IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

NO. _____

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ALFONSO HERNANDEZ,

PETITIONER,

-vs.-

UNITED STATES OF AMERICA,

RESPONDENT.

_____
_____

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Can a defense lawyer, consistent with the Sixth Amendment, contravene his client's wishes to object to a violation of the Speedy Trial Act?

2. Whether the Ninth Circuit violated this Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), in affirming the district court's exclusion of 559-days under the Speedy Trial Act, between arraignment and trial, over Mr. Hernandez's objection, via his trial counsel's failure to join Mr. Hernandez's oral motion to dismiss the indictment?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Alfonso Hernandez respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 16, 2018.[1]

[1] No other petitioner is involved in this petition. A copy of the Ninth Circuit's opinion is attached as Appendix A.

OPINION BELOW

The Ninth Circuit Court of Appeal denied Mr. Hernandez's direct appeal on October 16, 2018. *United States v. Hernandez*, 17-10096, 740 F. App'x 124 (9th Cir. 2018).

JURISDICTION

On October 16, 2018, the Ninth Circuit entered its decision affirming Mr. Hernandez's conviction and sentence. The Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Const. Amend. V ("[n]o person shall . . . be deprived of life, liberty, or property, without due process of law").

2. U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and 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 defense.").

3. 18 U.S.C. § 3161(c)(1) "In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate [United States magistrate judge] on a complaint, the trial shall commence within seventy days from the date of such consent."

I. INTRODUCTION

The Speedy Trial Act guarantees a criminal defendant a trial within 70 days of the later of his indictment or arraignment, subject to certain exclusions. 18 U.S.C. § 3161. Where the Act is violated, the remedy is dismissal of the indictment. *See* 18 U.S.C. § 3162(a)(2).

However, dismissal is not automatic: "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty *or nolo contendere* shall constitute a waiver of the right to dismissal." *Id.*; *United States v. Brown*, 761 F.2d 1272, 1276–77 (9th Cir. 1985) (holding that defendant's "failure to move for dismissal under the Speedy Trial Act prior to trial results in waiver of the right to dismissal under it."). Thus, under Ninth Circuit law, the defendant bears the burden of raising his Speedy Trial Act claim in a timely motion to dismiss, or otherwise sees this argument waived.

II. REASONS FOR ISSUANCE OF THE WRIT

But what happens when a defendant demands in open court a speedy trial or dismissal, but the defendant's court-appointed counsel refuses to file such a written motion? The question presented in Mr. Hernandez's case is whether trial counsel can somehow override his or her client's express demand for a speedy trial in such a circumstance.

Mr. Hernandez is a first-time offender with no experience with the judicial system. He wanted a speedy trial. What he got was an endless stream of "ends of justice" continuances based on forbidden rationales that delayed Mr. Hernandez's trial, over his objection, 559 days.

Supreme Court Rule 10(a) provides in part that this Court may grant the grant of certiorari where a United States Court of Appeal has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter ... or has so "far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

The Ninth Circuit's decision in Mr. Hernandez's case is in conflict with the decision of this Court in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) and conflicts with the Fifth and Sixth Amendments and the rule of other federal circuit courts of appeal regarding the constitutional right to a speedy trial.

III. CASE HISTORY/ PROCCEDINGS BELOW

On November 1, 2012, Mr. Hernandez was charged in a two-count indictment with separate counts of receipt and distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2). The district court held numerous status and trial setting hearings. At each hearing the district court continued Mr. Hernandez's trial and excluded time via the "ends of justice" exclusion. During the proceedings,

Mr. Hernandez became frustrated with the district court's refusal to grant him his right to a speedy trial.

> The Court: Are you also asking to invoke your speedy trial right and have me set a trial date within the time frame set by the law?
>
> Mr. Hernandez: I don't understand. If I would like him to file for dismissal, and that is not possible, then I would like to go through to trial. Does that answer your question? [2ER 30]

The district court declined to even entertain Mr. Hernandez's motion to dismiss or set a speedy trial date.

> The Court: Listen to me. You need to understand what I'm saying very clearly because it is very important to your case for you to understand this. When you say you are entitled to a defense, you are entitled to a defense attorney, but you are not entitled to a defense if one does not exist. No lawyer is obligated to manufacture a defense that does not exist. As a matter of fact, they have ethical obligations not to do such a thing. So what I'm telling you is you want a lawyer who is going to be straightforward with you and tell you the truth as he sees it. And it sounds to me as though your attorney is doing that.
>
> Mr. Hernandez: No, sir. I don't agree with that at all. I have not been part of the scheduling process. I have not been part of this speedy trial process. Nobody has told me that my speedy trial process had been denied. I have been misinformed, uninformed. I have given him many many, many reasons, including Amendment violations, as to what you do next. I have asked him to file a dismissal. So far, I'm not -- nothing is being done. I'm being ignored. [2ER 31-32]
>
> ***

The Court: Listen. Now is not the time to try your case. I can't try your case. A jury has been invoked, a jury trial has been invoked. I'm not even going to be the trier of fact here.

Mr. Hernandez: With all due respect, I have heard words from attorneys such as, "You are wasting my time." "The truth doesn't matter." "That would cost a lot of money, but we have money." "It would be a lot of work to do that." These are answers to some of the questions that I have for them. Why aren't we going to trial? Why aren't we examining my -- why aren't we doing the forensics? I have been asking for this, from the very beginning of this. [2ER 32]

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Mr. Hernandez: I still feel like I'm not being listened

to.

The Court: Are you asking me to –

Mr. Hernandez: I have said already enough of violations that I believe he -- he has told me he is the one that has to file. There is enough violations. I want this on record.

The Court: Those matters are not before me right now. If and when they get before me, I will rule on them. But what I am asking you is are you telling me anything other than what you have told me as far as what you want this morning?

Mr. Hernandez: With all due respect, I feel like I have been lied to all along, and I'm just now learning that my speedy trial was violated to begin with. [2ER 34]

The district court ignored Mr. Hernandez's speedy trial request and ultimately continued Mr. Hernandez's trial, via hearings, written stipulations or minute orders, a whopping 559 days. None of these days were properly excludable under the STA. In this fashion, Mr. Hernandez's trial was continued, over his objection, until June 29, 2016. After a quick two-day trial, where Mr. Hernandez's counsel (who had stipulated to many of the continuances ostensibly to prepare) presented *literally no evidence, exhibits, or testimony of any kind*, a jury found Mr. Hernandez guilty of both counts charged. [CR 66]

On February 27, 2017, the district court sentenced Mr. Hernandez, a first-time offender, to 210 months in custody followed by 120 months of supervised release. [CR 2-9; ER 10-40] Mr. Hernandez sought review with the Ninth Circuit Court of Appeal. On October 16, 2018, the Ninth Circuit issued its memorandum decision, affirming the district court's exclusion of a whopping 559 days. This petition of certiorari followed.

IV. ANALYSIS

A DEFENSE LAWYER CANNOT CONTRAVENE HIS CLIENT'S CLEAR, UNAMBIGUOUS OBJECTION TO A VIOLATION OF HIS SPEEDY TRIAL RIGHTS.

As noted *supra*, Mr. Hernandez made an unequivocal demand for a speedy trial and for dismissal below. The Ninth Circuit faulted Mr. Hernandez for his trial counsel's failure to file a written motion to dismiss the indictment. In support, the

Ninth Circuit relied upon its prior decision in *United States v. Lam*, 251 F.3d 852, 854, 858 (9th Cir. 2001). In *Lam*, the Ninth Circuit held that absent a showing of deficient performance of counsel, a defendant's letters to the court and oral expression of a desire for a speedy trial are insufficient to override counsel's decision not to file a motion to dismiss the indictment.

However, even the Ninth Circuit's decision in *Lam* does not support the decision in Mr. Hernandez' case because *Lam* acknowledged that the outcome might have been different had Lam moved to substitute counsel and dismiss the indictment prior to trial. *Lam*, 251 F.3d at 858. Here, as the Ninth Circuit noted, Mr. Hernandez brought his quarrel with his counsel to the district court's attention; further, he did, unsuccessfully, ask for a speedy trial, to dismiss the indictment. Thus, *Lam* is of no assistance. Perhaps more importantly, *Lam* may no longer be good law in the wake of this Court more recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

A. The Ninth Circuit's decision conflicts with this Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

The Ninth Circuit framed the issue in this case as one of a conflict between Mr. Hernandez and his trial counsel that the Ninth Circuit – incorrectly – resolved in favor of the attorney's failure to file a written motion. The Ninth Circuit somehow interpreted trial counsel's failure to act on Mr. Hernandez's behalf, as a

joint decision by Mr. Hernandez as well:

> "Hernandez and his counsel *chose not to file a motion to dismiss*, and Hernandez's pre-trial statements and actions cannot be construed to override this statement." *Hernandez*, 740 F. App'x at 125 (emphasis supplied).

However, the Ninth Circuit's approach conflicts with this Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018)(holding that a defense lawyer cannot, consistent with the Sixth Amendment, contravene his client's wishes to object to an aspect of the government's case), the Fifth and Sixth Amendments, and the rule of other federal circuit courts of appeal regarding the constitutional right to a speedy trial.

In McCoy, this Court held that a defense lawyer cannot, consistent with the Sixth Amendment, contravene his client's wishes to object to an aspect of the government's case. In *McCoy*, this Court held that the defendant's protected right to direct the objective of his defense was completely abridged when the trial court allowed defense counsel to usurp control of this issue. This Court further held that this violation of McCoy's Sixth Amendment autonomy right was structural error because it abridged his right to make fundamental choices about his own defense and the effects of his counsel's admission were immeasurable and required reversal.

In Mr. Hernandez's case, *McCoy* dictates that the district court should not have continued the trial over Mr. Hernandez's personal objection and this Court cannot now hold against Mr. Hernandez the failure of his trial counsel to file a STA-based motion where Mr. Hernandez made the motion orally himself. To hold otherwise would "abridge his right to make fundamental choices about his own defense," and thus violate his statutory and constitutional right to a speedy trial and his Sixth Amendment right to defend against the prosecution.

B. The Ninth Circuit's decision conflicts with the Fifth and Sixth Amendments and the rule of other federal circuit courts of appeal regarding the constitutional right to a speedy trial.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.'" U.S. Const. amend VI. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). When assessing a constitutional speedy trial claim, among the factors the Court considers are the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530.

The first factor, the length of the delay, "trigger[s]" the speedy trial analysis. *Doggett v. United States*, 505 U.S. 647, 651 (1992); *see also Barker*, 407 U.S. at 530. In Mr. Hernandez's case, a 559-day delay is sufficient to trigger the analysis. Accordingly, a court must consider the length of the delay among the other Barker factors. *Doggett*, 505 U.S. at 652. "The delay that can be tolerated

for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531. Mr. Hernandez's case was not complex, and given his trial counsel's failure to present evidence, testimony or substantive argument of any kind, the delay was prima facie unreasonable.

As to the second factor, the reason for the delay, there was no compelling justification offered below. At each hearing the judge would make the same meaningless pro forma STA "findings" that the "ends of justice" rendered the STA a nullity in Mr. Hernandez's case. This was an unreasonable application of *Barker*, which provides that "different weights should be assigned to different reasons" with "more neutral reason[s] such as negligence or overcrowded courts . . . weigh[ing] less heavily" than deliberate attempts to delay. *Id.*; *see also Vermont v. Brillon*, 556 U.S. 81, 90 (2009); *Doggett*, 505 U.S. at 657.

As to the third factor, the assertion of the right, Mr. Hernandez unequivocally asserted his right to a speedy trial. *See Barker*, 407 U.S. at 531 (requiring a court to consider both "[w]hether and how" the defendant asserted the speedy trial right); *see also Id.* at 533 (holding that "none of the four factors . . . [is] necessary or sufficient").

As to the fourth factor, prejudice to the defendant: Mr. Hernandez was incarcerated; he suffered anxiety; travel restrictions; and financial hardship. All of which impacted his ability to hire private counsel, leaving him stuck with an

attorney who did virtually nothing whatsoever to prepare or defend Mr. Hernandez' case. *See Doggett*, 505 U.S. at 654 (recognizing multiple forms of prejudice); *Barker*, 407 U.S. at 532 (same). Thus, Mr. Hernandez was prejudiced.

V. CONCLUSION

This Court should grant review to provide badly needed guidance to lower courts in this recurring issue, as there is currently little guidance available. For the foregoing reasons, Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 16, 2018.

Respectfully submitted,

Dated: January 13, 2019

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