

No.

21 - 6247

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Andrew Cox — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andrew Cox (Reg # 69123 ob1)

(Your Name)

Po Box 10

(Address)

Lisbon, OH 44432

(City, State, Zip Code)

n/a

(Phone Number)

TRULINCS 69123061 - COX, ANDREW - Unit: ELK-A-A

FROM: 69123061
TO:
SUBJECT: Question Presented
DATE: 11/01/2021 09:05:11 PM

QUESTION PRESENTED

I. Does an inordinate delay of almost six years -- as a matter of law -- render a motion to vacate under 28 USC 2255 inadequate or ineffective to the point that Petitioner may invoke the Suspension Clause and file a petition for a writ of habeas corpus under 28 USC 2241?

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:

RELATED CASES

n/a

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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 A 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 is unpublished.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 B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

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 is unpublished.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 is unpublished.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 10/13/21.

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: _____, 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. § 1254(1).

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

Article 1, section 9, clause 2 -- the Suspension Clause

28 USC 2241

28 USC 2255

FROM: 69123061
TO:
SUBJECT: Statement of the Case
DATE: 11/01/2021 09:06:26 PM

STATEMENT OF THE CASE

On 05 December 2014, (then) District of New Jersey Chief Judge Jerome B. Simandle sua sponte removed Cox's sentencing judge -- USDJ Jose L. Linares -- for criminal judicial misconduct and reassigned Cox's case to USDJ Claire C. Cecchi. See DNJ 11-cr-99 at docket entries 236-237.

Cox's conviction was finalized on direct appeal on 23 February 2015. Cox v. United States, No. 14-7941 (US, 2015).

On 20 January 2016, Cox filed a timely motion to vacate under 28 USC 2255, alleging, *inter alia*, malicious prosecution *per se* via the fraudulent manipulation of his district court docket to post-date his arrest 35 days (from the correct 02 December 2010 to the false 05 January 2011); actual innocence based on a staggering amount of unlawfully withheld Brady exculpatory evidence; and both Court and Government violations of his judicially binding Rule 11(c)(1)(C) plea agreement. See DNJ 16-cv-0345 at Dkt 01.

On 18 August 2016, Cox filed the underlying petition for a writ of habeas corpus under 28 USC 2241, asserting "that his 28 USC 2255 action has not been ruled on, thereby constituting suspension of his right to habeas corpus." NDOH 16-cv-1981 at Dkt 05, pg 01.

The District Court denied Cox's petition on 12 September 2016, stating "his 2255 case has been pending only since January 20, 2016. This does not, as a matter of law, constitute 'suspension' of his right to habeas corpus. Moreover, Cox has adequate remedies at law if he believes the trial court is not handling his 2255 petition in a timely manner." *Id* (internal citation omitted).

Judge Cecchi finally issued a briefing schedule on 17 November 2017 -- 22 months after Cox's 2255 motion was filed. See DNJ 16-cv-0345 at Dkt 22.

On 02 March 2018, the United States filed a stupidly frivolous and borderline incoherent Answer to Cox's 2255 motion, which failed to address or deny any of Cox's claims -- including that Cox was maliciously prosecuted *per se* and is actually innocent. *Id* at Dkt 29.

Thus -- under Rule 5(b) of the Rules Governing Section 2255 Proceedings ("The answer must address the allegations in the motion."), and Federal Rule of Civil Procedure 8(b)(6) ("An allegation ... is admitted if a responsive pleading is required and the allegation is not denied.") -- the United States legally admitted that Cox is actually innocent.

On 13 March 2018, briefing was completed with Cox's motion for summary judgment of his now Government-admitted 2255 motion. *Id* at Dkt 30.

But Judge Cecchi inexplicably refused to exercise jurisdiction over Cox's 2255 motion.

Unbeknownst to Cox at the time, in January of 2019, the AUSA assigned to Cox's case -- Shana W. Chen -- left the United States Attorneys Office, the Government chose not to assign another AUSA to Cox's active case, and thus the United States effectively abandoned Cox's prosecution. *Id* at Dkt 51.

The Government choosing to abandon Cox's prosecution at this point was appropriate -- and indeed was expected -- because the United States had already admitted ten months earlier (in March of 2018) that Cox was maliciously prosecuted *per se* and is actually innocent.

On 22 January 2020, Cox filed a motion to expedite (*Id* at Dkt 35), and on 27 January 2020 Judge Cecchi inexplicably ordered the United States to supplement its "deficient" Answer by 03 February 2020. *Id* at Dkt 36.

Since the United States abandoned Cox's prosecution in January of 2019 -- one full year earlier -- it refused to comply with Judge Cecchi's order and defaulted, thus officially abandoning Cox's prosecution because he is actually innocent.

Over the next three months, Cox filed a notice of Government default (*Id* at Dkt 37), motion for entry of nolle prosequi (*Id* at Dkt 38), and a second motion to expedite because a district court has no legal discretion to deny an abandoned prosecution (*Id* at

Dkt 39).

Importantly, at no point did Judge Cecchi ever issue a show-cause order to the United States, but still inexplicably refused to exercise jurisdiction over Cox's Government-admitted and Government-abandoned 2255 motion.

On 12 May 2020, Cox filed an emergency petition for a writ of mandamus asking the Third Circuit to grant his 2255 motion and order his immediate release from federal custody. *In re: Cox, No. 20-1993 (3d Cir. 2020).*

In direct retaliation for Cox filing that mandamus petition, the very next day, 13 May 2020, Judge Cecchi actually initiated multiple secret, *ex parte* communications with the United States. *Id* at Dkt 42.

When Judge Cecchi initially "reached out to the Government" *ex parte*: (1) she was told that AUSA Chen left the DNJ-USAO in January of 2019 and the United States had abandoned Cox's prosecution, and (2) she requested that the USAO assign a new AUSA to Cox's case to try and suppress the Government's previous 16-month abandonment. *Id.*

The DNJ-USAO assigned sacrificial rookie AUSA George L. Brandley to Cox's case, who then had at least one subsequent, secret *ex parte* teleconference with Judge Cecchi on 13 May 2020 regarding how to suppress the Government's 16-month abandonment of Cox's prosecution. *Id.*

There is no record of any of Judge Cecchi's secret, *ex parte* communications with the United States. There is no minute entry on the docket, no transcript, no letter memorializing the teleconference -- nothing. And Cox was neither informed nor included. See *Id* at Dkt 44.

The "appearance of justice" at this point indicates a criminal conspiracy between Judge Cecchi and the DNJ-USAO to deny Cox's constitutional due process right to entry of *nolle prosequi* following the Government's incredibly lengthy abandonment of his prosecution.

On 04 June 2020 (entered 09 June 2020), the Third Circuit denied Cox's mandamus petition, stating "contrary to Cox's contention, the District Court is moving forward with the case, and we are confident that it will adjudicate his pending 2255 motion in a timely manner." *In re: Cox, No. 20-1993 (3d Cir. 2020)* at Dkt 06, pg 03.

On 05 June 2020, the United States explicitly admitted to at least two of its secret, *ex parte* communications with Judge Cecchi. DNJ 16-cv-0345 at Dkt 42, pg 03.

Cox immediately moved to recuse Judge Cecchi on 16 June 2020 (*Id* at Dkt 45), and to disqualify AUSA George L. Brandley on 19 June 2020 (*Id* at Dkt 46).

The United States did not oppose Cox's motions to recuse Judge Cecchi or disqualify AUSA Brandley.

On 16 June 2020, Cox filed a motion for a certificate of innocence under 28 USC 2513, graphically detailing how Government cooperating witness Hakan Pekcan explicitly and repeatedly stated over months of debriefings and proffer sessions that he never received any child pornography from Cox; the United States repeatedly established that witness Pekcan received all of his child pornography from a named source in Japan and by downloading it from the internet (i.e., NOT from Cox); and the Government legally admitted that Cox is actually innocent at least four different times over the previous five years. DNJ 16-cv-0345 at Dkt 45-1.

The United States did not oppose Cox's motion for a certificate of innocence.

On 13 August 2020, Cox filed a second petition for a writ of mandamus with the Third Circuit Court of Appeals. *In re: Cox, No. 20-2665 (3d Cir. 2021).*

On 04 February 2021, Cox filed an expedited motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6) with the Northern District of Ohio, showing that, as a matter of law, an inordinate delay over three years constitutes "suspension" of his right to habeas corpus. NDOH 16-cv-1981 at Dkt 11.

On 01 March 2021, the Northern District of Ohio denied Cox's Rule 60(b)(6) motion, stating: "There is no reason to believe that the New Jersey District Court is not proceeding towards resolution of Mr. Cox's petition. ... Further, when considering the New Jersey docket, there is no indication that the New Jersey District Court has suspended proceedings related to Mr. Cox's 2255 petition." NDOH 16-cv-1981 at Dkt 12, pg 03 (and included here as Attachment B-3).

On 07 June 2021, the Third Circuit denied Cox's second mandamus petition, stating "to the extent that Cox complains about the pace of his 2255 proceedings, the docket report reflects that the case is moving forward[.]" *In re: Cox*, No. 20-2665 (3d Cir. 2021), 06/07/21 Opin at pg 03 (internal citations omitted). The Supreme Court denied Cox's petition for a writ of certiorari without comment on 04 October 2021. *Cox v. United States*, No. 21-5162 (US, 2021).

On 13 October 2021, the Sixth Circuit denied Cox's appeal, stating that the case holding an inordinate delay of "more than three years" renders post-conviction procedures "ineffective or inadequate" -- *Workman v. Tate*, 957 F2d 1339, 1344 (6th Cir. 1992) -- "concerned the requirement that a state prisoner must exhaust his state-court remedies before seeking federal habeas relief, 957 F2d at 1344; it does not speak to 2241 or whether 2255 is inadequate or ineffective when the district court has delayed ruling on the motion." *Cox v. United States*, No. 21-3258 (6th Cir. 2021), at Dkt 9-2, pg 04 (and included here as Attachment A-4).

"Therefore, Cox has not shown that he meets the exception that permits him to seek relief under 2241." *Id.*

However, not only does controlling authority from the Supreme Court appear to directly dispute the Sixth Circuit's holding, but that Court inexplicably failed to address Cox's argument that an inordinate delay of more than three years -- as a matter of law -- constitutes "suspension" of his right to habeas corpus.

On 19 October 2021, Cox filed yet another motion to expedite with the District of New Jersey (DNJ 16-cv-0345 at Dkt 59), but to date, almost six years after Cox's 2255 motion was filed; four years after it was conceded by the Government, and three years after the United States abandoned Cox's prosecution because his is actually innocent -- Judge Cecchi has NEVER exercised substantive jurisdiction over any portion of Cox's 2255 motion or its docket.

That is not justice; that is a witch-hunt and a railroad job.

This petition followed.

FROM: 69123061

TO:

SUBJECT: Reason the Writ should be Granted

DATE: 11/01/2021 09:06:36 PM

REASON THE WRIT SHOULD BE GRANTED

I. An inordinate delay of almost six years -- as a matter of law -- renders Cox's motion to vacate under 28 USC 2255 inadequate or ineffective to the point that he may invoke the Suspension Clause and file a petition for a writ of habeas corpus under 28 USC 2241.

Article 1, section 9, clause 2 of the United States Constitution -- the Suspension Clause -- states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Under 28 USC 2241, the writ of habeas corpus extends to a prisoner in custody in violation of the Constitution or laws of the United States. 28 USC 2241(c)(3).

Normally, federal inmates seeking to challenge their convictions should file those claims in the sentencing court under 28 USC 2255. Charles v. Chandler, 180 F3d 753, 755-756 (6th Cir. 1999).

However, under highly exceptional circumstances, a federal inmate may challenge his conviction and imposition of sentence under 2241 -- rather than 2255 -- if he establishes, under the savings clause of 2255, that his remedy is inadequate or ineffective to test the legality of his detention. See 28 USC 2255(e); Charles, 180 F3d at 755-756.

See also Swain v. Pressley, 430 US 372, 381-382 (1977)(explaining that the Suspension Clause is violated only where the remedy of habeas corpus is rendered inadequate or ineffective.).

In the only case found even referencing this issue hypothetically, Stirone v. Markley, 345 F2d 473, 475 (7th Cir. 1963), it was held "a refusal to entertain a section 2255 motion or an inordinate delay in its disposition would [] invoke the exception to [2255]'s remedial exclusiveness."

In Workman v. Tate, 957 F2d 1339, 1344 (6th Cir. 1992), the Sixth Circuit held that a state court's inordinate delay of "more than three years" in adjudicating the habeas corpus petitioner's claims for post-conviction relief rendered the state procedures "ineffective or inadequate."

Even though Workman involved a state prisoner filing a federal writ of habeas corpus under 18 USC 2254 regarding an inordinate delay in adjudicating his state post-conviction procedures -- and not a federal prisoner filing a 2241 petition regarding an inordinate delay in adjudicating his federal 2255 motion -- the Supreme Court has often interpreted portions of 2254 and 2255 in the same way. See, e.g., Gonzalez v. Thaler, 565 US 134, 149 (2012); Lackawanna City Dist. Attorney v. Coss, 532 US 394, 402 (2001)(extending a holding about 2255 to 2254 because the same concerns at issue in the case were "equally present in the 2254 context"). See also United States v. Asakevich, 810 F3d 418, 423-424 (6th Cir. 2016)(emphasizing the similarities between 2255 and 2254).

"2255 was intended to mirror 2254 in operative effect," Davis v. United States, 417 US 333, 344 (1974); see Reed v. Farley, 512 US 339, 353 (1994), and "precedents under 2255 and 2254 may generally be used interchangeably." 3 Charles Alan Wright et al., Federal Practice and Procedure 623 (4th ed 2015).

Thus, Workman's holding that an inordinate delay of "more than three years" -- as a matter of law -- renders post-conviction procedures "ineffective or inadequate" appears to control habeas petitions filed in the Sixth Circuit, whether they originate in the state and are filed under 2254 or in another federal district under 2255.

Here, Cox's 2255 motion has been pending for almost six years -- so this inordinate delay, as a matter of law, constitutes "suspension" of his right to habeas corpus.

Furthermore, as detailed above, the procedural history of Cox's 2255 motion is incredibly disturbing, shows very clear judicial bias, and thus "represents the proverbial horse of a different color" regarding "judicial runaround." Bradgate Assocs. v. Fellows, Read & Assocs., 999 F2d 745, 750 (3d Cir. 1993).

Regarding the state exhaustion analogy, the Sixth Circuit has held that a habeas court should excuse exhaustion where further

action in state court "would be an exercise in futility." *Lucas v. People of the State of Michigan*, 420 F2d 259, 262 (6th Cir. 1970) (holding that "such a judicial runaround is not mandated" by the exhaustion requirement).

Nor is such a judicial runaround mandated by the Suspension Clause.

Thus, since Cox has made "frequent but unavailing requests to have his [petition] processed" in his sentencing court under 2255, he should "not [be] required to take further futile steps ... in order to be heard in [this] federal court." *Simmons v. Reynolds*, 898 F2d 865, 867-868 (2d Cir. 1990).

Finally, to the District Court's original point that "Cox has adequate remedies at law if he believes the trial court is not handling his 2255 petition in a timely manner" -- Cox already tried that twice, even though it does not appear to be legally required.

The Supreme Court has stated that relief in the form of mandamus is available "where a district court persistently and without reason refuses to adjudicate a case properly before it." *Will v. Calvert Fire Ins. Co.*, 437 US 655, 661-662 (1978).

However, mandamus "is intended to provide a remedy for a plaintiff only if he has EXHAUSTED ALL OTHER AVENUES OF RELIEF and only if the defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 US 602, 616 (1984) (emphasis added).

In the only case that could be found addressing this issue, the petitioner was denied mandamus because he had "other means to attain the relief he seeks through a writ of habeas corpus." *Scott v. Holder*, 2011 US Dist Lexis 77162 (MDPA 2011).

Here, Cox filed his first mandamus petition with the Third Circuit in May of 2020, and Judge Cecchi immediately retaliated against Cox by initiating multiple secret, ex parte communications with the United States to suppress the Government's 16-month abandonment of Cox's prosecution.

The Third Circuit denied Cox's first mandamus petition because it believed "the District Court is moving forward with the case," when it absolutely has not, and clearly has no intention of doing so.

The Third Circuit then denied Cox's second mandamus petition in June of 2021 because it inexplicably believed "the docket report reflects that the case is moving forward" -- when again, it absolutely is not.

Thus, even though it does not appear to be legally required to invoke a habeas court's jurisdiction under the Suspension Clause, Cox already attempted to pursue remedies at law via two mandamus petitions -- to no avail.

In conclusion, 28 USC 2243 confers federal courts with the discretion to dispose of habeas corpus matters and tailor remedies "as law and justice require."

Under certain circumstances, inordinate delay or deprivation of access to the [habeas] process renders the procedure worthless such that a petition for habeas corpus may be unconditionally granted. *Turner v. Bagley*, 401 F3d 718, 727 (6th Cir. 2005)(citing *Ward v. Wolfenbarger*, 340 FSupp2d 773 (EDMI 2004)).

Therefore, since the almost six year inordinate delay in this case constitutes "suspension" of Cox's right to habeas corpus as a matter of law, the "judicial runaround" Cox has experienced involves literally unprecedented criminal judicial misconduct, and (even though it does not appear to be legally required) Cox already attempted a remedy at law twice to no avail, Cox hereby moves this Court to reverse the Sixth Circuit Court of Appeals, and remand to the Northern District of Ohio with orders to unconditionally grant his petition for a writ of habeas corpus under 28 USC 2241.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew Cox

Date: 11/02/21