No. 21-5101

In The Supreme Court of the United States

GIUSEPPE **VIOLA**,

Petitioner,

v.

JOHN **MACADOREY** WARDEN, ARIZONA STATE PRISON – YUMA, DESIGNATED AS A FEDERAL FACILITY BY **UNITED STATES** BUREAU OF PRISONS,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

GIUSEPPE VIOLA, 050936
ASPC YUMA – CIBOLA, 6A47
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Petitioner pro se

GROUNDS FOR REVIEW

The petitioner hereby fully incorporates and realleges the claims presented on certiorari, where the discretion of the Court was additionally requested to consider application 28 USC § 1651 in aid of its jurisdiction. He respectfully requests the petition to be docketed as submitted, and as presented in motion lodged but not acted upon, as it more accurately represents the relation of the parties.

The issues presented are provided in an effort to remedy those concerns upon which the Order of 4 October 2021 may have been based, and to further assist the Court in its determination that substantial constitutional rights have been violated in the absence of jurisdiction, contrary to its precedent decisions, and indeed, can be shown to present instances of actual innocence.

CERTIFICATE OF RESTRICTION OF GROUNDS

The undersigned petitioner hereby certifies that this Petition for Rehearing is restricted to the grounds above stated, as are more thoroughly set forth below, in compliance with Rule 44.2, and are limited to intervening circumstances of a substantial or controlling effect, or to other substantial grounds not previously presented, and pursuant to all other pertinent rules, in good faith, and not for delay.

Respectfully submitted under 28 USC § 1746 this 28th day of October, 2021.

/s/ Giuseppe Viola

Petitioner *pro se*

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PETITION FOR REHEARING

Giuseppe Viola respectfully petitions for rehearing to review the Order of this Court, in Viola v. Macadorey, *et al.*, No. 21 – 5101. [Caption FRAP 43(c)(2), *qv Appx*]

JURISDICTION

Following Rule 44.2, this Petition is submitted under 28 USC § 2241 in challenge to conditions of restraint, as afforded under the CARES Act for an elderly, medically vulnerable applicant, with request for invocation of 28 USC § 1651 (all Writs Act) in furtherance of the plenary authority of this Court in consideration of the "fact...of confinement" of 18 USC § 3626(g)(2), as a pertinent component of the CARES Act, as addressed in Martinez-Brooks v. Easter & Carvajal, No. CV 20-00569(MPS) (D CT 5/12/20), p. 34-36, as previously filed. *See*, Petition for Certiorari, Appendix G.

Since that filing, the petitioner has become aware of this Court's additional path for relief provided through direct collateral review, as is more thoroughly set forth in the comprehensive recent exposition by Z. Payvand Ahdout, of the University of Virginia, School of Law, in the *Columbia Law Review*, Vol. 121:1, 2021, pp. 159-213. *See*, fully provided, in Appendix E.

As all issues have been presented before the Arizona Supreme Court, both on Petition for Review from a decision of its Court of Appeals of a post-conviction collateral review, and as a Petition for Special Action, he additionally seeks such review under 28 USC § 1257(a).

REASONS FOR GRANTING THE PETITION

The inextricably intertwined nature of these now consolidated set of proceedings must be resolved collectively for any meaningful relief to occur, as vacating one or both of the state and federal actions, but without the involuntary bankruptcy used to seize all assets might result in liberty, it would be without any means to seriously resume business activities from which any restitution would be paid. Alternatively, if one of the actions and the financial case is permitted a pathway to resolution, but the remaining action continues custody, the net status is still gridlock.

The Statement of the Case clearly set forth how the cases were layered into an intricate array of maximum frustration. Yet each of these component bases of restraint have fatal flaws of absence of subject matter jurisdiction, and present sufficient evidence of actual innocence to allow any jurist who virtuously holds their oath of office above the external clamor of the swirl of political winds, to grant a meaningful review on the merits, if not the actual restoration of life and liberty.

I. Enumeration of Facts

Presently, we endure this last vexing combination, where the custody in the federal action has terminated, leaving only its separate restraint of supervised release and restitution upon release from state custody, which yet survives notwithstanding its many aspects for relief, none of which have yet been afforded review on the merits.

The instances of intervening circumstances of substantial or controlling effect are: (1) The closing without notice, process, or reason of the previously reopened involuntary bankruptcy; and (2) The again rebuffed presentation of a Petition for Post-Conviction Relief in the state trial court, where the state Supreme Court on both Petition for Review of an appellate court denial; and of a Petition for Special Action to avoid the procedural morass on post-conviction appeal, but unfortunately, again dismissed despite a clear argument on constitutional due process which does not permit designation as successive. *See*, Stewart v. Martinez-Villareal, 523 US 637, 638 (1998); Slack v. McDaniel, 529 US 473, 485-87 (2000); High v. Ignacio, 408 F. 3d 585, 589 n. 4 (9th Cir 2005). *Also see*, Section II A below.

Nevertheless, every conceivable path to relief in each of the three bases of custody has been amply pursued and exhausted over the course of the past eleven and a half years, each of which eventually leading to petitions for certiorari in this Court: (1) No. 13-6802, from direct appeal in the state case; (2) No. 14-7262, from the direct appeal in the federal case; (3) No. 17-8493 from the § 2254 appeal consolidated with the federal action and involuntary bankruptcy; (4) No. 18-9471 from the state PCR collateral review, presenting significant *ex post facto* violations, along with the related consolidated matters; and (5) this most recent in No. 21-5101, which, finding the holding of District Judge Michael P. Shea of the District of Connecticut to permit a review through § 2241 under the CARES Act for conditions of confinement to necessarily include review of the "fact or duration of confinement" itself, thus offering a unique avoidance of AEDPA obstructions and the opportunity to comprehensively review all the matters simultaneously.

The other substantive grounds not previously presented are those described in the recent *Columbia Law Review* article, Direct Collateral Review, by Z. Payvand Ahdout (*Col. L. Rev.* No. 121:1, 2021), detailing this Court's access to counter what may actually be the present form of AEDPA as constitutional annulment of federal guarantees provided under Article I, § 9, and by extension Ariz. Const. Art. 2, § 14.

II. Arguments in Support of Factual Bases

Collectively, these violations indicating the need to overturn in each, are as follows:

A. Actual Innocence in the Arizona Case

(No. CR 1990 – 010323)(Maricopa County Superior Court)

The Arizona appellate court's references to futures contracts as securities in its Memorandum Decision, taken from the trial record and State's brief, without the input of the petitioner, as he had been denied the right to self-represent on appeal after having done so at trial, conflict with the intent of Congress to preempt the field of futures transactions, as expressly provided in general, under the Commodity Exchange Act (CEA), 7 USC § 1 et seq., as this court held in Commodity Futures Trading Commission (CFTC) v. Schor, 478 US 833, 836-37 (1986) and Merrill Lynch v. Curran, 456 US 353, 368 FN 40 (1982). *See*, Appendices A, D, and E.

The predecessor of the latter, Curran v. Merrill Lynch, 622 F. 2d 216 (6th Cir 1980), decided *in pari materia* with the more explicit Kelly v. Carr, 691 F. 2d 800, 805 (6th Cir 1980) under 7 USC § 13a-2, by virtually the same panel, within four days of each other, clearly established the bright line for preemption in the subject areas. Only general prosecutions are permitted to the states, but all those, such as here, that even so slightly enter the regulatory realm are preempted. 7 USC § 13a-2(7).

The State, in its indictment, used "artful pleading", as held in Lambert Run Coal v. Baltimore, Ohio R.R. Co., 258 US 377, 382 (1922), to assert claims involving futures contracts under the exclusive jurisdiction of the Commodity Exchange Act, and which *inter alia*, referenced such contracts as "securities," as defined under ARS § 44-1801, in specific conflict with that of the Act, and of authorities of the Supreme Court. The State lacked subject matter jurisdiction, and more recently recognized same in its passage of ARS § 47-8103(F) (1995), without having amended ARS § 44-1801, which had caused the earlier conflict. *See*, also, Coleman v. Johnsen, 690 Ariz Adv Rep 10, 6/13/14, as the source of the procedural obstruction.

See, No. CV 20-01107-PHX-DJH, Dkt. 8, Mtn. for Expansion of Record, 6/16/20, p. 7-8; *Also*, Its Appendix C, Item 9, RT, No. CR1990-010323(Mar. Cty.), Donald Hearing, 1/411, p. 7, ln 3-19, Plea Offer; Place of service of sentence

B. Actual Innocence in the Federal Case

(N°. CR-10-0588 EJD (ND CA)

In the federal criminal proceeding, a lack of subject matter jurisdiction occurs where both the indictment and plea agreement derived therefrom acknowledged that the subject loan participation notes were all executed **after** thorough consultation on a face-to-face basis, and not through the instrumentality of the mails, thus outside of the applicability of the statutory element necessity of 18 USC § 1341, which requires the **execution** of any transaction under its authority, and not merely any subsequent derivative usage, as held in US v. Kann, 323 US 88, 95 (1944), US v. Parr, 363 US 370, 389 (1960), and US v. Maze, 414 US 375, 400 (1974). *See*, Petition for Certiorari, Appendix B, Indictment, 8/3/10, p. 2 ¶ 2, 4; p. 4, ¶ 8; p. 5.

However, all attempts at the successful presentation of this information to direct and collateral appellate review were stymied by the insistence on focusing to the presence of a plea agreement, and in the minds of the jurists involved, voided the merits of the argument, however substantive the subject matter jurisdictional issue may have been, or how the argument shadowed what would eventually become available a few years later. *See, also, Id.*, Settlement Communication, Appendix F.

Such matters can be challenged as to their constitutionality or jurisdiction without bar from any guilty plea. Class v. US, 583 US___, (2018). Therefore, the procedural shot of the proof needed to secure relief, has provided exactly that missing portion required to complete the actual innocence presentation.

C. Actual Innocence in the Involuntary Bankruptcy to Seize Assets (N°. 10-30904 DM) (ND CA)

Here, the obligation of the bankruptcy court, as a threshold matter, was to have initially ascertained its subject matter jurisdiction under 11 USC § 303(b) of a petition submitted in involuntary bankruptcy, citing this Court's seminal opinion in Canute Steamship Co. Ltd. v. Pittsburgh & W. Va. Coal, 263 US 244, 248 (1923), on which decisions in the Ninth Circuit relied, as applied by *In re* Quality Laser Works, 211 B.R. 936, 941 (9th Cir BAP 1997):

> "A petition on Official Form N°. 5 is regular on its face if the boxes next to the preprinted essential allegations are checked and if the form is otherwise correctly completed." Quality Laser at 941 *citing* *In re* Kidwell, 158 B.R. 203, 209 (Bkr ED CA 1993).

Which was precisely the condition of the petition presented, both as to its failure to check the boxes at the lower left of Official Form 5, and for its numerous incorrectly entered facts, including the improper identification of the parties, and that both Kirsch and Wherco had been fully reimbursed, as outlined in the motion to proceed on appeal *IFP*, as well as to the personal successful history of this petitioner to so proceed on numerous previous occasions recognized under FRAP 24(a)(3). *See*, Petition for Certiorari, Appendix C, Bankruptcy Petition and Declaration.

Additionally, *In re* Caucus Distributors, Inc. 106 B.R. 890 (Bkr ED VA 1989), had been cited, the definitive historical treatise by Chief Judge Martin V.B. Bostetter, Jr., of the Bankruptcy Court of the Eastern District of Virginia, in which another proceeding involved the concurrent criminal and involuntary bankruptcy actions had occurred, which could raise the additional question of whether the involuntary petition used to seize assets retained its civil aspect under § 1915, or had through coordination, served as a proxy for an action in forfeiture as a matter of prosecutorial strategy.

It is also a comprehensive authority for the bar-to-joinder doctrine proscribing subsequent creditors from joining a petition representing a circuit split and which, as filed as to entities not in the name, nor under control of the petitioner, and as such, lacked jurisdictional sufficiency. *See, Id.*, Appendix F, Claims Register

Unfortunately, the district court on appeal from the bankruptcy court, both bifurcated the issues addressed *sua sponte*, and then following the docketing of the appeal, moved to divest the petitioner of *IFP* status, as the obstructive order here.

Subject matter jurisdiction cannot be waived, forfeited, or stipulated. US v. Cotton, 535 US 625, 630 (2002), thus establishing actual innocence, and grounds for vacating the judgments in both of the criminal actions, and the entry of the involuntary bankruptcy, as well as the renewal of the counterclaim dismissed improvidently by the bankruptcy court. Stern v. Marshall, ___US___, 131 S. Ct. 2594, 2605 (2011); Granfinanciera, S.A. v. Nordberg, 492 US 33, 50 (1989).

III. SUMMARY

To reiterate the matters demonstrated and supported in appellate presentation:

1. The petitioner was denied the right to self-represent on appeal in the Arizona state case, despite numerous requests to do so, notwithstanding the holding of the state Supreme Court that such right was equal to that of representation, and available to those as this petitioner who had also self-represented at trial.
2. Although the trial court had acknowledged that the date of the alleged offenses required application of the sentencing protocols existing at the time, he failed after several requests, to specify the much shorter term, along with its much earlier expiration. *See*, Appendix B, Special Action, p. 7-8.
3. The petitioner was additionally foreclosed from filing any collateral relief review, on the mistaken application of the current time period allowed, when at the proper time relative to the alleged offenses, no such time constraint existed. Moreover, having denied the self-representation on the direct appeal, and thereby essentially extinguishing the state constitutional right to appeal, that no calculation of the allowed time beyond appeal could be made.
4. The state charges are barred by federal preemption. *See, Id.* Sp. Act, p.11-14.
5. The petitioner presented the testimony of the eminent forensic scientist, and specialist in fingerprint and biometric technology, and developer of the AFIS (Automatic Fingerprint Identification System), Kenneth R. Moses, who found that (1) Several immutable biometric identifiers were distinct and distinguishable between those on file from the 1987-89 charges alleged in the 1990 indictment, with those of the petitioner; and (2) that the earlier

information had been entered upon the current information cards, therby, at a minimum, providing reasonable doubt as to identity after twenty years.. *See*, Appendix C, Reporter's Transcripts, Kenneth R. Moses, 3/23 – 24/2011.

6. The Federal case, although resolved through plea agreement, retains the right to challenge jurisdictional and constitutional defects under Class, *supra*, which arose somewhat after the direct and § 2255 motion. It then allows for acknowledgment of the directly applicable holdings in Kann, Parr, and Maze, *supra*. Those authorities are unequivocal in their holding that the language of 18 USC § 1341 provides jurisdiction only to those instances where the offense occurs in its execution, and not in any derived transaction.
7. In similar manner, the question of subject matter jurisdiction is highlighted in any review under involuntary bankruptcy under 11 USC § 303(b), especially as here, as it was created as an adjunct to the ancient Arizona action as a means to seize the considerable assets of the operating entities under the administration of this petitioner, even where not in his name. Here, the Ninth Circuit BAP had established a very straightforward definition of that jurisdiction based on the regularity of the Chapter 7 petition, which here, was incomplete so as to avoid the certain knowledge by counsel for the filing petitioner that there were may more than the three required parties to file, and that such awareness would void any *faux naïve* submission, nor when not otherwise correctly completed as to named parties.
8. That the materials submitted in the petition for certiorari at its Appendix F amply demonstrate that this petitioner is an elderly, medically vulnerable individual, and is richly deserving of review of the conditions of his restraint under the present conditions of Covid -19 and its new δ variant (Delta), that if contracted by one whose protective coronary sheath of the heart musculature would be infected, it would present an extremely elevated risk of co-morbidity in the form tachycardia. Indeed, it has recently been found in young men to present conditions of myocarditis or pericarditis, as this petitioner sustained when infected by the SARS virus, the predecessor to these newer corona virus strains, twenty years ago in San Francisco. See, two recent relevant articles, to Covid and ADCRR responses, which also cite the recent troubling frequency of excess sentence terms, Appendix D.
9. Whereas, it has been demonstrated and enumerated that essential constitutional guarantees have been denied despite his persistent respectful requests across the span of the terms of two Popes and three Presidents, during this most recent period of which he has endured conditions that represent mortal danger beyond those permitted under Amendment VIII, he asks as on certiorari to resume a productive life within the advances in technology which continue to maintain his sanity, that the matters he has sought throughout his life may yet come to provide the benefits envisioned.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that the Court grant this Petition for Rehearing, upon its request for response from one or both of the named Respondents, upon which certiorari is granted, with the grant of Oral Argument upon the filing of the Brief on the Merits within the time and terms of Rules 24 and 28; whereupon relief as to be addressed and presented in its fullest form shall be sought.

Respectfully submitted this 28th day of October, 2021.

/s/ **Giuseppe Viola**
Petitioner pro se

Additional material from this filing is available in the Clerk's Office.