

FEB 17 2022

OFFICE OF THE CLERK

No. 21-7669

IN THE  
SUPREME COURT OF THE UNITED STATES

Thomas Hoey, Jr. — PETITIONER  
(Your Name)

VS.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Second Circuit Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI

Thomas Hoey, Jr.  
(Your Name)

ORIGINAL

Lewisburg Prison Camp, PO Box 2000

(Address)

Lewisburg, PA 17837

(City, State, Zip Code)

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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 A1 to A3  
the petition and is & B1 to B10

reported at 16-2738, 19-2353(2nd Cir. 2018, 2021); 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[ ] is unpublished.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 C1 to C13  
the petition and is 13-Mc-189(Part 1) & D1 to D12

reported at 15-cr-229-PAE(S.D.N.Y. 2016); or, E1 to E82  
[ ] 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[ ] is unpublished.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[ ] is unpublished.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[ ] is unpublished.

## 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

19-2353, Second Circuit Court of Appeals  
16-2738, Second Circuit Court of Appeals  
15-cr-229-PAE, Southern District of New York  
13-Mc-189(Part 1), Southern District of New York  
11-cr-337-PKC, Southern District of New York

## JURISDICTION

### For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 27, 2021, & March 8, 2018

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).

\*Petitioner's Petition for panel rehearing, or, A-23 (Appendix) rehearing en banc was denied on November 19, 2021.

\*\* Case 16-2738 was remanded on other grounds, so this is petitioner's first opportunity to Petition the Supreme Court that the Second Circuit Court of Appeals decision in that case was wrong.

### 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**

**Fourth, Fifth, & Sixth Amendments to the United States Constitution.**

### **QUESTION PRESENTED**

**Does new precedent need to be set to protect the Fifth, & Sixth Amendments, and the attorney-client privilege?**

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## STATEMENT OF CASE

This petition will demonstrate how the passage of time has eroded the strength of this Court's holding in *Kastigar v. U.S.*, 406 US 441 (1972), the Fifth Amendment's guarantee to the attorney-client privilege, the Sixth Amendment's guarantee that protects a criminal defendant against the government's indirect use of evidence obtained from his defense team pre-indictment, and the Fourth Amendment guarantee against unlawful searches.

On February 11, 2013, at 530pm, Special agent in Charge DEA, Gregory Finning, DEA agent Eric Baldus, and Homeland Security agent Kristen Krause, went to the home of petitioner's lawyer's investigator. (See Stein ruling Appendix D-5). Once inside, the agents questioned the investigator about petitioner's case, defenses and her communications with petitioner and petitioner's lawyer. (See Stein D-5) The agents asked her about the file she kept concerning petitioner's case. Investigator handed over petitioner's files, and without a warrant, the agents took petitioner's attorney-client privileged files. (See Stein D-5)

Ultimately, Judge Stein ruled that, "...the Kovel exception applies-communications between petitioner and investigator for the purpose of obtaining legal advice from lawyer are privileged. (See Stein D-9) Judge Stein further ruled that, "the government may not inquire into communications between petitioner and investigator." (Stein, D-12) Trouble is that the government had already inquired into communications between petitioner and his defense team.

Petitioner moved in the district court 3 times for a *Kastigar* hearing. The district court denied, employing a truncated view of the protections provided for in *Kastigar*, and the Fifth Amendment. The district court opined, "The defendant must demonstrate a "factual relationship" between the protected information and the present prosecution. (See Judge Engelmayr's ruling, C-8) Petitioner argues how can he demonstrate this while the government is holding all the cards? Petitioner did however make the connection a few times. Petitioner showed how the information gleaned from his investigator led to Mark Polito, a key government witness at trial, and Denise Chartier, a government agent who worked under agent Baldus who took petitioner's defense files.

Petitioner timely appealed and the 2nd Circuit denied holding, "Hoey had to show a factual connection between the alleged privileged information and the charges in this case." (See 2nd Cir. decision, B-6) The government provided no proof that they had Polito as a witness before obtaining petitioner's privileged information, and neither the district court nor the 2nd Circuit held the government to prove the information "did not shape, alter, or affect the evidence used by the government." (See *U.s. v. Conti*, 864 F.3d 63, 2nd Cir. July 19, 2017, citing *Kastigar*). The 2nd Circuit further reasoned, "Hoey first suggests that without access to the investigative file, enforcement agents would never have learned that Hoey's driver was a potential witness against him. He presents no evidence that suggests this connection, however. The record belies this point as the private investigator makes no specific mention of hoey's driver. Moreover, it would be fairly routine for law enforcement to interview a suspect's personal driver in the course of an investigation." (See 2nd Cir., B-6) They ignored the fact that an investigative file with Polito's name was in petitioner's investigator's file with his name and address on it, but they ignore *Kastigar* and the burden placed on the government.

Petitioner argues that the 2nd Circuit apparently interpreted *Kastigar* as prohibiting the government only from using immunized attorney-client privileged information as a lead rather than using it

STATEMENT OF CASE 2

at all. Petitioner argues that once the government is exposed to this immunized/attorney-client privileged information, the government is required under Kastigar to prove, at a minimum, that the review of the privileged information "did not shape, alter, or affect the evidence used by the government."(See Conti, Id.)

The protections this Court provided every criminal defendant in Kastigar will forever be meaningless, if the government and the lower courts are allowed to inject conclusory findings, and ignore Kastigar, in an otherwise simple dispute. If the government is in possession of a criminal defendant's attorney-client privileged information, the burden should fall squarely upon the government to adhere to the protections of the Fifth, and Sixth Amendments. Indeed petitioner's loss in the 2nd Circuit has already been used to deny another criminal defendant. In U.S. v. Sharma, 2019 U.S. Dist. LEXIS 136584, 18-cr-340(LGS) August 13, 2019, Sharma lost and was denied a Kastigar hearing, and the district court used the precedent set in my case, 2nd cir case 16-2738-cr, marked as Appendix B)

The erosion of Kastigar will continue and the rules that, "The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom: "NO testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case..." 18 USC 6002 Kastigar. "This is a total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead."(Kastigar at 406 US 460)

In this matter, the passage of time seems to have once again put criminal defendants in a position wherein the government has convinced the lower courts that even though they are in possession of attorney-client privileged information, their negation of taint on their word is sufficient to satisfy their obligation to that criminal defendant's Fifth Amendment rights.

Indeed this Court has prohibited this when it opined, "This burden of proof, which we affirm as appropriate, is not limited to a negation of taint, rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."(Kastigar at 406 US 460) Well in petitioner's case the lower courts did not require the government to prove how they got Mark Polito. The 4 corners of the record make no mention of this, and the proffer sessions all begin AFTER the agents gleaned petitioner's file that contained a file for Mark Polito in it.

Obviously now petitioner argues a new opinion, from this Honorable Court, one which will strengthen the disadvantage of every criminal defendant that have apparently lost the protection in Kastigar. The government's untested claims of independent sources, if allowed to persist will forever prejudice all criminal defendants. The 2nd Circuit decision does not say the government DID interview hoey's driver BEFORE coming into possession of hoey's attorney-client privileged information, they say, "...it WOULD be fairly routine for law enforcement to interview a suspect's personal driver..."(2nd Cir. B-6) Petitioner argues this is proof the lower court are ignoring the law in Kastigar, and substituting their own interpretation of the law of this Supreme Court. I have faith that our checks and balances in our system will work. Please take my case. Hear my case.

### STATEMENT OF CASE 3

It is important to note that a motion to disqualify the prosecution team in Judge Stein's court was pending/sub judice, and without seeking the courts permission this very same US Attorney's Office moved to grand jury and indicted petitioner. No Chinese wall was set up between the prosecution team and the privileged information.

STATEMENT OF CASE 4

The heavy burden placed on the government for delving into materials protected by privilege like this case, is instructive in U.S. v. North, 910 F.2d 843, 860 (D.C. Cir. 1996, where the Court held that, "We conclude that the use of immunized testimony by witnessess to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes evidentiary use rather than nonevidentiary use. The district court on remand is to hold the searching type Kastigar hearing described below, concerning North's allegations of refreshment. Finally, because the district court apparently interpreted Kastigar as prohibiting the government onmly from using immunized testimony as alead rather than using it at all, we hold that the district court's truncated Kastigar inquiry was insufficient to protect North's Fifth Amendment rights to avoid self-incrimination."(See North Id.)

Petitioner moved the district court 3 times for a Kastigar hearing. Before, and after trial. All were denied. Those denials were affirmed by the 2nd Circuit.(See B-5,6) This became the law of the case, and therefore prohibited from futher litgation till now. Slowly since Kastigar in 1972, and North in 1996, the government through intimidation and good-lawyering have chipped away at Kastigar, and the Fifth Amendment, and Sixth Amendment. This intimidation is on full display in this case. Petitioner's lawyer's investigator, Deidre Johnson expresses her fears from this intimidation in a sworn affidavit to the Court where she states: "One of the agents said that "a lot of people" were "going to be arrested" around this matter. These statements made me think that I was a target of their investigation. I became nervous and frightened..."(See Deidre affidavit A-6, ¶14) This intimidation continued, and Deidre further states: "The agents made it seem as if they believed Mr. Richman and I "were up to something", I felt defensive and shaken. Agent Baldus asked me if I was sleeping with Hoey(Petitioner)" (See Deidre A-7, ¶16)

The agents asked Deidre for my attorney-client privileged file she kept and used furhter intimidation to obtain it. Deidre explains: "I expressed my hesitation in giving the file to the agents because I believed its contents to be privileged. I said, "I Know I am not supposed to give you this." DEA agent Eric Baldus told me that they looked into the issue and that the privilege enjoyed between attorneys and clients did not apply to my work as a private investigator for Mr. Richman. He said like, "Trust me, we've looked into it, the privilege doesn't extend to you."

I hope this Honorable Court finds the brazen disregard for my Fifth amendment rights, and Your Ruling in Kastigar troubling. I am a fortunate litgator, and grateful I have been able to uncover this very openly defiance of our laws. I argue that many criminal defendants may suffer this type of invasion of their rights unknowingly, and I plead with you to Grant this Writ and hear my case.

I am not a man without fault in my life. I have served my time for it. But every day with Love in my heart and God in my mind, I live to be a better man. And through years of my prudent, honest, hardwork under difficult circumstances, I am proud to say I live in a prison camp, "out-custody", with no bars, fences, ahrusted inmate.

## STATEMENT OF CASE 5

The government agents are not the only bad actors in this matter attempting to mislead the Honorable Judges in my Circuit/district. The prosecutors in this case have attempted to conceal their link to this taint, and exposure to my Fifth Amendment and Sixth Amendment protected materials and information. In an email chain petitioner discovered at trial, AUSAS Tehrani and Greenberg, explain to DEA Agent Denise Chartier, EBSA Kendall Randall, and IRS agent Sergio Sobolev, that "Given defense counsel's taint motion and our representations to the Court that this investigation is completely separate from the prior one, I think its best if Baldus doesn't contact any of our potential witnessess."(See email chain A-12) This conduct should not be countenanced. The US Attorneys in this matter are not ordinary litigants; they represent the sovereignty and must be held to a higher standard. I plead with this Court to hold them to that standard. This email chain demonstrates the lack of respect for our Courts, and their use of intimidation tactics suffered by my lawyer's investigator, Deidre Johnson, sadly is obviously routine to these bad actors, and their credibility remains intact in our Courts. I argue this case needs to be heard to deter other bad actors within our Judicial System. I do Love Our Country, and understand there are many honorable, hard-working individuals amongst some of these bad apples. I do not think others should suffer the erosion of Our Constitutional rights like I have. I am grateful for the opportunity to be heard.

Lastly, I argue that the government agents in this matter have violated petitioner's Fourth Amendment rights when they questioned his lawyer's investigator for hours and gleaned attorney-client privileged information pre-indictment. Judge Stein did rule that, "The Court concludes that communication between investigator and Doe(Petitioner) are privileged pursuant to the so-called Kovel exception.(See Judge Stein Order, D-& 112)

## REASONS FOR GRANTING THE PETITION

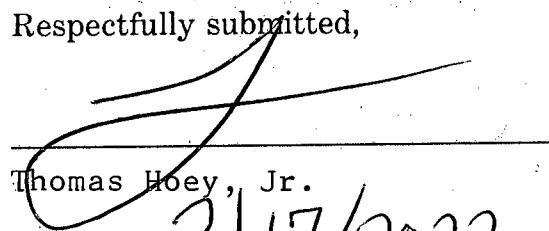
Over the last 50 years since Kastigar, criminal defendants have lost the benefits provided for by this Honorable Court in Kastigar. Over this time, the government lawyers and agents have grown in numbers and strength. Driven to succeed and keep us all safe, they have forgotten to follow the Supreme Court ruling that you cannot obtain attorney-client immunized testimony, and then use it against the defendant. This Writ needs to be granted to keep our checks and balances in place, and ensure the public perception of fairness and integrity within our System,

This case demonstrates how the government agents and prosecutors can take a target's attorney-client privileged materials, question his lawyer's Kovel protected investigator for hours, intimidate her harnessing the threat of our criminal penal system, and ultimately erode the freedoms and civil liberties our Judicial System was founded on. If this case is not heard the very protection guaranteed by our Constitution and it's Amendments will continue to be less and less effective in ensuring all American citizens a fair shot in Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
Thomas Hoey, Jr.

Date: 2/17/2022