

No. 21-5654

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL ORTEGA AKA SALVADOR HERRERO FLORES

Petitioner,

v.

STATE OF OREGON,

Respondent

On petition for a writ of Certiorari

to the Oregon Supreme Court

PETITION FOR REHEARING

Salvador Amílcar Herrera

A 206147530

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Pro Se Petitioner

December 21, 2021

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III. PREAMBLE

Pursuant to Supreme Court Rule 44.2, Michael Ortega aka Salvador Herrero Flores (“defendant” or “Ortega”), respectfully petitions for rehearing of the Court’s Petition for a Writ of Certiorari, decision issued on October 12, 2021. See *Ortega v. Oregon*, 2021 U.S. LEXIS 4966 (U.S. October 12, 2021). And that his submissions should be liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081(2007). Pursuant to Supreme Court Rule 44.1 and 29.2, this petition for rehearing was sent to the court within 25 days on this Court’s decision in this case. He is currently detained at Northwest Detention Center in Tacoma, Washington, and a Pro Se party. This is corrected and resubmitted petition in correct form within 15 days of the letter sent by this court on December 10, 2021. Pursuant Rule 44.6 of the rules of this court. Letter is attached in Appendices.

The Oregon Court of Appeal and Oregon Supreme Court has ignored petitioner’s constitutional claims and affirmed a void judgment, stripping him of his United State Constitutional Rights. Petitioner was tried on July 2014 for eight charges, but convicted only of fives convictions and acquitted for the rest. He appealed 2014 Judgment on the grounds of, inter alia, “Denial of Self-representation”, [a “Structural Error”, no subject to harmless error review, but automatic reversal]. The Oregon Court of Appeal decided that he had been deprived of his constitutional right of self-representation guaranteed by Sixth Amendment. See. *State v. Ortega*, 286, Ore. App. 673 (Or. Ct. App. July 6, 2017).

Subsequently States decided to not submit any review in Oregon Supreme Court or reconsideration on Court of Appeals, therefore, the Court of Appeals issued its Appellate Judgment on August 24, 2017, reversing all his convictions and remanded his case to be dismissed. He was retried in his remanded and convicted on February 2018, because the trial court determined that he had been remanded because of “Trial Error” and that “Double Jeopardy Clause” did not apply in his case, petitioner triggered his Double Jeopardy rights under United States Constitution which were denied by the trial court.

He appealed his 2018 judgment contending that, inter alia, his Double Jeopardy Clause protection had been infringed due to he had been retried and convicted for the same charges after a reversal of all his convictions on ground Denial of Self-representation rights, a Structural Error. The Oregon Court Appeal affirmed without opinion. see *State v. Ortega*, 2021 Ore. App. LEXIS 45 (Or. Ct. App. January 13, 2021). He petitioned for review in Oregon Supreme Court, it denied. See *State v. Ortega*, 2021 Ore. LEXIS 360 (Or. June 10, 2021).

Subsequently, he petitioned for reconsideration in Oregon Supreme Court, but it was denied again. See *State v. Oregon*, 2021 Ore. LEXIS S61(Or. August 26, 2021). It heralds the “Double Jeopardy Clause” of the Fifth Amendment and the “Self-representation right” of the Sixth Amendment to the United States Constitution. This is not a hyperbolic warning, but a fact unless this Court grants review.

This petition shows just how Oregon States has deprived petitioner of his liberty without a Due Process, depriving him of his Double Jeopardy Protection, which the Oregon Court of Appeals and Supreme Court relied on in coming to its decision.

IV. PETITION FOR REHEARING

The original Certiorari petition asked this court to resolve one issue of first impression: This case present the questions whether a state criminal defendant who has had his convictions overturned in collateral proceeding on the ground "Denial of Self-representation rights", a "Structural Error", no subject to harmless error-review, but automatic reversal, is an issue of ultimate fact determinate by a valid and final judgment which may again be litigated between the same parties or if it is barred [such persecution for the same charges] by Collateral Estoppel Doctrine, an integral part of the protection against Double Jeopardy of the Fifth Amendment to United States which was extended to States prosecution on 1969 through the Fourteenth Amendment United States Constitution as established by this court in *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d. 707 (1969). Petitioner contends that under these circumstances retrial infringe the constitutional protection against double jeopardy.

V. REASONS FOR REHEARING

This petition for rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. See Rule 44.2. The Oregon Court of Appeal has decided important federal questions in a way that conflicts with relevant decisions of this court, regarding a constitutional guarantees and federal law, therefore, this honorable court has the opportunity of citing the long history of the rights of the right of self representation and double jeopardy prohibition, and consensus of federal court authority and state constitution in support.

Petitioner has described as he has fully briefed, and the lower courts have decided, the controversial and profound deprivation of his constitutional rights by Oregon States that already lasted more than six years to force petitioner to re-file an original Habeas action in the district court and once again pursue every issue that has already been exhaustively litigated in this case. The balance of hardship weighs decisively in petitioner's favor. Since unconstitutional convictions could be used against him as ground of inadmissibility in immigration proceeding and his continue custody, which has been sustained for such unconstitutional convictions already for two years in immigration detention, and could be extended deliberately, therefore, he would continue deprived of his liberty without a Due Process. These considerations are highly to remove any obstacle to a grant the rehearing considering the questions raised in his petition.

Since for over a Century, this honorable Court has held that the Fifth Amendment to the United States Constitution command that no “person be subject for the same offense to be twice put in jeopardy of life or limb” U.S. Const. Amend. V. The Double Jeopardy Clause, applicable to the States through the Due Process Clause of the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784 787, 89 S Ct. 2056, 23 L. Ed. 707 (1969), protects against a second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 656 (1969). The Double Jeopardy Clause, also preclude the states from making repeated attempts to convict an individual for an allege offense, *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S. Ct. 2083, 72 L. Ed. 2d 416(1982); *United States v. Dinitz*, 424 U.S. 600, 606, 96 S. Ct. 1075, 47 L. Ed. 2d 267(1967).

The Double Jeopardy prohibition against retrial of the same offense also encompasses the concept of Collateral Estoppel as a constitutional requirement, this principle “bars relitigation between the same parties of issues actually determined at a previous trial” *Ashe v. Swenson*, 397 U.S. 437-444(U.S. April 6, 1970). *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S. Ct 13 49, 51 l. Ed. 2d 642(1977) (Controlling constitutional principle, and motivating double Jeopardy Clause is prohibition against multiple trials and corresponding of oppression by the government).

This honorable Court did not acknowledge Oregon’s lack of compliance with this Constitutional command and its decisions did not address the complicated questions

about Double Jeopardy guarantees in the context of unique procedural posture of this case. Rehearing is appropriate for this honorable Court to consider the following substantial question:

"Whether a state criminal defendant who has had his convictions overturned in collateral proceeding on the ground "Denial of Self-representation rights", a "Structural Error", no subject to harmless error-review, but automatic reversal, is an issue of ultimate fact determinated by a valid and final judgment which may again be litigated between the same parties or is barred such prosecution for the same charges by Collateral Estoppel Doctrine, an integral part of the protection against Double Jeopardy of the Fifth Amendment?"

Petitioner contends that under these circumstances retrial was barred by Collateral Estoppel Doctrine, an integral part of the constitutional protection against double jeopardy, a constitutional command established over a quarter of a Century ago. Therefore his Fifth Amendment guarantee again double jeopardy was violated.

For over the half of a Century, This honorable Court has elucidated that The Double Jeopardy prohibition against retrial of the same offense also encompasses the Collateral Estoppel as a constitutional requirement, *Turner v. Arkansas*, 407 U.S. 366, 92 S. Ct. 2096, 32 L. Ed. 2d 798(1972) (per curiam). The principle of collateral Estoppel, which "bars relitigation between the same parties of issues actually determined at a previous trial" *Ashe v. Swenson*, 397 U.S. 442 (U.S. April 6, 1970). Also, the government is not permitted to take advantage of the collateral estoppel

doctrine in criminal cases, as established in *Simpson v. Florida*, U.S.384(1971). The Standards conform with the Model Penal Code in their view that a defendant should be protected against successive prosecutions for the same conduct. See. ALI Model Penal Code § 1.08, comment (Tent. Draft No. 5, 1956).

Under *Ashe v. Swenson*, (1970) 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 469, The Fifth Amendment guarantee against Double Jeopardy encompasses the doctrine of collateral estoppel. The doctrine (recently renamed “issue preclusion”) is defined as follows:

“When an issue of fact or law is actually litigated and determined by a final and valid judgment, and the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”

(Restatement of the law, 2d, Judgments, §68 (Tent. Draft No. 1, March 28, 1973).)

Applying *Ashe v. Swenson*, petitioner’s reprosecution on February 2018 for the same charges Counts 1,3, 5, 6 and 7 was barred by Double Jeopardy.

Ninth Circuit in *United States v. Hernandez*, the Ninth Circuit court applied the Collateral Estoppel analysis involving three-steps process:

(1) An identification of the issue in two actions for the same purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) An examination of the prior case to decide whether the issue was “litigated” in the first case; (3) An examination of the record

of the prior proceeding to ascertain whether the issue was necessarily decided in the first case. 572 F.2d 218, 220 (9th Cir. 1978)

Applying this standard, in petitioner's case the issue at the 2014 first trial was to persecute petitioner for Count 1: Assault in the Second Degree, Count 2, 3 and 4: Unlawful Use of a Weapon, Count 5: Coercion, Count 6: Strangulation, Count 7 and 8: Assault in the Fourth Degree.

Petitioner was deprived of his fourth Amendment Rights, when he was arrested in his apartment without an arrest warrant and no exigent circumstances, subsequently all evidence was searched and seized. He was deprived of his right to counsel, when he was assisted ineffectively by his trial lawyer who refused to introduce any evidence and subpoena any witnesses in his favor [even when there were 8 potential witnesses, who rebutting evidence and false accusation by the supposed victim]. He refused to file any motion to suppress evidence obtained in violation of his constitutional rights. And finally, he denied petitioner 185 pages of the discovery where were the original pictures taken to the supposed victim and medical record and he never looked for the surveillance video of the petitioner's apartment building.

Finally, petitioner was deprived of his rights guaranteed by Sixth and fourteenth Amendment as: to self-representation, secure counsel of his own choice his counsel, be represent effectively, present evidence and witnesses in his favor, when he asked

the court for all these rights and the court forced him to retain his lawyer who decided to refuse to afford all privileges and rights to petitioner's defense.

The Government present its witnesses: the supposed victim, petitioner's roommate (who neither heard nor saw nothing), Officers Polices and supposed victim's daughter (who stating 'hearsay' statements), and a nurse of the hospital, and introduced evidence as medical record (stating "No Injuries" and "no bruises"), photos of petitioner's department and items without any scientific proof as fingerprints or ADN (they were obtained in violation of petitioner's Fourth Amendments rights), victim's photos modified of her face and body. Petitioner's lawyer did not challenge the State's weak case.

Petitioner was convicted of Counts 1: Assault in the Second Degree; 3: Unlawful Use of a Weapon; 5: Coercion; 6: Strangulation; 7: Assault in the Fourth Degree. He was sentenced to 70 months of imprisonment. He appealed and his appellate counsel just decided to plea that petitioner had been denied of his constitutional right of self-representation. The Court of Appeals of Oregon reversed all his convictions on the grounds of Denial of Self-representation, a "Structural Error", no subject to harmless review, but automatic reversal. see *State v. Ortega*, 286 Ore. App. 673 (Or. Ct. App. July 6, 2017).

In February 2018, four years later after petitioner's release for Appellate Judgment, petitioner was again prosecuted for the same charges which had been reversed on the grounds of Denial of Self-representation, a "Structural Error", no subject to

harmless review, but automatic reversal. Counts 1: Assault in the Second Degree; 3: Unlawful Use of a Weapon; 5: Coercion; 6: Strangulation; 7: Assault in the Fourth Degree. Presenting the same issue, same witnesses, and same evidence. He was convicted again and sentenced to 70 months of imprisonment. The state as in *Ashe v. Swenson* treated the first trial as no more than a dry run for the second prosecution, but this is precisely what the Constitutional guarantee forbids. 397 U.S. 447.

In short, the issue in both trials was the prosecution against petitioner with Counts 1: Assault in the Second Degree; 3: Unlawful Use of a Weapon; 5: Coercion; 6: Strangulation; 7: Assault in the Fourth Degree.

The first two steps in this issue preclusion inquiry was satisfied. The issue at both trials was substantially identical, and the issue was actually litigated in the former trial.

Therefore, the only questions which is arguably open is whether the issue was decided in petitioner's favor when the Court of Appeals reversed all his convictions on the ground of Denial of Self-representation right, a Structural Error, no subject to harmless error, but automatic reversal.

On 2014, Petitioner was convicted of Counts 1: Assault in the Second Degree; 3: Unlawful Use of a Weapon; 5: Coercion; 6: Strangulation; 7: Assault in the Fourth Degree. Petitioner appealed his judgment on grounds of Denial of self-representation, a "Structural Error", no subject to harmless error-review, but

automatic reversal. *United States v. Davila*, 569 U.S. at 611(“very limited class of errors’ that trigger automatic reversal they undermine the fairness of a criminal proceeding as a whole... includes ...denial of self-representation”). *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2D 35 (1999)(Structural Errors are “fundamental constitutional errors that ‘defy analysis by “harmless error” standards”)(quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 111 S. Ct. 1246, 113 L. Ed. 2D 302(1991)).

Three years later, on July 6, 2017, The Court of appeals he Oregon Court of Appeals asserted that petitioner had been deprived of Self-representation right and reversed all his convictions, see *State v. Ortega*, 286 Ore. App. 673 (Or. Ct. App. July 6, 2017), The state chose neither to petition for review in the Oregon Supreme Court nor to seek a reconsideration in the Oregon Court of Appeals.

Under State Statutes ORAP 14.05 provides, in part “appellate judgment means a decision of the Court of Appeals or Supreme Court together with a final order and the seal of the court”

“Final Order” means that part of the appellate judgment ordering payment of costs or attorney fees....

Therefore, the Court of Appeals issued its Appellate Judgment on August 24, 2017, becoming in a “Valid and Final Judgment”. it reversed all petitioner’s convictions and remanded petitioner’s case to be dismissed. See Attached a certified copy at Appendices.

Under Federal law a Structural Error is subject to automatic reversal, therefore, the reversal of all petitioner's convictions on the grounds of Denial of self-representation satisfied the third issue preclusion inquiry, since in an examination of the record of the prior proceeding, the issue was necessarily decided in the first case.

Even, although *Ashe v. Swenson* and *States v. Hernandez* are cases decided through acquittal, both were determined by a valid and final judgment and that issues cannot again be litigated between the same parties in any future lawsuit. At the same way Petitioner's reversal of all his convictions on the ground of Denial of self-representation issuing an Appellate Judgment on August 24, 2017 was determined by a valid and final judgment which barred second prosecution for the same charges as established Collateral Estoppel Doctrine, an integral part of the protection against Double Jeopardy of the Fifth Amendment. Therefore, petitioner considers that as in these cases his convictions should be reversed.

This case presents this honorable court with the opportunity of citing the long history of the right of double jeopardy prohibition and the Structural Error and Collateral Estoppel Doctrines, so as well consensus of federal court authority and state constitution in support. Absent intervention by this court, the Oregon court of appeals' decision will work to undermine the carefully-crafted procedural safeguards that this court has spent the past 50 years developing.

There are precisely the types of factual issues that not need to be resolved in full briefing and argument and for this reason, rehearing is appropriate. See *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)(summary disposition only appropriate in cases where "law is settled and stable, the facts are not in dispute, and the decision below is clearly in error").

VI. CONCLUSION

Petitioner respectfully request that this honorable Court grant the petition for rehearing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2021.

/s/  _____

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