

No:

21-6623

ORIGINAL

In the
Supreme Court of the United States

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SUPREME COURT, U.S.**

GUSTAV KLOSZEWSKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Was Kloszewski's Fifth and Sixth amendment rights violated when court appointed counsel divulged conversations of other uncharged/unrelated offenses in response and unrelated to the allegation of ineffective assistance of counsel

**PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW**

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District Court of New York.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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Gustav Kloszewski, the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, whose judgment is herein sought to be reviewed, is unpublished *United States v. Kloszewski*, No. 20-(2d Cir. July 15, 2021) is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court, Southern District of New York, whose judgment was appealed to be reviewed, is published in *Kloszewski v. United States*, No. 16 (?YEAR?) is reprinted in the separate Appendix B to this Petition. The opinion in a timely motion for Reconsideration/Rehearing is a published opinion in *Kloszewski v. United States*, 2020 U.S. Dist. LEXIS 179323 (S.D.N.Y. Sep. 29, 2020) is reprinted in the separate Appendix C to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on July 15, 2021.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).¹

¹ Based upon restrictions caused by COVID-19, the United States Supreme Court extended its 90-day filing deadline of all Writ of Certiorari to 150 days. See, Order, No. 589, 2020 U.S. LEXIS 1643 at * 1 (Mar. 19, 2020) (IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

Id.

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

Title 28 U.S.C. § 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id.

STATEMENT OF THE CASE

Kloszewski was convicted following a jury trial of conspiracy to traffic in firearms in violation of 18 U.S.C. § 371; firearms trafficking in violation of 18 U.S.C. § 922(a)(1)(A) and 924(a)(1)(D); Hobbs Act robbery conspiracy in violation of 18 U.S.C. § 1951; and conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. (Doc. 170).² On December 1, 2017, Kloszewski was sentenced to 360 months imprisonment. (Doc. 240). The Second Circuit affirmed the conviction and sentence. *See United States v. Kloszewski*, No. 17-4054, 2019 U.S. App. LEXIS 1338 (2d Cir. Jan. 14, 2019). A writ of certiorari was denied on *May 20, 2019*. *Kloszewski v. United States*, 139 S. Ct. 2629 (2019).

Kloszewski then filed a Title 28 U.S.C. § 2255 forwarding two arguments of ineffectiveness against his trial lawyer, Patrick Joyce (“Joyce”). He argued that he rejected a statutory maximum 5-year plea offer that would have limited his

² “Doc.” Refers to the docket entries in the United States District Court, Southern District of New York.

exposure and avoid a *de facto* life sentence. His arguments were presented with affidavits that contained conversations between himself and Joyce. Confidential conversations that only he and Joyce discussed, over that has now become the ineffectiveness claims. (Doc. 284, Exhibit A). The second argument was based on the premise that Joyce was ineffective for failing to investigate and call defense witnesses that would have discredited the government's theory of the offense. *Id.* at 19. The District Court instead of requesting a response from the government bypassed that angle and requested an affidavit from Joyce. (Doc. 285). Joyce's affidavit contradicted Kloszewski's, however, it also introduced statements involving a non-party Ralph Abravaya ("Abravaya"). (Doc. 286). Abravaya has never talked to Joyce, nor discussed any aspect of this case. Abravaya prepared a counter-affidavit discrediting all of Joyce's statements. Kloszewski also filed a supplemental affidavit. (Doc. 287, 288). Notwithstanding all the contradictory affidavits and all the statements made by Joyce unrelated to the ineffectiveness claim that were not part of the record and files, the District Court denied the 2255 without a hearing. (Doc. 288). No decision on whether a COA would be granted was made by the District Court at that stage. *Id.* (Doc. 288 at 3). Kloszewski then filed a timely motion for reconsideration under Fed. R. Civ. P. 59(e) which was also denied. (Doc. 292). The District Court then entered a *sua sponte* order

denying the request for COA. (Doc. 294. COA Denial). The Second Circuit denied the request for a Certificate of Appealability.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10 CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

- (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
- (b) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

WAS KOSZEWESKI'S FIFTH AND SIXTH AMENDMENT RIGHTS VIOLATED WHEN COURT APPOINTED COUNSEL DIVULGED CONVERSATIONS IN RESPONSE AND UNRELATED TO THE ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

The district court denied Kloszewski's 28 U.S.C. § 2255 after requesting an affidavit from Joyce as to the allegations of ineffectiveness. However, the troubling sequence of events violated Kloszewski's Fifth and Sixth amendment protections. The Fifth and Sixth amendment protections do not erode based on an ineffectiveness claim assistance. That is what occurred in this case. Kloszewski claimed Joyce rendered ineffective assistance by advising Kloszewski that several recordings made during the investigation by at witness Sian Stafford ("Stafford"), could not be introduced against him at trial since she was no longer a cooperating witness and would not testify for the government. Based on those assurances, (that the recordings would not be introduced at any stage), Kloszewski followed Joyce's guidance and rejected a statutory maximum 5-year plea offer. Those were the allegations of ineffectiveness. That is what required a response from Joyce. Not an elaboration of other non-related crimes apart from the ineffectiveness allegations. Apart from the error in denying the 2255, what Joyce divulged in his affidavit (and relied upon by the District Court), violated Kloszeski's Fifth and Sixth Amendment protections. Kloszewski made one straight forward allegation in his 2255, that Joyce was ineffective by advising him to reject a plea offer that would

have limited exposure. (Doc. 284, Kloszewski 2255 at 28). Kloszewski is aware by filing a 2255 he waived the attorney-client privilege. *See Graziose v. United States*, No. 03 Civ. 8109 (RWS), 2004 U.S. Dist. LEXIS 742, at *2, 2004 WL 102699 (S.D.N.Y. Jan. 12, 2004) (When a convicted defendant raises an argument that his counsel was ineffective and bases that contention on privileged communications with his attorney, the attorney-client privilege is waived as to the contents of those discussions.) However, here the waiver went beyond what the court expressed was necessary for the final resolution of the claims. The waiver applies to the ineffectiveness claim only. *Id.* . However, that was it. Joyce was not given the proverbial “*carte blanche*” to divulge or create statements as he wishes that implicate his client. The court was also wrong when it relied on those statements to deny the 2255. The District Court was clear. It requested a response from Joyce on the allegations of the ineffectiveness claim:

Prior to ordering further briefing or ruling on the petition, the Court seeks a response from Mr. Joyce. “The attorney-client privilege is implicitly waived when the defendant asserts a claim of ineffective assistance of counsel.” *Mendivelso v. United States*, 507 F. Supp. 2d 331, 339 & n.3 (S.D.N.Y. 2007). By June 26, 2020, Mr. Joyce shall provide a sworn declaration responding to the factual assertions underlying Petitioner’s claims of ineffective assistance of counsel. Mr. Joyce need not recite the factual and procedural history of the case but instead should focus his declaration on the particular facts relevant to the petition.

Id. (Doc. 285, Ord. Joyce Respond).

The court's order was not a blanket waiver of all conversations between Kloszewski and Joyce and would not have allowed Joyce to incriminate Kloszewski in other offenses. The court was clear, Joyce was required to "*focus his declaration* on the particular facts relevant to the petition." *Id.* . The Fifth and Sixth amendment protects the incrimination rights. The order directed Joyce to focus the declaration on the particular facts relevant to the 2255. Joyce's affidavit revealed statements that were neither made by Kloszewski, as well as other confidential protected information unrelated to the ineffectiveness claim. For example, several of the statements made by Joyce relate to the ineffectiveness claim and were protected by the client/attorney privileged that were not waived:

5. Mr. Kloszewski was furious that the people he had believed were his friends had turned on him.
6. For example, Mr. Kloszewski was convinced that if he offered to take a lie-detector test in the US Attorney's office, he would be exonerated. I informed him that the evidentiary value of a Lie-Detector test is suspect. I also told him I was afraid that he would admit to certain illegal activity which would be damaging to him. For example, he had revealed that he had been the driver for a co-conspirator when she drugged and robbed victims. He had revealed that he had worked a fraud scheme with that same co-conspirator. He revealed that he was present at the scene when the guns at issue had been removed from a house, that he helped store them, and that he was aware that the co-conspirator was going to go to New York to sell those firearms. All those facts would have been devastating to the continued defense of the case. I advised Mr. Kloszewski that I would not arrange for a Lie-Detector test. As a result, he petitioned the court to have me replaced as trial counsel. The court denied the request.

11. I imagine if he was asked today, Mr. Kloszewski would say he is innocent. He insisted on testifying at trial, against my advice, so that he could tell the jury that he was innocent. Against my advice he railed against the co-conspirator when he addressed the court at sentence.
14. "Ralph" ran a motel in Florida and he, at times, acted as Ms. Stafford's fence. He would often help sell items which Stafford and Kloszewski stole from individuals who were robbed at the "Cavalier Hotel." Ralph had no contact information for "Carlos" and did not know a person named "Justin."

Id. (Doc. 286, Joyce Aff'd.)

Those statements do not relate to the plea negotiations (which were the allegations on the 2255), nor the second ineffectiveness allegation, the locating of defense witnesses. There was no reason to divulge Kloszewski's conversations with Joyce's over Abravaya and his involvement in any other crimes, whether they occurred, or not. Neither was it necessary to incriminate Abravaya in his allegations. Those statements were not made to defend the 2255, but merely to discredit Kloszewski and a violation of District Court's order that restricted the release of the information to the ineffectiveness claim. "Mr. Joyce shall provide a sworn declaration responding to the factual assertions underlying Petitioner's claims of ineffective assistance of counsel." *Id.* (Doc. 285, Ord. Joyce to Respond). Nor was Joyce permitted to override Kloszewski's Fifth and Sixth Amendment rights. *See Bittaker v. Woodford*, 331 F.3d 715, 720, No. 02-99000, 2003 U.S. App. LEXIS 11298, at *13, *2003 (9th Cir. June 6, 2003) Cal. Daily Op. Service 4773, 2003 Daily Journal DAR 6078, 61 Fed. R. Evid. Serv. (Callaghan) 923 (9th

Cir. Cal. June 6, 2003) (The court must impose a waiver no broader than needed to ensure the fairness of the proceedings before it.) The boundaries were set. Joyce was instructed to respond to the ineffectiveness claims only, not divulge and create any conversation he desired and surely not to reveal privileged information unrelated to the plea negotiations. *Greater Newburyport Clamshell Alliance v. Pub. Serv. Co.*, 838 F.2d 13, 22 (1st Cir. 1988) (need reveal only information "for which defendants have so far shown a true need and without which they may be unfairly prejudiced in their defense"); *see also Mueller & Kirkpatrick* § 5.31, at 553 (suggesting that "in applying the doctrine of implied waiver by claim assertion, courts must be careful to target only" those privileged materials without which the adverse party would be unfairly prejudiced). A waiver that limits the use of privileged communications to adjudicating the ineffective assistance of counsel claim fully serves federal interests. *See Laughner v. United States*, 373 F.2d 326, 327 (5th Cir. 1967).

Kloszewski is placed in a dire predicament at this stage. Joyce has divulged (whether true or not), information relating to additional crimes that Kloszewski may be prosecuted by the government. Forcing Kloszewski to allow Joyce to divulge confidential information or to enter into such a broad waiver, would force him to the painful choice of, on the one hand, asserting his ineffective assistance claim, and risking a trial where the prosecution can use against him every

statement, he made to his first lawyer and, on the other hand, retaining the privilege but giving up his ineffective assistance claim. This would violate the spirit, and perhaps the letter of this court's decision in *Simmons v. United States*, 390 U.S. 377, 394, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968). According to Fed. R. Evid. 502(a), when the attorney-client privilege is waived as to the disclosed communication or information the following standards apply:

"the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional; (2) **the disclosed and undisclosed communications or information concern the same subject matter**; and (3) they ought in fairness to be considered together.

Id. . Dyer v. United States, No.: 5:13-cr-00107-1), 2014 U.S. Dist. LEXIS 143659, at *2 (S.D.W. Va. Oct. 9, 2014).

Joyce was just provided unfettered authority to discuss whatever he wished, even matters unrelated to the allegations raised in the 2255. Kloszewski did not waive all his protections of confidentiality by filing his 2255 and alleging Joyce was ineffective. The over disclosure (and in this case over divulging) of information not requested by the District Court warrants a writ of certiorari.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the Second Circuit.

Done this 10, day of December 2021.



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