

MAR 01 2023

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No. 23-5288

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IN THE SUPREME COURT OF THE UNITED STATES

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Jay Hymas,  
Petitioner,

v.

United States Department of Interior,  
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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Jay Hymas  
Petitioner/*Pro Se*  
508 East Hatton,  
Lind, WA 99341

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## QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals opinion, *United States v. Hooton*, 693 F.2d 857, 1982, overcomes the Federal Appellate Rules regarding the disposition of a case, and if so whether the principles of that very opinion can be violated in dismissing a case by asserting that claims of violation of the attorney-client privilege are “insubstantial”.

## 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:

## RELATED CASES

## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	
STATEMENT OF THE CASE .....	
REASONS FOR GRANTING THE WRIT .....	
CONCLUSION.....	

## INDEX TO APPENDICES

APPENDIX A	<i>Order denying rehearing</i>
APPENDIX B	<i>Order granting Summary Affirmance</i>
APPENDIX C	<i>District Court order denying sanctions</i>
APPENDIX D	
APPENDIX E	
APPENDIX F	

## TABLE OF AUTHORITIES CITED

### CASES

### PAGE NUMBER

U.S. v. Hooton, 693 F.2d 857, 1982

U.S. v. Sicarilla, 564 U.S. 162, 2011

### STATUTES AND RULES

9<sup>th</sup> Cir. Rule 27-10

9<sup>th</sup> Cir. Rule 3-6

### OTHER

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 B 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☐ is unpublished.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 C 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 \_\_\_\_\_ 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 \_\_\_\_\_ 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.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 8-19-2022.

☐ 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: 12-2-2022, and a copy of the order denying rehearing appears at Appendix A.

☐ 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 \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ 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

- 1) Constitutional right to due process, i.e. to be heard.
- 2) Whether violations of the Attorney-client privilege is a legal "insubstantiality".



## STATEMENT OF THE CASE

### I. The Appellate court erred in trivializing violations of the attorney-client privilege.

Petitioner (Appellant/Plaintiff) presents what he believes is plain error by the Appellate court. The Appellant court relied on its own 41-year-old opinion of, *United States v. Hooton*, 693 F.2d 857, 1982, and Circuit Rule 3-6 to dismiss a case (see Order, Exhibit A) prior to Petitioner's opening brief. Nevertheless the Appellate court found, **without any briefing for the case**, "A review of the record indicates that the questions raised in this appeal are so insubstantial as not to require further argument" (see Order).<sup>1</sup> However the questions on appeal are the violation of the attorney-client privilege and the violative actions are not contested by the Respondent. Petitioner is confident that the violation of the attorney-client privilege is not "insubstantial" justifying summary dismissal. The Appellate court violates its own rule (Rule 3-6) and its own precedence in dismissing this case before any record was even made.

This court has stated about the attorney-client privilege: "The attorney-client privilege ranks among the oldest and most established evidentiary privileges known to our law", *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011). And further:

"The district court disqualification order is based on a violation of professional ethical conduct, "the appearance of professional impropriety," as specified in the Model Code of Professional Responsibility, Canon 9.2 The plaintiffs-appellees, claim specifically a potential breach of the attorney-client privilege, in derogation of a former client's rights, and in violation of Model Code of Professional Responsibility, Disciplinary Rule (DR) 4-101(B)(1).<sup>3</sup> We affirm the district court's disqualification order." *KEVLIK v. GOLDSTEIN*, 724 F.2d 844, First Circuit Court of Appeals, 1984 (See also *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981)).

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<sup>1</sup> Petitioner/Appellant also requested a reconsideration and review *en banc* and was denied (see ~~Exhibit B~~ *Appx. A*).

## II. The Appellate court violates its own standard.

The decision this court's order relies on, *United States v. Hooton*, specifically requires that "Motions to affirm should be confined to appeals **obviously controlled by precedent** and cases in which the **insubstantiality is manifest** from the face of appellant's brief" (emphasis given). Even if the violation of the attorney-client privilege can be considered "insubstantial" and "controlled by precedent" the Appellate court did not base their decision on a "record" because no record then existed, there was no "brief" to determine "insubstantiality". Likewise there is no precedent anywhere claiming that violations of the attorney-client privilege are "insubstantial" and no attempt was made to offer any. The Appellate court simply does not want to scrutinize the obvious unethical conduct of a United States attorney, much less hold him accountable for it.

## III. The Appellate court goes beyond the FRAP.

The Appellate court Rule 3-6 goes beyond the FRAP and creates an arbitrary and capricious standard of "insubstantial" that is inconsistent with the FRAP and other Circuits and creates a *de facto* violation of due process requirement for an appellant to have his or her matters fairly heard. The Appellate court made no finding or explanations, nor cited any precedence for how it found "insubstantiality" leaving the world to wonder because the requirement for it to be obvious...is not so obvious. Additionally the trial court never found the matter "insubstantial"<sup>2</sup> and there was no basis for the Appellate court to find otherwise.

Dated: February 28, 2023

Respectfully submitted,

  
Jay Hyman

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<sup>2</sup> See ~~Exhibit~~ <sup>Appx.</sup> C.

## REASONS FOR GRANTING THE PETITION

- 1) The Appellate Court abused its discretion by violating its own precedence in *Hooton* by not providing a showing of “precedence” as required by *Hooton*. The Appellate Court made no reference to the precedence of violations of attorney-client privileges as being insubstantial to warrant summary dismissal.
- 2) *Hooton* requires both “precedence” and “insubstantiality”: “*Motions to affirm should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief.*” (emphasis added)
- 3) Appellant would submit for this court’s consideration that violations of the attorney-client privilege that involve extorting privileged material from a party’s prior counsel without party’s knowledge is always “substantial”.
- 4) That the Appellate Court granted the dismissal prior to ruling on Appellant’s motion to appoint counsel. Had Appellant been appointed counsel said counsel would undoubtedly been able to articulate the attorney-client violations more artfully.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jay Byrnes", is written over a horizontal line.

Date: 5-9-2023