19-7796 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

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IN RE KEVIN HAWKINS

PETITIONER,

VS.

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

ORIGINAL

RESPECTFULLY SUBMITTED,

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I N T H E

S U P R E M E C O U R T O F T H E U N I T E D S T A T E S

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In re KEVIN HAWKINS

Petitioner,

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PETITION FOR

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Q U E S T I O N (S) P R E S E N T E D

Does the Ninth Circuit circuit rules supersede the Federal Rules of Appellate Procedures, particular when it results in depriving an individual due process before the court?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

OPINIONS BELOW

The date on which the United States Court of Appeals denied the Petitioner for an Interlocutory Appeal was June 24, 2019.

A timely petition for reconsideration on the Interlocutory Appeal was denied by the United States Court of Appeals on the following date: ~~November~~ OCT 31, 2019, and a copy of the order denying reconsideration appears at **Appedix A.**

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPELLATE RULES OF PROCEDURE

FRAP RULE 40

Rule 40. Petition for Panel Rehearing

(a) Time to File: Contents: Answer; Action by the Court if Granted:
(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment.

FRAP RULE 35

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeal en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
(1) en banc consideration is necessary to secure or maintain uniformity of the court's decision; or
(2) the proceeding involves a question of exceptional importance.
(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing or en banc.
(1) The petition must begin with a statement that either:
(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decision; or
(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel

decisions of other United States Court of Appeals that have addressed the issue.
(2) Except by the court's permission:
(A) a petition for an en banc hearing.

RULES OF THE SUPREME COURT

SCOTUS RULE 10

RULE 10. Considerations Governing Review on Certiorari
a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; 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;

SCOTUS RULE 11

Rule 11. Certiorari to a United States Court of Appeals Before Judgment

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.

STATEMENT OF THE CASE

This case is about Petitioner requesting a ruling on the merits of double jeopardy and vindictive prosecution against the Respondents in this case where the Respondents claim to have a right to retry Petitioner on the exact same evidence in which was reversed for a Sixth Amendment Constitutional violation of self-representation and counsel being forced upon him.

The Ninth Circuit Court of Appeals rejected Petitioner's Interlocutory Appeal after the District Court refused to dismiss the case on double jeopardy grounds and vindictive prosecution. In doing so, the Ninth Circuit operated contrary to the Federal

Rules of Appellate Procedure from claiming that the 9th Circuit Court of Appeals did not have jurisdiction from a final order and that double jeopardy was not a colorable claim. It is this Supreme Court that orders, and approves the Appellate Rules which, the 9th Circuit's decision are in opposition to.

The 9th Circuit Court of Appeals in its ruling denying Petitioner's request for an Interlocutory Appeal and Rehearing, violated the Federal Rules of Appellate procedure, in its order did not provide an explanation as to why the Court rejected his request, it states. Petitioner's motion for reconsideration (Docket Entry No. 24) is denied. See 9th Cir. R. 27-10. No further filings will be entertained in this closed case.

On June 24, 2019, the Ninth Court of Appeals dismissed Petitioner's Interlocutory Appeal on the grounds that the Court lacked jurisdiction under 28 U.S.C. § 1291; Citing **Midland Asphalt Corp. v. United States**, 489 U.S. 794, 798 (1989) (stating that finality requirement **"generally"** prohibits appellate review until after conviction and imposition of sentence"); The Court also cited **United States v. Steel**, 626 F. 3d 1028, 1030 (9th Cir. 2010) (dismissing defendant's interlocutory appeal for lack of jurisdiction because double jeopardy claim was not colorable).

A R G U M E N T

On the contrary to 28 U.S.C. §1291, the 9th Circuit Court of Appeals did in fact have jurisdiction pursuant to 28 U.S.C. §1292(b) because the 9th Circuit Court of Appeals jurisdiction involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation based upon the fact that Petitioner has satisfied the requirement of **Midland Asphalt Corp. v. United States, supra**, 489 U.S. 794, 798 (1989), from Petitioner having already been convicted, sentenced, served the entire sentence and having the matter reversed on Appeal by the

9th Circuit Court of Appeals after serving the complete sentence in case number 16-10145.

Petitioner also met the requirements of **United States v. Steel, supra**, 626 F. 3d 1028, 1030 (9th Cir. 2010) based upon; (1) jeopardy attached in an earlier proceeding (**Serfass v. United States**, 420 U.S. 377, 391-92 (1975) (double jeopardy clause does not bar appeal or further prosecution when jeopardy had not attached in initial proceeding) and (2) that the original jeopardy has terminated (**Richardson v. United States**, 468 U.S. 317, 325 (1984) (double jeopardy clause by its terms applies only when some event terminates original jeopardy).

Petitioner's first trial, conviction and sentence certainly meets the requirement of **Midland Asphalt Corp. v. United States, supra**,, which is contrary to the ruling of this Court declaring that the Court does not have jurisdiction. Dismissing Appellant's interlocutory appeal from this Court declaring that Court lacked jurisdiction based upon Petitioner's double jeopardy claim was not colorable is contrary to other opinions pursuant to U.S.C. §1292(b).

In **Serfass v. United States, supra**, the Court held that "without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." Jeopardy attaches in a jury trial when the jury is impaneled and sworn. See **Downum v. United States**, 372 U.S. 737-38 (1963).

Petitioner contends that once he was convicted, jeopardy is not terminated with respect to the conviction until the criminal proceedings have "run their full course." See **Pierce v. Georgia**, 398 U.S. 323, 326 (1970). If a defendant's conviction is reversed on appeal, as was done in the present case by the 9th Circuit, and retrial is permitted when the defendant is considered to be in "continuing jeopardy." See **Justices of Boston Mun. Court v. Lydon**, 466 U.S. 294, 308 (1984) (concept of continuing jeopardy implicit in rule permitting retrial after reversal of conviction). Once the proceedings have run their full course, a conviction terminates the original jeopardy and a subsequent prosecution for the same offense is barred by the double jeopardy

clause. See **In re Neilsen**, 131 U.S. 167, 187 (1889) (final conviction for unlawful cohabitation bars subsequent prosecution for adultery included as integral part of convicted offense).

Petitioner moved for a dismissal of the charges prior to the retrial that was denied by the district court before filing his interlocutory appeal giving the Court jurisdiction under U.S.C. §1292(b). See **United States v. Bascaro**, 742 F. 2d 1335, 1365 (11th Cir. 1984).

Petitioner made a timely motion before the district court and made a prima facie, nonfrivolous showing of former jeopardy from (a) the prior conviction; (2) sentence; (3) completion of serving the entire sentence and (4) reversal of the conviction by the 9th Circuit Court of Appeals. The government now must show that the offense charged is not the same one for which Petitioner was formerly placed in jeopardy.

The Second, Third, Fifth, and Eleventh Circuits have held that the burden shifts to the government to prove by a preponderance of the evidence that the offenses are separate. See **United States v. Mallah**, 503 F. 2d 971, 986 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975); **United States v. Inmon**, 568 F. 2d 326, 332 (3d Cir. 1977), cert. denied, 444 U.S. 859 (1979)' **United States v. Loyd**, 743 F. 2d 1555, 1562-63 (11th Cir. 1984). The 9th Circuit Court of Appeals had characterized the government's burden as that of going forward with evidence, and held that the ultimate burden of persuasion on the double jeopardy claim remains with the defendant. **United States v. Bendis**, 681 F. 2d 561, 564 (9th Cir. 1981), cert. denied, 459 U.S. 973 (1982). The **Bendis** court acknowledged that the government's burden "may in practical effect amount to a burden to persuade the court." Id. at 564. The government in the present case did not attempt to persuade the court and failed to file an Answer after the 9th Circuit Court of Appeals Order.

In **Abney v. United States**, 431 U.S. 651 (1977), the Supreme Court held that a defendant may immediately appeal the denial of a pretrial double jeopardy motion.

Id. at 662. The **Abney** Court recognized that a denial of double jeopardy motion meets the criteria for an appealable order established in **Cohen v. Beneficial Indus. Loan Corp.**, 337 U.S. 541 (1949). To be appealable, an interlocutory order must fully dispose of the question at issue, resolve an issue completely collateral to the cause of action asserted, and involve important right that would be irreparable lost if review had to await final judgment. **Abney**, 431 U.S. at 658. A decision on a double jeopardy motion fully disposes of that issue and is collateral to the issue of guilt. Id. at 659. Because the double jeopardy clause is a guarantee against the ordeal of undergoing a second trial, the right would be irreparable lost if appeal were delayed until after the second trial. Id. at 661-62. But cf. **United States v. Tom**, 787 F. 2d 65, 68 (2d Cir. 1986) (Abney does not authorize interlocutory appeal from pretrial denial of double jeopardy claim when defendant each charged with at least two other predicate acts on which trial will occur in any event). In the present case there was only one charge. All other charges were dismissed under a violation of the Speedy Trial Act in violation of the Sixth Amendment.

The Abney Court reasons that an accused's right under the double jeopardy clause would be "so significantly undermined" if appellate review were postponded until after trial. See **Abney**, 431 U.S. at 660-62 (clause protects defendant from ordeal of retrial, not merely punishment that may result; protection lost if accused forced to **"run the gauntlet"** a second time before appeal). When a state court rejects a double jeopardy claim, the defendant, after exhausting state remedies, may pursue the claim in a federal habeas corpus action prior to state trial. Petitioner hereby reserve his writ to file a subsequent Federal Writ of Habeas Corpus or Mandamus and Prohibition before the 9th Circuit Court of Appeals on the merits of his double jeopardy and vindictive prosecution claim. See **Justices of Boston Mun. Court v. Lydon, supra**, 466 U.S. 294, 302-03 (1984) (state remedies exhausted when, under Massachusetts' two trier trial system, petitioner had no appellate alternative to trial de novo).

Petitioner contends that once jeopardy has attached and the original jeopardy has terminated, either in an acquittal or in a conviction that has run its full course, the double jeopardy clause prohibits prosecution for the same offense. See **Price v. Georgia**, 398. The Supreme Court in **Price v. Georgia, supra**, made clear that the protection was not limited to successive punishments for the same offense, but to "being twice **put** in jeopardy". Id. (emphasis added). The right, therefore, is preventive rather than remedial in character.

Rule 35(b)(1)(B) is very clear that en banc can be requested if, "the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated." Here, Petitioner's Motion for Reconsideration is of exceptional importance as he requested relief to prohibit the Respondent from retrying a case based upon the same evidence after Petitioner had served the entire sentence, which amounts to vindictive prosecution.

The 9th Circuits rehearing determination, en banc, is also in direct opposition to the Supreme Court decision approving all of the Federal Rules of Appellate Procedure, including Rule 35(a). In Petitioner's situation, the same two judges who reversed Petitioner's case for a Sixth Amendment violation, were the same two judges that denied Petitioner's Interlocutory appeal, did not disqualify themselves before ruling that the 9th Circuit Court of Appeal did not have jurisdiction and that the double jeopardy claims was not colorable.

Pro se Petitioner is entitled to Due Process, the same way as any party represented by an attorney. The very rules the 9th Circuit deprived Petitioner of, are undoubtedly the rules provide for due process.

It is still a shock to the conscious of Petitioner that the 9th Circuit Court of Appeals is allowing the Respondent to conduct a second trial after reversing the case for a Structural error of the Sixth Amendment right to self-representation and counsel being forced upon Petitioner.

REASONS FOR GRANTING THE PETITION

1) To maintain order and uniformity amongst the Circuits Court of Appeals.

2) This High Court set forth the Federal Rules of Appellate Procedure, and, the Appellate Courts must comply with the procedures, particularly the procedures that directly impact due process, as in this case.

3) Ensure Petitioner is provided equal opportunity to due process before judiciary, same as all others before it.

C O N C L U S I O N

This Writ is sought as Petitioner's case is still ongoing in the 9th Circuit from requesting a stay of mandate pending the decision of this Court on writ of certiorari. Therefore, if this Court agrees with the Petitioner, he respectfully request that upon remand, require two different judges to be assigned to this case.

Finally, as you are the 9-Justices before the highest court of country, please understand that a petitioner suffering from hypertension, post traumatice stress disorder, anxiety and falshbacks triggered by traumatic events, and is poor, has a hard enough time presenting a case to the courts withou the assistance of counsel.

For the two 9th Circuit Judges that chose to deprive Petitioner of his rights, under Color of Law, Petitioner also request that this Court review Judicial Misconduct of the Circuit Judges and not have their colleague, the Chief Justice of the 9th Circuit render a determination. Petitioner would be even more impressed if you select two of your Justices - Gorsuch, and Sotomayer, to consider the misconduct of those two judges, and take the appropriate action.

Petitioner does not need to know the details, and respects whatever determination is made.

I swear under the penalty of perjury that all of the information in this Petition for Writ of Certiorari is true, correct and complete, and to those matters stated on information and belief, Ibelieve them to be true.

DATED: December ___, 2019

Respectfully submitted,

Kevin Hawkins,
Petitioner In Pro Se/