

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 16 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 21-50225

Plaintiff-Appellee,

D.C. Nos.

v.

8:19-cr-00061-JVS-1

8:19-cr-00061-JVS

MICHAEL JOHN AVENATTI, AKA
Michael J. Avenatti,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted March 10, 2022
Pasadena, California

Before: TALLMAN and FRIEDLAND, Circuit Judges, and KORMAN,** District
Judge.

Defendant Michael J. Avenatti was indicted on charges relating to an alleged
scheme to defraud five of his law firm clients of their settlement monies. Towards

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Edward R. Korman, United States District Judge for
the Eastern District of New York, sitting by designation.

the end of the prosecution's case-in-chief, Avenatti moved for a dismissal or mistrial based on the government's late production of accounting data that he says was critical to the defense case. Although the district court found that the accounting data constituted *Brady* material and granted Avenatti's request for a mistrial so that he might have time to review the data for possible use at his retrial, the court twice denied Avenatti's motions to dismiss the indictment. Avenatti now appeals from the district court's pretrial order denying his motions to dismiss.

On interlocutory appeal, Avenatti argues that the district court erred because (1) a retrial would violate the Double Jeopardy Clause of the Fifth Amendment; (2) a retrial is barred by Avenatti's due process rights and the court's proper exercise of its supervisory powers; and (3) alternatively, the district court was required to conduct an evidentiary hearing before denying his motions to dismiss. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and dismiss in part.

1. The district court did not err in denying Avenatti's motions to dismiss on double jeopardy grounds. To succeed on this claim, Avenatti was required to establish that the prosecution's conduct giving rise to the motion was "intended to 'goad' [him] into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). But the district court expressly found that "[n]o 'goading' occurred," because the data was withheld by the government due to mere "inadvertence and a failure to appreciate what was there." Since Avenatti fails to show these findings

are clearly erroneous, this claim fails. *See United States v. Lopez-Avila*, 678 F.3d 955, 961–63 (9th Cir. 2012).

2. We lack jurisdiction over Avenatti’s due process and supervisory powers claims. The immediate appealability of a particular pretrial order is analyzed on a claim-by-claim basis, and the appealability of one claim “will not confer pendent appellate jurisdiction over defendants’ other claims.” *United States v. Yellow Freight Sys., Inc.*, 637 F.2d 1248, 1251 (9th Cir. 1980). Here, although we have jurisdiction over the district court’s denial of Avenatti’s motion to dismiss on double jeopardy grounds, *see Abney v. United States*, 431 U.S. 651, 662 (1977), this does not confer jurisdiction over the denials based on due process and supervisory powers grounds. Because Avenatti’s due process and supervisory powers claims do not independently fall within the collateral-order exception to the final judgment rule, we currently lack jurisdiction to consider them.

3. Avenatti’s argument that the district court abused its discretion by refusing to hold an evidentiary hearing to determine the intent of the prosecution also fails. Avenatti argues that the district court had “no evidentiary record to support its ‘findings’ that the government had not committed misconduct.” But the court clearly had an evidentiary record supporting its findings. It presided over the entire proceedings including extensive discovery practice, conducted both pre-trial and mid-trial motions hearings, and heard fifteen days’ worth of trial testimony

before the first motion to dismiss was filed. The presiding judge was very familiar with the record underlying Avenatti's motions and was uniquely positioned to evaluate and characterize the conduct of the government. *See United States v. Hagege*, 437 F.3d 943, 952–53 (9th Cir. 2006).

AFFIRMED IN PART AND DISMISSED IN PART.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

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The Clerk is requested to award costs to *(party name(s))*:

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