

No. \_\_\_\_\_

**20-8009**

**ORIGINAL**

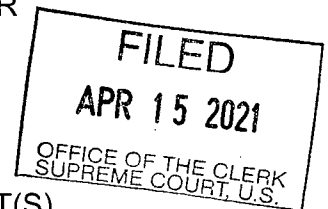
IN THE

SUPREME COURT OF THE UNITED STATES

DAVID CALHOUN — PETITIONER  
(Your Name)

vs.

COMMONWEALTH OF PENNSYLVANIA, et al. — RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAVID CALHOUN, Register #59771-066

(Your Name)

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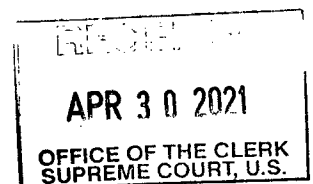
P.O. BOX 10

(Address)

LISBON, OH 44432

(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)



## CAVEAT

I, David Calhoun, hereby swear that the following statements of fact are the product of my first-hand, personal knowledge regarding my attempt to obtain access to a typewriter.

On December 14, 2020, David Calhoun (inmate Reg. #59771-066) was transferred out of the Federal Detention Center (FDC) Philadelphia. On February 4, 2021, David Calhoun (same) arrived at FCI Elkton in Ohio.

Since said arrival, David Calhoun has requested access to a typewriter, but was denied. Federal Bureau of Prisons staff have repeatedly denied Mr. Calhoun access to a typewriter and are delaying his access to an administrative remedy procedure to resolve the matter.

I, David Calhoun, swear under penalties pursuant to 28 U.S.C. § 1746 that the above statements are true.

Executed this 12<sup>th</sup> day of April 2021.

David Calhoun

DAVID CALHOUN

### QUESTION(S) PRESENTED

1. Would jurists of reason find it debatable whether the district court was correct in its denial of habeas petitioner's motion to Compel Production of Documents and did the court of appeals deny petitioner due process at a meaningful time and in a meaningful manner where it ordered respondent "to serve petitioner" the relevant documents after disposition of the case?

Suggested answer: Yes, as to both conjunctive clauses above.

2. Where Ground One for relief states "Plea of nolo contendere was rendered involuntary/unknowing [where] Commonwealth breached plea agreement," would jurists of reason debate both the district court's determination of untimeliness and the appellate court's determination that petitioner failed to state a valid claim of a denial of a constitutional right?

Suggested answer: Yes, as to both conjunctive clauses above.

3. Would jurists of reason debate whether the district court was correct in denying as untimely petitioner's claim that the state court's refusal to correct the erroneous public record had rendered his plea involuntary/unknowing?

Suggested answer: Yes.

## LIST OF PARTIES

- [ ] All parties appear in the caption of the case on the cover page.
- [✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

DAVID CALHOUN, Petitioner.

COMMONWEALTH OF PENNSYLVANIA, Respondent.

THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA,  
Respondent.

THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,  
Respondent.

(All Respondents are represented by the District Attorney's  
Office out of Philadelphia, Pennsylvania).

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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix E to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished, but appears at 2020 U.S. Dist. LEXIS 30143 (E.D. Pa. Feb. 20, 2020).

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 28, 2020. (denying Certificate of Appealability in a habeas matter under 28 U.S.C. § 2254.)

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 3, 2020, and a copy of the order denying rehearing appears at Appendix F.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including May 2, 2021 (date) on March 19, 2020 (date) in Application No. A. (Order List: 589 U.S. -- a general order extending all cases by 150 days from date of lower court judgment)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See HOHN v. UNITED STATES, 524 U.S. 236, 253 (1998) ("We hold that this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals.").

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The Privilege of the Writ of Habeas Corpus shall not be suspended[.]"

U.S. Constitution, Art. I, Sec. 9, Cl. 2.

"Nor shall any State deprive any person of life, liberty or property without due process of law." U.S. Constitution, Amend. 14, Sec. 1.

28 U.S.C. § 2244

28 U.S.C. § 2254

## STATEMENT OF THE CASE

On June 10, 2019, Petitioner filed a "protective" Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 to the United States District Court for the Eastern District of Pennsylvania. See Appx. A.

On July 29, 2019, said district court referred the habeas matter to a magistrate judge. On August 1, 2019 said magistrate ordered Respondents to file an Answer to said petition.

On October 25, 2019, Petitioner filed to said district court a motion to Compel Production of Documents. See Appx. B.

Although petitioner had filed said motion pursuant to Rule 5 of the Rules Governing § 2254 Cases, said magistrate recharacterized it as one under Rule 6 of said rules and promptly denied it. See Appx. C.

On December 5, 2019, said magistrate filed a Report and Recommendation to deny the habeas petition as untimely.

On February 20, 2020, the district court, upon consideration of Petitioner's objections to the magistrate's report, adopted said recommendations, denied the habeas petition, and denied Certificate of Appealability. See Appx. D.

Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit.

On April 22, 2020, Petitioner filed a timely Application for Certificate of Appealability (COA) to said appellate court.

On September 28, 2020, said appellate court denied COA; yet, said court ordered Respondent to serve the most relevant document upon Petitioner after disposition of the case. See Appx. E.

Petitioner filed a timely motion for rehearing. On December 3, 2020, said appellate court denied rehearing. Appx. F.

Petitioner now submits this timely Petition for Writ of Certiorari.

## REASONS FOR GRANTING THE PETITION

I. JURISTS OF REASON WOULD DEBATE WHETHER THE DISTRICT COURT WAS CORRECT IN DENYING HABEAS PETITIONER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND THE COURT OF APPEALS GRANT OF SAID MOTION AFTER DISPOSITION OF THE CASE DENIED PETITIONER DUE PROCESS AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER.

Respondents having filed an Answer to the habeas petition in the district court, Petitioner subsequently filed a motion to Compel Production of Documents. See Appx. B. Although said motion expressly invoked Rule 5 of the Rules Governing § 2254 Cases, the district court recharacterized it under Habeas Rule 6 and promptly denied. See Appx. C.

In denying COA, the United States Court of Appeals for the Third Circuit tacitly agreed with respect to Calhoun's position on said procedural ruling, stating:

Even if jurists of reason could debate whether the District Court erred in denying [Calhoun's] request for documents, they would agree [in denial of COA.]

See Appx. D.

Said appellate court did grant the motion for documents but only after disposition of the case. *Id.*

In deciding whether to grant certiorari, this Court should consider that the Third Circuit's ruling not to remand the matter (nor grant COA) is in conflict with other courts of appeals. See Rule 10(a) of the Rules of the Supreme Court of the United States. Said conflict arises from precedent in the Fourth Circuit which remanded based on a violation of Habeas Rule 5. See *THOMPSON v. GREENE*, 427 F.3d 263, 271 (4th Cir. 2005) ("It is irrelevant whether petitioner can demonstrate need to the court, or whether he already has the documents.").

The Eleventh Circuit also reversed and remanded for failure to serve documents for which a habeas petitioner is "procedurally entitled" under Habeas Rule 5. See *RODRIGUEZ v. FLA. DEPT. OF CORR.*, 748 F.3d 1073, 1082 (11th Cir. 2014).

In the district court, Calhoun had not received any documents that qualify under Habeas Rule 5; yet, his application for COA focused on the document that was

central to his first ground for relief. Ground One alleges the Commonwealth had breached the plea agreement when it argued in the Superior Court of Pennsylvania (and for the first time) to maintain a public court record that erroneously represents the disposition of the criminal matter as one of "Guilty Plea" whereas the parties signed for, and Calhoun so pleaded, "nolo contendere." Thus, the core document that triggers the claim in Ground One -- the Commonwealth's brief to the Superior Court filed in December 2018 -- contains the instance of the alleged breach. Such a document qualifies as required to be filed to the district court under Habeas Rule 5. See Rules Governing § 2254 Cases, Rule 5(d)(2) (stating: "The respondent must also file with the answer a copy of ... any brief that the prosecution submitted in an appellate court[.]").

The importance of that document cannot be understated because the date of the filing starts the one-year clock for Calhoun to file his habeas petition. The Court of Appeals for the Third Circuit tacitly disagreed with the district court's

determination that the habeas petition was untimely; however, said appellate court denied COA on an alternative ground. See Appx. D.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."

MATHEWS v. ELDREDGE, 424 U.S. 319, 333 (1976). If the

Eleventh Circuit is correct that a habeas petitioner is

"procedurally entitled" to be served documents that qualify under Rule 5 then the Third Circuit's ruling to serve

upon Calhoun the central document of a claim subsequent

to the disposition of the case fails to accord him due

process at a meaningful time and in a meaningful

manner.

For the reasons stated, this Court should grant the writ of certiorari on the question as to whether

Certificate of Appealability should issue regarding the

aforementioned procedural errors.

II. WHERE GROUND ONE FOR RELIEF STATES, "PLEA OF NOLO CONTENDERE WAS RENDERED INVOLUNTARY/UNKNOWING [WHERE] COMMONWEALTH BREACHED PLEA AGREEMENT," JURISTS OF REASON WOULD DEBATE BOTH THE DISTRICT COURT'S DETERMINATION OF UNTIMELINESS AND THE APPELLATE COURT'S DETERMINATION THAT PETITIONER FAILED TO STATE A VALID CLAIM OF A DENIAL OF A CONSTITUTIONAL RIGHT.

Petitioner's first ground for relief states:

GROUND ONE: Plea of nolo contendere was rendered involuntary/unknowing [where] Commonwealth breached plea agreement upon arguing for the [state appellate court] to permit the Common Pleas Court to maintain record of "guilty plea" where parties bargained for nolo contendere.

See Appx. A, p. 5 (pagination page 8). Petitioner also alleged the breach occurred in December 2018. *Id.*, p. 14 (pagination #17).

Petitioner filed the instant habeas petition within one year of when the alleged breach occurred, yet the district



court denied the petition as untimely. See Appx. C. The Court of Appeals tacitly agreed the petition was timely under 28 U.S.C. § 2244 (d)(1)(D), but denied COA. See Appx. D.

In deciding whether to grant a writ of certiorari, this Court should consider that the Third Circuit's ruling that Petitioner had failed to state a valid claim of a denial of a constitutional right is in conflict with other courts of appeal. See Rule 10(a) of the Rules of the Supreme Court of the United States. A precedent opinion in the Tenth Circuit states the exact opposite of said ruling in the instant matter. See GIBSON v. KLINGER, 232 F.3d 799, 803 (10<sup>th</sup> Cir. 2000) ("a material breach of [a] plea agreement ... debatably states a valid constitutional claim."). Precedent in the Eighth Circuit closely follows that of the Tenth. See UNITED STATES v. MOSLEY, 505 F.3d 804, 809 (8<sup>th</sup> Cir. 2007) ("the government's material breach of the plea agreement violates the defendant's due process rights"). The Ninth Circuit sitting en banc has held that a defendant has a "constitutional right to enforce a plea agreement." DOE v. HARRIS, 690 F.3d 972,

975 (9th Cir. 2011) (en banc). The Fourth Circuit has cited Supreme Court decisions where it held: "If the government breaches express or implied terms of a plea agreement, a violation of due process occurs." UNITED STATES v. MARTIN, 25 F.3d 211, 217 (4th Cir. 1994) (citing MABRY v. JOHNSON, 467 U.S. 504, 509 (1984) and SANTOBELLO v. NEW YORK, 404 U.S. 257, 262-63 (1971)).

A more recent decision in this Court has stated that the government's breach of a plea agreement "is undoubtably a violation of the defendant's rights." PUCKETT v. UNITED STATES, 556 U.S. 129, 136 (2009).

It is at least debatable that a "breach is material and substantial when it defeats the benefit for which the accused bargained." State v. NAYDIHOR, 270 Wis.2d 285, 678 N.W.2d 220, 225 (Wis. 2004). Thus, where the Superior Court of Pennsylvania adopted the Commonwealth's argument (breach) to maintain a public court record of "guilty plea" where Calhoun never so pleaded, he lost the benefit of his nolo contendere.

For the reasons stated, this Court should grant a writ for purposes of determining the debatability of the rulings below.

III. JURISTS OF REASON WOULD DEBATE WHETHER THE DISTRICT COURT WAS CORRECT IN DENYING AS UNTIMELY PETITIONER'S CLAIM THAT THE STATE COURT'S REFUSAL TO CORRECT THE COURT'S ERRONEOUS PUBLIC RECORD HAD RENDERED HIS NOLO CONTENDERE INVOLUNTARY/UNKNOWNING.

Plea negotiations in the underlying criminal matter resulted in a plea agreement signed by all parties and adopted by the Court of Common Pleas of Philadelphia County. Pursuant to said plea agreement, Calhoun entered nolo contendere; however, said court erroneously entered into its public record a disposition of "Guilty Plea." Calhoun never pleaded guilty to any charge.

Upon discovering the erroneous record, Calhoun filed a Motion to Correct Record to said court and, in the alternative--event the Common Pleas court refused to so correct,

Calhoun argued to take back his nolo contendere on grounds said refusal to correct rendered the plea involuntary/unknowing.

The Common Pleas court denied relief and Calhoun appealed to the Superior Court of Pennsylvania. During the appeal, Calhoun also filed the instant "protective" habeas petition to the aforementioned United States District Court.

Despite the fact that the habeas petition alleges the involuntariness of the nolo contendere turns on the State Court's refusal to correct a clerical error, the district court determined that petitioner should have filed the habeas petition within one year of when his criminal judgment was final. The district court did not conduct any analysis as to whether the Common Pleas's acceptance of the nolo contendere mislead Calhoun to believe the record would be recorded properly.

The district court's ruling implies that a habeas petition should have been filed without resort to a Motion to Correct.

Such a determination suggests there exists no protections of law are built into a plea agreement to serve as a barrier to involuntariness. This concept contravenes existing law.

The primary controlling principle on this issue at hand is that "[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts." *PUCKETT v. UNITED STATES*, 556 U.S. 129, 137 (2009)

Through said principle, remedies existing in state law where the plea agreement (contract) was consummated essentially become part of the contract (bargain). This Court stated:

The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as a measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than which the terms of the contract would indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right,

compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence, any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.

McCracken v. Hayward, 2 How. 608, 612, 11 L.Ed. 397, 399 (1844).

Thus, if a remedy existed in Pennsylvania law at the time the plea agreement was made to cure an erroneous public record then that remedy was necessarily incorporated into Calhoun's plea agreement. Indeed, the proper remedy for a faulty docket is through a motion to correct. See *COMMONWEALTH EX REL. GENTNER v. BURKE*, 175 Pa. Super. Ct. 440, 442 (Pa. Super. 1954).

It follows from these principles that Calhoun could not rightly claim his plea was rendered involuntary unless and until the remedy itself was denied. Appellate review of said denial of remedy was an additional remedy and therefore only where Calhoun exhausted remedies could his habeas claim manifest.

In light of the fact Calhoun had filed his "protective" habeas corpus within one year of when his remedies to correct the erroneous public court record were exhausted, said petition was timely filed. See 28 U.S.C. § 2244(d)(1)(D).

For the reasons stated, this Court should grant Calhoun a writ of certiorari on the question of whether jurists of reason would debate whether his habeas petition was timely.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David Calhoun  
DAVID CALHOUN

Date: April 15, 2021