No. _____

In the

Supreme Court of the United States

PHILLIP DALE SELFA, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari

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Question Presented

Does the prophylactic presumption of prosecutorial vindictiveness (*North Carolina v. Pearce*, 395 U.S. 711 (1982)) apply when two different sovereigns are involved in the original and the subsequent prosecution of the accused?

PARTIES TO THE PROCEEDINGS

Petitioner is Phillip Dale Selfa.

Respondent is United States of America.

Table of Contents

Table of Authorities

U.S. Supreme Court Cases

U.S. Circuit Court Cases

U.S. Constitutional Provision

Federal Statutes

PETITION FOR WRIT OF CERTIORARI

Phillip Dale Selfa respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit, which affirmed Selfa's conviction and sentence.

Opinions Below

The unpublished opinion of the Court of Appeal can be found at App-001. See also *United States v. Selfa*, 720 Fed App'x 856 (9th Cir. 2018), 2018 WL 1958663.

The Court of Appeal denied a timely rehearing petition October 10, 2018. (App-037).

Jurisdiction

The Ninth Circuit denied appellant's rehearing petition October 10, 2018. The jurisdiction of this Court is, thus, timely invoked under 28 U.S.C. § 1254 (1). *Hohn v. United States*, 524 U.S. 236 (1998).

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Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case and Facts

A. Selfa was initially arrested jointly by the FBI and local law enforcement, charged with six counts of robbery in state court and faced an indeterminate life sentence

Following a joint investigation conducted by the FBI and local law enforcement agencies, Selfa was arrested as a suspect in six bank robberies.[1] (ER-047). Selfa was charged in the San Joaquin County Superior Court with six counts of robbery arising out of these events. The charges he faced exposed him an indeterminate life sentence, plus five years, as to each charged count. In a memorandum prepared six days after Selfa's arrest, an FBI agent noted Selfa's criminal history

[1] All record citations are to the record on appeal in the Court of Appeal.

and stated that given that history, Selfa could be charged in state court under the Three Strikes law, and would face a mandatory minimum sentence of 25 years to life in prison. (ER-047).

B. Days after Selfa won a motion reducing his state court exposure to a 10-year maximum sentence, the Government indicted Selfa on six counts of federal bank robbery for the exact same criminal conduct with a 20-year maximum potential sentence; state court charges were dismissed the next day

More than a year after the state court charges were filed, Selfa won a motion in state court to reduce his sentencing exposure on each count from a 30-to-life sentence to a maximum sentence of ten years.

Eleven days after the state court order in question, the Government filed a criminal complaint against Selfa, charging the same six bank robberies at issue in the state case and raising the maximum potential sentence to 20 years. (ER 10-13, 54-59). The next day, on the district attorney's motion, the state court dismissed the state charges against Selfa. (9/6/12 State Court RT at 2).

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C. The District Court Assumed All of Selfa's Allegations About His Prosecution By State and Federal Government Were True, But Found That The Presumption Of Vindictiveness Was Not Triggered Because Two Different Sovereigns Are Involved

Selfa moved to dismiss the indictment on the ground of prosecutorial vindictiveness. Selfa argued that under the totality of circumstances, there is a rebuttable presumption that the Government prosecuted Selfa in retaliation for Selfa winning a motion in his closely related state court case to remove mandatory life sentence threat and reduce sentencing exposure. Both prosecutions were for the same criminal acts. The FBI participated in the arrest for these crimes, and an FBI memo written a few days after the arrest shows the federal awareness of the state prosecution & potential life sentence under the Three Strikes law. Yet after letting the state prosecute the case for some 15 months, once Selfa was successful in reducing his state court maximum potential sentence to 10 years, the Government immediately indicted Selfa in federal court for exactly the same crimes, with a 20-year potential maximum sentence. (CR Docket No. 25).

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At the hearing on the motion, the prosecutor denied knowing anything about the state case against Selfa until shortly before the federal court complaint was filed. The prosecutor also characterized the situation as "routine," in which the state would dismiss a case once state authorities find out the federal government has a detainer against the accused. (ER-020).

The district judge questioned the prosecutor about the reasons for deviating from the usual course of conduct, which supported an inference that the sudden decision to charge Selfa in federal court was tied to Selfa winning a sentencing motion in state court. (ER-022). The court described the case as "unusual" in that here, the Government could have indicted Selfa 15 months earlier but decided to let the state handle it until Selfa won a motion in state court and was no longer subject to a life sentence. (*Id*).

Despite the above, the district court denied the motion to dismiss the indictment. The district court assumed all of Selfa's alleged facts to be true. (ER-034). Citing *United States v. Robison*, 644 F.2d 1270 (9th Cir. 1981) and *United States v. Nance*, 962 F.2d 860 (9th Cir. 1992), the district court held that the presumption of vindictiveness was not

triggered because there were two different sovereigns involved. (ER-034).

D. The Court of Appeal's Decision That Presumption of Vindictiveness Did Not Apply

Citing *United States v. Goodwin*, 457 U.S. 368 (1982), at page 383, the Ninth Circuit held that presumption of vindictiveness is generally limited to "multiple opportunities for punishment before the same judge, prosecutor or sovereign." (App-003). And while the Ninth Circuit declined to completely prohibit application of the presumption in cases involving different sovereigns, the court "expressed doubt whether one sovereign's prosecution can be vindictive when it is alleged to have punished a defendant for rights he asserted against a different sovereign. (App-003, citing *United States v. Robi son*, 644 F.2d 1270, 1273 (9th Cir. 1981)).

Applying this rule, the Ninth Circuit agreed with the district court that the circumstances here did not trigger the presumption of vindictiveness. (App-004). The appellate court reasoned that there was no retrial to affect federal prosecutors' personal stake or trigger institutional bias against repeated proceedings. (*Id*). The Court of

Appeal reasoned also that the federal prosecution would not deter a future exercise of the right to avoid sentencing exposure under the California Three Strikes Law because the challenge here resulted in a less harsh sentencing exposure. (*Id*).

Finally, the Ninth Circuit held that even if Selfa's reduced sentencing exposure were a factor in his prosecution in federal court, there would be no basis for a vindictive prosecution claim because harsher federal penalties constitute a legitimate reason to bring federal charges. (App-003, citing *Nance*, 962 F.2d at 865).

Reasons for Granting the Writ

This Court Should Grant The Petition To Resolve a Constitutional Issue of Nationwide Importance As To Which There Confusion and Conflict Among Federal Circuit Courts

A. The Prophylactic Presumption of Vindictiveness

To protect the exercise of the accused's legal rights against prosecutorial retaliation, this Court has adopted a prophylactic rule. Under this rule, "in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to 'presume' an improper vindictive motive." *Goodwin*, 457 U.S. at 373. The reason for this rule is to free defendants

from fear of apprehension of retaliation by the prosecutors for exercising their rights. *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974).

B. The Question Presented Is Closely Related to *Tyler v. United States*, A Case Currently Pending Before The Court

This Court should grant review because the question presented is closely related to *Tyler v. United States*, in which the Court is considering the continuing viability of the dual sovereign exception to the Double Jeopardy Clause. As addressed later in the petition, the circuit court reason for declining to apply the presumption in dual sovereign situation is that an accused can be separately prosecuted by state and federal governments without violating the Double Jeopardy provision of the Fifth Amendment. (App-003; *Robison*, 644 F.2d at 1273.)

But should *Tyler* conclude that the dual sovereign exception is no longer valid, it would significantly undermine the rationale of the circuit court decisions that completely decline to apply the presumption of vindictiveness in a dual sovereign situation, as well as those that consider the involvement of dual sovereign a significant factor against applying the presumption of vindictiveness.

C. Problems With Circuit Courts' Interpretation of the Presumption of Vindictiveness in Dual Sovereign Context

Another reason to grant review is that the circuit court decisions addressing the presumption of vindictiveness in the dual sovereign context show confusion that requires guidance from this Court.

For example, one common reason for rejecting the presumption in dual sovereign scenario is the court of appeals' view that involvement of a different sovereign tends to negate the presumption of vindictiveness. *Robison*, 644 F.2d at 1273; see also *United States v. Schoolcraft,* 879 F.2d 64, 68 (3rd Cir. 1989) ("We note that the role of a separate sovereign in bringing charges against a defendant minimizes the likelihood of prosecutorial abuse"); *United States v. Cooper*, 617 Fed. App'x 249, 251 (4th Cir. 2015) [noting that most successful vindictive prosecution claims involve prosecutions by the same sovereign]; *United States v. Jarrett*, 447 F.3d 520, 528 (7th Cir. 2006) [same]; *United States v. Raymer*, 941 F.2d 1031, 1041 (10th Cir. 1991) ["Given a variety of fact patterns, federal courts repeatedly have rejected the idea that federal prosecution, after state proceedings, constitutes vindictive federal prosecution"].)

But nothing in decisions of this Court, such as *Goodwin* (cited by the Ninth Circuit here), to justify this refusal to invoke the presumption of vindictiveness based on the mere fact that the allegedly retaliatory prosecution is started by a different sovereign. *Goodwin* did not involve such a prosecution. Instead, *Goodwin* considered whether the presumption applied when, following a defendant's demand for a jury trial on a misdemeanor, the prosecutor charged the defendant with a felony offense. *Goodwin*, 457 U.S. at 383. Thus, this Court's explanation of why absence of certain factors of vindictive prosecution precluded application of the presumption of vindictiveness in *Goodwin* cannot be reasonably read as creating a bright rule for all cases. Yet circuit courts mistakenly cite *Goodwin* as the basis for not applying the presumption in a dual sovereign scenario.

Nor can the circuit courts' reading of the presumption of vindictiveness be reconciled with the practical reality of joint state-federal prosecutions. As the Ninth Circuit held in a closely related context, the Double Jeopardy Clause of the Fifth Amendment may bar consecutive and federal prosecutions when the later prosecution is a "sham and cover" for the earlier prosecution and thus is an extension of

that earlier prosecution. *United States v. Lucas*, 841 Fl.d 796, 803 (9th Cir. 2016). Different sovereigns may cooperate, but they are not allowed to collude to punish the defendant for exercising his statutory or constitutional rights.

There is a good reason to adopt the same rule for consecutive federal and state prosecution in the vindictive prosecution context. When two sovereigns cooperate in a joint investigation and prosecution, the two sovereigns share an institutional interest in the defendant's prosecution, as well personal and institutional biases against the defendant who exercised their rights in the earlier proceeding. In this scenario, the distinction between the two sovereigns may become practically meaningless and should not be a dominating factor in the analysis in all cases. Or, at minimum, there should be evidence each sovereign *independently* exercised its prosecutorial discretion.

Yet the current reading of the presumption by circuit courts *automatically* makes the mere involvement of a second sovereign a virtually dispositive factor in rejecting the presumption. A good illustration of this problem is the Seventh Circuit's decision in *Dickerson*, which, like this case involved a federal prosecution for bank

robbery started shortly state court prosecution for the same robbery was cut short by a grant of a suppression motion. *United States v. Dickerson*, 975 F.2d 1245, 1248 (7th Cir. 1992). The Seventh Circuit held that if a federal court granted a motion to suppress, the timing of a new federal charge alone "might raise an inference of actual vindictiveness." *Id*. at p. 1251. Yet the court refused to apply the presumption of vindictiveness because two different sovereigns involved, without exploring whether this fact mean that each sovereign exercised independent judgment. *Id*. at 1251-52.

In addition, a related problem with the circuit courts' reading of the presumption of vindictiveness is that it is too stringent. As noted earlier, presumption of vindictiveness is a prophylactic rule developed by this Court because "(t)he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." *North Carolina v. Pearce*, 395 U.S. 711, 725, 726 & n. 20 (1982). Since this presumption is not conclusive, it merely requires the defendant to create *a reasonable likelihood* of vindictiveness to force the Government to present objective evidence that the Government's actions did not stem from a vindictive motive or were justified by independent reasons

or intervening circumstances that dispel the appearance of vindictiveness. *Goodwin*, 457 U.S. at 373, 384; *United States v. Jenkins*, 504 F.3d 694, 700 (9th Cir. 2007).

Yet, for the most part, the circuit courts in these circumstances have effectively demanded proof of actual vindictiveness to apply the presumption. For example, in *Cooper*, the Fourth Circuit refused to apply the presumption even if there were evidence of local law enforcement bias in referring the case for federal prosecution, reasoning that the court cannot infer bias of the prosecutor from bias of investigating agents. *Cooper*, 617 Fed. App'x at 251, citing *United States v. Hastings*, 126 F.3d 310, 314 (4th Cir. 1997).[2] But given the rebuttable presumption and the difficulty a defendant would have proving actual bias, bias of referring investigating agents should require the Government to present objective evidence of non-vindictiveness.

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[2] See also *United States v. Woods*, 305 F. App'x 964, 967 (4th Cir. 2009) ["Even if we were to assume there was some evidence of animus on the part of Maryland law enforcement in referring Woods for prosecution pursuant to the Exile Initiative, there is no evidence to suggest that the Government official who actually made the decision to prosecute Woods was motivated by any impermissible consideration."]).

A similar flaw plagued the Seventh Circuit's analysis in *United States v. Jarrett*, 447 F.3d 520. The court held that the presumption did not apply even though local prosecutors were embarrassed by the dismissal of a state prosecution, followed by the federal prosecution. *Jarrett* reasoned that a possible bias of local prosecutors cannot be imputed to federal prosecutors because the court cannot "presume bad motives by the government." *Id*. at 528.

But the whole point of a prophylactic rule is to *presume* vindictiveness, at least for a limited purpose of requiring the Government to come up with objective evidence of non-vindictive motive for federal prosecution. It would be extremely difficult, if not impossible, for a defendant in this situation to present evidence of actual vindictiveness. Evidence of this nature is uniquely in the Government's hands. Yet the courts of appeal seem to be applying this rule as effectively demanding evidence of actual vindictiveness. But see *Jenkins*, 604 F.3d at 700 [presumption of vindictiveness applies so long as there is a "mere appearance" of prosecutorial vindictiveness].

For these reasons, this Court should grant review.

D. This Case Is A Good Vehicle To Address the Question Presented

This case presents this Court with a good opportunity to address the question presented. If this Court were to grant review and conclude that the presumption of vindictiveness must apply so long as there is a mere appearance of vindictiveness (i.e., even if other inferences from the evidence are possible), the presumption here would be triggered. Also, the Ninth Circuit's resolution of the issue was unreasonable.

1. Presumption of vindictiveness is triggered

Here, the record shows at least a reasonable appearance of a potential collusion between federal and state law enforcement and / or prosecutorial agencies. A *jointly* investigated case of the type that normally goes to federal court (ER-020) ends up in state court with (at minimum) *federal law enforcement* awareness that Selfa would face a life sentence. The case proceeds in state court for 15 months, and, only days after Selfa wins a reduction in sentencing exposure to *10 years*, it abruptly ends up in federal court where Selfa is facing a *20-year* maximum sentence; the state case is dismissed a day later.

On those facts, the Government should have been required to

present actual evidence (as opposed to unsworn statements by the prosecutor) that the federal prosecution was not "upping the ante" against Selfa for exercising his constitutional and statutory rights in state court.

This is also not a case, where the prosecutor's explanation (if accepted instead of evidence) would rebut the presumption. *Jenkins*, 504 F.3d at 701 ["Presumption of vindictiveness "must be overcome by objective evidence justifying the prosecutor's action"]. The prosecutor pointed to no change of circumstances that would provide a motive, independent of retaliation, for the sudden shift of this case to federal court on the heels of appellant exercising his rights in a closely related state court case by significantly reducing his sentencing exposure. (ER-019 to 025).

Instead, much like the argument about the presumption of the vindictiveness, the explanation is the individual prosecutor was personally unaware of the state case until a few days before filing the indictment. (ER 024 to ER-025). We concede that on this record, there is no evidence to doubt the *individual prosecutor's* lack of that knowledge.

But since the Government is an entity employing many attorneys, lack of an individual prosecutor's knowledge cannot conclusively resolve this matter. For example, law enforcement and prosecutorial agencies of the state and federal government would not be permitted to retaliate against a defendant by handing off this case to an unsuspecting individual prosecutor, or to use some sort of wink-and-nod arrangement between law enforcement agents and the prosecutors. If any such or similar acts occurred here, the concerns safeguarded by the presumption of vindictiveness would be implicated. *Goodwin*, 457 U.S. at 373-76.

Here, even if the individual prosecutor had not discussed the case with the state prosecutor before filing it, the circumstances strongly suggest that *someone* at the U.S. Attorneys' office had been aware of this case proceeding in state court all along. Because of the Government's *Petit* internal charging policy, letting this case be prosecuted by local authorities significantly restricts the Government's ability to later bring federal charges for the same criminal conduct.[3]

[3] *Petite v. United States*, 361 U.S. 529, 532 (1960); *Lucas*, 841 F.3d at 800 [an internal policy that generally precludes federal prosecution

And this is the type of case the Government says is a quintessential federal court case. (ER-020). As a result, there is a reasonable likelihood that federal law enforcement agents are not going to make this type of a charging decision in a major case on their own, without consulting federal prosecutors.

Plus, even if we accept as true that no one at the U.S. Attorney's Office knew about the state case until federal agents brought the case to this prosecutor, the record is still silent about (1) what did these agents know about the state case, and (2) what did they tell the prosecutor when they brought her this case. (ER-023 to ER-024). The district court judge posed those same questions to the prosecutor, and no direct response ever came. (ER-024). At minimum, these circumstances trigger a presumption of vindictiveness and require the Government to produce actual evidence of a non-vindictive motive for prosecution.

2. The Court of Appeal's resolution of the issue was unreasonable

In addition, this case is a proper vehicle to consider the question presented because the appellate court's resolution of the issue was

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after a state prosecution for the same crime unless certain factors exist].

erroneous. As noted earlier, the Ninth Circuit held that even if Selfa's win in state court were a factor in prosecuting him in federal court, it would not a basis for a vindictive prosecution claim because harsher penalty is a legitimate reason for federal court prosecution. (App-003 to 004, citing *Nance*, 962 F.2d at 865).

But *Nance* dealt with a materially different issue. There, the defendant argued that his due process rights were violated when the defendant was arrested for a drug offense by a joint federal-state task force and the task force referred the defendant for federal prosecution (rather than to state court) without the benefit of a neutral written policy governing such referrals. *Nance,* 962 F.2d at 864. In other words, the issue there was whether, faced with a possibility of prosecuting a case in a state or a federal court, potential severity of the sentence was a legitimate factor for the Government to consider. But that is not our issue.

Nance, unlike our situation, involved no claim that the federal prosecution was instituted *for a vindictive or improper motive after an exercise of a legal right*. This is a material difference because if the prosecution is motivated by vindictiveness or retaliation for exercise of

that right, that vindictiveness is not insulated from judicial review by a theoretical concern about harsher penalties. Yes, in deciding where to prosecute a defendant from the get-go in this situation, it is permissible to consider, which jurisdiction would impose a harsher penalty. But no, it would not be proper for the prosecutor to dismiss a state case and file a federal case on the very same facts to "up the ante" against the defendant after the defendant cut his maximum potential sentence in the state case. See, e.g., *United States v. Allen*, 954 F.2d 1160, 1165 (6th Cir. 1992) [decision to prosecute cannot be based on the defendant's exercise of a statutory or constitutional right]. This is especially true when the Government has not indicated that its interests would only be vindicated by a sentence of a particular length.

The appellate court is similarly mistaken that presumption of vindictiveness is not triggered. The court reasoned that there would not be a retrial in the same court to create personal or institutional bias. (App-004). But as noted earlier, when, as here, there is a joint federal-state effort to investigate and prosecute the same crime, the distinction between two different sovereigns effectively becomes a formality. It is not unreasonable to conclude that this significant reduction in

sentencing exposure creates biases similar to those in the same sovereign situation. Nothing more should be required to trigger a rebuttable presumption of vindictiveness.

Conclusion

For these reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

DATE: January 5, 2019

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