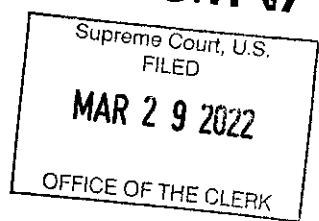


No. 21-7555

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN KERRY O'KEEFE — PETITIONER
(Your Name)

vs.

TIM GARRETT
THE STATE OF NEVADA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF THE STATE OF NEVADA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

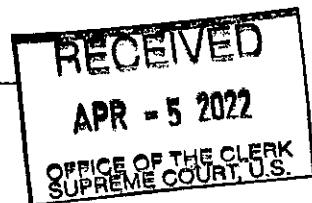
PETITION FOR WRIT OF CERTIORARI

Brian Kerry O'Keefe - #90244
(Your Name)

1200 Prison Road
(Address)

Lovelock, Nevada 89419
(City, State, Zip Code)

N/A
(Phone Number)



QUESTION(S) PRESENTED

Humbly as a case of first impression¹:

“Whether the liberty interest created by state statute extends to prisoners whose convictions are reversed and remanded back to class¹ of pretrial detainee, then devoid the procedural safeguard of effective assistance of counsel demonstrated by further unlawful restraint imposed by state improperly filing another information, on the same offense, contrary also to the Double Jeopardy Clause.”

1 - cf. Sandin, 515 U.S. at 484 (The liberty interest created by state statute is “generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”) see 45 GEO. L.J. ANN. REV. CRIM. PROC. 1140 (2016)

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:

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
EVANS V. MICHIGAN	133 S.Ct. 1069, 1081 (2013)
MARTINEZ V. RYAN	566 U.S. 1, 13 (2012)
McQUIGGIN V. PERKINS	569 U.S. 383 (2013)
MENNA V. NEW YORK	423 U.S. 61, 62 (1975)
SCHAD V. ARIZONA	501 U.S. 624, 632, 644 (1991)
PEOPLE V. SULLIVAN	173 N.Y. 122, 65 N.E. 989 (1903)
NEVADA V. MANGANA	33 Nev. 511, 518 (1910)
SANDIN V. CONNOR	515 U.S. 472 (1995)
STATUTES AND RULES	
NRCIVP 8	7
NR8 174.085	3, 4, 6 (Passim)
NRS 34.960	7
Habeas Rule 5 - Rules Governing 2254 Cases	6
Nev. Const., article I sec. 10 ("TWICE IN JEOPARDY")	6
OTHER	
"Double Jeopardy Clause" - FIFTH Const. Amendment	3, 5, 6
"Due Process Clause" - FOURTEENTH CONST. AMENDMENT	3, 6

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INDEX TO APPENDICES - ATTACHED AS EXHIBITS A -

APPENDIX A	ORDER OF AFFIRMANCE NOV 12 2021 NO. 83061-COA
APPENDIX B	ORDER DENYING REHEARING JAN 24 2022 NO. 83061-COA
APPENDIX C	ORDER DISMISSING THE CASE JUN 3 2021 NO. A-21-833626-C
APPENDIX D	ORDER DENYING PETITION FOR REVIEW FEB 14 2022 NO. 83061
APPENDIX E	ORDER OF REVERSAL AND REMAND APR 07 2010 NO. 53859
APPENDIX F	PETITION TO ESTABLISH FACTUAL INNOCENCE PURSUANT TO NRS 34.980 - 34.990 WHERE NEW EVIDENCE AS FEDERAL CIVIL ANSWER TO RELATED CASE C250630 MISREPRESENTS OPERATIVE FACT BY OMISSION THAT ANOTHER INFORMATION WAS FILED CONTRARY TO NRS 174.085 (3) LEADING WITH A NEW SECOND JEOPARDY ATTACHING BY JURY EMpanelment WITHOUT PRIMARY AUTHORITY OR JURISDICTION WHERE CLAIM WITHIN WARRANTS WRIT TO ISSUE FOR RESPONSE ON MERITS (FILED 04/27/2021)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the EIGHTH JUDICIAL DISTRICT court appears at Appendix C to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

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

For cases from **state courts**:

The date on which the highest state court decided my case was FEB. 14 2022. A copy of that decision appears at Appendix D.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const., FIFTH AMENDMENT : "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."
- U.S. Const., FOURTEENTH AMENDMENT : "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEVADA STATUTES

Title 14. Procedure in Criminal Cases.

Chapter 174. Arraignment and Preparation for Trial.

Pleadings and Motions Before Trial; Defenses and Objections

174.085. Proceedings not constituting acquittal; effect of acquittal on merits; proceedings constituting bar to another prosecution; retrial after discharge of jury; effect of voluntary dismissal.

1. If a defendant was formerly acquitted on the ground of a variance between the indictment, information or complaint and proof, or the indictment, information, or complaint was dismissed upon an objection to its form or substance, or in order to hold a defendant for a higher offense without a judgment of acquittal, it is not an acquittal of the same offense.

2. If a defendant is acquitted on the merits, the defendant is acquitted of the same offense, notwithstanding a defect in the form or substance in the indictment, information, or complaint on which the trial was had.

3. When a defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment, information or complaint, except as otherwise provided in subsections 5 and 6, the conviction, acquittal or jeopardy is a bar to another indictment, information or complaint for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which the defendant might have been convicted under that indictment, information or complaint.

STATEMENT OF THE CASE

1. Procedural History and Background (see APPENDIX F, EXHIBIT 6 - ORDER)²

O'Keefe (Petitioner) was tried in Nevada State court three times on charges of murder with the use of a deadly weapon, despite Nevada adopting the federal rights and protections of Schad v. Arizona, 501 U.S. 624, 644 (1991) pertaining to the "short form" murder charging practice and the well excepted "sullivan rule" concerning general verdict forms charging alternative theories of criminal liability equating a single crime.

(INITIATION OF THE PROSECUTION)

Nevada lodged a constitutionally and sufficient open murder information for a single crime and all the lesser and various mens rea. "First jeopardy" attached by jury empanelment on 3/16/2009. The first jury convicted and returned an implied acquittal for second degree murder w.d.w. on 3/20/2009. On April 7, 2010, the Nevada Supreme Court reversed O'Keefe's conviction and remanded for a new trial, based on insufficient evidence and trial court instructional error. (see APPENDIX E, ORDER OF REVERSAL AND REMAND)

On remand, "contrary" to NES 174.085 (3), the district court permits state prosecutors, newly assigned, to file another information on same offense - without the procedural safeguard of effective assistance of counsel - where unlawful restraint repeats in county jail. A second jeopardy resulted. The attorney general's answer omits this fact. Nevada Legislature promulgates a new mechanism of law, effective 7/1/2019, without limitations and treated as a civil complaint, where O'Keefe timely filed action on 4/27/2021 (see APPENDIX F, Copy of Petition Filed).

² Federal Order, Habeas Corpus case 3:14-cv-00477-RJF-VPC 2254 petition VERTIFIED Procedural History on respondents' motion to dismiss.

II.

REASONS FOR GRANTING THE PETITION

Q. "Whether the liberty interest created by state statute extends to prisoners whose convictions are reversed and remanded back to class¹ of pretrial detainee, then devoid the procedural safeguard of effective assistance of counsel demonstrated by further unlawful restraint imposed by state improperly filing another information, on the same offense, contrary also to the Double Jeopardy Clause."

¹ Cf. Sandin, 515 U.S. at 484

A. "Because O'Keefe's allegations concerning the amended information and his double jeopardy rights were insufficient to demonstrate that he was factually innocent, he was not entitled to relief." (See APPENDIX A) - (ORDER OF AFFIRMANCE)

(WHY WRIT SHOULD ISSUE)

1.) Fundamental Manifest Injustice by jurisdictional failure constitutionally. O'Keefe had pled "not guilty" and completed the termination of a first jeopardy, not contested by the state. Therefore, jurisdictional issues such as double jeopardy, are rights declared "sui generis" and protect something other than the truth seeking process. • see Menna v. New York, 423 U.S. 61, 62 (1975). Subsequent the Order of Reversal, (see APPENDIX E), the state's conduct of proposing another information on the same single crime was improper for the court lacked jurisdiction for second information. Despite a third trial conviction, two years subsequent the initial retrial, the double jeopardy clause mandates the second trial unconstitutional.

- See Menna, *supra* ("Where the state is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside.") - (emphasis added).
- see APPENDIX F (id at 9, lines 18-22 citing "Menna")

2.) • Deprivation of Protected Liberty Interests protected by the Fourteenth Amendment.

- a.) Nev. 174.085 (2)(3) reads that if a defendant is acquitted on the merits, the defendant is acquitted of the same offense, notwithstanding a defect in the form or substance in the indictment, information, or complaint on which the trial was had. • (see APPENDIX F, id at 6, lines 16-19) (PETITION FILED)

Moreover, subsection three (3) prohibits and bars another information for an offense necessarily included within first information, after suffering a first jeopardy. • (see Statute provided)

- b.) Double Jeopardy Clause(s) of the Fifth U.S. Const. Amend. and Nev. Const. art. I sec 10 prohibit - "TWICE IN JEOPARDY!"

• c.) Habeas Rule 5 of the Rules Governing 2254 Cases.

Federal Judge Robert Jones ordered the respondent (Nevada Attorney General's Office) that any response on the merits "shall" comply to Habeas Rule 5 and will list all state court documents filed regarding here, double jeopardy claim. However, the respondent commits fraud and makes judicial omission, concerning another information being filed.

- see APPENDIX F, EXHIBIT 4 (Federal Order on Mandate, id at 2, lines 5-23)
- see APPENDIX F, EXHIBIT 7 (ANSWER TO REMAINING CLAIMS..., id at 4, lines 6-12)

3.) New Controlling Supreme Court Precedent (Martinez v. Ryan, 566 U.S. 1, 13 (2012))

Not a single appointed defense attorney, for trial(s) and or direct appeals to the post conviction habeas matters, raised and challenged the true fundamental constitutional error that would have provided relief.

Instead, the continual deprivation of access to courts again is manifested where the district court removed filed action from calendar.

4.) Initial Retrial from Reversal (see APPENDIX E) Contrary to "Schad".

Where Nevada has adopted Schad v. Arizona, 501 U.S. 624, 632 (1991) - "due process" permitted the state to provide a general verdict form based on alternative mental states as mere means of satisfying a single mens rea element. Therefore, an acquittal on one-theory of a single count crime serves as an acquittal on all theories of that crime. (id Schad at 644); ● see The State of Nevada v. Mangana, 33 Nev. 511, 518 (1910) citing People v. Sullivan, 173 N.Y. 122, 65 N.E. 988 (1903) (Indictment not improper in presenting two theories of a killing to a jury.) ("Sullivan rule")

5.) Nevada's New Mechanism (NRS 34.960) Without Limitations

The Nevada Legislature's intent of the new mechanism of law promulgated, taking effect on July 1, 2019, was to provide a civil action, governed by the Nev. R. Civ. P., and file a petition at anytime averring a claim (NRCIVP B(2); FRCIVP B) based on operative facts giving rise to a right enforceable by a court. However, the district courts of Nevada are experiencing great trepidation and fearing the risks of exposure of many prisoners who have been wrongly convicted.

6.) New Supreme Court Precedents - "McQuiggin", "EVANS".

Despite Nevada's new petition to establish factual innocence having no procedural bars, McQuiggin v. Perkins, 569 U.S. 383 (2013) qualifies this action to be warranted with writ to issue for certiorari review. Additionally, Evans v. Michigan, 133 S. Ct. 1069, 1081 (2013) holds that trial court instructional error is not a pass over the federal double jeopardy clause. ("Twice in Jeopardy"). This Supreme Court well knows this better than anybody. Nevada must be held to the "rule of law".

(SUMMATION)

An "abuse of process" occurred where O'Keefe's factual innocence and cloak of innocence was tainted by the new libel lodged. The power to restrain O'Keefe from his liberty resulted from the State improperly filing another information on the same charge subsequent first jeopardy having terminated. Once Nevada empaneled the second jury on July 25, 2010, as a claim-of-causation, "Twice in Jeopardy" resulted as an aberration in Federal and Nevada Law. Can not a claim of factual innocence be demonstrated by a jurisdictional failure?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James R. O'Keefe #90244

Date: March 29th, 2022