

RECORD NO: 20-5149

IN THE
SUPREME COURT OF THE UNITED STATES

Marcel Malachowski,
Petitioner,

v.

United States of America,
Respondant,

ON PETITION FOR WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

SUPPLEMENTAL BRIEF

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ADDITIONAL QUESTIONS PRESENTED

1. Does A Separate And Distinct Motion Brought Under 28 U.S.C. § 455(a) Presented Under Habeas Proceedings Require A Certificate Of Appealability In Order To Appeal A District Court's Decision To Deny Recusal?
2. Does Conflicting And Unfavorable Application Of The Strongest Argument Standard Violate Due Process Rights Of Pro Se Litigants In Light Of Judicial Precedent?
3. Is The Identified Strongest Argument Standard Discretionary?
4. Did The Appellate Court Have A Jurisdictional, Or Lawful Obligation Under Harris vs. Kerns, To Consider Actual Innocent Claim Brought Under § 2241? In turn, Did The Resulting Action Violate The Eighth Amendment's Prohibition Against Cruel And Unusual Punishment?

TABLE OF CONTENTS

Questions Presented	(i)
Table of Contents	(ii), (iii)
Table of Authorities	(iv)
Constitutional Provisions	(iv)
APPENDIX	
Recent Second Circuit Decision (19-4069)	15
I. STATEMENT	1
II. Supplemental Reasons For Granting The Writ	
A. Conflicting Rulings Issued By The Second Circuit Court of Appeals Require This Court's Intervention To Resolve An Issue Whether A COA Is Necessary In Order To Appeal A Decision Denying Recusal Occurring During Habeas Proceedings.	3
1. Rulings Issued Under Related Matters Stand In Contrast.	
2. Panel Is Unclear Of Procedure	
3. Clarification Would Aid In This Courts Jurisdiction	4
B. Subject Rulings In Both Matters Establish That The Second Circuit Court of Appeals Has Capriciously And Unfavorably Misapplied Precedent Causing Prejudice	
1. Unfavorably Construes Weaker Motion As One Seeking COA	4

(ii)

Table of Contents Cont

2. Refused To Construe Remaining Arguments Under Liberal Construction Standard	5
3. Application of Different Standards Motivated By Underlying Aggression Towards Ineffective Assistance of Counsel Issues Is Unconstitutional	5
C. Compelling Argument Is Presented By Extra-Ordinary Circumstances Presented By COVID-19, Further Causing Prejudice As A Result of Unconstitutional Convictions Continuing To Subject Petitioner To An Increased Statutory Penalty.	
1. COVID-19 Presents Potentially Life Threatening Circumstances	8
2. Petitioner Qualifies Under High Risk Category	9
3. Unable To Provide Self-Care Within Environment of Correctional Facility.	10
4. Considered In View of Actual Innocence Claim Raises Significant And Compelling Argument Under Fifth And Eighth Amendment.	11
D. Injustice And Inequality Under The Color of Law	13
E. Conclusion	15

TABLE OF AUTHORITIES

Harris v. Kerner, 404 U.S. 519, 529 (1972)	5
Olmstead v. United States, 277 U.S. 438 (1928)	7
United States v. Galaz, 15-CR-02559-GPC (Aug. 6, 2020)	11
United States v. Hernandez, No. 18-CR-00834 (PAE), 2020 WL 1684062 (S.D.N.Y. April 2, 2020)	8
United States v. McCarthy, 2020 WL 1698732 (D. Conn. April 8, 2020)	8
United States v. Mueller, No. 08-CR-191-AB, 2020 WL 3791548 (E.D. PA July 7, 2020)	11

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 455(a)

U.S. Sentencing Guidelines § 1B1.13 cmt. 1(A)(ii)

FIFTH AND EIGHTH AMENDMENTS

I.

STATEMENT

Supplemental argument is necessary to call to attention recent decisions material to consideration that were not available at the time of original filing

On August 12, 2020, the Second Circuit Court of Appeals issued an order in related appeal (19-4069), presenting nearly identical circumstances and related issues. The new ruling runs

in tension with prior determination subject of this appeal (19-2560). Contrasting in two respects, the first ruling provides that a certificate of appealability is necessary in order to appeal a district court's denial of motion to recuse brought under relevant statute. Conversely, a separate panel issued a second ruling on this issue suggesting that COA is not required, or is at least unclear on this issue. Both panels do not cite or reference any authority in which to support either position. Resolving this issue would aid in this Court's jurisdiction providing authority for the nation.

These rulings also present an underlying issue that has prejudiced both matters throughout post conviction proceedings. Whereby, the Second Circuit Court of Appeals has capriciously and continuously misapplied the liberal interpretation standard unfavorably to Petitioner's pro se filings. In each identifiable instance, reasonable argument exists that the court

has done so effectively avoiding ineffective assistance of counsel issues presented in both matters. Highlighted by the fact that in either case, despite numerous complaints to such constitutional violations, the appellate court has not reviewed or provided a ruling in one instance. Review as defined by an appeal providing thorough and meaningful evaluation.

Recent decisions provide further support to Petitioner's claim that he continues to be further prejudiced by the underlying convictions subject of this appeal. Especially in view of a credible and compelling claim of actual innocence, strengthened by intervening interpretation of relevant statute under which convictions occurred.

District Courts across the country have recently determined that the extraordinary circumstances presented by COVID-19 provides compelling grounds for consideration in request for relief. Especially where decisions by the Second Circuit Court of Appeals continue to wrongfully subject Petitioner to an increased statutory penalty (double), than he would have faced if not but for the ineffective assistance of counsel. Such facts and circumstances present a significant and compelling claim under the Eighth Amendment's prohibition against cruel and unusual punishment.

Recent decisions rendered in the State of Missouri involving Petitioner pertaining to a termination of parental rights

matter. Further suggest that prejudice has resulted from the underlying convictions, whereby his parental rights have been unlawfully terminated in clear violation of his protected rights under the Fourteenth Amendment.

II. Supplemental Reasons For Granting The Writ

A. Conflicting Rulings Issued By The Second Circuit Court of Appeals Require This Court's Intervention To Resolve An Issue Whether A COA Is Necessary In Order To Appeal A Decision Denying Recusal Occuring During Habeas Proceedings.

1. As stated, the Appellate Court has issued rulings under related matters involving Petitioner, together suggests that not only is the court unclear on this procedural issue. But also, the ruling suggests that different panels have taken different positions that stand in tension. In turn, giving rise to questions of due process concern where in subject appeal (19-2860), the ruling indicates that COA was necessary.

Inferred by the court's application of standards under Kellog v. Strack, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam) enunciating principles under Slack v. McDaniels, 529 U.S. 473, 478 (2000).

2. Avered from the ruling under appeal (19-4069), indicates

that the procedural issue is unclear, "[a]ssuming arguendo that a COA is not required to review the district court's decision not to recuse," runs in tension with the court's prior determination rendered under subject appeal (19-2560). Whereby, the court construed a motion to hold appeal in abeyance as one seeking COA on this issue of recusal.

3. Clarification on this procedural issue would aid in this Court's jurisdiction by establishing authority from which the nation to draw upon. (Petitioner makes this assumption without confirmation of whether relevant authority exists. Because, currently GPCF prohibits access to legal resources due to circumstances presented by COVID-19. Further adding that the Appellate Court neither cites or references judicial precedent in other circuits in support of either position.)

B. Subject Rulings In Both Matters Establish That The Second Circuit Court Has Capriciously And Unfavorably Misapplied Well Settled Precedent Causing Prejudice.

1. As provided by the initial filing, Petitioner argues that the Appellate Court unfavorably utilized motion to hold appeal in abeyance as one seeking COA. Especially in view of the fact that the court had been presented a claim of actual

innocence citing recent intervening interpretation of relevant statute under which convictions occurred. Accompanied by underlying constitutional claims supported by prior determinations issued by the court, in which impute Petitioner received the ineffective assistance of counsel. See (§ 2241 motion filed under 19-2560)

2. Recent decision provided by (19-4069), further supports Petitioner's contention that the Appellate Court has capriciously and unfavorably applied established law found under Harris v. Kerns, 404 U.S. 519, 529 (1972). Contrary to the ruling issued under the subject appeal, the court failed or refused to construe "Appellants remaining arguments challenging the district court's denial of his Rule 60(b)," as seeking COA under the same standard. (Demonstrating another instance whereby the court has effectively avoided consideration of an ineffective assistance of counsel issue that is clear from the record. Establishing a third instance under the related appeal, that the court has avoided reaching an issue first presented on direct appeal.)

3. The clear application of different standards in related matters, together highlighting a pattern of similar conduct requires exercise of this Court's supervisory powers. Necessary to also

address an underlying issue presented by the Second Circuit Court of Appeals traditional aggressiveness towards ineffective assistance claims. Court action and position that is unconstitutional in nature.

Moreover, the recent decision confirms a pattern that has reoccurred in both matters spanning several appeals. Each time the pattern has emerged, the court has effectively avoided consideration of apparent ineffective assistance of counsel claims. Earlier on relative to these proceedings, both lower courts refused to liberally construe pro se Rule 33 motions as ones brought under § 2255. Not only did the motions present ineffective assistance claims, meeting provisions under 28 U.S.C. § 2255. But also, Petitioner filed a separate request to amend pro se motions citing the All Writs Act and § 2255. In effect, avoiding consideration of the aforementioned claims now also subject of motion filed under § 2241.

Such identifiable court action demonstrates inequality under the color of law and denies Petitioner the fair administration of justice. Denial of equal protection and inequality are interchangeable in these times of current civil unrest. In order for the nation to squarely address injustice and inequality, courts must provide fair and equal

administration of justice along with equality under the color of law. Policy and law reform is rendered ineffective when courts do not adhere to the rule of law.

In speaking to the subject matter and current social climate, the Supreme Court in *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564 (1928) (Brandeis J., dissenting), posited that,

decency, security, and liberty alike demand that government officials be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure conviction of a private criminal -- would bring terrible retribution.

It would be unreasonable to conclude that courts play the most vital role in affecting reform, while the converse is true also.

C. Compelling Argument Is Presented By Extra-Ordinary Circumstances Presented By COVID-19, Further Causing Prejudice As A Result Of Unconstitutional Convictions Continuing To Subject Petitioner To An Increased Statutory Penalty.

1. Petitioner argues that extra-ordinary circumstances exist in light of COVID-19, establishing potentially life threatening conditions should exposure and infection occur. There are several reasons from which to draw upon that indicate Petitioner has pre-existing "medical condition[s] making] him particularly vulnerable to serious illness or even death from COVID-19 virus sweeping through federal prisons across the country, a precarious situation that a growing number of federal courts have found to constitute an 'extra-ordinary and compelling' reason warranting relief." See McCarthy, 2020 WL 1698732, at *5 (D. Conn. Apr. 8, 2020) unreported, quoting United States v. Cotinok, Case No. 13-CR-03890-MV, See also, United States v. Hernandez, No. 18-CR-00834 (PAE), 2020 WL 1684062, at *3 (S.D.N.Y. April 2, 2020) ("The COVID-19

pandemic is extraordinary and unprecedented in modern times in this nation.) The CDC has warned that COVID-19 poses a heightened risk to those incarcerated in jails and prisons. Interim Guidance on Mgmt. of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, Ctrs. for Disease Control and Prevention 2 (March 23, 2020).

2. Petitioner has a good faith belief that he falls into the high risk category, established by susceptibility to bronchial infection resulting in respiratory illness and difficulties. This condition has existed since childhood, likely stemming from birth as a result of complications arising from a collapsed lung. Sustained through decades of hours upon hours spent on both indoor and outdoor ice rinks.

This condition resulted in experiencing respiratory difficulties in 2013 while undergoing surgery that required extended hospitalization and cause for concern. (Surgery occurred while in custody of US Marshall Service, Albany, N.Y.)

Recently, occurring on April 18, 2020, medical staff at GPCF requested and performed a second set of X-ray images of Petitioner's lungs due to "abnormalities" previously identified a month earlier. (Currently awaiting final results)

Additionally, however shameful to admit, Petitioner took up cigarette smoking occurring on and off for more than a decade in the wake of his mother's death. An awful habit that has likely worsened the aforesaid condition.

3. "Any incarcerated person with even one of the underlying conditions identified by the CDC is unlikely to be able 'to provide self-care within' the environment of a correctional facility' to avoid contracting COVID-19. U.S. Sentencing Guidelines §1B1.13 cmt. 1 (A)(ii). The CDC has identified smoking as a condition which might put an individual at increased risk of severe illness from COVID-19. See People with Certain Medical Conditions, Ctrs. for Disease Control and Prevention, <http://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> ("Being a current or former cigarette smoker may increase your risk of severe illness from COVID-19" (emphasis added))

Recent research suggests that the risk presented from smoking is not merely speculation. See Roengvadee Patanavanich et al., Smoking Is Associated With COVID-19 Progression: A meta-analysis, Nicotine & Tobacco Research (2020), <https://academic.oup.com/ntr/article/doi/10.1093/ntr/ntaa082/5835834> (finding that the risk of disease progression in those who currently smoke

or previously smoked was nearly double that of non-smokers). As COVID-19 is a respiratory disease, and "[s]moking... increases] the risk of severity of pulmonary immune function in general." *Id.* See e.g. *United States v. Mueller*, No. 08-CR-139-AB, 2020 WL 3791548, at *3 (E.D. Pa. July 7, 2020) (recognizing that a history of smoking increases the risk of disease progression and that "when the disease worsens, current or former smokers had more acute or critical conditions or death."), see also, *United States v. Rich*, No. 17-CR-94-LM, 2020 WL 2949365, at *4 (D.N.H. June 3, 2020), quoting *United States v. Gular*, 15-CR-02559-GPC (08-06-2020) (internal quotation marks omitted.)

4. As such, this argument becomes relevant because considered together with underlying claim of actual innocence. Together raises significant and compelling claims under the Fifth and Eighth Amendment. In light of COVID-19, consideration of this issue would aid in this Court's jurisdiction establishing authority for such questions that arise out of intervening change or interpretation of controlling law.

The combination of both matters present an interesting set of questions, especially where there has been no thorough and meaningful review of underlying constitutional claims.

Potential relief available through the exercise of this Court's supervisory power, would therefore oblige the Second Circuit Court of Appeals to squarely address issues presented by this matter. (Noting, that the Appellate Court has effectively avoided reaching issues of trial error in three separate instances.)

Such action would also lead to spare judicial resources in unprecedented times by avoiding having to present §2241 motion filed under the subject appeal (19-2560) to a district court within jurisdiction where Petitioner is currently housed. It is important to consider whether the Second Circuit Court of Appeals had a jurisdictional obligation to consider the subject motion, or an obligation to re-assign the matter to a different district court (as requested).

In light of COVID-19, through the lower courts refusal to provide thorough and meaningful review to underlying claims subject to this appeal. There exists a figurative and unconstitutional hold presenting life threatening circumstances, placed through action of evidence tampering, perjury, and additional trial error all attributable to the ineffective assistance of counsel. Intervention is necessary to address the Second Circuit's "... traditional hostility towards claims

ineffective assistance of counsel..." quoting Missouri Law Review, Vol. 41, Iss. 4, Pt. 1, pg. 16.

D. New Emerging Climate Of Civil Unrest Pertaining To Injustice And Inequality Under The Color Of Law Speak To The Facts And Circumstances Of This Case.

In light of the state of affairs across the country, exercise of this Court's supervisory power would aid in this Court's jurisdiction by speaking to a national problem of inequality under the color of law. Although one case does not resolve the issue completely, it begins by reinforcing the existing foundation set in this Court's history, providing strength to recent and any further reform.

Petitioner has an inherent right to equality under the color of law, as much as any citizen born in this Country. As a Salish Indian, people with a history deeply rooted in this Country recognized by the Supreme Court in *Moe v. Confederated Salish & Kootenai Tribes...*, 425 U.S. 463 (1976). However, the facts and circumstances pertaining to the lower courts treatment of this matter cannot be reasonably explained.

Analogs to recent events occurring across the country

involving law enforcement causing civil turmoil, figuratively Petitioner has suffered a different form of assault by agents involved in the investigation. Action also taken under the color of law; assault committed by such conduct as evidence tampering, and perjury occurring during grand jury and trial testimony, done in order to increase chances of conviction. Adding to this injustice, both lower courts have effectively struck away Petitioner's Fifth and Sixth Amendment rights.

Such castigation can only be explained through analogy painted by government officials, dubbing the hunt and killing of the world's worst terrorist after one of the most notable Native Indians in history, Geronimo. The irony alone is worth discussion, and the symbolism that Geronimo represents speaks to the equality so many people of this country hope to achieve. How else can the lower courts handling of this matter be explained away.

This type of evaluation is warranted not only in view of the current civil climate, but even more compelling in consideration of the fact that other individuals convicted of arguably worse, or more severe crimes are being provided fair treatment under law. See e.g., *United States v. Pippin*, CR16-0266-

JCC (05-20-2020) convicted of child pornography while also having sexual interaction with children, granted compassionate release), see also; United States v. El-Hanafai, 10-CR-162 (KMN) (05-19-2020) convicted of providing and attempt to provide aid to Al-Qaeda, granted compassionate release).

Petitioner is not requesting release, merely that he be provided thorough and meaningful review of his case(s) (presenting similar issues stemming from nearly identical facts; recent dismissal of appeal 19-4069 will now come before this Court). Not since *Banks v. Dretke*, 540 U.S. 668 (2003), and; *Brady vs. United States*, 397 U.S. 724, 747 (1970), has the Supreme Court been confronted by such issues as provided by related matters involving Petitioner.

E. Conclusion

WHEREFORE, for all the foregoing reasons set forth herein, Petitioner respectfully request that this Court grant petition for writ of certiorari, affording such other and further relief as deemed justified and proper.

Date: August 23, 2020

Respectfully Submitted,
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