

19-612

No. _____

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In The
Supreme Court of the United States

————◆————
HASSAN ABPIKAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

————◆————
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

————◆————
PETITION FOR WRIT OF CERTIORARI

————◆————
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In Propria Persona

————◆————
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SUPREME COURT, U.S.

QUESTION PRESENTED

1. Whether the 9th Circuit Court of Appeals Ruling on petitioner's claim to his Rights under the Speedy Trial Act is IN CONFLICT WITH OTHER CIRCUITS, when charges contained in the Criminal Complaint NOT brought in the Timely Original Indictment (August 20, 2008) but included in the UN-TIMELY materially broadened and substantially amended Superseding Indictment (November 24, 2009) (that does NOT relate back to the Original Indictment) arising from the same conduct that increased petitioner's sentence THREE-FOLD (more than fifteen months passed instead of 30 days) violates 18 U.S.C. § 3161(b)? *United States V. Uri Ammar*, 842 F.3d 1203 (11th Cir. 2011); *United States V. Palomba*, 31, F.3d 1203 (9th Cir.1994); *United States V. Timothy Alphonso Jones*, 23 F.3d 1307 (8th Cir. 1994); *United States V. Montoya*, 827 F.2d 143 (7th Cir. 1987); *United States V. Crane*, 776 F.2d 600 (6th Cir. 1985); *United States V. Dignam*, 716 F.3d 915 (5th Cir. 2013); *United States V Leftenant*, 314 F.3d 338 (4th Cir. 2003); *United States V. Cox*, 553 F. App'x 123 (3rd Cir. 2014); *United States V. Lucky*, 569 F.3d 101 (2nd Cir. 2009); *United States V. Bryant*, 523 F.3d 349 (D.C. Cir. 2008). (See **EXHIBIT A**).

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OPINIONS BELOW

The Opinion of the 9th Circuit Court on Petitioner's Direct Appeal is unreported. The Opinion of the District Court's Ruling on petitioner's Motion 28 U.S.C. § 2255 is unreported.

JURISDICTION

The Judgment of the Court of Appeals for the 9th Circuit on a Direct Appeal was entered on July 14, 2014. Pro Se Petitioner, Hassan Abpikar ("Abpikar") filed for a timely motion under 28 U.S.C. § 2255 on November 6, 2014. The District Court Honorable Judge Advila Denied the § 2255 and Denied Certificate of Appealability ("COA") on August 15, 2018. Abpikar TIMELY requested for a COA from the 9th Circuit Court of Appeals which was Denied on April 25, 2019. (See **EXHIBIT B**).

Abpikar TIMELY requested for a "Motion To Reconsider, and Motion for Hearing En Banc Hearing" (Docket Entry No. 5) Which was Denied on June 27, 2019. (See **EXHIBIT C**).

Abpikar Now, on September 22, 2019, files his TIMELY Petition For a Writ of Certiorari in Propria Persona.

The Jurisdiction of this Honorable United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3161(b) of title 18 of the United States Code provides in part:

“Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.”

Other Provisions involved:

Section 3161(c), Section (c)(2), Section 3161(h), 3161(h)(1)(A); ETC . . .

PROCEDURAL STATEMENT

Pro Se Petitioner, Hassan Abpikar (“Abpikar”) Respectfully submits this *TIMELY* petition for a Writ of Certiorari of Appealability (“COA”) to the United States Court of Appeals for the 9th Circuit.

On August 15, 2018 the District Court Denied Abpikar’s motion pursuant to 28 U.S.C. § 2255 (hereinafter “motion § 2255”); and Denied Certificate of Appealability (“COA”). (See D.C. Doc 358, Case No. 5:08-CR-00560-RMW-1 (EJD)) [hereinafter, “Order”].

On April 25, 2019 the 9th Circuit Court of Appeals Denied Abpikar’s request for a COA. (See **EXHIBIT B**).

On June 27, 2019 the 9th Circuit Court of Appeals also Denied Abpikar's request for "Motion to Reconsider, and Motion for a Hearing En Banc". (See **EXHIBIT C**).

Abpikar's **TIMELY** request for a Petition for a Writ of Certiorari follows:

**REASONS FOR GRANTING A
WRIT OF CERTIORARI**

Abpikar is entitled to a COA, based on the 5 (five) reasons set below:

(1) DENYING ABPIKAR'S COA BY THE 9TH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE OTHER CIRCUIT COURT OF APPEALS

The 9th Circuit Court of Appeals denying Abpikar's request for a COA is *IN CONFLICT with the other Circuit Courts*, because Abpikar's Right to his Sixth Amendment Rights under the U.S. Constitution were violated when charges contained in the Criminal Complaint NOT brought in the timely Original Indictment but included in an *Untimely* Superseding Indictment arising from the same conduct that increased Abpikar's sentence THREE-FOLD (more than fifteen months passed instead of 30 days) violates 18 U.S.C. § 3161(b) and § 3161(c)? *United States V. Uri Ammar*, 842 F.3d 1203 (11th Cir. 2011); *United States V. Palomba*, 31, F.3d 1203 (9th Cir.1994); *United States V.*

Timothy Alphonso Jones, 23 F.3d 1307 (8th Cir. 1994); *United States V. Montoya*, 827 F.2d 143 (7th Cir. 1987); *United States V. Crane*, 776 F.2d 600 (6th Cir. 1985); *United States V Dignam*, 716 F.3d 915 (5th Cir. 2013); *United States V. Leftenant*, 314 F.3d 338 (4th Cir. 2003); *United States V. Cox*, 553 F. App'x 123 (3d Cir. 2014); *United States V. Lucky*, 569 F.3d 101 (2d Cir. 2009); *United States V. Bryant*, 523 F.3d 349 (D.C. Cir. 2008). (See **EXHIBIT A**).

**(2) ABPIKAR HAS SUBMITTED ALL FACTS
IN HIS MOTION 28 U.S.C. § 2255**

Abpikar in his § 2255 motion has submitted all the relevant documents, all the necessary facts and the pertinent Record, and argued effectively with a pinpoint accuracy supported by Controlling Case Laws and Statutes. Further, Abpikar by 'Clear and Convincing Evidence' and with a "Substantially showing" also proved beyond a reasonable doubt or any doubt at all that his rights to the 4th, 5th 6th, and 8th Amendments to the U.S. Constitution were violated, in that, any reasonable and rational fact finder or a reasonable jurist would have concluded that Abpikar has stated valid Constitutional claims that would entitle his motion § 2255 be Granted.

Abpikar now demonstrates by 'Clear and Convincing Evidence' and with a "Substantial Showing" that his Constitutional Rights under the 4th, 5th, 6th, and 8th Amendments to the U.S. Constitution have been violated as required by 28 U.S.C. § 2253(c)(2), because

(A) the District Court's 23-page Order does NOT even address or refer to Abpikar's claim that his Rights to a Speedy Trial were violated when the Untimely "materially broadened and substantially amended Superseding Indictment" returned more than 30 (thirty) days after the Original Indictment, in violation of 18 U.S.C. § 3161(b); and (B) that Abpikar was NOT brought to trial within the required 70 (seventy) day period, in violation of 18 U.S.C. § 3161(c)(1), among other Thirteen issues of substance due to (3) Ineffective Assistance of Trial Attorney David Paulson ("Trial Attorney Paulson") AND Appellate Attorney Eric Babcock ("Appellate Attorney Babcock"); and (4) the fact that District Court relies on Procedural Grounds in Denying Abpikar's Constitutional violations claims stated in his motion § 2255.

(3) DENIAL OF ABPIKAR'S RIGHTS TO SPEEDY TRIAL ACT CLAIM

District Court's Order, with All Respect, does NOT even address or refer to the Constitutional violation issues that Abpikar has claimed in his motion§ 2255 whatsoever. The District Court does NOT address Abpikar's claim in reference to the Speedy Trial Act violations, 18 U.S.C. § 3161-3174, DURING FOUR PERIOD OF TIME: (A) Competency and Psychological Examination, (B) Pretrial Motion Preparation, (C) Superseding Indictment is in Violation of 18 U.S.C. §§ 3161(b), 3161(c), and (D) Pre-Indictment & Post-Indictment Delay.

(4) SUPERSEDING INDICTMENT IS IN VIOLATION OF 18 U.S.C. §§ 3161(b), 3161(c)(1)

Because: (1) more than fifteen months passed (as opposed to the required 30 days under the STA) from Abpikar's arrest on August 8, 2008 until November 24, 2009 filing of the Superseding Indictment, and (2) the Superseding indictment was materially broadened and Substantially Amended and contains charges that omitted in the Original Indictment from the same conduct [filling out a Naturalization Application, form N-400] and does NOT relate back to the August 20, 2008 Original Indictment, thus is Untimely. See *United States V. Palomba*, 31 F.3d 1456, 1463 (9th Cir. 1994) (“[C]harges contained in the Criminal Complaint NOT brought in the timely Original Indictment but included in an *Untimely* Superseding Indictment (more than 30 days) violates 18 U.S.C. § 3161(b). . . . Holding that complaint was sufficiently broad to encompass acts alleged in Superseding indictment even though complaint did not specifically identify such acts In short, the Superseding Indictment charged Palomba in an *Untimely* manner with an offense which was contained in the complaint but which was not preserved against sanction 3162(a)(1) dismissal either by such facial factual differences or by inclusion in the timely Original Indictment.”); See also *United States V. Pollock*, See 726 F.2d 1345 (9th Cir. 1984); See also *United States V. Karsseboom*, 881 F.2d 604, 607 (9th Cir. 1989) (“the 70-day clock continues and does not begin anew unless the original indictment in its entirety has been previously dismissed”); *United States v. Clymer*, 25 F.3d 824 (9th

Cir. 1994) (“[a]lthough the grand jury returned a superseding indictment, this action did not restart the Speedy Trial Act clock. When a superseding indictment contains charges which, under double-jeopardy principles, are required to be joined with the original charges, Speedy Trial Act calculations begin from the date of the original indictment.”); See also *United States V. Rojas-Contreras*, 474 U.S. 231, 239, 106 S. Ct. 555, 88 L.Ed.2d 537 (1985) (“[I]t would make little sense to restart both the 30-day and 70-day periods whenever there is a Superseding Indictment.”). (See also 9th Cir. Doc. 58 at 6-8 in reference to *United States V. Palomba*, *supra*)

Abpikar submitted and argued in his motion § 2255 that his Right to a Speedy Trial under 18 U.S.C. § 3161(b) [the 30-day clock] and 18 U.S.C. § 3161(c)(1) [the 70-day clock] have been violated in a 7-page long discussion with supporting Statutes and Case Laws from the 9th Circuit and the U.S. Supreme Court. BUT the District Court’s 23-page Order does NOT even refer to it, NOR does it even address Abpikar’s Speedy Trial claims under 18 U.S.C. § 3161(b), 3161(c)(1). (See motion § 2255 at 24 and at 17-24.)

(5) COMPARISON OF ORIGINAL INDICTMENT TO SUPERSEDING INDICTMENT SHOWS THAT

The August 20, 2008 Original Indictment was still validly pending, when “materially broadened and substantially amended Superseding Indictment” was

returned 15 (fifteen) months later on November 24, 2009 in an Untimely manner, arising from the same conduct [filling out a Naturalization application] contained the same repeated charges of the August 7, 2008 Criminal Complaint but omitted from the Original Indictment that is well beyond the required 30 (thirty) days in violation of 18 U.S.C. § 3161(b), based on the reasons below:

The Naturalization Application, from which the charges stem, was signed and dated on September 19, 2004. The charges in the Original Indictment are:

Count 1: Failure to disclose his prior 1980 Okla. conviction, 18 U.S.C. § 1015(a), Count 2: Failure to disclose his correct home address, 18 U.S.C. § 1015(a), and Count 3: Failure to disclose above false statement under oath, 18 U.S.C. § 1015(a).

The materially amended and substantially amended superseding Indictment contains NEW Charges, expanding the original indictment from three to six counts, set below:

Two Counts: making false statement under oath, 18 U.S.C. § 1015(a),

Two counts: Concealing material facts from a Gov. Agency, 18 U.S.C. § 1001(a), Two Counts: Perjury, 18 U.S.C. § 1621. And The Superseding Indictment stated:

(A Abpikar failed to disclose his prior 1982 marriage,

- (B) Abpikar failed to disclose his 1980 Oklahoma arrest and conviction,
- (C) Abpikar failed to disclose his prior May 14, 2005 arrest,
- (D) Abpikar committed perjury when he signed the Naturalization Application,
- (E) Abpikar committed perjury on May 18, 2005 when appeared before the Immigration Examining Officer, and
- (F) Abpikar failed to disclose his correct home address.

The materially broadened and substantially Amended Superseding Indictment increased the basis for conviction [It increased Abpikar sentence by three-fold] *without* prior Notice to Abpikar to be prepared for his defense.

In addition, the prosecutor Kaleba was *FULLY AWARE* of all the above amended charges when the August 7, 2008 Complaint was filed. He also knew of Abpikar's May 14, 2005 arrest during the Bond Hearing on August 13, 2008 when prosecutor Kaleba himself presented Abpikar's Rap Sheet to the Honorable Magistrate Judge Trumbull. Moreover, prosecutor Kaleba *KNEW* from Abpikar's Removal Proceedings May 30, 2006 Notice To Appear ("NTA") when he presented it to the Magistrate Judge Trumbull that refers to the charge of March 6, 2006 [as a result of the May 14, 2005 arrest]. Therefore, there is NO excuse for the Government to explain why it did NOT assert all the charges in the Original Indictment or within the

required 30 (thirty) days under the STA to form a Superseding Indictment, because the Government was FULLY AWARE of all the charges when they filed the Criminal Complaint on August 7, 2008 as a result of the same conduct of filling out a Naturalization Application. And all of sudden, after 15 months, they decided to materially broaden and Substantially Amend the Original Indictment in an Untimely manner.

Accordingly, because the new charges in the November 24, 2009 Superseding Indictment which were omitted in the Original Indictment, were filed more than 30 days in an Untimely manner in the Superseding Indictment that repeated charges stated in the complaint [over thirty days before] arising from the same scheme or conduct (Naturalization Application) violates Abpikar's Right to speedy Trial Act under 18 U.S.C. § 3161(b) that plainly requires such charge shall be Dismissed. 18 U.S.C. § 3162 (a)(1). See *United States V. Palomba*, 31 F.3d 1456, 1463 (9th Cir. 1994) ("[C]harges contained in the Criminal Complaint NOT brought in the timely Original Indictment but included in an *Untimely* Superseding Indictment (more than 30 days) violates 18 U.S.C. § 3161(b). . . . Holding that complaint was sufficiently broad to encompass acts alleged in Superseding indictment even though complaint did not specifically identify such acts. . . . In short, the Superseding Indictment charged Palomba in an *Untimely* manner with an offense which was contained in the complaint but which was not preserved against sanction 3162(a)(1) dismissal either by such

facial factual differences or by inclusion in the timely Original Indictment.”).

On the other hand, Despite Abpikar repeatedly asking Trial Attorney Paulson numerous times to Move for the Dismissal of the Superseding Indictment or to amend Abpikar’s pending Motion for Dismissal of the Superseding Indictment, Attorney Paulson NEVER filed such a motion to Dismiss. As a result of the Trial Attorney Paulson Deliberate failure not to move for the Dismissal of the Indictment, Abpikar was convicted and sentenced to three Years in prison that Prejudiced Abpikar. (See Abpikar’s D.C. Doc 97, 102) (See *United States V. Palomba*, *supra* (“[d]efense counsel erred in failing to move for dismissal of the charges Untimely raised in the Superseding indictment under section 3161(b) of the STA. . . . We conclude that defense counsel’s error unfairly Prejudiced Palomba. It is settled that an error that may increase a defendant’s sentence is Prejudicial. See *United States V. Skillman*, 922 F.2d 1370, 1379 (9th Cir. 1990).

CONCLUSION

Based on all of the above reasons, a Writ of Certiorari must be GRANTED.

Originally filed: September 23, 2019
Re-filed: November 8, 2019

/s/ Hassan Abpikar
HASSAN ABPIKAR

**“SEE ATTACHED AFFIDAVIT
OF HASSAN ABPIKAR”**

IN THE SUPREME COURT OF
THE UNITED STATES

STATE OF CALIFORNIA)
) S. S. AFFIDAVIT
COUNTY OF SANTA CLARA)

AFFIDAVIT OF HASSAN ABPIKAR

I, Hassan Abpikar declare as follows:

1. On March 16, 2009 I INVOKED my Right to a Speedy trial in the Open Court, on the Record, before the trial Court, Honorable Judge White.
 2. On March 16, 2009 I was instructed to go to Magistrate Lloyd for Competency Evaluation *AFTER* I fired my Court appointed Attorney.
 3. A private Psychologist and a Court appointed Psychologist examined me, and they BOTH concluded that: "NOT only Abpikar is competent to stand trial, BUT he is above average."
 4. I had NO Court appearance for about 4 (FOUR) months, from March 16, 2009 to July 7, 2009, while I was incarcerated, for sole purpose of just waiting for a Court Appointed Psychologist who was 10 minutes driving away from my jail in the Santa Clara County.
 5. Long time experienced Trial Attorney Paulson NEVER moved the Court to make a ruling on my Pro Se Motion to Dismiss Indictment for the Speedy Trial Act violation, NOR did he ever file on his own on my behalf.

6. Appeal Attorney Babcock intentionally and on a Corrupt Purpose did NOT raise all my appealable issues (as shown hereby and on the 28 U.S.C. § 2255 on the Direct Appeal, and instead, he ONLY raised NON-Relevant issues that he knew the 9th Circuit Court of Appeals would reject.

I **DO SWEAR** and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on this 12th day of September 12, 2019 in the City of San Jose, California.

/s/ Hassan Abpikar
HASSAN ABPIKAR