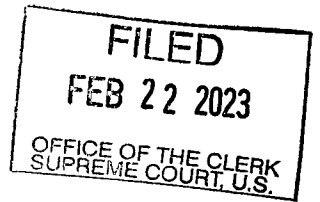


22-6900

No. _____

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

Tony Deng, pro se — PETITIONER
(Your Name)

vs.

David Shinn, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States District Court, District of Arizona
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Tony Deng #304373
(Your Name)

ASPC-Eyman Cook unit, P.O. Box 3200
(Address)

Florence, Arizona 85132
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the "will overborn" standard or analysis, which requires the finding of violence or threats of violence overbearing a person's will, should be used to evaluate the voluntariness of a confession obtained by means of trickery and deception, tactics which do not involve the use of coercion or threats to overbear a person's will.
2. What exactly must the federal habeas court do when conduct the required "independent review" on issues of voluntariness of a confession under the requirement of *Miller v. Fenton*, 474 U.S. 104 (1985).
3. Whether intercepting and recording a person's cellphone conversation by a state agent for the purpose of discovering incriminating evidence constitute a body search and seizure of the cellphone user.
4. Whether a person making a cellphone call has a reasonable expectation of privacy and whether his or her expectation of privacy during the call can be vicariously waived or denied by the consent of a state agent who is a party to the call.
5. Should the test for determining when the counsel right attaches be centered more on when the aid of counsel is most needed rather than solely based on the custody and indictment factors.
6. Whether the COA standard used by the 9th Circuit Court of appeals in this case departed from the standards established by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

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:

Additional Respondent:

The Attorney General of the State of Arizona

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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 D to the petition and is

☐ reported at NO. 22-15480; 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 and C to the petition and is

☐ reported at CASE NO. 2:21-CV-00546-SPL; 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 A to the petition and is

☐ reported at CASE NO. 1 CA-CR 15-0638; 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 9/30/2022.

☐ 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: 10/27/2022, and a copy of the order denying rehearing appears at Appendix E.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including March 26, 2023 (date) on November 29, 2022 (date) in Application No. 22 A 469.

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 2/9/2017.
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: June 22, 2017, and a copy of the order denying rehearing appears at Appendix N/A.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including March 26, 2023 (date) on November 29, 2022 (date) in Application No. 22 A 469.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

The Fifth Amendment to the United States Constitution provides that "No person shall be ... compelled in any criminal case to be a witness against himself ..."

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C.S. § 2253(c)(2) provides that "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

Petitioner Tony Deng was convicted of ten counts of sexual conduct with a person and one count of sexual abuse of a person. The person was under the age of fifteen.

The convictions were relied heavily on recorded incriminating statements made by Deng during a secret police cellphone interrogation performed by the victim at the behest of the police. During the cellphone interrogation, Deng made multiple inquiries about the true nature of the phone call but he was misled by the state agent into believing that he was merely having a casual conversation. He also repeatedly asked the caller, sitting right next to a police detective who was coaching her and monitoring the call, for privacy and to make sure that no one could hear the conversation. Again, Deng was deceived. The state agent promised that the conversation was private in nature and no one else was listening which led Deng to erroneously think that he could speak freely without legal consequence. Deng's statements were made in response to the agent's express questioning under misrepresentation, improper influence and false promise of privacy.

Prior to trial and on appeal, Deng challenged that his 4th Amendment right was violated. He proved that he had a reasonable expectation of privacy under the two part test of *Katz v. United States*, 389 U.S. 347 (1967) and *United States v. Van Poyck*, 77 F.3d 285 (9th cir. 1996), and that he also exhibited a subjective expectation for privacy by asking his speech not to be heard by third parties during the cellphone conversation. He showed that the interception of his cellphone was a functional equivalent of a warrantless governmental search and seizure because the caller was a state agent performing search for incriminating evidence at the behest of the police, and that his right to privacy was vicariously waived or denied by the consent of a government agent.

Subsequently, the state court ruled, without holding an evidentiary hearing, that under the Fourth Amendment, there is no invasion of privacy in monitoring, recording and introducing into evidence a telephone conversation where one party has given prior consent to the interception, but the court did not, for Fourth Amendment purpose, take into consideration the fact that the caller was a state agent searching for

On 11/8/2022, Deng filed a motion to vacate the 9th circuit court's dispositive ruling entered on 10/27/2022, because in this petition unless the court grants COA and rule on the merits of Deng's claims. This court should proceed with this petition.

by the 9th circuit court of appeals on 10/27/2022.

Deng timely filed motion for COA which was denied on 9/30/2022 and his motion for rehearing was also denied. Deng's objections and denied certificate of appealability on 3/31/2022. (See Appendix B and C). Thereafter, dismissed. The district court judge simply adopted the Report and Recommendations without even address habeas corpus relief in the federal district court of Arizona. The magistrate recommended Deng's petition be After all available state remedies for these claims have been exhausted, Deng raised ten grounds for

No. 2:21-cv-00546-SPL).

court, nonetheless, refused to take these factors into consideration. (see State v. Deng and Deng v. Shinn, aid of counsel was most needed because Deng's liberty - legally protected interest - was at risk, the the call into a critical confrontation between Deng and his expert adversary - the government - where the during which the police were on their quest to obtain a confession to prosecute Deng, which transformed invoke his counsel right, that the cellphone call was a police interrogation - an adversarial proceeding - deliberately delayed the filing of the indictment to make sure Deng could not meet the requirements to presented substantial facts to show that the police intentionally interrogated him in a noncustodial setting, because he was not in custody and no indictment was filed at the time of interrogation. Although Deng appeals. The decision was based on a boilerplate standard that Deng was not entitled to counsel rights Deng's Sixth Amendment right to counsel claim was also denied by the trial court and the court of

2/9/2017, Page 5).

The Arizona court of appeals affirmed this decision on appeal. (see State v. Deng, NO. 1 CA-CR 15-0638, the victim engaged in trickery at the best of the state apparently, but that does not amount to coercion" impermissible trickery and deception. However, the trial court denied Deng's motion, stating that " were involuntary because his decision to continue the conversation was induced by a state agent through incriminating evidence at the best of the government. Deng also argued that his statements

REASONS FOR GRANTING THE PETITION

The questions presented in this petition are questions of federal law, not only important to Deng, but also important nationwide because they concern the constitutional rights of all criminal defendants in the United States. The courts below have decided some of these questions in a way that conflicts with other circuit courts' decisions. These conflicts will likely to reoccur in the future if this court does not exercise its supervisory power to settle the conflicts and unify the standards for analyze these federal questions.

Question 1 asks this court to clarify what is the appropriate legal test for assessing the voluntariness of a confession obtained by means of trickery and deception. This clarification is necessary because the "will overborne" test has been the standard test for assessing the voluntariness of confessions where the method by which confessions are obtained involves the use of violent physical force or threats. But in some cases, even confessions obtained by trickery and deception, which do not involve the use of violence or threats of violence, are being analyzed by the "will overborne" standard.

For example, in this case, the state courts ruled that "... Victim engaged in trickery at the behest of the state apparently, but that does not amount to coercion." (see Appendix A at 5). The Arizona federal district court also agreed with this ruling. (see Appendix B and C).

Deng believes that the state courts and the federal district court applied the wrong standard to assess his claim because the courts equate trickery, a technique that gains control of a person's will by misleading and manipulating his perception and belief, to coercion, a method which overbears the will of a person by the use of violent force or threat of the use of violent force.

Coercion and trickery, as the meaning of the words itself suggested, are two completely different techniques for extracting confessions. Coercion means persuade an unwilling person to do something by using force or threats. Trickery is defined as an act or scheme intended to deceive or outwit someone. (see Oxford American Dictionary, 2nd Edition, 2008).

The question here becomes how could trickery be compared with or measured by coercion when trickery gains control of a person's will, not by the use of violent physical force or psychological threats, but by way of altering and manipulating the person's perception and belief? Although one tactic overbears a person's will by force or threats of force while the other by manipulation and misrepresentation, both coercion and trickery are equally effective in gaining control of a person's will and cause the person to confession.

In this case, the reason the court did not find evidence of coercion or pressure is because no violent physical force or threat was used. Deng's will might not have been overborne by violent force, pressure or threat of violent force, but his perception and belief were altered and manipulated. Deng's will was improperly influenced and overcome by the state agent's misrepresentation and false promise of privacy which ultimately persuaded him to confess.

The technique of trickery and deception used in this case had produced the same end result as the method of coercion would have except in a very different manner. In that regard, trickery is no less than coercion in terms of persuasive power. It should not make any difference whether a confession is extracted by coercion or trickery/deception because no matter which method is used, the confession is no longer a product of a rational, intelligent or uninfluenced choice by its maker.

Thus, for the court to ruled that trickery does not amount to coercion in this case, not only defies common logic, but also contrary to the standards other circuit courts have established for evaluating claims based on trickery and deception.

"Whether a claim of voluntariness based on trickery and deception can be sustained required a showing that government agent affirmatively misled the defendant as to the nature of the investigation and that their misrepresentation "materially induced the defendant[s] to make incriminating statements." See *United States v. Sacco*, 884 F. Supp 734 (1995); *United States v. Mitchell*, 966 F.2d 92.100 (2d cir. 1992) (HNG); *United States v. Okwumabua*, 828 F.2d 950 (2d cir. 1987) (HNG) and

United States v. Kourani, U.S. Dist. 2018. See also United States v. Tweel, 550 F.2d 297 (5th cir. 1977) (Trickery and deception rise to the level of impermissibility if there is clear and convincing evidence that government official performed one or more affirmative acts that materially mislead the defendant.)

It is clear that under these tests, for claims of voluntariness based on trickery and deception, the elements of coercion or pressure are not part of the analysis. These tests do not require the irrational orange and apple comparison — whether trickery amounts to coercion — as the courts did in Deng's case. The decision of state courts and Arizona district court is in conflict with these circuit court's standards.

For the reasons mentioned above, this court should clarify and unify the legal standards for evaluating claims of voluntariness of a confession based on trickery and deception, police tactics which do not involve the use of violence or threats, to prevent conflicts such as this from reoccurring in the future.

With regard to question 2, this court in Fenton found the issue of voluntariness of a confession to be an issue of law therefore subject to independent federal review in habeas corpus proceeding. Fenton, 474 U.S. at 112-118. In addition, this court found that application of the 28 USC § 2254(d) presumption of correctness is precluded reviewing a state court voluntariness determination. However, this court did not clarify what constitutes "independent review" or what exactly must a federal judge do when conducting an "independent review."

This clarification is absolutely necessary because criminal defendants' constitutional rights are at stake. According to Fenton's holding, a reasonable jurist would and should examine the entire existing record to ensure that no facts have been overlooked and correct legal standards have been applied when evaluating a claim of voluntariness of a confession. But that did not happen in this case. The district court judge simply adopted the R&R without considering the

facts, pointed out by Deng, which were overlooked by the state courts. The district court judge did not even provide any adequate rationale to support his decision, much less take time to examine whether the correct standard was applied in this case. This type of errors would not have occurred if the Fenton requirement details what constitutes an independent review.

To prevent this from happening again in the future, this court should establish a clearly defined standard which will require the lower courts to, at the very least, specify the reasons why it denies or grants the claim and provide relevant facts to support its conclusion when conducting independent reviews, especially on legal issues such as the voluntariness of a confession, in a federal habeas corpus proceeding.

Questions 3 & 4 are of nationwide public importance, because they involve the privacy concern of not only criminal defendants, but of every American citizen as well. Today, as the government's surveillance technology advances, citizen's right to privacy diminishes. Cellphone communication is a very important part of our modern day life, and the cellphone has become almost a permanent attachment to the user's body.

As what had happened in Deng's case, for the government to intercept and record a cellphone conversation is the equivalent of searching the cellphone user's body or person within the meaning of the Fourth Amendment. Without a warrant, this type of electronic governmental search of the user's person/body should be illegal regardless the person on the other end consents because that consenting person is or was a government agent in Deng's case. The Fourth Amendment would be hollow and meaningless if its warrant requirement can be so easily replaced or circumvented by a state agent's consent.

Therefore, this court must uphold its duty to administer justice and protect the constitutional right of all American citizens by establishing a boundary with regard to the privacy of all

cellphone users which the government must respect unless it has obtained a search warrant prior to the interception.

Question 5 is important because it concerns the most basic rights of all criminal defendants. The Sixth Amendment right to counsel during police interrogation is meaningless if it can only be invoked when the suspect is in custody or has been indicted, because these two conditions can easily be circumvented, altered or completely eliminated by the government without the knowledge of the suspect.

When the custody or indictment condition is not met, the courts below have been repeatedly refusing to consider whether a particular interaction between the accused and the government constitutes an adversarial proceeding or a critical stage at which the aid of counsel is needed. In other words, the courts below have been refusing to recognize the principle established by this Court that the right to counsel is shaped by the need for assistance of counsel. See *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); and *Messiah v. United States*, 337 U.S. 201 (1964).

For example, in this case, the police could have filed the charges against Deng and placed him in custody for interrogation because they had already interviewed the victim the day before, accusations have been made against him, a physical examination had been done on the victim and Deng was the sole suspect. In actuality, the investigation was no longer a general one, it had been transformed into a quest for a confession at that point in time, yet the police still chose to interrogate Deng for the purpose of getting him to confess in a noncustodial setting so that he could not meet the requirements to even invoke his right to counsel.

The right to use counsel at the formal trial would be a very hollow thing if, for all practical purposes, the conviction is already assured by pretrial examination or confrontations. In *Haynes v. Washington*, 373 U.S. 503 (1963), this Court held that "when the process shifts from investigatory to accusatory - when its focus is on the accused and its purpose is to elicit a confession - our adversary

system begins to operate... the accused must be permitted to consult with his lawyer."

The holding of Haynes should be the guiding principle or standard test for determining when the right to counsel attaches because this principle focuses on the potential prejudice to a suspect's counsel right inheres in police interrogations and where the aid of counsel can help prevent that prejudice and protects the suspect's most basic rights during his confrontation with the government.

Again, in Deng's situation, the indictment or custody factor is irrelevant and completely meaningless because the police deliberately delayed the filing of the indictment, delayed the arrest and deliberately interrogated Deng in a noncustodial setting for the very purpose of getting him to confess knowing that he could not meet those conditions to invoke the aid of counsel. If these type of police conduct is permitted by law, the right to counsel might as well be nonexistent because the police could easily alter or eliminate the conditions needed for an accused to invoke that right through acts of deceit which the accused has no means to detect.

Furthermore, the principle of *Powell v. Alabama*, 287 U.S. 45 (1932) and succeeding cases requires that courts scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witness against him and to have effective assistance of counsel at the trial itself. Thus it calls upon the courts to analyze whether potential substantial prejudice to defendant's right inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.*, at 227, 87 S.Ct., at 1932 (emphasis in original). See *Kirby v. Illinois*, 406 U.S. 682 (1972) dissenting opinion of Justice Brennan, Justice Douglas and Justice Marshall. See also *United States v. Wade*, 388 U.S. 218 (1967), the Supreme Court pointed out that "it is always necessary to scrutinize any pretrial confrontation." 388 U.S. at 227, 87 S.Ct. at 1932.

For these reasons, this court should review question 5, and establish a meaningful and robust test that focuses more on the need-for-counsel aspect, rather than a set of fixed conditions. This test should also require the courts to scrutinize all interactions between the government and the

accused, especially interactions where the government is seeking a confession, even before custody or indictment, to determine whether the aid of counsel is needed, so that the government cannot deliberately interrogate a suspect for the very purpose of eliciting a confession in a setting which it knew that the suspect could not invoke his right to counsel, the way it did in Deng's case, in the future.

Question 6 is very important to all criminal defendants because it involves legal standards for assessing whether a certificate of appealability (COA) should be issued and whether the standard used by the circuit courts departed from the controlling statute and this court's interpretation of the controlling statute.

28 USCS § 2253(c)(2) states "a certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." This court has explained that there is two ways a habeas petitioner can make that showing; he must demonstrate that reasonable jurists could debate 1) whether the petition should have been resolved in a different manner or 2) that the issues presented were adequate to deserve encouragement to proceed further." See *Slack v. McDaniel*, 529 U.S. 473 (2000); and *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

According to the language of § 2253(c)(2) and the Supreme Court's interpretation, a habeas petitioner only required to show one component of the requirements; either show that reasonable jurists could debate whether the petition should have been resolved in a different manner, or show that the issues presented were adequate to deserve encouragement to proceed further, not both.

In Deng's case, however, the 9th circuit court of appeals imposed upon Deng a two-part test which requires a petitioner to show that reasonable jurists could debate whether the district court was correct in its procedural ruling, in addition to the original requirement of § 2253(c)(2) - whether the petition states a valid claim of the denial of a constitutional right. Worse,

this test completely ignored or eliminated one of the important question set forth by this Court's interpretation — whether the issues presented were adequate to deserve encouragement to proceed further.

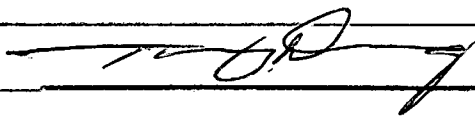
The 9th circuit court's two-part test illegally modified or deviated from the statutory requirement of 28 U.S.C. § 2253(c)(2) and this Court's interpretation of that requirement. Consequently, this modification or expansion of the COA requirement by the 9th circuit court of appeals has made a low standard unreasonably more difficult to meet for habeas corpus petitioners trying to obtain a COA.

For this reason, this court must exercise its supervisory power to clarify which component of the COA standard must be met under 28 U.S.C. § 2253(c)(2) so that habeas petitioners will have a fair chance to obtain an appeal of their federal habeas corpus proceedings and their constitutional claims.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully submitted,



Tony Deng, petitioner pro se

Date: February 22, 2023