No. 22-5804

IN THE SUPREME COURT OF THE UNITED STATES

In re DAVID KEVIN LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Appeal from the United States Fifth Circuit Court of Appeals

REHEARING FOR WRIT OF MANDAMUS

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QUESTION

Is the Fifth Circuit obligated to recall the mandate on behalf of Lewis?

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 under review in regards to the Statute of Limitations issue.

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OPINION OF UNITED STATES DISTRICT COURT

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 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's 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.

OPINION OF FIFTH CIRCUIT 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.

OPINION OF THE SUPREME COURT

The petition for writ of mandamus is denied.

STATEMENT OF JURISDICTION

Jurisdiction in this Court is brought under article 3 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).

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PROVISIONS RELIED UPON

ARTICLE 6 CL. 2 U.S. CONST.:

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.

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, xi

unless the indictment is found or the information is instituted within 6 years after the commission of the offense.

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 months 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 the AEDPA's Statute of limitations, and dismissed [him] with prejudice.

On 7/7/17 Lewis filed a Certificate of Appealability 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.

On 8/26/22 the petition for writ of mandamus was filed in this court and placed on the docket 10/11/22. On 11/7/22 the petition for writ of mandamus was denied.

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STATEMENT OF EXCEPTIONAL CIRCUMSTANCE

Lewis who has filed a "motion to recall the mandate" in the 5th 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 appelate 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 circumstance warrants the exercise of its use for mandamus relief through the discretionary powers which cannot be obtained in any other form or any other Court due to exhausting appeals and writ of habeas corpus remedies.

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SUMMARY OF ARGUMENT

Lewis shows that he has a right to relief of the Statute of Limitations defense. Lewis further Shows that the Fifth Circuit Court of Appeals is obligated to recall the mandate to prevent injustice. Lewis also shows that relief is only available in this Court. Thus recall of the mandate is necessary to prevent injustice in accordance with the Fifth Circuit Rules.

ARGUMENT

Question 1: Is the Fifth Circuit obligated to recall the mandate on behalf of Lewis?

LEWIS HAS A RIGHT TO RELIEF

To understand if Lewis has been denied a constitutional right we must first understand that the "Laws of the United States" otherwise known as the United States Code holds force under the supremacy clause. See New York v. FCC, Util. L. Rep. (CCH) 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.). In such supremacy clause we find that Lewis has a federal right which although derives from 18 U.S.C. 3301 is no less sufficient under the supremacy clause. See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)(Supremacy clause of Federal Constitution (Art VI, Cl 2) is not source of any federal rights, but rather accords all federal rights, whether created by treaty, statute, or regulation, priority whenever they come in conflict with state law.). Thereby if such Law must be in pursuance with the Constitution and the States and their officers are bound by federal statutes, it is clear the same construes to apply to the United States and its officers. See Alden v. Maine, 527

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U.S. 706 (1999) (Under the Federal Constitution's supremacy clause (Art VI, Cl 2), states and their officers are bound by obligations imposed by Constitution and by federal statutes that comport with constitutional design.).

In Toussie v. United States, 397 U.S. 112 (1970), this Court came to the conclusion that the prosecution was barred by the language of the Act which should disclose with specificity the meaning of which the Statute of limitations was to apply. The relevance here is that the effective date of enactment of 18 U.S.C. 3301 (b) which is 6 years was enacted July 21, 2010 without specifying a continuing offense doctrine to be applicable in the language of the substantive criminal statute which would compel further prosecutution. See Fed. R. Evi. R. 402; See also 18 U.S.C. 3301 (b) (emphasis placed on "History"); See also Toussie v. United States, 397 U.S. 112 (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

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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).

This is not a new situation and has been ruled that in such particular situation that the statute of limitations bars the prosecution from trying or penalizing in such instance. See United States v. Gentile, 235 F. Supp. 3d 649 (D.N.J. 2017)(This section's six-year statute of limitation was inapplicable to security fraud crimes defendant allegedly committed before its enactment because when he allegedly committed his crimes, he had 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.).

Thereby Under the U.S. Constitution a federal right has been provided to Lewis and there can be no rule making or legislation that can abrogate such right. See Miranda v. Arizona, 384 U.S. 436, 491 ("Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.").

FIFTH CIRCUIT OBLIGATED TO COMPLY

The Fifth circuit like any other court is "bound" to enforce the U.S. Constitution and Statutes that are pursuant to it and anything contrary notwithstanding. See Art. 6 Cl 2.; See also Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Supremacy of Constitution as law is declared without qualification and is absolute.).

The only recourse for the United States is that they had a chance to address the issue of Statute of limitations at trial. See United States v. Cook, 84 U.S. 168 (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 the prosecution had its chance to rebut the defense. See Trial Record Vol 1B P. 57 to 58:

Q. Okay. So it was your testimony the FBI did not

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get involved until the case was referred to the United States Attorney?

A. Yes, that's correct.

Q. And do you recall approximately when the case was referred to the United States Attorney?

A. I believe it was around 2011. I can't remember exactly.

Q. All right. And could you -- could you tell the members of the jury why it took from basically November of 2006 to approximately sometime in 2011 to -- middle of the year, end of the year?

A. We're a small office, and I had -- this wasn't my only case. I had a number of other cases. And you kind of work on a triage method of handling the immediate threats first.

My concern was getting this indicted before the statute of limitations ran. They were no longer offering and selling securities, so that was really the main deadline to work by.

As we see the requirement in Cook has been met and with emphasis because the prosecution raised the issue in "Direct Examination" it was Lewis who addressed the issue in "Cross Examination". See Trial Record Vol 2 P. 4 to 5:

Q. Let me ask you this.

Yesterday you testified about a problem you had with the statute of limitations and that's the reason

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were in federal court. Would you explain that to the jury?

A. No. I think I would characterize it more as when I mentioned the statute of limitations that that was the deadline I was working by in terms of referring the case.

Q. Oh, I see.

Because there's a different statute of limitations in the State securities -- for State securities acts as there are in federal, right?

A. Well, I believe that the statute of limitations for state securities fraud is five years.

Q. And in federal court it's --

A. I think it's five years too, isn't it?

Q. I believe it's six years.

A. I could be wrong.

Q. But, anyway, my understanding is that you got this in just before the statute of limitations expired, correct?

So, anyway, you were -- you were concerned about the statute of limitations, because you said you were understaffed or whatever, had a lot of other cases?

A. Yes.

So as the record reflects Lewis's alleged conduct took place between June 13 and October 30, 2006 and the indictment was returned June 15, 2012 beyond the 5 year statute of limitations applicable on this case. See United States v. Gentile, 235 F. Supp. 3d 649 (D. N. J. 2017) (This section's six-year statute of limitation was inapplicable to security fraud crimes defendant allegedly committed before its enactment because when he allegedly committed his crimes, he had 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.); See also Toussie v. United States, 397 U.S. 112 (1970).

With the prosecution having such chance at trial to defend the statute of limitations defense it is open season to attack the indictment by way of Statute of limitations. See United States v. Cook, 84 U.S. 168 (1872) (With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accuratly and clearly alleged in the indictment or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error.).

More importantly Lewis had a right to file a motion of acquittal and have it heard and granted

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on the basis of the facts and law. See Fed. R. Crim. P. 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.). This court must realize that the Fed. R. Crim. P. R. 29(c)(1) is constitutional making the 5th Circuit compelled to follow the rules of the Supreme Court. See 28 U.S.C. 2072 (a) and (b); See also Fed. R. Crim. P. R. 29(c)(1); See also White v. Toledo, St. L.&K. C.R. Co., 79 F. 133 (2d Cir. 1897) (Predecessor to 28 USCS 2072 was constitutional.).

In light of all the principles, facts, and law the conclusion to this case is simple due to the fact that "repose" is main issue ~~to~~ be addressed. See Toussie v. United States, 397 U.S. 112 (1970) (Criminal Statutes are to be liberally interpreted in favor of repose.). With the record and law showing relevant evidence that a bar exist to prosecution, a timely filed trial motion suffices to challenge statute of limitations. See Fed. R. Crim. P. R. 29(c)(1); 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); See also Toussie v. United States, 397 U.S. 112 (1970) (While every Statute of limita-

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tions may permit a rouge 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.").

Hereby the 5th Circuit is compelled to recall the mandate to prevent the injustice of Lewis who properly exercised the rules of the Supreme Court as instructed by the Fed. R. Crim. P.. See Fifth Cir. R. 41.2 (once issued a mandate will not be recalled except to prevent injustice.). Further such trial right in light of all the evidence, facts of record and law cannot be evaded and will always be protected by the Constitution lest the Constitution be just mere sound instead of substance. See Boyd v. United States, 116 U.S. 616 at 635 (1885) (It may be that it is the abnoxious thing in its mildest form; but illegitimate and unconstitutional practices get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in

Sound than in substance. It is the duty of the Courts to be watchful for the Constitutional Rights of the Citizens, and against any stealthy encroachment thereon. Their motto should be obsta principiss.").

NO OTHER REMEDY EXISTS

This Court is the only place where such remedy exists due to the District Court following suit of the 5th Circuit who has made Lewis's case the standard which they shall rule in regards to any similar occurrence. See United States v. Lewis, 774 F.3d 837 (5th Cir. 2014) (Statute of limitations defense could not be asserted for 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.).

Further the 5th Circuit relying on United States v. Cook, 84 U.S. 168 (1872) erroneously, will not hear Lewis's case in light of the fact that all the evidence and Law supports Lewis which can only be corrected by this Justice Court. See Fifth Circuit Rule 41.2; See also 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.),

This Court has created the Law regarding Statute of limitations being issued in regard to whether the continuing offense doctrine applies by language as well as repose. See Toussie v. United States, 397 U.S. 112 (1970). This Court has also created the law regarding the prosecution to have a chance to rebutt the Statute of limitations defense. See United States v. Cook, 84 U.S. 168 (1872). This Court has most importantly construed with the Rules Enabling Act created the rule of acquittal construed with Fed. R. Crim. P. See 28 U.S.C. 2072 (a) and (b). Thereby this Court is the only Court to compel and bring justice on behalf of Lewis who has met the Standards of Toussie, Cook and the Fed. R. Crim. P. See Marbury v. Madison, 2 LED 60, 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 issued in all cases where the party

12. has a right to have anything done, and has no other specific means of compelling performance.").

CONCLUSION

This Rehearing for writ of mandamus should be granted and the Fifth Circuit be made to recall the mandate due to the facts and Law presented herein.

Date: 11-28-2022

Respectfully

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