_____

NO._____

_____

IN THE SUPREME COURT
OF THE
UNITED STATES

_____

2023-2024 TERM

_____

EDGAR VAZQUEZ

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____

**PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

_____

JOFFE LAW, P.A.
Attorney for Petitioner
110 Tower Building
110 S.E. 6th Street
17th Floor, Suite 1700
Ft. Lauderdale, Florida 33301
Telephone: (954) 723-0007
Florida Bar No. 0814164

QUESTIONS PRESENTED

I.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF VAZQUEZ' MOTION TO DISMISS OR IN THE ALTERNATIVE VAZQUEZ' MOTION TO SUPPRESS WITHOUT AN EVIDENTIARY HEARING.

II.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF VAZQUEZ' MOTION TO DISMISS OR IN THE ALTERNATIVE VAZQUEZ' MOTION TO SUPPRESS.

TABLE OF CONTENTS

Appendices:

Table of Authorities

Table of Authorities
Continued

Table of Authorities
Continued

United States Constitution **Pages**

_____

NO._____

_____

IN THE
SUPREME COURT
OF THE
UNITED STATES

_____

2023-2024 TERM

_____

EDGAR VAZQUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____

**PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

_____

The Petitioner, EDGAR VAZQUEZ, (hereinafter "VAZQUEZ"), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceedings on March 28, 2023.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered an unpublished opinion affirming the District Court's Sentence, *United States of America v. Edgar Vazquez* on March 28, 2023. *Appendix 1.*

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals affirming the Judgment of the United States District Court was entered on March 28, 203. The Eleventh Circuit Court of Appeals entered its Order Denying VAZQUEZ' Petition for Rehearing and Petition for Rehearing *En Banc* on February 6, 2024. *Appendix 2*. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

The Fifth Amendment to the Constitution provides, in relevant part that: "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 deprived of life, liberty, or property, without due process of law…."

UNITED STATES CONSTITUTION, AMENDMENT VI

The Sixth Amendment to the Constitution provides in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

1. Course of Proceedings

On February 27, 2019, a grand jury returned a 2 count Indictment against VAZQUEZ (DE:1). VAZQUEZ appeared for arraignment on March 6, 2019 and entered his plea of not guilty. (DE:5).

On May 12, 2019, VAZQUEZ filed his Motion to Suppress. (DE:17).

On May 22, 2019, a three-count Superseding Indictment was issued against VAZQUEZ. (DE:21). The Superseding Indictment charged VAZQUEZ with possession of cocaine with intent to distribute (Count I); possession with intent to distribute 500 grams or more of cocaine (Count II); and possession of a firearm in furtherance of a drug trafficking crim. (Count III). (DE.21).

On July 11, 2019, the District Court held an evidentiary hearing on VAZQUEZ's Motion to Suppress. (DE;40) VAZQUEZ's Motion to Suppress was denied by the District Court on August 1, 2019. (DE:41).

VAZQUEZ retained new counsel on or about November 4, 2019 and counsel proceeded to file a Motion to Dismiss or in the Alternative Motion to Suppress on February 5, 2020. (DE:74). The government filed a Response in Opposition to VAZQUEZ's Motion to Dismiss or in the Alternative Motion to Suppress on February 19, 2020. (DE:80). On March 2, 2020, without holding an evidentiary hearing, the District Court denied VAZQUEZ's Motion to Dismiss or in the Alternative Motion to Suppress. (DE:84).

VAZQUEZ went to trial on September 14, 2020. (DE:133). The government announced that they would be dismissing Count I and only proceeding on Count II and Count III. VAZQUEZ conceded guilt as to Count II but chose to defend against Count III. (DE:133). On September 15, 2020, the jury returned a guilty verdict as to Count II and a not guilty verdict for Count III. (DE:136). VAZQUEZ was sentenced to 136 months imprisonment followed by 60 months of supervised release on May 26, 2021. (DE. 168).

VAZQUEZ filed his Notice of Appeal on June 14, 2021 appealing only the denial of his Motion to Dismiss or in the Alternative Motion to Suppress. (DE:171,173).

The Eleventh Circuit Court of Appeals issued its opinion affirming the District Court's denial of VAZQUEZ's Motion to Dismiss or in the Alternative Motion to Suppress on March 28, 2023. The Mandate was issued on April 26, 2023. (DE:196,

197). VAZQUEZ never received the Appellate Court's opinion, either from the Court or his counsel. Because of no communication, VAZQUEZ submitted a pro se motion to the Appellate Court requesting information regarding the appeal. The Appellate Court then sent VAZQUEZ the Eleventh Circuit's decision around April 25, 2023, but VAZQUEZ was never advised of any deadlines or the procedure to file a Petition for Rehearing or anything, In fact, VAZQUEZ did not hear from his attorney, Mr. Fletcher until June 2, 2023, and the only information given to him by his lawyer was that the matter was affirmed. As such, due to VAZQUEZ not knowing about the opinion being rendered, VAZQUEZ was unable to file his Petition for Rehearing and Petition for Rehearing *En Banc* in accordance with 11th Cir. R. 40-3 and 11th Cir.R. 35-2.

VAZQUEZ filed his Motion to File his Petition for Rehearing and Petition for Rehearing *En Banc* Out of Time. Said Motion was granted and VAZQUEZ filed his Petition for Rehearing and Petition for Rehearing *En Banc.* VAZQUEZ' Petition for Rehearing and Petition for Rehearing *En Banc* was denied February 6, 2024.

2. <u>Statement of the Facts</u>.

a. The Offense Conduct.

On September 13, 2018, Deputy C. Rodriguez of the Lee County Sheriff's Office began following VAZQUEZ' 2008 Ford Edge. Deputy Rodriguez was

instructed by other law enforcement officials to do a traffic stop in order to stop VAZQUEZ. (Appendix to VAZQUEZ's Initial Brief 5, pages 5-9).

Deputy Rodriguez stated that he observed VAZQUEZ' vehicle and as he was pulling up adjacent to it, it "abruptly slowed down . . . it was a sudden decrease in speed. I noticed the cars next to me which were behind him had to slow down… which in my experience . . . could have caused a major accident". (Appendix to VAZQUEZ's Initial Brief 5, pages 15-16). Deputy Rodriguez stated everyone was going about 45 miles per hour and slowed down to about 20 miles per hour and then picked up to speed. As a result of said action, Deputy Rodriguez initiated a traffic stop and issued VAZQUEZ a warning citation for improper breaking. (Appendix to VAZQUEZ's Initial Brief 5, page 23).

During the traffic stop other deputies arrived and Detective Oro, utilizing his K-9 JOJO conducted a free air sniff of the vehicle. The canine allegedly alerted, and a subsequent search of the vehicle found a significant quantity of cocaine in a vacuum sealed bag underneath the driver's seat. (Appendix to VAZQUEZ's Initial Brief 3, page 1)

b. VAZQUEZ's Motion to Dismiss or in the Alternative Motion to Suppress.

VAZQUEZ alleged in his Motion to Dismiss or in the Alternative Motion to Suppress filed February 5, 2020, that newly discovered evidence to wit: that the

black Chrysler 200 that was approaching quickly behind him, and that caused him to brake as he did, leading to his traffic stop, was in reality being driven by Special Agent Murray who apparently was investigating VAZQUEZ. (DE:74).

A. The Eleventh Circuit Erred in Affirming The District Court's Denial Of VAZQUEZs Motion to Dismiss or in the Alternative Motion to Suppress Without an Evidentiary Hearing.

The affirming of the District Court's denial of VAZQUEZ' Motion to Dismiss or in the Alternative Motion to Suppress without an evidentiary hearing was in violation of VAZQUEZ due process rights. A defendant is entitled to a hearing on his suppression motion if he "allege [s] facts that, if proved, would require the grant of relief." *United States v. Richardson*, 764 F.2d 1514, 1527 (11th Cir. 1985). VAZQUEZ' Motion alleged sufficient facts that clearly required the granting of the relief sought and therefore an evidentiary hearing should have been held.

B. The Eleventh Circuit Erred in Affirming The District Court's Denial Of VAZQUEZ's Motion to Dismiss or in the Alternative Motion to Suppress Without an Evidentiary Hearing.

The affirming of the District Court's denial of VAZQUEZ' Motion to Dismiss or in the Alternative Motion to Suppress clearly was a miscarriage of justice. *see generally, United States v. Addonizio,* 442 U.S. 178, 185, 99 S.Ct. 2235 (1979).

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF VAZQUEZ' MOTION TO DISMISS OR IN THE ALTERNATIVE VAZQUEZ' MOTION TO SUPPRESS WITHOUT AN EVIDENTIARY HEARING.

Whether to hold an evidentiary hearing on a defendant's allegations is determined by the District Court on a case by case basis. *United States v. Poe,* 462 F.2d 195, 197 (5th Cir.1972). The granting of an evidentiary hearing lies within the District Court's sound discretion, and the denial of an evidentiary hearing is reviewed for abuse of that discretion. *United States v. Colón-Muñoz,* 318 F.3d 348, 358-59 (1st Cir.2003).

A defendant is clearly entitled to a hearing on his suppression motion when he "allege[s] facts that, if proved, would require the grant of relief." *United States v. Cooper,* 203 F.3d. 1279 (11th Cir. 2000). It is not sufficient for defendants to "'promise' to prove at the evidentiary hearing what they did not specifically allege in their motion to suppress." *United States v. Richardson,* 764 F.2d 1514, 1527 (11th Cir.1985). In other words, the Defendant's Motion must raise factual allegations which, if established, would warrant relief. *Grant v. United States,* 282 F.2d 165,

170 (2nd Cir.1960). There must be some specific factual basis underlying the defendant's constitutional theory of suppression. At a minimum, this is necessary to alert the District Court what wrong the defendant complains of.

In the case at hand, VAZQUEZ' Motion clearly "allege[s] facts that, if proved, would require the grant of relief." In the case at hand, VAZQUEZ clearly alleged facts sufficient to assure that if proven, would grant VAZQUEZ the relief he was seeking. After all VAZQUEZ clearly alleged sufficient facts to support his argument that the alleged probable cause relied upon by law enforcement to arrest and search VAZQUEZ' car was based upon the outrageous conduct by law enforcement to wit: the actions of law enforcement that led to an unlawful pretextual traffic stop of VAZQUEZ. VAZQUEZ alleged that Agent Murray was driving a black Chrysler 200 model vehicle with dirt rims. VAZQUEZ further alleged that he "had observed this same vehicle on several previous occasions parked at the Fresh Cuts Studio in Ft. Myers, located at 2158 Colonial Boulevard. (DE:74). The due process clause protects defendants from outrageous conduct by law enforcement. Therefore, because VAZQUEZ alleged sufficient facts of "outrageous conduct" on the part of law enforcement, an evidentiary hearing should have been held to further investigate VAZQUEZ claim as to the actions of law enforcement. See generally, *United States v. Pawlak*, 935 F.3d 337 (5th Cir. 2019); *United States v. Richardson*, 764 F.2d 1514 (11th Cir. 1985). However, because it was not, supports VAZQUEZ' argument that

the Eleventh Judicial Circuit erred in affirming the denial of VAZQUEZ' Motion to Dismiss and or in the alternative Motion to Suppress and therefore his Petition for Writ of Certiorari Review must be granted in order to avoid a miscarriage of justice.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF VAZQUEZ' MOTION TO DISMISS OR IN THE ALTERNATIVE VAZQUEZ' MOTION TO SUPPRESS.

'A motion to suppress must in every critical respect be sufficiently definite, specific, detailed, and nonconjectural to enable the Court to conclude that a substantial claim is presented.... A court need not act upon general or conclusory assertions....' " *United States v. Cooper*, 203 F.3d 1279, 1284 (11th Cir. 2000) (quoting *United States v. Richardson*, 764 F.2d 1514, 1527 (11th Cir. 1985)) (emphasis added).

Fed.R.Crim.P. 12(b)(3)(C) mandates that all motions to suppress evidence be raised by pretrial motion "if the basis for the motion is then reasonably available." Under Fed.R.Crim.P. 12(c)(3), if a motion to suppress is untimely, the District Court may consider the motion if the party shows good cause for the delay. The motion must allege facts which, if proven, would provide a basis for relief.

VAZQUEZ argues that he has shown good cause for the delay because he was not provided the information regarding Special Agent Christopher Murray and the car he was driving at the time of the search of VAZQUEZ' car. VAZQUEZ argued in his Motion that "Agent Murray was driving a black Chrysler 200 model vehicle with dirt rims." VAZQUEZ further alleged that he "had observed this same vehicle on several previous occasions parked at the Fresh Cuts Studio in Ft. Myers, located at 2158 Colonial Boulevard. (DE:74)(VAZQUEZ' Initial Brief, page 5). This in and of itself was sufficient allegations to show that because the information was not known by VAZQUEZ, due to the government not advising him of same, that VAZQUEZ has shown sufficient facts to support "good cause" for the Motion to Dismiss or in the Alternative Motion to Suppress being file untimely.

Even if said allegations were not found to be "good cause" for the untimely filing, the District Court should have still allowed the Motion to be ruled upon in order to avoid a "miscarriage of justice". The term "miscarriage of justice" is when the error complained about by a defendant is "a fundamental defect which inherently results in a complete miscarriage of justice." *Hill v. United States,* 368 U.S. 424, 428, 82 S.Ct. 468 (1962); *see also United States v. Addonizio,* 442 U.S. 178, 185, 99 S.Ct. 2235 (1979). When this occurs, Courts have the equitable power to consider an issue notwithstanding the existence of a procedural bar. *See Murray v. Carrier,* 477 U.S. 478, 495-496, 106 S.Ct. 2639, 2644 (1986). VAZQUEZ argues that even

if the Motion was untimely and he failed to show "good cause" for it being untimely, that same must and should have been ruled upon and granted in order to avoid a "miscarriage of justice". Based upon caselaw and the allegations alleged by VAZQUEZ, this Court must find that VAZQUEZ Motion should have been deemed timely under this exception to the procedural default doctrine.

In addition, the Eleventh Circuit should have reversed the District Court's denial of VAZQUEZ Motion due to the allegations made by VAZQUEZ regarding the outrageous conduct of the law enforcement. Case law is clear that "outrageous conduct of law enforcement" is properly raised in a Motion to Dismiss and that is what VAZQUEZ did. *United States v. Wingender*, 790 F.2d. 802 (9th Cir. 1986).

VAZQUEZ argues that the actions by law enforcement to orchestrate the reason for a "viable" traffic stop to wit: causing VAZQUEZ to "put on his brakes" clearly was "outrageous conduct" and clearly "violated the fundamental fairness, showing to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment." *United States v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1637 (1973). Therefore, VAZQUEZ' Motion raised an issue of law for the court and was properly raised by a pretrial motion to dismiss the indictment. Fed.R.Crim.P. 12(b). *See United States v. Nunez-Rios*, 622 F.2d 1093, 1098 (2d Cir. 1980). *United States v. Wylie,* 625 F.2d 1371, 1378 (9th Cir. 1980). Not to grant VAZQUEZ Motion clearly tantamounted to a miscarriage of justice. *Ivey v. Allstate Ins. Co.,* 774 So.2d

679 (Fla. 2000). After all, "[t]he due process clause protects Appellants against outrageous conduct by law enforcement agents." *United States v. Pawlak*, 935 F.3d 337, 344 (5th Cir. 2019)(*quoting United States v. Arteaga*, 807 F.2d 424,426) (5th Cir. 1986). It is quite clear that the government's actions were outrageous and because of said action, the Eleventh Circuit should not have affirmed the District Court's denial of VAZQUEZ' Motion to Dismiss or in the Alternative Motion to Suppress since the prosecution against VAZQUEZ was developed through said outrages conduct. "We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction...." *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637(1973). VAZQUEZ' Motion raised an issue of law for the court and was properly raised by a pretrial motion to dismiss the indictment. Fed.R.Crim.P. 12(b). *See United States v. Nunez-Rios*, 622 F.2d 1093, 1098 (2d Cir. 1980). *United States v. Wylie,* 625 F.2d 1371, 1378 (9th Cir. 1980). Therefore, VAZQUEZ' Petition for Writ of Certiorari Review must be granted.

Furthermore, the Eleventh Circuit failed to consider the fact that said alleged traffic stop that led to the search of the vehicle and the arrest of VAZQUEZ was a pretextual stop and it is clear that law enforcement, created the "alleged traffic stop" in order to create probable cause to stop the vehicle. *See generally*, *United States v.*

Smith, 799 F.2d 704 (11th Cir. 1986). Said traffic stop clearly violated VAZQUEZ' Fourth Amendment rights because there was no valid probable cause nor was there reason to believe that a traffic violation had occurred. It is clear that the stop was orchestrated by the government so that Deputy Rodriguez would in fact stop VAZQUEZ. Clearly the District Court and this Court should have found that the government intentionally created the violation so that they could benefit from said "alleged illegal traffic activity" and create "probable cause" for the traffic stop, search and arrest.

Even if the traffic stop was warranted as a result of the alleged "braking", said traffic infraction would only have given probable cause for the initial stop; not the search of the vehicle. *See generally, Whern v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996). Law Enforcement had to have probable cause to support their search of the vehicle and the confiscation and not just mere suspicion that contraband might be found. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). The burden is on the government to demonstrate that the police had probable cause to conduct a warrantless search. *See, United States v. McGough*, 412 F.3d 1232 (11th Cir. 2005); *see also, United States v. Davis*, 313 F.3d 1300, 1302 (11th Cir. 2002). In the case at hand there was no probable cause for the search. Therefore, the Eleventh Circuit's opinion affirming the District Court's denial of VAZQUEZ' Motion to Dismiss or in the Alternative Motion to Suppress was unfounded. Clearly a reading of

VAZQUEZ' Motion and the facts alleged in the Motion supports VAZQUEZ' argument that the search of his vehicle and the confiscation of the evidence was without probable cause and was based upon law enforcement's outrageous conduct. Accordingly, the fact that the District Court surmised the Motion was untimely and/or that said Motion failed to allege sufficient facts to warrant either a dismissal of the superseding indictment or suppression of the evidence and same was affirmed by the Eleventh Circuit, VAZQUEZ' request for Certiorari review by this Honorable Court must be granted in order to avoid another miscarriage of justice.

CONCLUSION

This Court should explicitly adopt VAZQUEZ' position based upon law and equity. The upholding of the Eleventh Circuit's opinion affirming the District Court's failure to have an evidentiary hearing on VAZQUEZ' Motion to Dismiss or in the Alternative Motion to Suppress seriously affects the fairness, integrity and public reputation of the judicial proceedings. *See generally, United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993).

Furthermore, the denial of VAZQUEZ' Motion to Dismiss or in the Alternative Motion to Suppress was an abuse of discretion by the District Court and the affirmance of same by the Eleventh Circuit was clearly a miscarriage of justice.

Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468 (1962); *see also United States v. Addonizio,* 442 U.S. 178, 185, 99 S.Ct. 2235 (1979).

For all of these reasons and in the interest of justice, the Petitioner, EDGAR VAZQUEZ, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,
JOFFE LAW, P.A.
Attorney for VAZQUEZ
The 110 Tower Building
110 S.E. 6th Street
17th Floor, Suite 1700
Ft. Lauderdale, Florida 33301
Telephone: (954) 723-0007
Facsimile: (954) 723-0033
davidjjoffe@aol.com

By David J. Joffe
DAVID J. JOFFE, ESQUIRE
Florida Bar No. 0814164

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of April, 2024, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By David J. Joffe
DAVID J. JOFFE, ESQUIRE