No. 11-672

In the Supreme Court of the United States

DAVID BOBBY, Warden,

Petitioner,

v.

JOE D'AMBROSIO,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY OF THE PETITIONER

In this case, a district court in federal habeas corpus granted extraordinary relief to Respondent Joe D'Ambrosio. Based on alleged misconduct by the prosecutor -- allegedly committed after the district court had granted a conditional writ and a re-trial had been scheduled, and having nothing to do with the constitutionality of D'Ambrosio's conviction -- the district court barred D'Ambrosio's re-trial from proceeding. The Warden contends that this relief is wholly outside the authority conferred by the habeas corpus statutes. In response, D'Ambrosio argues essentially that the district court did not do anything extraordinary or out of bounds, and that even if it did, no harm was done. As explained below, D'Ambrosio's arguments are incorrect.

A. Contrary to D'Ambrosio's arguments, the district court clearly erred.

D'Ambrosio contends that this case is "simply about" the state's "admitted failure" to comply with the conditional writ. According to D'Ambrosio, the Sixth Circuit was correct in concluding that exhaustion was "not an issue," because the district court properly considered the "impact" of the state's non-compliance. Further, D'Ambrosio argues essentially that the Sixth Circuit's decision is consistent with the decisions of the other circuits with respect to the circumstances under which a district court may bar re-prosecution in federal habeas corpus.

D'Ambrosio's defense of the Sixth Circuit's findings and reasoning is unavailing. The case is not just about the state's failure to complete D'Ambrosio's re-trial within the time prescribed by the conditional writ. That was recognized by the district court, which did not bar D'Ambrosio's re-prosecution initially, when it was apparent that the state would not start trial proceedings within the time set forth in the conditional writ. As the Sixth Circuit observed, the district court's decision not to bar re-prosecution at this juncture "further complicated" the case. Petition at 14. And, contrary to the Sixth Circuit's reasoning and D'Ambrosio's parroting of it, the district court did not bar re-prosecution based upon the claim of suppressed evidence which was the basis of the initial grant of a conditional writ. For the reasons stated by Judge Boggs and the Warden -- to which D'Ambrosio offers no reasoned argument in response -- the prosecutor's alleged misconduct in failing to disclose the death of the state's "key witness" cannot possibly be construed as misconduct calling into question the fairness of D'Ambrosio's conviction.

D'Ambrosio's attempt to place the Sixth Circuit's decision within the mainstream of circuit precedents is equally unavailing. It is well-established among the circuits that even where the state fails to bring the prisoner to trial within the time provided by a conditional writ, and the prisoner is released from custody, the state may ordinarily still re-arrest and re-prosecute. *Carzell v. Moore*, 972 F.2d 318, 320 (11th Cir. 1992), citing *Gardner v. Pitchess*, 731 F.2d 637, 640 (9th Cir.1984) (granting of writ of habeas corpus does not preclude re-trial of defendant). Exceptions to this general rule involve

cases in which re-trial itself would violate the prisoner's constitutional rights; or re-prosecution under the circumstances would be so manifestly unjust as to constitute a violation of the prisoner's fundamental right to due process. *See Latzer v. Abrams*, 615 F. Supp. 1226, 1229-1231 (U.S.D.C./N.D. N.Y 1985), and the cases cited therein.

In sum, contrary to D'Ambrosio's arguments, the district court clearly erred.

B. The Sixth Circuit's decision does have potentially wide ranging implications and does matter here.

D'Ambrosio concedes that the Sixth Circuit's decision could likely be cited by other petitioners with suppressed evidence claims who seek a bar to their re-prosecution. But he contends this doesn't matter since the bar for this relief remains high. But that is not the case. The Sixth Circuit's decision removes a long-standing barrier, the requirement that petitioners exhaust their claims before the state courts. D'Ambrosio further suggests that the state has waived the issue by not appealing the trial court's dismissal of the case after the district court barred re-prosecution. Of course, the state had no grounds to appeal -- the trial court dismissed the case based *solely* on the district court's order. *See* Electronic Docket of the Court of Common Pleas of Cuyahoga County, Case No. CR 232189, available at http://cpdocket.cp.cuyahogacounty.us. The trial court had not dismissed the indictment as a sanction for the non-disclosure of Espinoza's death, but had

instead precluded the state from introducing Espinoza's prior testimony

Finally, contrary to D'Ambrosio's argument, his re-trial is not barred by Ohio law. The statute cited by D'Ambrosio does not grant further rights to criminal defendants than the double jeopardy clauses of the US or federal constitution. *See State v. Walker*, 9th Dist. App. No. 13172, 1987 WL 17921 (Sep. 23, 1987). It is a "venerable principle of double jeopardy jurisprudence" that the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge. *Montana v. Hall,* 481 U.S. 400, 402 (1987), citing *Burks v. United States*, 437 U.S. 1 (1978) and *United States v. Scott*, 437 U.S. 82, 90-91 (1978)

Contrary to D'Ambrisio's arguments, the Sixth Circuit's decision does have potentially wide ranging implications and does matter here.

CONCLUSION

The Court should grant the Warden's petition.

Respectfully submitted,

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