CASE NO. 18-8688

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

RKB

FEDRICK ALLEN MCSHAN
Petitioner

V.

UNITED STATE OF AMERICA
Respondent

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

PETITION FOR REHEARING

FEDERICK ALLEN MCSHAN, PRO SE

PETITION FOR REHEARING
(Sup. Ct. R. 44)

Pursuant to Rule 44 of this Court, Petitioner respectfully petitions for rehearing of this case before a full nine menber court.

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this Court held "a courts inherent power to recall a jury is limited to civil cases only. Given additional concerns in criminal cases, such as attachment of double jeopardy bar?" Smith v. Massachusetts, 160 L.Ed 2d 914 2005 543 us 462 473-474.

5. Did the Appellate Court err in denying to recall the mandate when it erroneously concluded Petitioner did not preserve his double jeopardy claim when the record reflects he did in fact reserve his double jeopardy claim?

GROUND 2

Petitioner presented prima facie evidence specifically supporting a Circuit split between the Circuit Courts of Appeals on the issue of whether a jury may be recalled after discharge.

The Fourth and Second Circuits have established a case-specific analysis of "whether the jurors became susceptible to outside influences and beyond the control of the Court once discharged." However the Eighth and Third Circuit has equally established a conflicting and competing view that when the Court Announces the jury's discharge, and they leave the presence of the Court their functions as jurors have ended, and neither with nor without the consent of the Court, can they amend or alter their verdict.

GROUND 3

In addition to the split the Sixth Circuit addressed the issue of whether a jury can be repolled after being discharged in Ross v. Petro, 515 F.3d 653 (6th Cir. 2007) explaining:

> "It is undisputed that the verdict forms played no role in Judge Bond's decision to declare a mistrial. In her opinion, the verdict forms, discovered during ex parte communications between herself and the jurors, after the mistrial had been declared and the jurors were officially discharged, but before they were actually dismissed, simply came to light too late to make a difference. Hrg. Tr. pp. 156-58, JA 262-64. Consistent with the 'well established' teaching of Gugliotta, 829 N.E.2d at 762, Judge Bond believed that the jury could not be reassembled at that point because the jury had already been discharged and the case adjourned." Hrg. Tr. p. 108, JA 214.

The Sixth Circuit has entered a decision denying Petitioner's Appeal in conflict with Ross v. Petro, the Eighth, and Third Circuits. Petitioner was not granted an opportunity by the Court to distinguish this case from the former cases of Summers v. United States, 11 F.2d 583 (4th Cir. 1926) (cites encased) and United States v. Rojas, 617 F.3d 669 (2nd Cir. 2010) (cites encased)

This case contains several factual and procedural distinctions from the case of Summers and Rojas that warrant its determination by a different rule:

1. In Summers the jury remained in their seats and was not

equal protection of the First and Fourteenth Amendment.

To protect his rights, Petitioner sought to Recall the Mandate as the Sixth Circuit erred by concluding Petitioner did not object to the District Court repolling the jury. (See Exhibit - 3) (See footnote - 4)

The Sixth Circuit refused to fix this grave error and denied Petitioner's Motion to Recall the Mandate. The Sixth Circuit's failure to correct this error or to provide him a viable avenue for relief on this double jeopardy claim has resulted in a miscarriage of Justice in its purest form. Furthermore, if this Honorable Court were to turn a blind eye on the constitutional violations that have occurred to Petitioner without redress, it's decision would go against the Fundamental principles of Law established by the United States Constitution, set forth to protect American Citizens Rights. In reference to recalling the mandate, is a matter of Fundamental Fairness to Petitioner and would not unduly burden this Court.

CONCLUSION

For the reasons stated above, Petitioner, Frederick Allen McShan. Pro Se, respectfully request this Court construe his pleading liberally and urges that this Petition for Rehearing be granted in the Interest of Justice, and that, on further consideration the Petition

for Writ of Certiorari be granted. Alternatively, Petitioner request this Court remand the matter back to the Appellate Court - with instructions to Recall the Mandate in order to re-evaluate the fatal factual error that Petitioner did not preserve his double jeopardy claim as the record unequivocally demonstrate he did preserve his double jeopardy claim - and consider the double jeopardy claim de novo; or grant relief by whatever means this Honorable Court deem just and appropriate.

I declare under penalty of perjury that the facts set forth above are true and correct to the best of my knowledge, information, and belief.

6/18/2019

DATE:

Fedrick McShan

Fedrick Allen McShan

Footnotes

*1 McDaniels v. Warden Cambridge Spring SCI, 700 Fed Appx 119, 29-31; 2017 U.S App LEXIS 12084 (3d Cir. 2017)

*2 Wagner v. Jones, 758 F.3d 1030, 1034-1037; 2014 U,.S. LEXIS 133399 (8th Cir. 2014)

*3 In Petitioner's case, he also argued that the DIstrict Court committed unconstitutional error by its ex parte communications with the jury, having taken place when the Judge went to jury chambers

without, first, consulting with defense counsel, nor being accompanied by defense counsel. The Sixth Circuit did not address this issue.

*4 This Court has the "inherent power" to recall a mandate, Calderon v. Thompson, 523 U.S. 538, 549, ...(1998). "One seeking recall of a mandate must demonstrate good cause for that action through a showing of exceptional circumstances, 'including but not limited to' fraud upon the court, clarification of an outstanding mandate, [or] correction of a clerical mistake." Petterson v. Haskin, 470 F.3d 645, 662 (6th Cir. 2006).

CERTIFICATE OF GOOD FAITH BY PETITIONER

I, Fedrick Allen McShan, Pro SE, certify that this Petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44 of the Rules of this Court.

Fedrick Allen McShan

CERTIFICATE STATING GROUNDS ARE LIMITED TO INTERVENING CIRCUMSTANCES OF SUBSTANTIAL OR CONTROLLING EFFECT OR TO OTHER SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED

I, Fedrick Allen McShan, Pro Se, certify that the grounds are limited to intervening circumstances of substantial or controlling effect and to other substantial grounds not previously presented.

Fedrick Allen McShan

I declare under penalty of perjury that the above Certificates are true and correct.

Executed on 6/18, 2019

Fedrick Allen Mcshan