

No. 12-3023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 10, 2012
LEONARD GREEN, Clerk

In re: JAMES C. DIMORA,)
)
 Petitioner.) ORDER
)
)

Before: SILER, ROGERS, and DONALD, Circuit Judges.

Petitioner James Dimora appeals the denial of his motion to dismiss an indictment based on the claim that his right to be protected from double jeopardy bars the trial. (Case No. 11-3010). He petitions for a writ of prohibition preventing the district court from proceeding with trial. The government opposes the petition. Because a jury has been selected, but not yet sworn, the government moves for an expedited ruling on the petition.

A writ of prohibition, like a writ of mandamus, is a drastic remedy only available in extraordinary situations where the petitioner shows his right to the writ to be clear and indisputable and where there are exceptional circumstances amounting to a judicial usurpation of power. *In re Alea*, 286 F.3d 378, 380 (6th Cir. 2002) (order); *In re Gregory*, 181 F.3d 713, 715 (6th Cir. 1999) (order); *see also Kerr v. U.S. Dist. Ct. for No. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (writ of mandamus); *In re Prof'l's Direct Ins. Co.*, 578 F.3d 432, 437 (6th Cir. 2009) (writ of mandamus).

Dimora has not shown a clear and indisputable right to a stay of the jury trial pending his appeal. A double jeopardy claim “requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense[.]” *United States v. MacDonald*, 435 U.S. 850, 862 (1978) (distinguishing the appealability of the denial of a motion to dismiss based on double jeopardy from the denial of a motion based on a speedy trial violation);

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see also Richardson v. United States, 468 U.S. 317, 322 (1984) (“we have indicated that the appealability of a double jeopardy claim depends upon its being at least ‘colorable,’ and that ‘frivolous claims of former jeopardy’ may be weeded out by summary procedures.”) (internal citations omitted). Thus, if the district court determines that the claim of double jeopardy lacks any “colorable foundation” or is frivolous, it may proceed with the trial pending appeal. *United States v. Lanci*, 669 F.2d 391, 394 (6th Cir. 1982) (citations omitted).

Dimora argues that the indictment in this case (N.D. Ohio No. 10-cr-387) and a second indictment (N.D. Ohio No. 11-cr-491) charge him twice with the same crimes. The district court found Dimora’s double jeopardy claim to be frivolous because he had not yet been placed in jeopardy in either case. The instant case will be the first time that Dimora will be placed in jeopardy of conviction. “The Double Jeopardy Clause embodies three protections: ‘It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.’” *Grady v. Corbin*, 495 U.S. 508, 516 (1990) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). Proceeding with a jury trial in this case will not place Dimora in double jeopardy.

The motion to expedite is **GRANTED**; the petition for a writ of prohibition is **DENIED**.

ENTERED BY ORDER OF THE COURT



Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Leonard Green
Clerk

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Re: Case No. 12-3023, *In re: James Dimora*
Originating Case No. : 10-00387-001

Dear Sir or Madam,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Jill Colyer
Case Manager
Direct Dial No. 513-564-7024

cc: Ms. Geri M. Smith

Enclosure

No mandate to issue