

No. **19-6869**

ORIGINAL

SUPREME COURT OF THE UNITED STATES

FILED

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SUPREME COURT, U.S.

In re Michael Anthony Jefferson

Petitioner

VS.

State of Arizona
David Shinn et, al.
Warden Bruno Stolc
Attorney General Mark Brnovich
Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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I. Questions Presented

- A. Do prosecutors create the appearance and presumption of vindictiveness requiring dismissal of a case and violate the rule in Blackledge v. Perry when prosecutors resurrect a charge which was known to them and pending for nearly 5 years and only filed on the day a person exercises his rights and wins a motion to suppress on a different case?
- B. In the interest of justice and for the concern of the public should a criminal case be dismissed if someone is imprisoned, deprived of their liberty, and punished for exercising legal protected rights?
- C. When charges are filed with no action taken in a case for several years and only resurrected on the day a person invokes his constitutional rights in a subsequent case and prevails does this violate one's speedy trial rights as articulated in Barker v. Wingo?

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:

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- A. To deter Prosecutors from violating due process by using criminal charges to punish defendants from exercising statutory and constitutional rights
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Appendix D 9th Circuit Court of Appeals denial of a COA

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IV. Petition for Writ of Certiorari

Michael Anthony Jefferson, an inmate currently incarcerated at Red Rock Correctional Center in Eloy, Arizona, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals from denial of Writ of Habeas Corpus and a Certificate of Appealability.

V. Opinions Below

The following opinions and orders below are pertinent here and unpublished: opinion on Post-Conviction from Superior Court 12/30/2015 and 1/25/2016; Arizona Court of Appeals denial of Petition for Review 10/31/2017; order denying writ of habeas corpus from District Court 3/8/2019; order denying Certificate of Appealability 9/13/2019; Rehearing En banc denial 11/8/2019

VI. Jurisdiction

The District Court and the Court of Appeals for the Ninth Circuit denied Petitioner's request for Certificate of Appealability. In Hoh v. United States, 524 U.S. 236 (1998), this Court held that pursuant to 28 U.S.C. § 1257(1), the United States Supreme Court has jurisdiction, on certiorari, to review a denial of a request for a Certificate of Appealability by a Circuit Judge or panel of a Federal Court of Appeals and rules governed by 28 U.S.C. § 2254. Petitioner's Writ of Certiorari is timely within ninety days of the United States Court of Appeal's judgment.

VII. Standard Review

Denial of Certificate of Appealability

In Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029(2003), this Court clarified the standard of issuance of a Certificate of Appealability [hereafter "COA"]: "...A prisoner seeking a COA need only demonstrate a substantial showing of the denial of a constitutional right." A Petitioner satisfies this standard by demonstrating that jurist of reason could disagree with the District Court's resolution of his constitutional claims or that jurist could conclude the issues presented are adequate to deserve encouragement to proceed further. We do not require petitioner to prove before the issuance of a COA that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might

agree, after the COA has been granted and the case has received full consideration that Petitioner will not prevail. Id. 123 S. Ct. at 1034, citing Slack v. McDaniel, 529 U.S. 473 (2000).

In this present case, the District Court and the Court of Appeals denied the Petitioner a Certificate of Appealability despite the overwhelming evidence the Petitioner presented in his application for a Certificate of Appealability and his rebuttal of presumption of correctness in the State and District Courts. Petitioner presented clear evidence of ineffective assistance of counsel which led to counsel missing serious constitutional violations, vindictive prosecution, and a speedy trial violation. None of the Courts properly analyzed the merits of his constitutional claims or conducted an evidentiary hearing. This Court should issue a COA and grant Certiorari with full briefing in the interest of justice and for the concern of the public, and for reasons stated in this Writ of Certiorari.

VIII. Constitutional Provisions Involved

United States Constitution, Amendment V:

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 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 offense 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.

United States Constitution, Amendment 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.

United States Constitution, Amendment XIV § 1:

All persons born or naturalized in the United States and subjected to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privilege or life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 U.S.C. § 2254. The Standard for relief under 'AEDPA' is set forth in 28 U.S.C. § 2254(d)(1)(d)(2).

IX. STATEMENT OF THE CASE

Over 47 years ago, this Court held in Blackledge v. Perry, 417 U.S. 21 S. Ct. (1974) that prosecutors violate due process by bringing more serious charges against a defendant who has exercised his statutory or constitutional rights, and to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. See also U.S. v. Goodwin 457 U.S. 368 S. Ct. (1982)

This Court has also held that the government violates due process in prejudicially delaying a Petitioner's case to gain a tactical advantage which violates Petitioner's right to a speedy trial. See Klopfer v. NC 386 U.S. S. Ct. (1967).

This Court has also set the standards for Strickland regarding ineffective assistance of counsel which requires a two prong test: (1) deficient performance and (2) prejudice which is the standard, but for counsel's deficient performance was the Petitioner prejudiced and possibly affected the outcome of the circumstances of his case. See Strickland v. Washington 466 U.S. 668 S. Ct. (1984)

This case presents two questions of law, whether Mr. Jefferson's constitutional rights were violated; (1) when counsel failed to investigate the fact that the prosecutor punished Mr. Jefferson for exercising his constitutional and statutory rights on a case that had been in the government's possession for 5 years by filing charges shortly after Mr. Jefferson's successful motion to suppress on a different case and (2) when counsel failed to investigate the fact that the state intentionally delayed Mr. Jefferson's case which violated his rights to a speedy trial.

Mr. Jefferson, as a result of a jury trial, was convicted of money laundering in the 1st degree, 3 counts of aggravated identity theft, 1 count of trafficking in stolen identities, 1 count of control of an illegal enterprise, and 1 count of fraud schemes and artifices. Mr. Jefferson was sentence to a term of 31.5 years in the Department of Corrections. On January 27, 2012, Jefferson filed a timely notice of Appeal and the Court of Appeals affirmed the conviction on May 16, 2013. Mr. Jefferson filed a timely notice of post-conviction relief on May 17, 2013 and was appointed counsel who claimed to have found no colorable claims to raise on Mr. Jefferson's behalf. Mr. Jefferson then filed his own proper petition for post-conviction relief raising several claims of ineffective assistance of counsel. On December 30, 2015, the Court rejected and denied the PCR petition without conducting an evidentiary hearing or properly addressing the two claims contained in this Writ of Certiorari. Mr. Jefferson then filed for

clarification of the record because the Court refused to address important claims. The Court issued an order only addressing some claims in part on January 25, 2016. Mr. Jefferson, on January 30, 2016, sought review in the Arizona Court of Appeals and that Court granted review but denied relief on October 31, 2017. Mr. Jefferson petitioned for a Writ of Habeas Corpus on November 6, 2017 and the District Court adopted the magistrate's report and recommendation and denied relief and a Certificate of Appealability on March 8, 2019. Mr. Jefferson filed a timely notice of Appeal on March 18, 2019. Mr. Jefferson also filed a timely application for a Certificate of Appealability on March 25, 2019 in the 9th Circuit Court of Appeals. The Court of Appeals denied Mr. Jefferson a Certificate of Appealability on September 13, 2019. A rehearing En banc was denied on ~~November 8, 2019~~.

1. Pertinent Facts

On February 28, 2007, Mr. Jefferson was arrested at his home in Queen Creek Arizona for an alleged probation violation warrant. MCSO officers entered Mr. Jefferson's home without search warrants. After MCSO officers searched Mr. Jefferson's home, the Chandler Police executed a search warrant and a second search was conducted in connection to a pending fraud case with a hacked merchant account. Mr. Jefferson was taken into custody on the probation violation while in custody. The next day, Detective Jeremiah Stout from the Chandler Police Department transported Mr. Jefferson to the Chandler Police interview room where he questioned Mr. Jefferson about a business called Diamond Dice Records. Mr. Jefferson invoked his right to an attorney and the interview ceased. The Detective began to take finger prints

from Mr. Jefferson. Mr. Jefferson then asked the detective “what am I being charged with?” The detective responded “money laundering, fraud schemes, aggravated identity theft, trafficking in stolen identity, and control of an illegal enterprise.” Mr. Jefferson was then returned to jail and sentenced on his probation violation to two years in prison. Mr. Jefferson was released from prison on August 28, 2008 and heard nothing from the state on the pending charges and several years passed while the charges were still pending and known about. Mr. Jefferson was charged with possession of marijuana in 2009 in CR # 2009-179857-001DT. Defense Counsel Terrea L. Arnwine filed a motion to suppress due to an illegal search and seizure. Shortly after the evidentiary hearing was complete and resulted in dismissal of the case, another prosecutor named Alane Roby Ortega entered the Court room and cussed at Mr. Jefferson’s Attorney Terrea L. Arnwine for winning the case and said, “bitch you won this case let’s see you win this one.” Mr. Jefferson was arrested in Court at that time and this case was filed against him. This was the same day of his successful motion to suppress. Mr. Jefferson was later released that same day to pre-trial services. See Appendix F.

Prior to trial in a settlement conference on March 18, 2011 in the presence of Superior Court Judge Whitten, defense attorney James Buesing, Mr. Jefferson and County Attorney Alane Roby, Mr. Jefferson explained that this case against him had been pending for several years and was surprised it was just coming up. See Appendix G Mr. Jefferson then explained that after another case ended in his favor he was arrested in Court and an argument between the prosecutor and his attorney took place. Mr. Jefferson asked a couple of lawyers about the situation and said the lawyers told him this was vindictive prosecution. Mr. Jefferson then asked Mr. Buesing to file a motion to dismiss on vindictive prosecution because the timing of

the charges just after a successful motion to suppress seemed suspicious. Mr. Buesing said he was not going to investigate or file any motions. Mr. Jefferson also told Buesing the delay in his case had been long and wondered why charges were filed only after his successful motion to suppress 5 years later. Mr. Buesing again told Mr. Jefferson he was not going to investigate this claim either. Counsel failed to do any pre-trial investigation or file any motions. See Strickland v. Washington 466 U.S.668 S. Ct. (1984). See Appendix F. Counsel failed to challenge the timing of the charges filed just after Mr. Jefferson's successful motion to suppress or challenge the prejudicial delay. Had counsel filed the proper motion and conducted a proper investigation based on delay and vindictive prosecution this would have changed the outcome of Mr. Jefferson's case resulting in dismissal.

2. Vindictive Charges and Prejudicial Delay (IAC)

This case contains no procedural issues, all pleadings were filed timely and all claims were properly raised and exhausted, as well as, all claims hereto in this Writ of Certiorari. Despite the overwhelming evidence that Mr. Jefferson presented on his constitutional claims to both State and Federal Courts regarding (IAC) vindictive prosecution, the Courts never properly addressed the underlining merits of his constitutional issues or even conducted an evidentiary hearing. The rulings in those Courts were an unreasonable determination of the facts in light of the evidence Mr. Jefferson presented in support of his constitutional claim, as well as an unreasonable application of Strickland 2254(d)(2) with clear evidence in support of his constitutional claim presented to the District Court. The District Court should have resolved Mr.

Jefferson's constitutional claims differently. In ground two of the PCR and Habeas Corpus proceedings, Mr. Jefferson staked his vindictive prosecution claim on the timing of the charges that were filed against him after his successful motion to suppress on a different case. See U.S. v. Jenkins 504 F. 3d 694 (9th Cir. 2007) Mr. Jefferson explained and argued, "Defense counsel failed to investigate and move for dismissal on the ground of Prosecutorial Vindictiveness. After Mr. Jefferson's case was delayed for nearly 5 years before the charges were filed against him and charges were not filed until after Mr. Jefferson exercised his constitutional and statutory right on a successful motion to suppress in another case, due to a 4th Amendment violation. Mr. Jefferson submitted criminal docket displays proving to State and Federal Courts the timing of when the charges were filed. After the other case was dismissed on his successful motion to suppress on the same day, the prosecutor filed this current case against Mr. Jefferson that were in the prosecutor's possession for 5 years, which gives a rise to a presumption of Prosecutorial Vindictiveness as well as an appearance of vindictiveness. See U.S. v. Groves, 571 F.2d 450 (9th Cir. 1978) Since the case was in the State's possession for 5 years the State could have prosecuted Mr. Jefferson well before he won his successful motion to suppress and the timing of the charges created the appearance of vindictiveness. Alternatively Mr. Jefferson is entitled to a presumption of vindictiveness if he can show that the fraud charges were filed because he exercised a statutory procedural or constitutional right in circumstances that give rise to an appearance of vindictiveness. Mr. Jefferson's attorney Terrea L. Arnwine witnessed the retaliatory conduct of the prosecutor just after she litigated his successful motion to suppress. She submitted an affidavit in support of her claim. Mr. Jefferson submitted that affidavit to all State and Federal Courts. In another case where this exact set of circumstances occurred was a

case from the 6th Circuit in United States v. Ladeau 734 F. 3d 561 (6TH Cir. 2013). In that case, the Petitioner filed a motion to suppress and the government retaliated by filing charges after his successful motion to suppress on charges that were in the state's possession for 13 months. That Court dismissed the charges with prejudice. The Court stated this created an appearance of vindictiveness. The prosecutor was so angry that Mr. Jefferson had won the marijuana case on a successful motion to suppress that she cussed at him and his attorney and said "bitch you won this case let's see you win this one." Mr. Jefferson was immediately taken into custody after his successful motion with a dismissal of the marijuana case in CR 2009 – 179875 – 001 DT. This coincidence of events presents overwhelming circumstantial evidence that the charges were filed in retaliation of Mr. Jefferson exercising his constitutional and statutory rights which violates due process. See U.S. v. Goodwin 457 U.S. 368 S. Ct. (1982); Blackledge v. Perry 417 U.S. 21, 28 – 29 (1974).

In the case of U.S. v Jenkins 504 F. 3d 694 9th Cir. 2007) which is very similar to Mr. Jefferson's case, in that case an appearance and presumption of vindictiveness was established when the defendant was indicted on alien smuggling charges only after exercising her right to testify in her defense to a different marijuana importation case where the prosecution knew about the smuggling charges beforehand but did not bring charges until defendant exercised her legal rights. Since Mr. Jefferson's case was pending for so long there is a reasonable likelihood that the State would not have brought the fraud charges had not Mr. Jefferson moved to suppress the illegally seized evidence in the other case. The appearance of vindictiveness results only where as a practical matter that there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive

animus towards the defendant because he has exercised his specific legal rights. See U.S. v. Goodwin 457 U.S. 368 (1982). There is no doubt that counsel's ineffectiveness prejudices Mr. Jefferson's case by not investigating the fact that Mr. Jefferson was clearly punished for exercising his constitutional right when charges were filed against him the same day as his successful motion to suppress, with the shocking fact that the case was pending for nearly 5 years and was only resurrected after he exercised his rights which is a violation of due process and requires dismissal of the case. Appendix F shows the docket display and attorney affidavit regarding this claim.

As discussed before, the trial counsel failed to investigate the unreasonable prejudicial delay of Mr. Jefferson's case after several years passed. Charges were filed only on the same day of his successful motion to suppress. The delay in this case was enough to trigger the 4 factor balancing test articulated by Barker v. Wingo 407 US. 514, 530-32 (1972). (1) the length of delay (2) the reason for delay (3) whether defendant asserted speedy trial rights and (4) whether a defendant was prejudiced by the delay. To succeed on a claim of pre-indictment delay, a Petitioner must show actual prejudice and that the delay was due to intentional government inaction. See U.S. v. Marion, 404 U.S. 307, 324 (1971) A pre-indictment delay approaching 1 year meets the threshold for applying the balance test because of presumed prejudicial. See Doggett v. U.S. 505 U.S. 647 S. Ct. (1992) In Mr. Jefferson's case, there is a nexus between the pre-indictment delay and the misconduct when filing the charges several years later only after Mr. Jefferson exercised his rights on a successful motion to suppress. The government laid and waited until after Mr. Jefferson's successful motion to suppress. This was nothing more than a ploy to gain a tactical advantage over Mr. Jefferson. The State has never

been held accountable to answer the reason for the delay or the reason for charging Mr. Jefferson after his successful motion to suppress. All of the Courts have turned a blind eye to these issues and avoided addressing the merits of these claims. Also, the delay had been so long in this case that Mr. Jefferson was unable to confront certain witnesses because the witnesses were no longer available and/or were substituted by the prosecution with other witnesses. The only remedy for a violation of one's speedy trial rights which results in an unnecessary delay is to dismiss the case with prejudice. Klopfer v. NC, 386 U.S. 213 S. Ct. (1967) See also U.S. v. Strunk 412 U.S. 434 S.Ct. (1973) To deny Mr. Jefferson relief in State and Federal Courts was clearly unreasonable and the Court of Appeals erred by not issuing a COA because Mr. Jefferson had made a showing of a denial of a substantial constitutional right and these claims are for sure debatable among jurist of reason. Mr. Jefferson was clearly denied his right to the effective assistance of counsel.

X. REASON FOR GRANTING THE WRIT

A. To deter Prosecutors from violating due process by using criminal charges to punish defendant for exercising statutory and constitutional rights.

In Blackledge v. Perry 417 U. s. 21 S. Ct. (1974), this Court held that the due process clause prohibits a prosecutor from using criminal charges to penalize a defendant's valid exercise of constitutional or statutory rights. When a defendant, after successfully exercising legal rights during or after a trial, is re-indicted and faces an increase in the number or severity of charges

can create an appearance and presumption of vindictiveness. In U.S. v. Goodwin, 457 U.S. 368, 373 (1982), a presumption of vindictiveness when defendant has established that (1) the prosecutor has some stake in deterring defendant's exercise of rights and (2) the prosecutor's conduct was unreasonable, due process is violated if new charges are brought with retaliatory motive. This Court has established that the only remedy for this type of constitutional violation is to dismiss the case and vacate any sentence imposed. Here, none of the Courts wanted to address the merits of this claim and the Courts just stated that Mr. Jefferson failed to make a showing under Strickland regarding counsel's failure to investigate this claim. Without conducting an evidentiary hearing and despite the overwhelming showing of a substantial denial of a constitutional right. The Court of Appeals for the Ninth Circuit erred by failing to issue a Certificate of Appealability. Mr. Jefferson also staked his vindictive prosecution claim on the timing of the charges that were filed against him on the same day. The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings when they denied Mr. Jefferson a COA to proceed to briefing and not following the standards set forth in Miller-El v. Cockrell 537 U.S. 322, 123 S. Ct. 1029 (2003). Mr. Jefferson needs to show a substantial showing of a denial of a constitutional right and the claim presented to the Court is debatable among jurist of reason. Mr. Jefferson meets this standard and the prima facie claims Mr. Jefferson presented have been decided differently by different panels within the same circuit and is in direct opposition of Strickland and Blackledge v. Perry line of cases. The reason that claims regarding vindictive prosecution are of national importance is because these basic rights

exercised by American citizens are what the Framers of the constitution entailed such as the freedom of speech, freedom of religion, freedom of press, the right of the people to peaceably assemble, and to petition the Government for a redress of grievances. To punish a person because he or she has chosen to exercise his right on what the law plainly allows him to do is a gross violation of due process and basic protected rights under the United States Constitution. In circumstances where Courts have not answered or they have not been held accountable for these type of actions and conduct is the correct purpose for issuing an extraordinary Writ of Certiorari. The issues that Mr. Jefferson sets forth in this writ of certiorari are of grave concern, not just for Mr. Jefferson, but society as a whole. Prosecutors should be held accountable for using criminal charges to punish individuals for exercising protected constitutional rights. There is no doubt that Mr. Jefferson was vindictively prosecuted and all the circumstances and timing of the charges is a clear appearance and, at the very least, a strong presumption of vindictiveness and counsel was ineffective for failing to investigate this claim. A criminal trial that is the product of vindictive prosecution is fundamentally unfair and invalidates the conviction and must be dismissed. This present case is a clear case of prosecutorial vindictiveness and by far more insidious than most Blackledge line of cases. Citizens should be free from reprisal of the prosecution punishing them for exercising procedural, statutory, and constitutional rights. A case must be dismissed when the justice system fails to protect defendants from prosecutor's actions to punish them from what the law allows them to do. This Court should intervene in this serious matter and grant Certiorari.

B. To prevent the government from violating defendant's rights to a speedy trial and unnecessary prejudicial delay.

This Court should address the issue regarding the staggering prejudicial delay of this case. Appendix G shows proof of the delay and proof that witnesses who had nothing to do with the case were allowed in Court and were substituted by the prosecution in place of the real witnesses due to the excessive delay. Mr. Jefferson was deprived of the opportunity to face his original accuser. A delay approaching 1 year is presumed to be prejudicial and is enough to trigger the Barker Factors articulated in Barker v. Wingo by the prosecution's ambush like tactics of the delay and only bringing the case up once Mr. Jefferson exercised his rights on a successful motion to suppress. See U.S. v. Ladeau, 734 F. 3d 561 (6th Cir. 2013), U.S. v. Lavasco 431 U.S. 783, 790 (1977).

The delay was a complete disadvantage to Mr. Jefferson with an ambush lie in wait tactic to gain a tactical advantage and only bring the case up against Mr. Jefferson after he had exercised his constitutional rights several years later. This Court has the authority to dismiss this entire case with prejudice and should do so because the issues raised are in conflict with the authorities from this Court as well as the 9th Circuit and it is of grave concern to national and public interest to deter prosecutors from punishing suspects for exercising procedural, constitutional, and statutory rights and from purposeful delay of someone's case to deprive them of due process. Mr. Jefferson's case is a text book example of ineffective assistance of counsel, vindictive prosecution, and purposeful prejudicial delay.

XI. CONCLUSION

For the foregoing reasons, Mr. Jefferson respectfully requests that this Court issue a writ of certiorari to review the judgment of the 9th Circuit Court of Appeals' denial of a COA and order full briefing.

Dated this 19 day of 11/2019

Respectfully submitted

Michael Jefferson