

No. 24-7403

ORIGINAL

Supreme Court, U.S.
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19-12708

IN THE
SUPREME COURT OF THE UNITED STATES
WRIT OF CERTIORARI

MICHAEL STAPLETON — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL STAPLETON
(Your Name)

F.C.I Atlanta, P.O. Box 150160
(Address)

Atlanta, GA 30315
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Did the Court of Appeals create a split in Circuits by affirming Movant's convictions and sentences for crimes that were committed simultaneously under the same statutory provision of Title 8 U.S.C. 1324 when it said that multiple convictions and sentences can co-exist where the Ninth Circuit said that legislative proves that Congress never intended to impose multiple punishments for Title 8 U.S.C. 1324 offenses that were committed simultaneously before reversing the convictions in United States v. Sanchez-Vargas?

Did the Court of Appeals create a split in Circuits and violated this Court's ruling in Blockburger v. United States when the Court of Appeals applied the Blockburger test to Title 8 U.S.C. 1324 single statutory provisions where the Ninth Circuit said that the Blockburger test does not apply to offenses defined in single statutory and penalty provisions, where this Court held that the Blockburger test correctly applies to offenses defined in separate statutory and penalty provisions?

Did the Court of Appeals create a split in Circuits by denying the motion to recall the mandate where the Fifth Circuit said that two indictments may be pending at the same time as long as jeopardy has not attached to the first indictment does not moot the case (if) the first indictment is still pending where in Movant's case jeopardy attached to the 2013 indictment at the trial of the 2014 indictment where the Government voluntarily dismisses the 2013 indictment (22) days after the conviction and prior to sentencing mooted the case?

Whether the Blockburger test is applicable to multiple charges brought under a single statutory subsection, or whether Court's must instead rely on legislative history to determine congressional intent to impose cumulative punishment?

Does the Court of Appeals Opinion conflicts with this Court's ruling in Rutledge v. United States where the Court of Appeals affirmed Movant's convictions and sentences on counts 10, 32 and 47 where a mandatory special assessment was imposed on a lesser and greater included offense where this Court held that a mandatory special assessment imposed on a lesser and greater included offense

violates the Double Jeopardy Clause?

Does the Court of Appeals Opinion conflict with this Court's ruling in Clemons v. Mississippi where the Court of Appeals affirmed Movant's convictions and sentences on the District Court's failure to provide limiting instructions to the jury on aggravating circumstances where this Court held that aggravating circumstances cannot constitutionally be presented to the jury without limiting instructions?

Whether the denial of a motion to recall the mandate when based on the failure to recognize clearly established Supreme Court Precedents in Rutledge v. United States and Clemons v. Mississippi violates the Due Process Clause of the principles of fair judicial process?

Whether the Federal Court of Appeals may deny a motion to recall the mandate under 11th Cir. R. 41-1(c) where it previously affirmed a conviction in contravention of clearly established Supreme Court precedents, and later granted relief to a similar situated defendant on the same legal ground?

Whether the re-litigation bar, as articulated in Shoop v. Hill, precludes an Appellate Court from refusing to correct a prior legal error that was well-understood and settled at the time of the original Opinion?

Whether a Court created error that contradicts clearly established Federal Law can be shielded from correction solely on the basis of a Procedural Rule under 11th Cir. R. 41-1(c), even when a timely motion to recall the mandate is filed based on subsequently revealed, identical relief is granted to another defendant?

Whether denying relief from unconstitutional convictions solely on the finality of judgement violates the Due Process Clause when the error involves an illegal sentence and a violation of the Double Jeopardy Clause?

Whether convictions and sentences under multiple counts of a single statutory provision of Title 18 U.S.C. 1324(a)(iv) and (a)(2) based on simultaneous conduct violates the Double Jeopardy Clause when Congress did not clearly intend to authorize multiple punishments?

Where Movant preserved an argument on direct appeal where the Court of Appeals affirmed on the District Court's failure to provide limiting instructions to the jury given in support of the 404(b) evidence violations, does it violate the Due Process Clause of the Fifth Amendment where the Opinion of the Court of Appeals is devoid on any decisions on the issue raised?

Whether a sentencing Court violates Due Process when it enhances a sentence by two levels for a dangerous weapon based on a previously dismissed indictment, despite having ruled earlier that the dismissed indictment charged separate and distinct conspiracy's?

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits sentencing enhancements based on conduct charged in a separate indictment that the Government later voluntarily dismissed after the conviction in the second, overlapping indictment involving the same conduct where the Court of Appeals said that both indictments was part of the same common scheme or plan with the same modus operandi and common purpose when they affirmed the two level enhancement on direct appeal?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

REVERSED OR VACATED FOR THE IDENTICAL ISSUES RAISED ON DIRECT APPEAL.

Clemons v. Mississippi 494 U.S. 738 (1989)

Rutledge v. United States 517 U.S. 292 (1996)

United States v. Anaya 509 Supp 289, 297 (S.D. FLA 1980)

United States v. Gonzalez 975 F.2d 1154 (11th Cir 1992)

United States v. Harding 104 F. 4th 1291 (11th Cir 2024)

United States v. Sanchez-Vargas 878 F.2d 1163 (9th Cir 1989)

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at N/A; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 03-27-2025.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 05-05-2025, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Sixth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Movant was initially indicted in case No:13-80201-CR-Ungaro. The indictment charged Movant with a conspiracy beginning around September, 2013 and ending through on or about September, 19, 2013, in violation of Title 8 U.S.C. 1324 (a)(1)(A)(iv) all in violation of Title 8 U.S.C. 1324 (a)(1)(A)(v)(I), Count One. Twelve counts of encouraging to induce illegal entry into the United States in violation of Title 8 U.S.C. 1324 (a)(1)(A)(iv) and Title 18, U.S.C. 2, Counts Two through Twelve. One count of aiding and assisting a convicted felon to enter the United States in violation of Title 8 U.S.C. 1327 and Title 18 U.S.C. 2, Count Thirteen.

Movant was once again indicted in case No:14-80151-CR-DMM. The indictment charged Movant with a conspiracy that began in November, 2012 and continued on through or about December 9, 2012, in violation of Title 8 U.S.C. 1324(a)(1)(A)(iv) all in violation of Title 8 U.S.C. 1324(a)(1)(A)(v)(I), Count One. The indictment charged a second conspiracy that began on or about October, 5, 2013 through or about October 10, 2013, in violation of Title, 8 U.S.C. 1324(a)(1)(A)(iv) all in violation of Title 8 U.C.S. 1324(a)(1)(A)(v)(I), Count Two. Twenty-two counts of encouraging to induce illegal entry into the United States in violation of Title 8 U.S.C. 1324(a)(1)(A)(iv) and (v)(II) and Title 18 U.S.C. 2, Counts Three through Twenty-four. Twenty-two counts of bringing and attempting to bring illegal aliens in the United States for commercial advantage and private financial gain in violation of Title 8 U.S.C. 1324(a)(2)(B)(II) and Title 18 U.S.C. 2, Counts Twenty-five through Forty-six. One count of aiding and assisting a convicted felon to enter the United States in violation of Title 8 U.S.C. 1327 and Title 18 U.S.C. 2, Count Forty-seven.

Both indictments contained forfeiture allegations and are herein attached as exhibits.

Movant timely filed pre-trial motions to dismiss both indictments for Duplicity and Multiplicity. (CR-DE-33) Movant challenged the 2013 and 2014 indictment as being part of the same common scheme or plan with the same modus operandi and common purpose. Movant also challenged counts 10, 32 and 47 as Multiplicitous which invokes the Double Jeopardy Clause. The Government responded stating that there was no Duplicity or Multiplicity issues because both indictments correctly charged three separate conspiracy's, further that counts 10, 32 and 47 were not Multiplicitous. The Government stated that Attorney Allen Kaufman raised the wrong issues, his claims should have been Double Jeopardy. (CR-DE-46) The Magistrate Judge agreed and recommended that the motion to dismiss be denied. (CR-DE 56). The District Court agreed and adopted the report and recommendation and denied relief.

The Government then filed a motion to join the 2013 and 2014 indictment for the purpose of one trial, stating that both indictments has a substantial overlap in time and were part of the same common scheme or plan with the same modus operandi and common purpose. (CR-DE-99). The Government also filed a second discovery. (CR-DE-100-101). On January, 25, 2019 the District Court held a status conference. (CR-DE-110). During the status conference Movant informed the Court that he filed several pre-trial motions to re-appoint counsel and re-assert his Public Authority Defense based on the new discovery filed by the Government. (CR-DE-120). Movant also objected to the motion to join both indictments for the purpose of one trial stating that the District Court already denied the pre-trial motion to dismiss both indictments stating that both indictments correctly charged separate crimes, if the crimes are separate, the cases can

not be joined. (CR-DE-110). The District Court ignored Movant's request to re-appoint counsel and ignored his request for a continuance. The District Court then threatened Movant with joinder of both indictments for the purposes of one trial if he tries to seek a continuance for any reason. Threatened with the possibility of increased punishments if the cases were joined, Movant withdrew all of his pre-trial motions filed and agreed to go to trial three days later without an attorney.

The District Court denied the pre-trial motion to join both cases for the purpose of one trial, stating that the motion was filed in such a short notice and stating that it wanted to give Movant more time to prepare for trial. (CR-DE-133). The District Court never gave Movant more time and took Movant to trial three days later.

The Government initially filed a motion in limine to introduce evidence of the uncharged 2013 indictment even though it claimed that the 2013 and 2014 indictment charged separate crimes. (CR-DE-102). On the morning of trial, the Government presented another motion in limine to introduce evidence of rapes at trial. (CR-DE-114). Movant timely objected to both motions in limine, citing its prejudicial effect and short notice. (CR-DE-216)(CR-DE-217 at 169-171). The District Court allowed both motions in limine to proceed, gave limiting instructions on the use of the 2013 indictment at trial and did not provide any limiting instructions on the rapes.

After a three-day trial, the jury found Movant guilty on all counts charged in the 2014 indictment. Once the trial was over, the Government provided Movant with the sworn declaration of Geicy Sousa, where Geicy Sousa stated that she was raped by a man named Marvin two times, not Movant. Movant timely filed a motion for a new trial. (CR-DE-157). The District Court denied relief without a response from the Government. (CR-DE-196-197). After the District Court denied the motion

for a new trial the Government filed a late response to the motion for a new trial. (CR-DE-198). The District Court took the late response filed by the Government and used the late response to deny another motion. (CR-DE-256).

The Government and Federal Agents came to Movant in the cell block after the conviction and offered Movant a deal to plead guilty to the charges in the 2013 indictment for a lesser sentence on the charges in the 2014 indictment, Movant rejected their offer. The Government then filed a motion (22) after the conviction on the 2014 indictment and (5) months prior to sentencing to voluntarily dismiss the 2013 indictment, the motion was granted on the same day.

At sentencing the District Court used the 2013 indictment that was introduced at trial as 404(b) evidence and enhanced Movant's sentence (4) levels as being the leader of the 2013 and 2014 indictments, (6) levels for smuggling (32) or more aliens into the United States by combining the 2013 and 2014 indictments alien counts, (2) levels for a dangerous weapon that was derived from the use of the 2013 indictments and (4) levels for serious bodily injury from the 404(b) evidence of the rapes. (CR-DE-278).

No sentence was imposed on counts (1-26); the District Court began a conversation with the probation officer seeking her assistance on how to impose the (262) month sentence. The District Court somehow forgot to impose sentence on counts (1-26) and imposed sentence on counts (27-47) for a total of (262) months.

Movant timely filed a Notice of Appeal. After some time counsel Mr. Richard Della Fera filed an Anders Brief stating that he has found no issues of merit that warrants appellate review. The Court of Appeals rejected the Anders Brief and ordered counsel to file a merits brief addressing the following issues;

- 1) Whether the District Court erred in denying Stapleton's motion to dismiss the indictment based on the Government's violation of his constitutional speedy trial

rights;

- 2) Whether the District Court erred in admitting Fed. R. Evid. 404(b) evidence of Stapleton's abuse of Ms. Michelle Pacheco and Geicy Sousa;
- 3) Whether the evidence was sufficient to convict Stapleton of Count 47; and
- 4) Whether the District Court erred by enhancing Stapleton's advisory guideline range under U.S.S.G. 2L1.1(b)(5)(C).

On Direct Appeal counsel raised all of the issues that the Court of Appeals directed him to raise and included a Double Jeopardy argument against the (2) conspiracy counts charged in the 2014 indictment and against counts 10, 32 and 47. The Court of Appeal sua sponte ordered briefing on counts 10, 32 and 47. After briefing and oral arguments the Court of Appeals affirmed on all counts. (CR-DE-323). This Court also denied relief after requesting that the Solicitor General respond to the Writ of Certiorari. Stapleton v. United States 143 U.S. S. Ct. 2693 (2023).

Movant timely filed a 2255 petition in case No: 23-81082-CV-DMM. The District Court agreed with the Government and denied relief on all grounds raised. (CV-DE-28). The Court of Appeals denied the request for certificate of appealability and this Court denied the the Writ of Certiorari on October, 19, 2024.

In denying the 2255 petition the Government quoted the Opinion of the Court of Appeals where the Court of Appeals affirmed Movant's conviction and sentences on the (2) level enhancement derived from the use of the 2013 indictment, stating that the 2013 and 2014 indictments were part of the same common scheme or plan, with the same modus operandi and common purpose.

While the 2255 petition was pending appeals before this Court the Court of Appeals reversed the convictions and sentences in United States v. Harding 104 F. 4th 1291 (11th Cir 2024)., for the failure of the District Court to provide limiting instructions to the jury. Where in Movant's case the Court of Appeals

affirmed Movant's convictions and sentences on the identical claim raised in his initial brief in support of the 404(b) evidence violations, without addressing the merits of the District Court's failure to provide limiting instructions on aggravating circumstances about the allegations of rapes. The failure to address arguments in Movant's brief violated Movant's rights to Due Process and the Suspension Clause.

Upon further review of the Opinion of the Court of Appeals revealed that the Court affirmed Movant's convictions in contravention to clearly established Supreme Court law and Circuit precedents, also creating a split in Circuits. United States v. Gonzalez 975 F.2d 1514 (11th Cir 1992), Clemons v. Mississippi 494 U.S. 738 (1990), United States v. Sanchez-Vargas 878 F.2d 1163 (9th Cir 1989), Rutledge v. United States 517 U.S. 292 (1996). All of the above listed cases gave other defendants relief on the identical arguments Movant raised in his appellate brief but got not relief.

Movant moved to recall the mandate under Shoop v. Hill 586 U.S. 504, 506 (2019), arguing that clearly established Federal Law was violated, the Court of Appeals denied the motion without Opinion, citing 11th Cir. R. 41-1(c).

The Eleventh Circuit's refusal to recall the mandate conflicts with clearly established Federal Law as determined by this Court in prior rulings. The denial takes away the only available avenue for relief after exhausting all other remedies available to Movant. The ruling of the Court of Appeals denying relief is now the subject of this Writ of Certiorari.

REASONS FOR GRANTING THIS WRIT

To resolve the split in Circuits where the First and Eleventh Circuits applied the Blockburger test to Title 8 U.S.C. 1324 single statutory provisions where the Ninth Circuit said that the Blockburger test does not apply to Title 8 U.S.C. 1324 offenses because legislative history provides that Congress never intended to impose multiple convictions and sentences for crimes that were committed simultaneously under the same statutory provisions of Title 8 U.S.C. 1324, before reversing the convictions and sentences in United States v Sanchez-Vargas on the same issue.

To resolve the split in Circuits on the use of dismissed indictment. The Fifth Circuit in United States v. Rainey acknowledges that when an indictment is dismissed, it's legal significance for future prosecution maybe extinguished. In vacating the convictions and sentences in United States v. McIntosh the Eleventh Circuit quoted the Opinion of the Fifth Circuit in Rainey but declined to extend the same fundamental fairness in Movant's case by failing to recall the mandate where the Fifth Circuit said that where jeopardy attaches to the first indictment the appeal is not moot until the first indictment is dismissed. Where as in Movant's case the first indictment was dismissed voluntarily (22) days after the convictions and (5) months before the sentencing on the second indictment. The dismissal of the first indictment, according to Fifth Circuit's precedents mooted the case and there was nothing before the Court's to decide because the 2014 indictment violated the Double Jeopardy Clause to the 2013 indictment where jeopardy attached at the trial of the 2014 indictment when the jury was empanelled.

To clarify if the same "common scheme or plan" with the same "modus operandi and

common purpose," means that the 2013 and 2014 indictment charged the same crimes, where the Court of Appeals in affirming Movant's convictions and sentences on the use of the 2013 indictment to enhance the sentence in the 2014 indictment said that both indictments charged the same crime, by extension does the convictions on the 2014 indictment violated the Double Jeopardy Clause to the 2013 indictment and did the dismissal of the 2013 indictment mooted the case and took away the jurisdiction of the Court's to proceed any further?

To clarify if the Court of Appeals violated this Court's ruling in Rutledge v. United States where the Court of Appeals ignored this Court's holding in Rutledge which bars multiple punishments for lesser and greater included offenses where the imposition of a mandatory special assessment was imposed on counts 10, 32 and 47 violates the Double Jeopardy Clause, a core constitutional protection.

To clarify if the Court of Appeals Opinion conflicts with this Court's ruling in Clemons v. Mississippi where this Court held that Appellate Courts cannot uphold convictions on a Trial Court's failure to provide constitutionally required limiting instructions on aggravating circumstances. Movant's case presents the same core constitutional defect, lack of limiting instructions but the Court of Appeals affirmed without addressing the issue of the District Court's failure to provide limiting instructions, arguments that were made in Movant's initial brief in support of the 404(b) evidence violation. The Court of Appeals later reversed the convictions and sentences in United States v. Harding on the identical issue. This creates a direct conflict with Clemons and violates equal protections principles.

Overruling clearly established law in Shoop v. Hill where the Court of Appeals denied Movant's motion to recall the mandate, contravenes Shoop v. Hill, where the Court of Appeals held that finality does not override clearly established law when a petitioners constitutional : rights are at stake.

Constitutional importance of Double Jeopardy protections: The Fifth Amendment's protection against multiple punishments for the same offense is a bedrock principle in American Law. Permitting multiple convictions and sentences under a single statutory provision where Congress never intended to impose such punishments undermines the Constitution.

Double Jeopardy implications require clarifications: The Government claimed that the 2013 and 2014 indictments correctly charged separate conspiracy's to defeat a motion to dismiss, where on direct appeal the Court of Appeals affirmed the (2) level enhancement derived from the use of the 2013 indictment stating that both indictments were part of the same common scheme or plan with the same modus operandi and common purpose. This internally inconsistent position results in a clear Double Jeopardy dilemma. Movant was told he was facing separate charges (to justify multiple prosecutions) and treated as if he had committed a single scheme to enhance his sentence. This Court's guidance is needed to resolve this constitutional paradox.

Use of dismissed charges in sentencing conflicts with Due Process where the sentencing Court adopted facts from an indictment that was voluntarily dismissed before sentencing, resulting in a dramatic enhancement. This creates a Due Process problem, as the dismissed indictment no longer had legal effect. This Court should clarify whether such conduct is permissible under the Due Process Clause.

The denial of relief under 11th Cir. R. 41-1(c) where the Court itself created the error violates Due Process. Movant sought to recall the mandate under the re-litigation bar which permits such relief in extraordinary circumstances. The Court of Appeals denial without addressing the fact that it was the Court itself that affirmed Movant's conviction in contravention to clearly established law, denies Movant fundamental fairness. The Court of Appeals should not be allowed to rely on it's own procedural rule to insulate it's errors from correction especially when that error conflicts with decisions of this Court and with it's own rulings under clearly established Circuit precedents.

This case presents a clear opportunity to clarify the standards for recalling the mandate after appellate inconsistency, something that this Court has never done. There is a need for this Court to clarify whether Court of Appeals may deny a motion to recall the mandate when subsequent decisions demonstrate that a constitutional error occurred in the petitioner's case. This issue affects litigants nation wide and directly implicates the integrity of the judicial process.

Movant has no other avenue for relief. Having exhausted his direct appeal and 2255 collateral review. Movant's only avenue for relief is to recall the mandate. If this Court does not intervene, the denial of the motion to recall the mandate will stand as a final judgement even though the underlying conviction is constitutionally infirm. This implicates the Suspension Clause and the right to meaningful habeas corpus review.

Exceptional circumstances justify review. Unconstitutional convictions and sentences remain on the record that would work to undermine carefully crafted decisions of this Court that took decades to develop. The Court of Appeals

failure to address the Constitutional violations in this case perpetuates a grave miscarriage of justice that requires this Court's intervention, this Court should not turn a blind eye to the issues in this case that violates the Constitutional of the United States, where it is the duty of this Court to protect the Constitution.

Pursuant to this Court's ruling in Hemphill v. New York 595 U.S. 142 S.Ct. 681 (2022). This Court made it clear that, "no particular words or phrase is essential for satisfying the presentation requirement, so long as the claim is brought to the attention of the Court with fair precision and in due time." A party may advance any argument in support of that claim. Id. All claims presented in the Writ of Certiorari is clearly presented to the Court of Appeals in Movant's appellate brief.

The law of the case doctrine bars re-litigation of issues that were decided either explicitly, or by necessary implications in a prior appeal. Arrington v. Miami Dade Public School District 2023 U.S. App Lexis 5908 (11th Cir 2023), quoting Olaleinde v. City of Birmingham 230 F.3d 1295, 1288 (11th Cir 2000). A Court may reconsider an issue if, among other things, the prior decision was clearly erroneous and work a manifest injustice. Id.

To meet the unreasonable application exception to the re-litigation bar, "a prisoner must show far more than that the Court decision was merely wrong or even clear error." Shinn v. Kayer 141 S. Ct. 517 (2000). The re-litigation bar forecloses relief unless the prisoner can show that the error was well understood and comprehended in existing law beyond any possibility for fair minded disagreement. Shoop v. Hill 139 S. Ct. 504, 506 (2019).

MULTIPLICITOUS COUNTS: 10, 32 and 47 (see appellate brief at 43).

On May 02, 2022, the Court of Appeals, on it's own motion, directed the parties to file supplemental briefs addressing the following question:

Does this Court's holding in United States v. Lopez, 590 F.3d 1238, 1249 (11th Cir 2009), that the definition of "encourage" in 8 U.S.C. 1324(a)(1)(A)(iv) includes "to help" render Count 10 multiplicitous with Counts 32 and 47? Is there any indication that legislative "intended that each violation be a separate offense? United States v. Davis, 854 F.3d 1276 1286 (11th Cir 2017). Otherwise, applying Blockburger v. United States, 284 U.S. 299 (1932), what elements of proof, if any, does 8 U.S.C. 1324(a)(1)(A)(iv) require that 8 U.S.C. 1324(a)(2)(B)(ii) and 8 U.S.C. 1327 do not? If counts 10 is multiplicitous with Counts 32, does this mean that Counts 3 through 24 are all multiplicitous with Counts 25 through 46?

The Court of Appeals after briefing and oral arguments sided with the Government and affirmed the convictions and sentences on counts 10, 32 and 47. In affirming Movant's convictions and sentences, the Court of Appeals applied the Blockburger test to counts 10, 32 and 47, in doing so the Court of Appeals violated clearly established Supreme Court law and Circuit precedents. The Court of Appeals also created a split in Circuits. The Ninth Circuit said that the Blockburger test does not apply to offenses defined in Title 8 U.S.C. 1324 single statutory provision United States v. Sanchez Vargas 878 F.2d 1163 (9th Cir. 1989). The Ninth Circuit held that legislative history proves that Congress never intended to impose multiple punishments (for) Title 8 U.S.C. 1324 offenses under the same statutory provision.

In applying the Blockburger test to counts 10, 32 and 47 resulted in the Court of Appeals reaching an erroneous decision. This Court has held that the Blockburger test correctly applies to offenses defined in separate statutory

provisions. Gore v. United States 357 U.S. (1958), Heflin v. United States 358 U.S. 415 (1959), Prince v. United States 352 U.S. 322 (1957), Blockburger v. United States 284 U.S. 299 (1932). Id. The Blockburger test does not apply to offenses under single statutory provisions because this Court has not yet applied the Blockburger test in such a manner.

The Opinion of the Court of Appeals conflicts with the Florida En Banc Court. The Florida Court held that legislative history proves that Congress never intended to impose multiple punishment for the same offense. The Court said that (a)(1) is directed towards those who were involved in the physical ingress and (a)(iv) is directed towards those who's acts are not so active as to fall within the prohibitions of bringing. The concurring Opinion noted that by adding the offense of encouraging to induce illegal entry, Congress completed it's statutory scheme. United States v. Anaya 509 Supp 289, 297 (S.D. FLA 1980). Id.

This Court's ruling in Rutledge v. United States 517 U.S. 292 (1996) also made it clear that Congress never intended to impose multiple punishments for the same offense that were committed simultaneously. A mandatory special assessment was imposed on each count of conviction as it relates to counts 10, 32 and 47. This Court has held that a mandatory special assessment imposed on a lesser and greater included offense violates the Double Jeopardy Clause. This Court reversed the convictions in Rutledge for the identical error that is present in this case, count 10 is a lesser included offense to counts 32 and 47. Movant could not lawfully be convicted and sentenced for all three violations of the same statute under Title 8 U.S.C. 1324 single statutory provisions for crimes that were committed simultaneously. Ball v. United States 470 U.S. 856 (1958). Courts may not prescribe greater punishment than what Congress intended. Rutledge v. United States. Id.

404(b) EVIDENCE VIOLATIONS: (see appellate brief at 33-36

The Court of Appeals affirmed Movant's convictions and sentences for the admitted use of the 404(b) evidence, in doing so, violated clearly established law and long standing Circuit precedents.

The Government filed (2) motions in Limine seeking to introduce evidence of an uncharged alien smuggling case and allegations of rapes. (CR-DE-102-114). The District Court ruled on admissibility of the uncharged alien smuggling case and gave limiting instructions to the jury. As to the rapes the District Court never ruled on admissibility of the rapes and never provided limiting instructions to the jury. Movant objected to the use of both 404(b) evidence and renewed his objections at the close of trial. (CR-DE- 130, 216 at 10, 217 at 170).

Against Movant's objections and without permission of the Courts, the Government wasted no time in questioning both Geicy Sousa and Michelle Pacheco about the rapes. (CR-DE 216 at 63-68), see also (CR-DE-217 at 53). The Government tried to minimize their mis-conduct by using the word abuse instead of rape or sexual assault even though the Motion in Limine specifically used the word rapes. (CR-DE 114). Id. The Court of Appeals, the District Court and the Government all faulted Movant (for) bringing the word sexual assault into trial. The Courts all overlooked the fact of the Governments statements at trial. The Government made it clear that even though we used the word abuse, "everyone in this Court knows we are talking about a sexual assault." (CR-DE-217 at 53-59). Also it was Michell Pacheco who also suggested that the abuse was sexual in nature. (CR-DE 217). If everyone in the Court knew that the Government was talking about a sexual assault by using the word abuse, it made no difference who brought it into trial because it made clear that a rape occurred.

The trial testimony of the abuse was extremely prejudicial because the jury cried along with Geicy Sousa as she gave her accounts about the rapes as the Government cried along, these acts are not recorded in the trial transcripts but the transcripts does show the Government trying to console Geicy Sousa. (CR-DE 216).

Once the trial was over the Government gave Movant a sworn declaration of Geicy Sousa given under the penalty of perjury where Geicy Sousa made it clear that she was raped two times by a man named Marvin, Movant filed motions for a new trial but the District Court denied the request. The sworn declaration made it abundantly clear that the allegations of the rapes were totally false. See sworn declaration herein attached as exhibits, see also appellants brief and appendix where the declaration was attached to the brief. Geicy Sousa never made any mentions of Movant raping her, the same way that Geicy Sousa said that she was raped two times by a man named Marvin, she could have easily told the investigators that she was raped by Movant, Geicy Sousa never said that she was raped by Movant because she was never raped by Movant. The only thing Geicy Sousa said about Movant, was she paid Movant to smuggle her to the United States. Id.

In affirming Movant conviction the Court of Appeals failed to consider the sworn declaration attached to Movant's brief and was wrong to conclude that Movant never objected to the use of the 404(b) evidence and viewed the 404(b) evidence under plain error. The Court of Appeals also failed to consider Movant's arguments that the District Court failed to rule on admissibility of the 404(b) evidence and failed to give limiting instructions to the jury. The Court of Appeals however did address the 404(b) evidence of the uncharged 2013 indictment but declined to rule on the allegations of the rapes, the Opinion of the Court of Appeals is devoid of any rulings regarding limiting instructions about the rapes.

In addressing the uncharged 2013 indictment that was admitted under 404(b), the Court of Appeals in error said that the evidence was properly admitted at trial because it was a prior conviction, quoting United States v. Perez 443 F.2d 772 (11th Cir 2006). The Court of Appeals classified the uncharged crime inline with the Courts ruling in Perez, the 2013 indictment was not a prior conviction and failed the test for admissibility under the preponderance of evidence.

Movant offers public records as proof that the 2013 indictment was not a prior conviction. This Court may take judicial notice of public records under Fed. R. Evid. 201, see order of dismissal of the 2013 indictment herein attached as exhibits.

The Court of Appeals Opinion conflicts with the very case they used to deny relief. Fed. R. Evid. 404(b) permits evidence to show preparation, knowledge, intent, motive and a common scheme or plan. In viewing 404(b) decisions, Courts apply a three part test for admissibility of such evidence; 1) the evidence must be relevant to the issue other than defendants character; 2) there must be sufficient proof that the fact finder could find that the defendant committed the extrinsic act; 3) the evidence must possess probative value that is not substantially outweighed by undue prejudice. Perez. Id.

First, Movant filed pre-trial motions to dismiss the 2013 and 2014 indictment for Multiplicity stating that both indictments charged the same conspiracy that was part of the same common scheme or plan to smuggle migrants into South Florida with the same modus operandi and common purpose. (CR-DE-33). The Government denied that the two indictments charged the same crimes, stating that the conspiracy's charged are all separate crimes. (CR-DE-46). The District Court agreed and denied relief. (CR-DE-96). If the conspiracy's are in fact separate crimes then there is a Due Process violation by allowing an unrelated crime to be used as 404(b) evidence. A separate crime from the one charged in the 2014 indictment could not be used to show preparation, knowledge, intent, motion and a common scheme or plan.

Second, the second prong of the 404(b) evidence analysis is satisfied where the extrinsic act involves a "conviction," the order of dismissal clearly shows that the 2013 indictment was not a prior conviction. The 2013 indictment failed the test of admissibility under the preponderance of evidence test under 404(b). The Opinion of the Court is in clear conflict with Perez because of the lack of a prior conviction.

Third, under the preponderance of evidence test the Eleventh Circuit has held that a single witness uncorroborated testimony can be sufficient to prove other act's existence, so long as the testimony is based on personal knowledge of the defendant's conduct. United States v. Barrington 648 F.3d 1178, 1187 (11th Cir 2011), quoting, United States v. Duran 596 F.3d 1283, 1298 (11th Cir 2010). In both cases the Eleventh Circuit affirmed the admitted use of the testimony of a "co-conspirator" to prove the extrinsic act by a preponderance of evidence. The trial testimony of the 2013 indictment did not come from a co-conspirator, it came from a migrant who had reason to lie and curry favor with the Government to remain in the United States.

Fourth, the probative value was substantially outweighed by undue prejudice. The trial testimony of the uncharged 2013 indictment went directly to Movant's character to show how poorly Movant treated the migrants while under his care.

Fifth, the District Court failed to provide limiting instructions on the use of the allegations of the rapes.

The introduction of the 404(b) evidence was unconstitutional because they failed the test of Due Process or Fundamental Fairness. United States v. Lavasco 431 U.S. 783, 790 (1977).

This Court has held that for purposes of determining whether relevant evidence should be allowed in a criminal trial under the unfair prejudice provisions of Rule 403 of the Federal Rules of Evidence, the improper grounds on which the fact finder may find the defendant guilty include generalizing an earlier bad act as bad character and taking that as 1) raising the odds that the defendant did the later bad act now charged, 2) worst, calling for preventive conviction even if the defendant should happen to be innocent momentarily, although such "propensity evidence" is relevant, the risk that the jury will convict anyway because a bad person deserves punishment creates a prejudicial effect that outweighs ordinary relevance. Chief v. United States 519 U.S. 172, 176 (1997).

This Court has stressed that evidence of a "prior conviction" is subject to analysis under Rule 403 for relative probative value and for prejudicial risk. *Id.* Not only was the 2013 indictment not a prior conviction, the District Court failed to give an analysis under Rule 403 for prejudicial probative value. Nothing in clearly established law supports the finding that both 404(b) evidence was properly admitted at trial.

This Court went on to say that, to be sure, preventing undue prejudice against a defendant is an important responsibility of Judges, and it is certainly possible that, with the benefit of limiting instructions jurors would be able to dispassionately consider evidence about the nature and extent of the defendant's past criminality only for the narrow question whether the defendant's past crimes were, in fact, committed on separate occasions. Erlinger v. United States 602 U.S. 144 (2024), quoting Spencer v. Texas 385 U.S. 554 (1967). This Court has also held that aggravating circumstances cannot constitutionally be submitted to the jury without limiting instructions. Clemons v. Mississippi 494 U.S. 738 (1989). (remanded because it was unclear that the District Court employed such analysis), quoting Johnson v. United States 547 So 2d 59, 60 (1989). The same should apply in this case because no limiting instructions was provided to the jury on the allegations of the rapes.

The Court of Appeals also shared the same view as this Court when they reversed and remanded for a new trial for the failure of the District Court to provide limiting instructions to the jury, before and after Movant was convicted but declined to do the same in Movant's case on the identical issue.

The Eleventh Circuit made it clear that under Eleventh Circuit precedents the District Court "must" provide limiting instructions to the jury before it admits extenuating evidence under Rule 404(b). United States v. Harding 104 F.4th 1291 (11th Cir 2024) (vacated after Movant was convicted on the same issue),

quoting United States v. Tokars 95 F.3d 1520 (11th Cir 1996) and United States v. Gonzalez 975 F.2d 1154 (1992)(vacated prior to Movant's conviction on the same issue). The Court of Appeals went on to say that, failure to provide limiting instructions is an abuse of discretion where the admission seriously impaired the defendant's ability to present an effective defense when it "opened the door for the jury to consider the evidence in an improper light." The jury was allowed to consider the 404(b) evidence of the allegations of rapes but was never informed of it's prohibitions. The allegations of the rapes was not needed to complete the story of the charged offenses.

The Opinion of the Court of Appeals speaks about the need of the Rule 403 analysis for it's probative value but the trial transcripts is totally devoid of any such analysis by the District Court. The law was clearly established prior to Movant's conviction, this issue relating to the use of the 404(b) evidence was properly before the Court of Appeals but the Court of Appeals affirmed Movant's convictions without addressing Movant's arguments about the failure of the District Court to provide limiting instructions about the allegations of the rapes violating Movant's rights to Due Process of law, The Court of Appeals gave other defendants relief on the identical issue before and after Movant's conviction but decline to do the same in Movant's case.

The errors in this case was well understood and comprehended in existing law where this Court also gave a defendant relief for the failure of the District Court to provide limiting instructions. The re-litigation bar does not foreclose Movant's claims. Shoop v. Hill. Id.

Jurisdictional Claim

The motion to recall the mandate in Movant's direct appeal was motivated

by the denial of Ground Four of the 2255 petition in case No: 9:23-CV-81082-DMM. In denying relief the District Court agreed with the Government who quoted the Opinion of the Court of Appeals that affirmed Movant's conviction on the (2) level enhancement derived from the use of the 2013 indictment to enhance Movant's sentence for the use of a dangerous weapon. (CR-DE-323 at 21-22). The Court of Appeals affirmed the (2) level enhancement stating that the 2013 indictment was the same conduct and part of the same common scheme or plan as the charges in the 2014 indictment because they shared the same modus operandi and common purpose.

Ironically Movant's advanced this identical argument to dismiss the 2013 and 2014 indictment for Multiplicity which invokes the Double Jeopardy Clause, (CR-DE-33), United States v. Woerner 709 F.3d 527 (5th Cir 2013).

The Opinion of the Court of Appeals opened the door to a series of Due Process violations. The Opinion made it clear that the District Court was wrong to deny the pre-trial motion to dismiss the 2013 and 2014 indictments for the violation of the Double Jeopardy Clause. The Opinion also made it clear that the 2013 and 2014 indictments erroneously charged separate conspiracy's in two separate indictments and the convictions on the 2014 indictment violated the Double Jeopardy Clause. The dismissal of the 2013 indictment (22) days after the convictions and (prior) to the penalty phase mooted the case and the District Court was without Jurisdiction to proceed any further.

The Government said that the 2013 and 2014 indictments correctly charged separate crimes. (CR-DE-46). The Magistrate Judge agreed and recommended that the pre-trial motion to dismiss both indictments be denied. (CR-DE-56). The District Court agreed and denied relief. (CR-DE-96).

Once the Court of Appeals affirmed Movant's convictions and sentences Movant filed a 2255 petition challenging the (12) level enhancement

derived from the 2013 indictment because the Government and the District Court both said that the 2013 and 2014 indictments correctly charged separate conspiracy's. The District Court denied Ground Four quoting the Court of Appeals now calling the 2013 indictment relevant conduct. (CV-DE-28 at 23). The District Court agreed with the Government that the 2013 indictment was part of the same common scheme or plan with the same modus operandi and common purpose as the 2014 indictment. The District Court is ruling on Movant's case with a two edged sword giving conflicting rulings. To deny the pre-trial motion the District Court said that the crimes charged in both indictments correctly charged separate crimes and to deny the 2255 petition the District Court switched positions stating that the crimes is now the same. Even though the District Court is giving conflicting rulings on the same issue of law and fact, the Opinion of the Court of Appeals takes precedents over the District Courts erroneous and conflicting rulings. Movant has advanced his 2255 petition and has no other way to address this issue but to come back under the re-litigation bar.

The law of the case doctrine generally provides that when a Court decided a rule of law, that decision should continue to govern the same issue in subsequent stages of the same case. Musacchio v. United States 577 U.S. 237 (2016). The Court of Appeals made a rule of law when it decided Movant's direct appeal when it stated that the 2013 and 2014 indictments was part of the same common scheme or plan with the same modus operandi and common purpose. This Court made it clear that that decision governs. Id.

Where the Court of Appeals Opinion implicated the Double Jeopardy Clause the voluntarily dismissal of the 2013 indictment (22) days after the convictions and (5) months prior to the sentencing of the 2014 indictment mooted the case and took away the Courts Jurisdiction to sentence Movant on the charges in the

2014 indictment. There was nothing before the Court because of the dismissal of the 2013 indictment. Jeopardy attached at the trial of the 2014 indictment when the jury was empanelled. Serfass v. United States 420 U.S. 377, 388, 95 (1975). Based on the ruling of the Court of Appeals, Movant has spent the last (7) years in prison in violation of the Constitution of the United States. The Fifth Amendment provides that no persons should be deprived of liberty of life or limb or to be twice placed in jeopardy. Fifth Amendment Constitution of the United States.

The record of this case totally agrees with the Opinion of the Court of Appeals. Both indictments charged (3) conspiracy's primised on the same conduct of encouraging to induce illegal entry. The 2014 indictment only added additional charges. All of the locations are the same as charged in both indictments that all terminated in Palm Beach County in the Southern District of Florida. There is a substantial overlap of (16) days between the conspiracy's charged in both indictments and Movant's sentence was enhanced (4) levels as being the leader of all conspiracy's charged. The P.S.R. also supports the Opinion of the Court of Appeals because there were failed trips proceeding every month of the initial arrest throughout the end of the conspiracy.

The Court of Appeals vacated a prior Opinion when they were put on notice that they were without Jurisdiction in another case but declinded to do the same in Movant's case when it was the Court of Appeals who made the rule of law in Movant's direct appeal. Laufer v. Arpan LLC 77 F.4th 1360 (11th Circuit 2023). The Opinion was vacate (15) months after the Court of Appeals was put on notice that they were without Jurisdiction.

The Fifth Circuit said that two indictments maybe pending at the same time for the same offense if jeopardy has not attached to the first indictment in which the Government intends to try the defendant, does not moot the case

because the first indictment was still pending. United States v. Rainey 757 F.3d 234 (5th Cir 2014). In Movant's case, the first indictment was no longer pending because it was dismissed by the Government, jeopardy attached at the trial of the 2014 indictment.

The Eleventh Circuit went to great lengths to explain what takes away the Court's Jurisdiction where Double Jeopardy is implicated. United States v. McIntosh 704 F.3d 894 (11th Cir 2013). The Court of Appeals vacated the convictions in McIntosh and remanded with instructions (to vacate) the convictions on the second indictment and ordered that McIntosh be sentenced to the first indictment McIntosh pleaded guilty to. United States v. McIntosh 580 F.3d 1222 (11th Cir 2009). In Movant's case the convictions on the second indictment based on clearly established law was a second prosecution. Schiro v. Farley 510 U.S. 222, 230 (1984)(refusing to treat the sentencing phase of a single prosecution for Double Jeopardy purposes). The Court of Appeals in McIntosh that an indictment is prerequisite for prosecuting a criminal case to a federal Court's Jurisdiction. See also Ex parte Bain 121 U.S. 1, 13, 7, (1887)(holding that a Court has no Jurisdiction over an offense not properly presented by an indictment), overruled by United States v. Cotton 535 U.S. 625, 122 (2002); Ex parte Wilson 114 U.S. 417, 429 (1885)(holding that the District Court exceeded it's jurisdiction by holding the defendant to answer a crime and sentencing him without an indictment), United States v. Moore 37 F.3d 169, 173 (5th Cir. 1994)(the lack of an indictment in a federal felony case is a defect going to the jurisdiction of the Court's); see also Fed. R. Crim. P. 7(b). Id.

Movant's claims is not the type of jurisdictional claim that is directed at a defect in the indictment, Movant's claims is a claim where the second indictment violated the Double Jeopardy Clause to the first indictment and the dismissal of the first indictment mooted the case. Indeed this is the type of jurisdictional claim that this Court spoke about in Ex parte Bain, Cotton and Ex parte Wilson,

where no indictment was pending at the penalty phase. This is the type of extraordinary circumstances that this Court spoke about in Calderon v Thompson 523 U.S. 538, 549, 118 (1998), which warrants the recalling of the mandate.

The law was clearly established in Clemons v. Mississippi, Rutledge v. United States, United States v. Sanchez-Vargas, United States v. Gonzalez, United States Harding, United States v. Anaya and United States v. Rainey. The Opinion of the Court of Appeals is in conflict with all of these rulings that gave other defendants relief for the identical error that is present in this case.

Movant has satisfied the re-litigation bar and the requirements outlined in this Court's ruling in Shoop v. Hill, Movant humbly moves this Court to please allow the Constitution of the United States to apply to Movant as it did in all of the above listed cases.

CONCLUSION

For all of the above listed reasons, Movant prays that this court grant this Writ of Certiorari.

Respectfully submitted,

Sign 

Michael Stapleton 17627104

Dated this 18, May, , 2025