

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

DONALD MITCHELL JOHNSON, AKA
Ski Johnson,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Before petitioner's federal court trial for wire fraud the district court, on petitioner's motion, excluded evidence effectively "dismissing" the broader fraud scheme the government alleged in its superseding indictment. The question presented is whether the Double Jeopardy Clause and 18 U.S.C. §3731 barred the government from appealing this ruling at the conclusion of the case where petitioner was convicted by the jury of a much narrower fraud scheme. Put another way the question is: considering the district court's pretrial exclusion of evidence and effective dismissal of the broader fraud scheme, whether the Ninth Circuit Court of Appeals had jurisdiction over the government's appeal in this case.

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Petitioner, Donald Mitchell Johnson, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

1. The published opinions of the Ninth Circuit Court of Appeals styled as *United States v. Johnson*, 854 F.3d 1098 (9th Cir. April 21, 2017), *superseded by* *United States v. Johnson*, ___ F.3d ___, 2017 WL 4018078 (9th Cir. August 22,

2017), together with the simultaneously unpublished memorandum disposition styled as *United States v. Johnson*, 691 F3d.Appx. 305 (9th Cir. April 21, 2017) are attached in the Appendix (Appx.) to this petition at pages 1-12.

2. The relevant written orders of the United States District Court below dated February 13, 2015, March 4, 2015 and July 6, 2015, respectively are in the Appx. at pages 13-27.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's first published Opinion and its unpublished memorandum disposition were filed on April 21, 2017 (Appx. at pages 1-5 and 11-12). Petitioner next filed a petition for rehearing with a suggestion for rehearing *en banc*, with that petition being denied and an Amended Opinion issued on August 22, 2017 (Appx. at pages 6-10). This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was both electronically filed and placed in the United States mail, first class postage pre-paid, on November 20, 2017, within the 90 days for filing from the denial of rehearing under the Rule of this Court (*see* Rule 13, ¶1).

FEDERAL CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

This case involves the following federal constitutional and statutory provisions:

UNITED STATES CONSTITUTION - AMENDMENT V

No person shall be . . . twice put in jeopardy of life or limb . . .

18 U.S.C.A. § 3731
§ 3731. Appeal by United States
Currentness

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT OF THE CASE

(A) United States District Court Below

The government brought a series of charging documents alleging wire fraud: an original Indictment; a Superseding Indictment and a Superseding Information (Appx. at pages 28-33, 34-39 and 40-43, respectively). In both the original and Superseding Indictments the alleged scheme to defraud took place in Montana and “elsewhere” between 2011 and 2014. To support this broad scheme the government alleged only a single set of email communications between petitioner in Virginia and a representative of the Big Brothers and Big Sisters in Montana on July 17, 2012. No other wire transactions were alleged in any charging document.

In pretrial motions petitioner raised concerns that, according to discovery provided by the government, the “elsewhere” jurisdictions (totaling ten in number) were not supported by any alleged wire transactions. It appeared therefore that the government was attempting to use the single set of July 2012 wire transmissions between Montana and Virginia as a sort of anchor to support allegations of fraud in

ten other “elsewhere” districts between 2011 and 2014, none of which involved use of the wires.

During and after this pretrial process the district court entered i) an order, ii) a clarification order and iii) a final order addressing what evidence would be admissible on the government’s case-in-chief at trial. (Appx. at pages 13-24, 25 and 26-27, respectively). Moreover, between the clarification order and the final order petitioner twice attempted to plead guilty to just the Montana fraud supported by the single set of July 2012 email transmissions. At the first plea change hearing on April 14, 2015 the government took the position that petitioner was pleading guilty to a fraud extending from 2011 through and including 2014. Consequently following discussion between government counsel and the Magistrate Judge conducting the plea hearing no plea was entered. (Appx. at pages 44-57).

In preparation for petitioner’s second attempted plea change the government even went so far as to file a Superseding Information and Amended Proof Offer narrowing the allegations of the scheme to the year 2012, and by removing the alleged “elsewhere” frauds in the years 2011, 2013 and 2014, by actually striking the word “elsewhere” as set forth in the Superseding Indictment. (*Compare* Appx. at 35 *with* Appx. at 41). Unfortunately this attempt to plead guilty likewise failed because

the government suggested that the “elsewhere” frauds from 2011, 2013 and 2014 could be considered relevant conduct under USSG §1B1.3 at any sentencing hearing.

After petitioner formally moved to put his case back on the trial calendar due to the last described failed plea change the government moved the district court to dismiss the Superseding Information to insure the case would actually be tried on the Superseding Indictment. Petitioner opposed. Reluctantly granting this motion the district court entered a final written order which expressly told the government that although the court would grant the requested dismissal the government’s evidence at trial would be restricted to the Montana fraud in 2012 as alleged in the Superseding Information; and further that if convicted Petitioner’s restitution obligation would be limited to the Montana fraud allegations:

The Court will grant the motion to dismiss the Superseding Information because the pleading remains pending and the motion appears not to be motivated by bad faith. That said, the government’s pleadings in this case have done little to advance the ball, and the Court has grown tired of hedging its views on the universe of admissible trial evidence. The ***Superseding Information*** is the clearest, most concise statement of the government’s view of this case. With it now off the table, Johnson’s concerns with the scope of the scheme alleged against him are rightly at the fore once again. The Court shares these concerns, particularly in light of the government’s statement that “[t]he defendant’s fraud took place in several states including Washington, Florida, New Jersey, Texas, and Montana.”(Doc. 62 at 4.)

This case is about a single fraud evidenced by a single use of the wires between Virginia and Montana in July 2012. No evidence of other frauds executed by other, separate uses of the wires will come in at trial. The government may believe that the scheme Johnson employed in the Montana fraud stretched over a longer period of time and a larger geographic area, but the government will not be permitted to present evidence of any aspect of that scheme consisting of other uses of the wires. Stated another way, the government will not be permitted to prove the scheme underlying the Montana fraud by putting on evidence that Johnson employed the same scheme in another fraud outside of Montana. Furthermore, should the government obtain a conviction in this case, the extent of the Montana fraud will dictate the loss amount for which Johnson will ultimately be held responsible. The Court will not permit an end-run around these limits under the guise of evidence pertaining to Johnson's alleged scheme. The Court cannot make its position on the scope of the trial of this case and associated evidentiary issues any more clear, and to the extent previous orders have served to confuse the government, or caused the government to engage in wishful thinking, it is hoped that the above statement clears up this confusion.

(Appx. at 26-27;
2015 WL 4092759 *1 (2015)) (emphasis added)

Instead of bringing an interlocutory appeal to the Ninth Circuit on this order within thirty days or before jeopardy attached, as 18 U.S.C. §3731 requires, the government proceeded to trial resulting in petitioner's conviction for a very narrow subset of the broader fraud scheme alleged in the superseding indictment. A result consistent with this Court's decision in *United States v. Miller*, 471 U.S. 130 (1985) (defendant's grand jury guarantee not violated where conviction rests on proof that supports only a narrower fraud scheme but which is nevertheless included in the

indictment). However at petitioner's sentencing hearing the government urged that petitioner should be sentenced for the broader fraud scheme contained in the superseding indictment, which it was unable to prove beyond a reasonable doubt at trial under the terms of the district court's order suppressing/excluding evidence. Moreover, consistent with its pretrial order restricting the government's trial proof the district court rejected the government's effort to have petitioner sentenced for a fraud scheme it never proved. Thus petitioner was sentenced to five years probation and restitution in the amount of \$5,648.58 (Appx. at pages 58-62). The government then filed a "NOTICE OF APPEAL" to the Ninth Circuit "from the Judgment imposed in open court." (Appx. at pages 63-64). Petitioner then filed a notice of appeal and cross-appeal preserving his claim that the evidence was insufficient to convict him of the broader fraud scheme. (Appx. at pages 65-67).

(B) The Government's Argument on Appeal.

On appeal the government converted its failure to prove the broader scheme alleged in the superseding indictment into a sentencing issue. Based on a fraud scheme it never proved at trial the government argued that all of the alleged "elsewhere" frauds from 2011, 2013 and 2014 should have been included as restitution, increasing the sum awarded by the district court (\$5,648.58) up to

\$74,565.70. A figure over thirteen times greater than the restitution amount awarded by the district court.¹

(C) Decisions of the Ninth Circuit Court of Appeals.

In both its original and amended opinions the Ninth Circuit cited to a decision styled as *United States v. Loftis*, 843 F.3d 1173, 1175-76 (9th Cir. 2016) going on to hold that government appeals under 18 U.S.C. §3731 are permissive not mandatory. (Appx. at pages 3 & 8).

REASONS FOR GRANTING THE WRIT

The government “has no right of appeal in a criminal case, absent explicit statutory authority.” *United States v. Scott*, 437 U.S. 82, 84-85 (1978). And this petition poses the important question whether the appeal the government brought before the Ninth Circuit was authorized under 18 U.S.C. §3731 and the Double Jeopardy Clause. The First Circuit characterizes this issue as a “vexing question.” *United States v. Brooks*, 145 F.3d 446, 453 and n. 3 (1st Cir. 1998), *comparing by contrast*, *United States v. Shears*, 762 F.2d 397, 400 (4th Cir. 1985) (suggesting that

¹If 18 U.S.C. §3731 applies and required the government to appeal before jeopardy attached the Ninth Circuit had no jurisdiction over the government’s appeal and it should have been summarily dismissed, since the government failed to appeal the district court’s final order excluding government evidence within 30 days or before jeopardy attached. The point is that it matters that the government was the primary appellant in this case before the Ninth Circuit.

such appeal can be taken even after jeopardy attaches) *with United States v. Layton*, 720 F.2d 548, 554 (9th Cir. 1983) *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499, 505-506 (9th Cir. 2008) (*en banc*) (suggesting the opposite). Section 3731 confers an immediate right of appeal in the government if the district court “dismiss[es] an indictment” or “from a decision or order of a district court suppressing or excluding evidence.” *Id.* Such appeals must “be taken within thirty days after the decision, judgment or order has been rendered” and in some situations before jeopardy attaches. *Id.*

It is not open to serious question that before petitioner’s jury trial the district court below entered an order suppressing/excluding evidence which essentially dismissed a major portion of the government’s superseding indictment and fell squarely within the embrace of §3731. Nor is it debatable that the government failed to appeal that ruling within thirty days, and before jeopardy attached at trial, where petitioner was convicted for a much narrower fraud scheme than the one alleged in the superseding indictment. *Cf. United States v. Miller* 471 U.S. 130 (1985) (defendant’s Grand Jury Clause guarantee not violated where conviction rests on proof that supports only a narrower fraud scheme but which is nevertheless included in the indictment).

The Ninth Circuit misapplies *Miller* and ignores settled Double Jeopardy principles established by this Court. *See e.g. Green v. United States*, 355 U.S. 184 (1957) (conviction of lesser included offense is an implied acquittal of the greater offense establishing a double jeopardy bar); *Price v. Georgia*, 398 U.S. 323 (1970) (same rule).

As for *Miller* the holding in that case is not a blank check allowing the government to prove at trial a narrower, but included, fraud scheme only to contend at sentencing that the defendant should be accountable for the greater fraud scheme alleged but not proved. *Cf. United States v. Mubayyid*, 658 F.3d 35, 54 (1st Cir. 2011) (where government proves included but narrower scheme than alleged defendants will be held “to so much of their criminal conduct that the government has properly charged and successfully proven”); *also see Smalis v. Pennsylvania*, 476 U.S. 140, 145-146 (1986) (holding that Double Jeopardy Clause bars not only a second trial but when reversal would translate into further proceedings going to elements of the offense charged).

This is exactly the situation here. Before trial the government suffered an order suppressing material evidence of the broader scheme alleged making it impossible for the government to prove the broader fraud before the jury. But after proving the much narrower fraud at trial the government nevertheless argued at sentencing for

restitution accountability thirteen times greater than the fraud it actually proved. After such relief was denied in the district court the government appealed and now awaits a new sentencing hearing. The Ninth Circuit's decision in this case violates §3731 and petitioner's Double Jeopardy rights because the government failed to timely appeal robbing the Ninth Circuit of appellate jurisdiction; and further because the Ninth Circuit's remand of the case violates the Double Jeopardy principle set forth in *Smalis, supra*.

Moreover, in *Miller* the Ninth Circuit originally ruled that the defendant's Grand Jury Clause guarantee had been compromised when the trial proof showed a fraudulent scheme much narrower than, though included within, the scheme the grand jury had alleged. *United States v. Miller*, 715 F.2d 1360 (9th Cir. 1983), *as modified* 728 F.2d 1269 (9th Cir. 1984). This Court reversed holding that the defense had not "shown any compromise of [Miller's] right to be tried only on offenses for which a grand jury has returned an indictment." 471 U.S. at 145. However, in *Miller* this Court was careful to point out that apart from the Grand Jury Clause issue when a scheme narrower but included within a broader indictment is proved at trial other concerns can emerge such as "the general fairness of the trial, or the indictment's sufficiency to bar subsequent prosecutions . . ." 471 U.S. at 138, n. 5.

Petitioner had a fair trial on the superseding indictment which was narrowed by the district court's final pretrial ruling restricting the government's material evidence to the Montana fraud in 2012. A ruling that this government ought to have appealed under 18 U.S.C. §3731 before jeopardy attached if it desired to prove the alleged "elsewhere" frauds in 2011, 2013 and 2014. The Ninth Circuit had no jurisdiction to consider the government's appeal and any further sentencing proceedings on the Ninth Circuit's remand order will violate the Double Jeopardy Clause in any case.

CONCLUSION

WHEREFORE, this petition should be granted and the case set down for full briefing and argument to answer the important question whether, in some situations, the government is required to appeal a pretrial ruling restricting its material evidence within thirty days or before jeopardy attaches, whichever is sooner.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "M. Donahoe", is written over a horizontal line.

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November 20, 2017