirmed that sentences above the maximum authorized by law are antithetical to our constitutional design.[8]

A sentence of imprisonment that exceeds the otherwise-applicable statutory maximum sentence for the defendant's crime violates the separation-of-powers doctrine and deprives the defendant of his liberty by punishing him without prior congressional authorization. *See Whalen v. United States*, 445 U.S. 684, 689-90 & n.4, 100 S. Ct. 1432, 1436-37 & n.4 (1980); *see also, e.g.*, *Hammond v. Hall*, 586 F.3d 1289, 1335 n.19 (11th Cir. 2009) (referring to the "constitutional right not to be subject to a higher sentence than the law allows"). As this Court has explained, "[e]very person has a fundamental right to liberty in the sense that the

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[7] The Fifth Amendment to the United States Constitution enshrines the Due Process Clause and due process protection.

[8] Additionally, we argue that the government failed to prove the conduct underlying the convictions supporting their enhanced sentences, in violation of *Fiore v. White*, 531 U.S. 225, 121 S. Ct. 712 (2001).

Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees." *Chapman v. United States*, 500 U.S. 453, 465, 111 S. Ct. 1919, 1927 (1991). Once a person is convicted of a crime after a constitutionally-sound proceeding, however, that person is "eligible for, and the court may impose, *whatever punishment is authorized by statute for his offense*." *Id.* (emphasis added).

These fundamental principles—that Congress must "ordain [the] punishment" for an offense, *see United States v. Wiltberger*, 18 U.S. 76, 95 (1820), and that a defendant's sentence may not exceed the maximum penalty authorized by Congress—was violated in this case. The defendant's sentence exceeds the otherwise-applicable maximum provided by Congress. This sentence is therefore unauthorized by law and unconstitutional, and should be set aside.

Under our constitutional system, the Framers entrusted Congress with the exclusive power not only to define federal crimes, but also to determine the range of punishments that courts may impose on violators. *See Whalen*, 445 U.S. at 689, 100 S. Ct. at 1436 ("the power * * * to prescribe the punishments to be imposed upon those found guilty of [federal crimes] resides wholly with the Congress"). Just as there are no federal common-law crimes, *see United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812), so too are there no non-statutory federal punishments. *See, e.g.*, *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339, 351 (1870) (district

court exceeded its authority by ordering forfeiture of property beyond that authorized by statute). Federal courts simply have no inherent authority to impose penalties in a criminal case without congressional authorization to do so. *See, e.g.*, *United States v. Foster*, 514 F.3d 821, 824 (8th Cir. 2008) (district courts have no authority to impose "suspended sentences" because Congress repealed the statute authorizing such sentences). A court that imposes a "punishment[ ] not authorized by Congress" has "exceed[ed] its own authority," *Whalen*, 445 U.S. at 689-90, 100 S. Ct. at 1436-37, in violation of "the constitutional principle of separation of powers," *id.*, because there is an absence of "legislative authorization for [the] punishment * * * imposed." *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798, 114 S. Ct. 1937, 1956 (1994) (Scalia, J., dissenting, joined by Thomas, J.). And such a sentence, as we will now explain, also violates basic notions of due process of law.

It is black-letter law that "[a] defendant may not receive a greater sentence than the legislature has authorized." *United States v. DiFrancesco*, 449 U.S. 117, 139, 101 S. Ct. 426, 438-39 (1980). Thus, "[a]ny excess of punishment"—that is, any punishment that Congress has not authorized for a crime—"deprives [a defendant] of liberty or property without due process of law." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1874). In *Lange*, the defendant was sentenced to one year of imprisonment and a $200 fine for stealing mail bags from the Post Office, under a statute that authorized a maximum sentence for that crime of one year of

imprisonment or a fine not to exceed $200. The Supreme Court held that Lange's sentence was "void"—that is to say, the district court had no authority to impose it—because the sentence "obviously * * * exceeded that authorized by the legislature." *Jones v. Thomas*, 491 U.S. 376, 383, 109 S. Ct. 2522, 2526 (1989) (discussing *Lange*); *see McCleskey v. Zant*, 499 U.S. 467, 478, 111 S. Ct. 1454, 1461-62 (1991) (*Lange* involved a "sentence[] imposed without statutory authorization").[9]

This Court more recently applied the constitutional principles identified in *Lange* and the reasoning undergirding it in *Whalen*. In that case, the Court concluded that Congress had not authorized consecutive sentences for the defendant's two offenses and that the imposition of unauthorized cumulative sentences "denied [Whalen] his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." 445 U.S. at 690. Although the Court, as it had in *Lange*, also relied on double jeopardy principles, it emphasized that this Fifth Amendment guarantee was "simply one aspect"

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[9] While *Lange* invoked the Due Process Clause, as well as principles of the common law and the Double Jeopardy Clause, Fifth Circuit has described *Lange* as resting on the Due Process Clause. *See United States v. Rodriguez*, 612 F.2d 906, 921 n.43 (5th Cir. 1980) ("The original sentence [in *Lange*] exceeded the statutory maximum, a violation of Due Process."); *see also Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798, 114 S. Ct. 937, 1956 (1994) (Scalia, J., dissenting, joined by Thomas, J.) ("[T]he Due Process Clause alone suffices to support the decision [in Lange by] assur[ing] prior legislative authorization for whatever punishment is imposed.").

of the more "basic principle" that a federal defendant has "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." 445 U.S. at 690. The Court further explained that, "[i]f a federal court exceeds its own authority" by imposing an extrastatutory penalty (there, consecutive sentences), "it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Id.* And, recognizing that federal constitutional separation-of-powers principles do not bind the States, the Court rejected any suggestion that the rule at issue was limited to federal cases when it wrote that "[t]he Due Process Clause of the Fourteenth Amendment * * * would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Id.* at 690 n.4.[10]

Whalen is not properly understood as a Double Jeopardy Clause decision that muses about the Due Process Clause in passing. Rather, *Whalen* serves as a powerful reaffirmation of a bedrock constitutional principle—that extrastatutory punishments implicate

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[10] There is no need to decide whether this language from *Whalen* is or is not technically *dicta* because even if it is, "*dicta* from the Supreme Court is not something to be lightly cast aside." *Schwab v. Crosby*, 451 F.3d 1308, 1325-26 (11th Cir. 2006). To the contrary, such *dicta* carries "considerable persuasive value." *Id.*; *see also United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (following Supreme Court *dicta*); *United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) (same).

structural separation of powers concerns regarding the authority of a federal court as well as a defendant's fundamental liberty interest—embodied in both the Double Jeopardy and Due Process clauses of the Fifth Amendment. And that principle directly supports the defendant's due process challenge to his sentence in excess of the statutory maximum based on a drug quantity which the jury never found as required by *Apprendi*.

CONCLUSION

WHEREFORE, the Petitioner, Abel Diaz, respectfully requests this Honorable Court grant this petition for certiorari.

Respectfully submitted,

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