No. 20-7816

IN THE

SUPREME COURT OF THE UNITED STATES

Afolabi Pro se – PETITIONER(S)

vs.

Warden – RESPONDANT(S)

ON PETITION FOR REHEARING TO

United States Court of Appeals for the Third Circuit

PETITION FOR REHEARING

Lassissi Afolabi

North Lake Correctional Facility, P.O. Box 1500

Baldwin, MI 49304

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STATUTES AND RULES

ARGUMENT

1. The Petitioner Lassissi Afolabi asserts that his case meets the usual criteria for rehearing consideration. The Petitioner also asserts that a proceeding involves a question of "exceptional importance" inter circuit conflicts create problems, and that this Court has discretion to review his claim regarding 28 U.S.C. § 2241 under saving clause 28 U.S.C. § 2255(e) in the sense of "extraordinary circumstances." The Petitioner respectfully demands this Court that rehearing is necessarily needed for clarification to correct those errors, reverse the Court of Appeals judgment, reverse his conviction and grant relief.

2. First, the Court of Appeals by summarily affirming the District Court's judgment of the Petitioner's 28 U.S.C. § 2241 petition, stated that "Because the appeal fails to present a substantial question." The Petitioner argues that a substantial question can be a new question or a question that the Court of Appeals itself can determine for the interest of justice. The Petitioner filed a motion of Application to Bail under Rule 46(a)(2) of the Federal Rule of Criminal Procedure, asking the Court of Appeals to assign a judge to determine that substantial question and grant a bail. The Court of Appeals did not argue that the Petitioner's claim is frivolous or delay but denied the motion.

"In the following case, the fact that there was an apparent conflict among courts with respect to a question raised in an application for bail pending appeal to a Federal Court of Appeals from the applicant's conviction for federal income tax evasion was a factor in the granting of such application, by an individual Supreme Court Justice, on the ground that a substantial question had been presented.

See also *Clark v. United States* (1953) 98 L Ed 1147, 74 S Ct 357, where, in granting an application for bail pending appeal from a conviction of refusing to be inducted into the arned services, Mr. Justice Douglas, as Circuit Justice, said that the merits of the case could not be deemed insubstantial where after denial of bail by the Court of Appeals, the Supreme Court had reversed a decision bearing upon the issue raised by the appeal, and where, moreover, other Court of Appeals, on facts closely analogous to those at bar, had taken a view contrary to that taken by the trial court."

3. Thus, a trial court's denial of a defendant's request to inspect a witness' testimony before the grand jury in order to impeach him was held in *Herzog v. United States* (1995) 99 L Ed 1299, 75 S Ct 349, to raise a "substantial question" within the meaning of Rule 46(a)(2) of the Federal Rule of Criminal Procedure, which, prior to its amendment in 1956, authorized bail pending appeal of certiorari only if it appeared that the case involved a substantial question which should be determined by the Appellate Court. In such case, Mr. Justice Douglas, as Circuit Justice, pointed out that the defendant's request would have been treated differently in different circuits, and thus fell within the view that a question may be substantial if there is a contrariety of views concerning it in the several circuits.

4. In determining whether or not to grant an application for bail pending appeal of an applicant's conviction, individual Supreme Court Justice have in some cases taken into consideration whether substantial questions were presented by an appeal which raised questions as to the interpretation of previous court decisions.

5. Thus, in *D'Aquino v. United States*, (1950) 180 F.2d 271, Mr. Justice Douglas, as Circuit Justice, indicated that a question might be substantial within the meaning of Rule 46(a)(2) of the Federal Rule of Criminal Procedure, as it existed prior to the 1956 Amendment, where such

question involved important questions concerning the scope and meaning of decisions of the Supreme Court, and that even the application of well-settled principles to the facts of a case might raise fairly debatable issue."

6. Second, the Court of Appeals erred by saying the Petitioner may not pursue his claim pursuant § 2241 under the savings clause because he collateral attacked his conviction and sentence. The Petitioner in this case believes that his claims meet the criteria requires by the Supreme Court to pursue his claims. Based on the Supreme Court interpretation of the "savings Clause" the prisoner has to meet certain prongs as stated here:

> However, a petitioner must satisfy a two prongs test before he may invoke the "Saving Clause" to address errors occurring at the trial or sentencing in petition filed pursuant to 2241. In consideration of the afore-mentioned and the claims raised by the petitioner in the case at bar, §2255 as inadequate and ineffective to test the legality of a conviction due to: (1) at the time of the conviction, settled law of the circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first §2255 motion, the substantive law changed such that the conduct of which the petitioner was convicted is deemed not to be criminal; (3) the prisoner cannot satisfy the gatekeeping provisions of §2255 because the rule is not constitutional law.

7. As you can see from this text that even if it is jurisdictional concern, the United States Supreme Court is not telling the government to choose which sentence has to be applied to the petitioner. Rather, the United States Supreme Court has given opportunity to the petitioners to ("satisfy") the Courts, by showing when those errors occurred – just to specify their claims based on one of those sentences in the compound sentence to refer to when error occurred. If any court observes closely, it cans see that the United States Supreme Court has written this "saving clause" as a compound sentence, using "semi-colon." Semi-co-lon is "a punctuation mark; that is usu, used to separate the independent clauses of a compound sentence when the clauses are joined by no connective, when the clauses are joined by a conjunctive adverb, or when the clauses are joined

by a coordinating conjunction but are long and contain internal punctuation and that is often used to separate long items in a series."

8. As you can see from the United States Supreme Court's first sentence in the compound sentence using a word "establish" which means "To settle or fix after consideration or by enactment or agreement (a congressional bill ~ ing duties on a wide range of imports) (an act ~ ing quota limits on immigration)." Then, after the semicolon comes in the beginning of second sentence of the same compound sentence a word "subsequent" which means "following in time: coming or being later than something else (~ events) (a period ~ to the war) 2: following in order of place: SUCCEEDING (a clause in a treaty)." Here, the Supreme Court is talking about "events" when errors occurred along the proceedings, therefore, the petitioners have to be freed "to demonstrate" where or when error has occurred during their proceedings. For example, the petitioner who chooses "establish" to show to the court when error(s) occurred during his/her proceedings should not be barred from pursuing his claim because he or her has not chosen "subsequent" the way that jurisdiction wants it, because: (1) If that law has been established before the petitioner's trial or pretrial and the proper interpretation of the statute has been foreclosed by the Circuit Court itself, then, the first sentence in the compound sentence of the "savings clause" should be raised at any time by the petitioner regardless of jurisdiction concern. If the petitioner can demonstrate that a wrong statute or ambiguous statute has been applied to his/her case at trial or pretrial, that error must be raised and corrected at any time in § 2241 under the savings clause regardless of whether the petitioner has pled guilty to the offense. Because at that point there is a strong evidence to show that the petitioner has not properly be advised by neither his lawyer or by the court. Thus, any court should reverse the petitioner's conviction at any time, at any stage regardless of what jurisdiction the petitioner is been held. (2) If the establish law does not exist

before the petitioner's trial, pretrial, at sentencing or direct appeal, and the Supreme Court has come to intervening to address the issues or changed the law, then, the second sentence in the compound sentence can be raised by the petitioner if he or she cans "demonstrate" that the intervening retroactive caselaw of the Supreme Court applies to his/her case.

9. In those cases, if the reviewing court is satisfied that errors occurred during the proceedings, then the court to which the petition has been submitted to, cans ask if "subsequent", applying the retroactivity of the substantive law, the conduct of which the petitioner was convicted is deemed not to be criminal. In other words, if "subsequent", applying the retroactivity of the substantive law, the conduct of which the petitioner was convicted is considered non-criminal. The sentence number (1) and (2) in the Supreme Courts text of the savings clause are "two clauses" that any court should accept without jurisdiction concern if it is true that the petitioner has "demonstrated or satisfied" the court by showing error(s) occurred. (3) The third sentence in the compound sentence refers to constitutional concern, demanding the courts to analyze the petitioner's claim to see if his/her claim satisfies the gatekeeping provision of §2255 based on constitutional or unconstitutional. This third sentence is just little bit far from the sentence (1) and (2) in the compound sentence, which is particularly directs to the courts.

10. In this instance case, the Petitioner believes that the conflicts between Circuit Courts regarding 28 U.S.C. § 2241 under the "savings Clause" itself creates extraordinary circumstances in this case, which this Court has discretion to resolve. If the law hasn't be made, there would be no establish, without establish, there would be no subsequent. See Webster's Third New International Dictionary OF THE ENGLISH LANGUAGE UNABRIDGED PRINCIPAL COPYRIGHT 1961 for more clarification of "Semi-colon, establish and subsequent." See *Bruce v. Warden Lewisburg USP,* 868 F.3d 170, 180 (3d Cir. 2017).

11. Third, here, the Petitioner has raised a claim of wrongful interpretation of 18 U.S.C. § 2423(b) and 18 U.S.C. § 1589 statutes. Other Circuit Courts have been interpreting 18 U.S.C. §2423(b) differently. It turned out the change in law in 18 U.S.C. § 2423(b) has been established since 1996, but the Government and the District Court convicted the petitioner based on an ambiguous interpretation of the statute. Clearly, there is strong evidence here that the Petitioner has been wrongfully convicted because the essential elements the Government must prove beyond a reasonable doubt was omitted. When an opportunity is given to the petitioner to demonstrate where or when error occurred, he pointed to the first sentence of the compound sentence, which read "at the time of conviction, settle law of the circuit or the Supreme Court established the legality of the conviction" as requires by the Supreme Court by using *Esquivel-Quintana v. Sessions*, 581 US - - 137, S. Ct. 1562; 198 L. Ed. 2d 22(2017) to demonstrate when error occurred before pretrial or at pretrial, then subsequently, used *Esquivel-Quintana v. Sessions* to demonstrated that caselaw render his conviction non-criminal. Because this statute has been established in 1996, but the interpretation of the law has been foreclosed by the Third Circuit at the time of petitioner's pretrial and the Petitioner has been convicted based on ambiguous or wrong interpretation of the statute. See *Parker v. Arkansas*, 498 US 883, 112 L Ed 186, 111 SCT 218 (October 1, 1990) (I would grant the petition in order to clarify the limited implications of hall's suggestion that prosecution under "wrong" statute can be trial error for purposes of the Double Jeopardy clause. Consequently, I dissent....Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendment, *Gregg v. Georgia*, 428 US 153, 231, 492 Ed 2d 859, 96 S Ct 2909 (1976) (Marshall, J., dissenting), I would also grant the petition for certiorari and vacate the death sentence in this case).

12. The Court of Appeals erred by agreeing that "for the reasons provided by the District Court, that Afolabi may not pursue, in a § 2241 petition, his claim that his sentence is unconstitutional because he was not convicted of a crime of violence." The Petitioner convicted of crime of violence is extraordinary circumstance that this Court has discretion to address to also resolve this issue. The Government stated that "Afolabi next challenge the sentencing Court's application of a 4-level enhancement for conduct involved sex by forced. Section 2A3.1 (b)(1) of the adversary Guidelines increases a defendant's offense level by four when "the offense involved conduct described in 18 U.S.C. § 2241(a) or (b)." In this case, the District Court looked to subsection (a), which criminalizes conduct that 'knowingly' causes another person to engage in a sexual act – (1) by using force against that person; (2) by threatening or placing that other person in fear will be subjected to death, serious bodily injury, or kidnapping."

13. The Petitioner has been arguing that the adversary guidelines was wrongly applied to him. That force under 18 U.S.C.S. § 2241 (a)(1) meant physical force, not psychological coercion or threats. 18 U.S.C.S. § 2242(1) the e carve-out language in the latter statute reinforces the differences between the basic sexual-abuse crime and the aggravated form. The crime of sexual abuse under § 2242(1) encompasses the use of any kind of threat or other fear – inducing coercion to overcome the victims will. But for aggravated sexual abuse under § 2241(a), the jury must find that the defendant (1) actually used force against the victim or (2) that he made a specific kind or threat, i. e..., that the threatened or placed the victims in fear of death, serious bodily injury, or kidnapping. See *Cates v. United States*, 882 F.3d 731 (September 7, 2017).

14. Obviously, the Petitioner argues that he can still pursue his claim under § 2241 because he has also raised *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The Petitioner argues that the language "knowingly" used in *Rehaif* case 18 U.S.C. § 922(g) and § 924(a)(2) is relevant to

language used in 18 U.S.C.S § 2241(a), which is advisory guidelines used by the District Court and 18 U.S.C. § 1589 statute itself. 18 U.S.C. § 1589 read as follows:

> Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means-(1) by means of force, threat of force, physical restraint, or threats of physical restraint to that person or another person;(2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse of threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be [guilty of a crime].

15. Because the Supreme Court held *Rehaif* on June 21, 2019 and the Petitioner has raised *Rehaif* on June 05, 2020, means that the claim is timely raised. See Page 21 of the Petitioner's appeal to the Court of Appeals. Because 18 U.S.C. § 1589 statute carries 20 years for "forced labor" and increases to life sentence if "aggravated sexual abuse" occurs, and the Petitioner has been sentenced to about 25 years imprisonment, this Court has discretion to grant rehearing and review this case.

16. Fourth, the Petitioner argues that his due process clause has been violated. On March 21, 2019, the Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. When the case was pending in District Court for its decision, the Warden of Fort Dix transferred the Petitioner without a court's knowledge, from Fort Dix, NJ to MDC Brooklyn, NY, from MDC Brooklyn, NY to Oklahoma, and finally from Oklahoma to North Lake Correctional Facility in Baldwin, Michigan, a private facility which holds only foreigners or deportable immigrants. Day before his arrival in North Lake Correctional Facility, the district court ordered a dismissal of his petition. The Petitioner argues that this transfer violated Rule 36 of the Supreme Court. Rule 36 of the Supreme Court states that:

> 1. Pending review in this Court of a decision in habeas corpus proceeding commenced a court, justice or judge of the United before States, the person having custody of the prisoner

> may bot transfer custody to another person unless the transfer is authorized under this Rule. 3. (a) Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be enlarged on personal recognizance or bail, as may appear appropriate to the court, Justice, or judge who entered the decision, or to the court of appeals, this Court, or a judge or Justice of either court.

17. The Petitioner hasn't been given any any notice from the Court that he is subjected for deportation or whether his federal conviction has been dropped, therefore, he should be removed from the federal or FBOP system. The conditions of his confinement is significant harsher. This classification put the Petitioner in a position where he has not access of any source of legal correspondence because the facility does not have any e-mail system for the inmates as the FBOP has for other inmates confine there. See *United States v. Bioyo,* 1998 U.S. Dist. LEXIS 19112; No. 97 C 7039 (November 30, 1998). The court explained the harsher conditions include incarceration in a medium security rather than a minimum security federal prison and ineligibility for community confinement during the last ten percent of his sentence. Thus, the Petitioner in this instance case argues that his transfer from low federal prison (FBOP) to a private facility and the conditions of his confinement, specially, in this COVID-19 pandemic, is extraordinary circumstances this Court has discretion to grant rehearing and review this case. The Seventh Circuit reversed and remanded the case for resentencing "because the district court appears to have been under the impression that it lacked discretion' to evaluate whether defendant's deportable alien status resulted in unusually harsh conditions of confinement. Id. at 847. Following *Koon v. United States*, 518 U.S. 81, 98-99, 116 S. Ct. 2035, 2046-47, L. Ed. 2d 392 (1996).

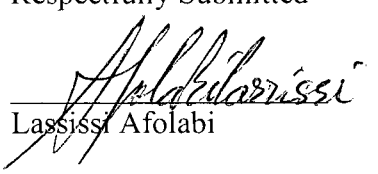
18. Finally, the Petitioner also argues that he has mentioned the transfer in his appeal and requested for attorney, stating that he is indigent and lacks legal matter and that his case is complex, but the Court of Appeals for the Third Circuit still denied him appointment of counsel. The

Petitioner asserts that this petition for rehearing is submitted timely and in good faith and is in a form that comply with Rule 44 or with Rule 33 or Rule34.

CONCLUSION

For the reasons mentioned-above rehearing should be granted.

Respectfully Submitted



Lassissi Afolabi

Date: July 2, 2021