

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE AVALOS-PETITIONER,

VS.

UNITED STATES-RESPONDENT.

ON PETITION FOR WRIT FOR A CERTIORARI TO
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PETITION FOR WRIT OF CERTIORARI

JOSE AVALOS #26551-047 (PRO-SE)

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QUESTION(S) PRESENTED

(1) If the jurors themselves do not report any difficulty in reaching a verdict and the trial judge terminates the trial abruptly on the assumption that the jury is unable to agree on a verdict, without the defendant consenting, would a subsequent trial violate defendant's Fifth Amendment "Double Jeopardy Clause?"

(2) Does a defendant who fails to object to a sua sponte declaration of a mistrial lose his right under the Fifth Amendment "Double Jeopardy Clause," when "Manifest Necessity" was not present?

(3) If the Eighth Circuit Court of Appeals has not decided a question of when a District Court failed to use "sound discretion" in properly determining when a jury is "genuinely deadlocked" and with most appeal courts in conflict with the district courts ruling, would that not meet the "debatable" standard for a Certificate of Appealability as set forth in § 2253(c)?

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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:

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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 judgement below.

OPINION BELOW

For cases from federal courts:

The judgement or order sought to be reviewed was entered in the United States District Court for the District of Nebraska and appears at Appendix A to the petition. It is reported at United States v. Avalos, 2017 U.S. Dist. LEXIS 33053 (D. Neb. Mar. 8, 2017).

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals denied my application for certificate of appealability ("COA"), In Forma Pauperis was Granted, on November 30, 2017 (case no. 17-2333). A copy of the order is APPENDIX H.

A timely petition for rehearing was denied by the United States Court of Appeals on February 16, 2018, and a copy of the order denying rehearing appears at Appendix B.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States which provides that:

"no person shall be subject for the same offence to be twice put in jeopardy of life or limb"

And, also involves the Effective Assistance of Counsel of the Sixth Amendment of the Constitution of the United States which provides that:

"[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On March 20, 2013, a federal grand jury returned a three count Indictment against Jose Avalos ("defendant hereinafter") and his brother Juan Avalos ("co-defendant hereinafter") (Docket Entries 1 "DCD hereinafter"). Defendant exercised his right to trial on Count I, which charged him with possession with intent to distribute 50 grams or more of methamphetamine (actual), in violation of 21 U.S.C. § 841(a)(1) and (b)(1) (Id.). Defendant was not charged in count II. Count III which charged defendant with a violation of 18 U.S.C. § 922(g), was dismissed by the United States prior to trial. (DCD 110).

The case proceeded to a jury trial on September 30,

2014. (DCD 113). On October 2, 2014, the jury was dismissed without a verdict and mistrial was declared sua sponte. (DCD 124). A new trial commenced on November 4, 2014. (DCD 143). The jury returned a guilty verdict on November 6, 2014. (DCD 154).

SENTENCING

Defendant appeared for sentencing before the district court on March 15, 2015. The district court sentenced defendant to 360 months incarceration to be followed by a 5 years term supervised release. (DCD 167, 168). Defendant timely filed a Notice of Appeal. (DCD 172).

DIRECT APPEAL

Defendant was represented by William Pfeffer (trial counsel) on appeal, the conviction was affirmed by the Eighth Circuit Appeals Court. UNITED STATES v. AVALOS, 817 F.3d 597, 601-02 (8th Cir. 2016).

§2255 MOTION

Defendant timely filed §2255 motion, claiming counsel was constitutionally ineffective for the following: (1) misadvise defendant prior to trial (2,A) Ineffective when failed to object to court violating Rule 26.3 and Rule 43(a) when counsel was not afforded time to consult with defendant about jury notes or mistrial declaration. (2,B) Counsel was ineffective when he failed to object to the sua sponte declaration of a mistrial when manifest necessity was not present, in violation of the Double Jeopardy Clause. (3)

WASHINGTON, 434 U.S. 497, 509 (1978)). When a defendant's mistrial resulted from a hung jury,...the second trial of [the defendant] did not constitute double jeopardy.' UNITED STATES v. PENA, 339 F.3d 715, 720 (8th Cir. 2003)."

"Avalos first trial began on September 30, 2014, and was submitted to the jury the next day, October 1, 2014, at 4:32 p.m. [the jury went home at around 5:00 p.m.]. The jury continued its deliberations the following day, October 2, 2014, at 9:00 a.m. Throughout the day, the jury submitted [four] questions in writing to the Court, the contents which led the Court to believe the jury was unable to reach a verdict. After conferring with counsel on the record [11 minutes] and in the presence of the Defendant, both counsel agreed that a mistrial should be declared and a new trial held. The Court declared a mistrial at 4:16 p.m."

"The Court concluded that the totality of the circumstance, including the short length of the trial, the relatively long duration of the deliberations, and the nature of the questions posed by the jury that demonstrate profound confusion, support the conclusion that a new trial was in the public interest and the interest of justice. Accordingly, the Court's declaration of a mistrial did not violate the principles of double jeopardy, nor was [counsel's] consent to the declaration of a mistrial ineffective assistance of counsel. Accordingly, the claim presented in Ground Two, Part B, will be summarily dismissed." See Appendix A. (DCD 210).

REASONS FOR GRANTING THE WRIT

I. The defendant did not consent to the sua sponte declaration of a mistrial, Manifest Necessity was not present, in violation of the Fifth Amendment "Double Jeopardy Clause" of the United States Constitution, when the jury was not deadlocked.

A. The Court violated petitioners rights under the Double Jeopardy Clause of the U.S. Constitution.

The court was required to take steps to ascertain and clearly demonstrate that the jury felt that no verdict could be reached given more time, at the time of the mistrial declaration, there was no sound discretion as defined by federal law. UNITED STATES v. PEREZ, 22 U.S. 579, 9 Wheat, 579, 6, 165 (1824); ARIZONA v. WASHINGTON, 434 U.S. 497, 98 S. Ct. 824, 54 L.Ed. 2d 717 (1978); and UNITED STATES v. JORN, 400 U.S. 470, 98 S.Ct. 824, 54 L.Ed. 2d 543 (1971).

The Fifth Amendment protection from Double Jeopardy is one of the cornerstones of the criminal justice system. The rights protected by the Fifth Amendment include the right to have one's case decided by a particular jury impaneled for that purpose. Before declaring a mistrial a trial judge must weigh heavily a "defendant's valued right to have his trial completed by a particular tribunal." WADE v. HUNTER, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949). If manifest necessity required the declaration of a mistrial, then the defendant may be retried without violating his protection against double