

S.D.N.Y.-N.Y.C.
12-cr-152
17-cv-4723
McMahon, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of June, two thousand twenty-one.

Present:

Rosemary S. Pooler,
Raymond J. Lohier, Jr.,
Circuit Judges,
Lewis A. Kaplan,
*District Judge.**

Michael Binday,

Petitioner,

v.

21-1206

United States of America,

Respondent.

Petitioner moves for a determination of whether he may proceed in district court with his motion filed under 28 U.S.C. § 2255 and 28 U.S.C. § 2241. Upon due consideration, it is hereby ORDERED that the proceeding is STAYED pending a response from the Respondent, a reply from the Petitioner, and this Court's consideration of the supplemental briefing. *See Galtieri v. United States*, 128 F.3d 33, 37 (2d Cir. 1997) (permitting stay of successive proceeding, with the 30-day period for deciding the successive motion starting when all papers necessary for a reasoned decision are filed). The response is to be filed within 21 days after the date of this order; the reply is to be filed within 14 days after the filing of the response. The response and reply must address, with citations to the relevant case law, all issues relevant to whether Petitioner should be permitted to proceed in district court under § 2255 and/or § 2241, including the following issues:

* Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

- (1) Whether Petitioner's proposed motion falls within § 2255 and/or § 2241;
- (2) If encompassed by § 2255, whether it is successive within the meaning of § 2255(h);
- (3) If encompassed by § 2241, whether Petitioner is entitled to any relief;
- (4) Whether *Kelly v. United States*, 140 S. Ct. 1565 (2020), announced "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," within the meaning of § 2255(h)(2);
- (5) Whether *Kelly* is otherwise retroactive to Petitioner's case;
- (6) Whether *Kelly* has overturned or otherwise affected this Court's decision in *United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017), or other relevant decisions; and
- (7) Whether Petitioner's arguments have been preserved in prior proceedings and whether that affects this Court's analysis of any relevant issue.

Once the supplemental briefing is completed, the present motion will be considered by a new panel in the ordinary course.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

A circular seal of the United States Court of Appeals for the Second Circuit is positioned over the signature. The seal features the words "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, with stars on either side of the center text.