

ORIGINAL

22-5804  
No.

IN THE SUPREME COURT OF THE UNITED STATES

FILED

AUG 26 2022

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

" In re DAVID KEVIN LEWIS "

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

ON APPEAL FROM THE UNITED STATES FIFTH CIR-

CUIT COURT OF APPEALS

PETITION FOR WRIT OF MANDAMUS

DAVID KEVIN LEWIS  
F.C.I. El Reno  
PO Box 1500  
El Reno, OK. 73036  
Inmate #34305-077

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SUPREME COURT, U.S.

QUESTION

Is the Law of the United States for Statute of limitations a matter of jurisdiction and by Lewis raising the issue in trial as well as filing the trial motion for acquittal meet the affirmative defense standard?

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OPINION OF UNITED STATES DISTRICTCOURT

Enclosed by attachment are a copy of the opinion of the District Court due to complexity and extensive "limitations" judgment by the court. See attached EXHIBIT F.

OPINION OF THE FIFTH CIRCUIT COURT**C. Statute of Limitations**

Lewis argues that 18 U.S.C. § 3301, which extended the applicable statute of limitations from five years to six, is a violation of the Constitution's prohibition of ex post facto laws. U.S. Const. art I, § 9, cl. 3. He also indirectly argues that the statute's extension of the applicable statute of limitations should not be applied retroactively because it lacks an explicit retroactivity provision. We do not address these arguments because we hold that Lewis waived his affirmative statute of limitations defense by not "asserting [it] at trial." United States v. Arky, 938 F.2d 579, 581 (5th Cir. 1991).

Lewis raised his statute of limitations defense for the first time in his post-conviction motion for acquittal. Although we have clearly held that a defendant waives his statute of limitations defense if he raises it for the first time on appeal, id., we have not squarely addressed whether a statute of limitations defense can be asserted for the first time in a post-conviction motion for judgment of acquittal. However,

we have previously determined that a statute of limitations defense is an affirmative defense that must be "affirmatively assert[ed]...at trial to preserve it for appeal." Id. at 582 (emphasis added). This is because defenses such as a statute of limitations defense will, in many cases, turn on disputed factual issues. If defendants were allowed to raise a limitations defense after a conviction, the prosecution would be prevented from introducing evidence to rebut the defense. Cf. United States v. Cook, 84 U.S. 168, 179-80 (1872)(explaining that the rationale for requiring the statute of limitations defense to be raised at trial is to allow the prosecutor to present evidence in order to rebut the defense). By requiring a defendant to "raise and develope" his statute of limitations defense at trial, United States v. Solomon, 29 F.3d 961, 964 (5th Cir. 1994)(citing Arky, 938 F.3d at 581-82), the prosecution will have a chance to rebut the defendant's arguments with evidence of its own. Although facts surrounding Lewis' statute of limitations defense are not in dispute, this does not change our conclusion that a rule requiring all defendant's to "affirmatively assert a limitations defense at trial to preserve it for appeal." Arky, 938 F.3d at 582, is preferable to a case-by-case determination. Such a case-by-case determination would leave defendants without clear rule as to when a statute of limitations defense must be raised.

### III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

OIPINION OF FIFTH CIRCUIT COURT  
TO RECALL MANDATE

Before King, Dennis, and Clement, Circuit Judges.

Per Curiam:

IT IS ORDERED that Appellant's motion to recall this Court's mandate is DENIED.

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STATEMENT OF JURISDICTION

Jurisdiction in this Court is brought under article III Sec. 2 Cl. 2 of the U.S. Constitution construed with recall of the mandate in the Fifth Circuit Court denied on 6/23/22. Such appellate jurisdiction for extraordinary writ is hereby brought in accordance with Federal Rules of the Supreme Court Rule 3(a) and 28 U.S.C. 1651 (a).

PARTIES JUDGMENT UNDER REVIEW

Judge Sidney A. Fitzwater of the Northern District of Texas Dallas Division's, judgment regarding motion for acquittal and new trial. Judges King, Dennis and Clement of the Fifth Circuit Court who affirmed the Judgment of the District Court are under review in regards to the Statute of Limitations issue.

STATEMENT OF CASE

David Kevin Lewis who was indicted 6/5/12 in the U.S.D.C. Northern District of Texas Dallas Division proceeded to trial in pursuance with multiple counts of securities fraud ranging from 18 U.S.C. 371 (15 U.S.C. 77q(a) and 77x) Conspiracy to Commit Securities Fraud and 23 other counts of 15 U.S.C. 77q(a) and 77x and 18 U.S.C. 2 Securities Fraud and Aiding and Abetting. On 9/4/13 Lewis was found guilty as to all counts.

On 10/2/13 Lewis filed a timely motion for acquittal and motion for new trial due to extension to file such 9/13/13. Such was denied by the court on both accounts of acquittal and new trial.

On 1/24/14 Lewis was sentenced to 360 mon ths imprisonment. On 1/27/14 Lewis filed a timely notice of appeal. On 12/8/14 the Fifth Circuit Court of Appeals filed and published its opinion affirming the District Court's judgment. A revised published opinion was filed 12/30/14, which issued its mandate in such matter.

On 3/22/16 Lewis filed an untimely motion under 28 U.S.C. 2255 on grounds that counsel was ineffective for failing to preserve the statute of limitations defense in

the District Court. On 5/30/17 the District Court dismissed Lewis's 2255 motion as time-barred by AEDPA's statute of Limitations, and dismissed [him] with prejudice.

On 7/7/17 Lewis filed a Certificate of Appealability (COA) which was denied 5/1/18.

Lewis filed a Motion to Recall the Mandate on 6/22/22 to the Fifth Circuit Court of Appeals. Such motion to recall the mandate was denied 6/23/22.

#### STATEMENT OF EXCEPTIONAL CIRCUMSTANCE

Lewis who has filed a "motion to recall the mandate" in the Fifth Circuit Court construed with Fifth Circuit Rule 41.2 was denied by blanket response which denied explanation of its reasoning to accept the recall of mandate. With the United States Court of Appeals for the Fifth Circuit being of appellate jurisdiction to the United States District Court, no other Court but this Justice Court can compel the Fifth Circuit Court to recall the mandate. Thus authorization under 28 U.S.C. 1651(a) is necessary and asserted in this Court agreeable to the usages and principles of law. So as to recall the mandate to prevent injustice which is the sole purpose of Fifth Circuit Rule 41.2.

Thereby exceptional circumstances warrants the exercise of this Court's discretionary powers which cannot be obtained in any other form or any other Court due to exhausting appeals and writ of habeas corpus remedies.

SUMMARY OF ARGUMENT

Lewis brings into question whether subject-matter jurisdiction was properly attained by the District Court. Further upon raising the issue of statute of limitations construed with a law of the United States which is not construed to apply retroactively in accordance with U.S.C. § 3301 not stating in the wording that continuance was to be applied. If a timely motion for acquittal was filed in regards to statute of limitations it is a matter of jurisdiction which is a substantive right that cannot be abridged. Thus recall of the mandate is applicable so as to prevent injustice in accordance with the Fifth Circuit Rules.

• • •

CONSTITUTIONAL PROVISION RELIED UPON**ARTICLE 6 CLAUSE 2:**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding.

STATUTORY PROVISION RELIED UPON**18 U.S.C. § 3301:**

(a) Definition. In this section, the term "securities fraud offense" means a violation of, or a conspiracy or an attempt to violate-

- (1) Section 1348 [18 USCS 1348];
- (2) Section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a));
- (3) Section 24 of the Securities Act of 1933 (15 U.S.C. 77x);
- (4) Section 217 of the Investment Advisors Act of 1940 (15 U.S.C. 80b-17);
- (5) Section 49 of the Investment Company Act of 1940 (15 U.S.C. 80a-48); or
- (6) Section 325 of the Trust Indenture Act (15 U.S.C. 77yyx).

(b) Limitation. No person shall be prosecuted, tried, or punished for a securities fraud offense, unless the indictment is found or the information is instituted within 6 years after the commission of the offense.

ARGUMENT

This Court has long held the position that the statute of limitations is a issue that upon exhausting such time limit that Congress in its new statute must have intended to extend the limitation of the prior statute. See Toussie v. United States, 397 U.S. 112, 115, 90 S.C.T. 858, 25 L.Ed. 2d 156 (1970)(With respect to deciding when a criminal statute of limitations begins to run as to a particular offense, the principles that such statutes of limitations are to be liberally interpreted in favor of repose and that they normally begin to run when the crime is complete, indicate that the doctrine of continuing offenses is only to be applied in limited circumstances, since the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent, the latter, for all practical purpose, extending the statute beyond its stated term; these considerations do not mean that a particular offense should be construed as a continuing one, but do require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such conclusion, or the nature of

the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one).

Lewis raised the issue in trial regarding the statute of limitations. See EXHIBIT A, Vol.2, Page 4, Line 12 to Page 5, Line 7. See United States v. Arky, 938 F.2d 579 (1991)(a defendant must affirmatively assert a limitations defense at trial to preserve it for appeal). Upon Lewis filing a motion for acquittal in regards to the Statute of Limitations the District Court disclosed in its denial that Lewis waived his right to the affirmative defense by not raising the issue at trial. The Fifth Circuit choosing not to address the issue cited United States v. Arky, 938 F.2d 579, 581 (5th Cir. 1991). The Circuit Court purports that the government would need to be able to respond to the affirmative defense of time limitation. See United States v. Cook, 84 U.S. 168, 179-80 (1872)(explaining that the rationale for requiring the statute of limitations defense to be raised at trial is to allow the prosecutor to present evidence in order to rebut the defense). The record reflects not only did the government have such a chance but it raised the issue to begin with. See EXHIBIT A, Vol. 1b, Page 57, Line 21 to Page 58, Line 5. Thereby in accordance with the Confrontation Clause the witness in cross examination was asked questions in regard to the Statute of Limitations. See EXHIBIT A, Vol. 2, Page 4, Line 12 to Page 5,

Line 7; See Md. v. Craig, 497 U.S. 845 (1990); See also, Ky. v. Stincer, 482 U.S. 730, 737 (1987)(confrontation right designed to promote truth-finding function of trial).

Not only are the standards of Arky and Cook met in the trial proceeding but the right to file for an acquittal as far as 14 days after trial. See Fed. R. Crim. Pro. R. 29(c)(1); see also, United States v. Davis, 583 F.2d 190 (5th Cir. 1978)(One of salutary purposes of motion for judgment of acquittal is to give court opportunity to correct error immediately). Due to the Confrontation Clause already being implemented the "Winship" "beyond-a-reasonable-doubt" standard applies. See Sullivan v. La., 508 U.S. 275, 278 (1993). The standard protects three interests. First, it protects the defendant's liberty interest. See Winship, 397 U.S. at 363. Second, it protects the defendant from stigma of conviction. Id. Third, it encourages community confidence in criminal law by giving "concrete substance" to the presumption of innocence. Id. However the government's failure to provide the sufficient evidence necessary to close the door on statute of limitations provides necessity to correct such error of affirmative defense. See United States v. Ubl, 472 F. Supp. 1236 (N.D. Ohio 1979)(Rule 29(a) performs vital function in criminal case of protecting defendants from conviction on basis of inadequate evidence).

More importantly Fed.R.Crim.P.R. 29(c)(1) is consti-

tutional due to the rules of criminal procedure being put in place by the Supreme Court. See 28 U.S.C. 2072; White v. Toledo, St. L & K. C.R. Co., 79 F. 133 (2d Cir. 1897) (Predecessor to 28 USCS 2072 was constitutional). Lewis following the rules of criminal procedure cannot be abridged, enlarged or modified by the District Court in regards to statute of limitations issue being brought forth by motion for acquittal. See Woodbury v. Andrew Jergens Co., 61 F.2d 736, 16 U.S.P. Q(BNA) 120 (2d Cir. 1932), cert denied, 289 U.S. 740, 53 S.Ct. 659, 77 L.Ed. 1487 (1933)(In exercising rule making power, district court could not restrict or enlarge rules made under predecessor to 28 USCS 2072).

• • •  
However no court rule could restrict a issue in regards to jurisdiction. See United States v. National City Bank 83 F.2d 236 (2d Cir.) Cert denied, 299 U.S. 563, 57 S.Ct. 25, 81 L.Ed. 414 (1936)(No court rule could restrict jurisdiction). It is clear statute of limitations is a jurisdictional issue and Lewis being under a 5 year statute of limitations due to the time of repose can not only raise the issue in timely motion for acquittal but any other time. See United States v. Gentile, 235 F. Supp. 3d 649 (D.N.J. 2017)(This section's six-year statute of limitations was inapplicable to security fraud crimes defendant allegedly committed before its enactment because when he

allegedly committed his crimes, he had a statutory right to be protected from criminal prosecution five years from date he committed said acts, and this section contains no discussion nor mention of retroactivity).

Any law of the United States which must be in pursuance with the Constitution is the Supreme Law of the Land which applies to Statute of Limitations before Dodd-Frank Act as well as after. See Art. 6, Cl.12. U.S.Const; New York v. FCC, 486, U.S. 57, (1988)(Phrase "Laws of the United States" encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization). With the statute in place at the time of repose being the five year time limitation statute the Court lacked subject-matter jurisdiction which is to be liberally interpreted in favor of repose. See Toussie v. United States, 397 U.S. 112 (1970)(While every statute of limitations may permit a rogue of escape, when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such case "no person shall be prosecuted, tried, or punished").

Lewis properly seeking to recall the mandate in order to prevent such injustice to continue filed such motion in the Fifth Circuit Court in accordance with Fifth

Cir.R.41.2. The Fifth Circuit in its blanket response refuses to recall the mandate to prevent injustice abridging a substantive right. See Fifth Circuit Rule 41.2; See Marbury v. Madison, 2 LED 60, 1 Cranch 147 (1803) (There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must then, be a jurisdiction somewhere competent to issue that kind of process). Lewis having no other place to seek relies to prevent injustice hereby seeks the Supreme Court which is the only party able to compel performance of the Fifth Circuit. See Marbury v. Madison, 2 LED 60, 1 Cranch 147 (1803)(Blackstone, vol. 3, p.110, says that a writ of mandamus is "a command issuing in the King's name from the court of King's bench, and directed to any person, corporation or inferior court requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of most extensively remedial nature, and issues in all cases where the party has a right to have anything done, and has no other specific means of compelling performance").

REASON FOR GRANTING PETITION

The reason for granting this case is due to the Federal Courts being of limited jurisdiction. Such jurisdiction is authorized by "statute" and the "Constitution". See Kok-

kenen v. Guardians Life Ins. Co. of America, 511 U.S. 375 (1994) ("Federal Courts are Courts of limited jurisdiction. They possess only power authorized by Constitution and Statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside the limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction").

Thus "Statute of Limitations" is in fact a issue of jurisdiction which has a "Statute" specifically disclosing such jurisdiction a Federal Court has in prosecuting a case regarding Securities Fraud. See 18 U.S.C. § 3301. However due to the actions of Lewis taking place before the Dodd-Frank Act which was enacted July 21, 2010 the previous statute of limitations are to be applied due to no retroactivity. See United States v. Gentile, 235 F.Supp. 3d 649 (D.N.J. 2017) (Absent clear legislative intent to apply a criminal statute of limitations retroactively, the court will refrain from doing so).

Clear evidence which was brought by the government questioning the witness was made to disclose when the repose of the actions took place. See EXHIBIT A, Vol.1b, p.57-58. This Court being well aware that criminal limitation statutes are interpreted by repose. See Toussie v. United States 397 U.S. 112 (1970) (Criminal limitation statutes are to be liberally interpreted in favor of repose). It is clear that

a bar to prosecution . exist that can: (1) be addressed in a "trial motion" which is a motion for acquittal timely filed. See Fed.R.Crim.P.29(c)(1); See United States v. Jones, 174 F.2d 746 (7th Cir. 1949)(Proper motion to raise question of sufficiency of evidence is motion for judgment of acquittal); (2) be appealed due to such being a issue that was brought into question at trial and a motion for acquittal filed construes with such. United States v. McCall, 553 F.3d 821 (5th Cir. 2008)(Because general language about insufficiency of all of evidence for all elements of all counts was used to introduce and conclude defendant's motion for acquittal, issue was preserved since Fed.R.Crim.P.29 motions did not have to be specific) and; (3) be brought up at anytime due to such being a issue of jurisdiction. See 18 U.S.C. 3301; See Toussie v. United States, 397 U.S. 112 (1970); See also William V.Berry 8 HOW. 945, 940 12 L.Ed. 1170, 1189 (1850)(Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities; they are not avoidable, but simply void, and this even prior to reversal).

Thus recall of mandate which is used to prevent injustice. See Fifth Cir.R.41.2 (once issued a mandate will not be recalled except to prevent injustice). Is in the interest of Lewis who meets the standard for reversal due to the statute of limitations clearly being in his interests when

the Court of Appeals deemed otherwise and the district court following the standard of the Court of Appeals. See In re Incident aboard D/B Ocean King, 877 F.2d 322, 14 fed. R. Serv. 3d (Callaghan) 266 (CA5 La. 1989)(Mandate would be recalled and reformed where court itself had brought about potential injustice by failing to give instructions regarding allowance of interest).

The integrity of the judicial process is clearly at stake due to a "Statute of Limitations" holding the force of the Supreme Law of the Land by being a law of the United States. See Caldwell v. Alabama Dry Dock & Shipping Co., 161 F.2d 83, (5th Cir. 1947)(Valid federal laws are part of supreme law of land, and state may not discriminate against rights by or arising under such laws.); See also New York v. FCC, 486 U.S. 57 (1988)(Phrase "Laws of the United States" encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization).

The Fifth Circuit creating a rule that discloses that Statute of Limitations defense is merely a affirmative defense that can only be asserted in trial and not post-conviction motion for judgment of acquittal. See United States v. Lewis, 774 F.3d 837 (5th Cir. 2014)(Statute of Limitations defense could not be asserted for the first time in post-conviction motion for judgment of acquittal; statute of limitations defense was affirmative defense that had to be affirmatively

asserted at trial to preserve it for appeal). Such creates a complete abuse of the "trial motion" which is known as motion for acquittal which was properly filed less than 14 days after jury verdict as disclosed by the Fed.R.Crim.P. See Fed.R.Crim.P.29(c)(1); See Page 8 of Docket Text for Case #3:12-cr-159-D-1; See United States v. Davis, 538 F.2d 190 (5th Cir. 1978)(one of salutary purposes of motion for judgment of acquittal is to give court opportunity to correct error immediately). The integrity of the Court would be further in deprivation of allowing such to happen to other citizens of the United States when clearly this Court created the criminal procedure in order to enforce acquittal. See 28 U.S.C. 2072(a); See Johansen v. E.I. Du Pont de Nemours & Co., 627 F.Supp. 968 (5th Cir. 1987)(Only where there is direct collision between federal rule and state law is court required to determine whether federal rule is within scope of 28 USCS 2071).

However, despite the record reflecting the issue was addressed at trial regarding Statute of Limitations and a timely motion for acquittal being submitted. If the Court allows such an issue to become merely affirmative defense instead of a jurisdiction issue any case will be able to be trespassed upon regarding Statute of Limitations when no party should be held to be tried, or punished regarding Statute of Limitations which is the point of Statute of Limita-

tions creation and enforcement. See United States v. Toussie, 397 U.S. 112 (1970)(While every statute of limitations may permit a rogue to escape, when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such case "no person shall be prosecuted, tried, or punished").

Lewis also respectfully submits to this Court that due process provides that the "rights of pro se (Sui Juris) litigants are to be construed liberally and held to less stringent standard than formal pleadings drafted by lawyers; if court can reasonably read pleadings to state valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements" Spencer v. Doe, 1998; Green v. Bransou, 1997; Boag v. McDougall, 1998; Haines v. Kerner, 1972. "Right to proceed to pro se (Sui Juris) is fundamental statutory right that is afforded highest degree of protection" DEVINE V. INDIAN RIVER COUNTY SCHOOL RD., 11th CIR. 1997.

Finally, review in this Court has long held the position that [its] nature of review by means of a writ is not a matter of right, but of judicial discretion. The primary concern of the Supreme Court is not to correct errors in lower

court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved.

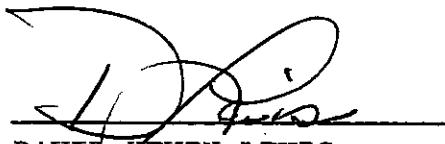
An important consideration in accepting Lewis's case for review include the existence of a conflict between the decision of which review is sought and a decision of another appellate court on the same issue. An important function of the Supreme Court is to resolve disagreements among lower courts about specific legal questions. Another consideration is the importance to the public of the issue. Lewis believes [his] issues fit squarely within this Courts nature of review not particular facts and parties involved and protects public liberty interests and encourages community confidence in criminal law by giving "concrete substance" to the presumption of innocence.

CONCLUSION

In accordance with Lewis meeting the affirmative defense burden set by Arky and Cook, supra, as well as having a right by lack of subject-matter jurisdiction set by statute prior to Dodd-Frank Act. Lewis request that this Court compel the performance of the Fifth Circuit Court to recall the mandate so as to prevent injustice.

Date: 8-19-22

Respectfully submitted,



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