

IN THE SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C.

22-7042

ROSA SERRANO, PETITIONER

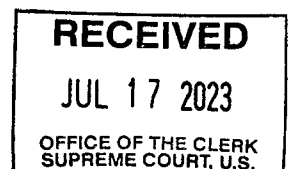
V.

BOBBY LUMPKIN, TDCJ,

RESPONDENT

MOTION FOR REHEARING

21-50889



ISSUES PRESENTED

1. Whether a claim for civil rights claim exists by denial of a federal right under the Medicaid Act, and where the appeal of the removal under 1443 was denied by joinder to federal habeas. And without allowing the appeal of the removal under 1447, it denied Petitioner due process when joined do federal habeas;
2. Whether Petitioner's third-party standing invokes a civil rights claim to allow removal of state prosecution to federal district court for a protected activity under a federal right.

LIST OF AUTHORITIES

<i>City of Greenwood v. Peacock</i> , 384 U.S. 808, 828, 86 S.Ct. 1800, 1812 (1966)	5
<i>Craig v. Boren</i> , 429 U. S. 190 (1976)	7
<i>Davis v. Glanton</i> , 107 F.3d 1044, 1050 (3d Cir. 1997)	5
<i>Doe v. Bolton</i> , 410 U. S. 179 (1973)	7
<i>Eisenstadt v. Baird</i> , 405 U. S. 438 (1972)	7
<i>Griswold v. Connecticut</i> , 381 U. S. 479 (1965)	7
<i>McGowan v. Maryland</i> , 366 U. S. 420 (1961)	7
<i>Powers v. Ohio</i> , 111 S.Ct. 1364 (1991)	7
<i>Preiser v. Rodrigues</i> , 93 S. Ct. 1827 (1973)	4
<i>Rachel v. Georgia</i> , 86 S. Ct. 1783 (1966)	4,8
<i>Washington v. Virginia</i> , Civil Action No. 3: 18CV871 (E.D. Va. Feb. 28, 2019)	8

FEDERAL STATUTES

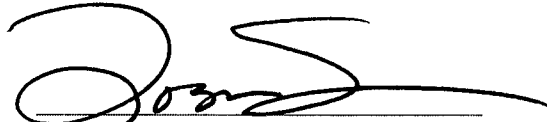
28 U.S.C. §1443.....	1,4,5
28 U.S.C. §1447.....	2,4,6
28 U.S.C. §2106.....	9
31 U.S.C. §3730(h).....	6
42 U.S.C. §1396a.....	1,6
42 U.S.C. §1396u-2	1,6
42 U.S.C. §1983.....	2

CERTIFICATE OF COMPLIANCE

I certify the petition for rehearing is presented in good faith and not for delay. And Petitioner files this motion for rehearing where no previous appeal of the removal of state criminal proceeding was presented or raised in the appeal of 17-51086 in federal habeas. Because the appeal of the removal under 28 U.S.C. 1447 could not be done in the appeal of the federal habeas in EP-17-CV-221-FM, no appeal was done on the issue of removed state criminal proceeding prior to state trial. Whereupon a void conviction exists and federal habeas in W-19-CA-414-ADA failed to account that a void conviction exists by removal of state proceeding prior to state trial under 28 U.S.C. 1443. However, the appeal of removed proceeding under 1443 was never done nor addressed by the Fifth Circuit. Because the hearing addresses the need for the appeal of the denial of the removal prior to remanding the state proceeding, the removal is still pending in district court. Thus, a void conviction exists where the state's jurisdiction was divested upon removal. And without a remand order issued, the issue remains undisposed where the appeal of the removal is permitted under 1447, however it was not permitted when joined to the habeas petition. These issues raise substantive and controlling effects on the federal habeas filed after state appellate court decision

in 08-17-00190CR to challenge the jurisdictional defect. Where no appeal was granted although required but denied when no COA was issued in the appeal of the federal habeas, and without a separate cause number issued for the appeal of the habeas and removal the appeal was not filed by the court. Petitioner then reasserted the removal of the state court proceeding under 1443 in this federal habeas to address the civil rights claim in the removal under 1443. The issue of the appeal of the removal done on 7-27-2017 of the state criminal conviction 20170D0317 was not done nor addressed in this federal habeas although raised. Where the appeal of the removal is permitted under 1447 yet joined under federal habeas in 28 U.S.C. 2254, intervening circumstances of substantial or controlling effect that were not raised in the petition plus another ground upon which to receive relief when denied due process by failure to allow appeal of the removed proceeding under 1447.

Certified this day June ²⁵26, 2022.



Rosa Serrano

STATEMENT OF FACTS

Removal of state criminal prosecution instructs a need for denial of a federal right. Petitioner was denied a federal right under 42 U.S.C. 1396a and 1396u-2 when retaliatory conduct was imposed by denial of valid claims and subsequently termination of contract. These considerable factors lie under the principle of 28 U.S.C. 1443 when Petitioner by third-party standing is invoked by a direct relationship to deny a federal right under the Act. Petitioner sought to represent the rights of the enrollees whose federal right is obstructed by limited or denied service although required by the Act and paid by federal funding under both ARRA (American Recovery and Reinvestment Act) known as the stimulus fund. However, although limited funds from the Stimulus grant funded services at higher rate than the HMOs under the Medicaid Act. Yet, the Act continues to fund the services at the prescribed rate under the contract with CMS, while HMOs continue to deny or limit services. Therein, the practice to deny a federal right to enrollees, and prosecution of Petitioner for representing the right of enrollees, enables third-party standing. Plus, where the denial of a federal right which specifically prohibits any punishment or attempts to punish for exercising standing to the misallocated funding for the intent to fund services to enrollees that were diverted to HMOs. This practice removes the use of equal access to medical care for other persons who would have access under private insurance, and Medicaid does not permit this practice to discriminate by the use of the Act to acquire services. By limiting payment and services under the Act, the enrollee is limited to the services under the Act although paid by federal spending. The Spending Clause sets the need to guarantee any federal funding will be utilized according to federal law proposed by Congress, its constitutional provision guarantees equal access to all individuals. Denial of the medical care grants removal to district court under 1443. Petitioner's standing is invoked as a direct relationship with enrollee to provide services. Absent the state statute of the

discriminatory practice under its Medicaid state statute, the federal statute secures a federal right will be imposed. Meeting all the requirements that the state court in prosecution of Petitioner for representing unpaid and denied claims by HMOs for Medicaid services, enables for removal to district court. However, district court jointly addressed the federal habeas and removal onto the EP-17-CV-221-FM, and distinguishable yet both assessed the denial of due process of a protected federal right. The void contempt orders denied due process to prepare for trial of Medicaid Fraud. Denial of a federal right to enrollees and a protected activity for Petitioner all translate to federal district court jurisdiction. FCA (False Claim Act) all pose the requirements for federal jurisdiction rather than state court, and protected activity is a federal right where whistleblower on diversion of funds to deny services under Medicaid. All these factors constitute federal jurisdiction, and removal is proper. Denial of removal allows for appeal under 28 U.S.C. 1447, an exemption is made for these denials to move forward to any remand, without affirming that motion to remand was filed by prosecuting attorney. Uniquely, placing this proceeding remaining in district court when a motion to remand was not filed, nor remand order was done in EP-17-CV-221-FM. Because these requirements were not done, it leaves the removed proceeding unresolved. The state prosecution is unable to address the issue of third-party standing to represent the federal right of an enrollee, while Petitioner is able to assert that right, standing is invoked. Denial of due process under illegal detention is evident by the void contempt orders when Petitioner was restraint illegally when void civil judgments were entered when subject matter jurisdiction is devoid in state court proceeding. Arrest and prosecution in state indictment of these void civil judgments clearly states a need for removal for civil rights violation (42 U.S.C. 1983) when unable to receive protection under a federal constitutional right. Furthermore, enrollees' rights also command removal to federal court when standing by Petitioner grants protection of federal right under the

Act, and Supreme Court precedence dictates the need for punishment is erased when a civil rights claim exists by denial of a federal right. Removal was deemed necessary, plus the appeal of the denial of the removal was permitted, even though never addressed, it equates to denial of due process. When the Fifth Circuit Court of Appeals failed to address the removal under a civil rights claim (17-51086) for a federal right denied and Petitioner's standing to represent that right under the Act. Immunized by the conduct, Petitioner's standing to represent a federal right denied to enrollees under the Act, permits for removal when all medical facilities participating under Medicaid where unable or denied the service to enrollees. Federal law requires enrollees to receive care at these medical facilities; however, payment or denial of service is misallocated when reimbursement is denied or restricted. Culminating to removal of the state prosecution of Petitioner when a federal right is being obstructed to enrollees and Petitioner was denied payment for services rendered.

STATEMENT OF ARGUMENT

Due process assigns a constitutional right to every defendant, it is not implied but instrumental to grant a fair tribunal of an adversarial process to secure safeguards. Removal of the state proceeding under 1443 was to initiate a conclusive oversight of a denied federal right to enrollees. Where the Fifth Circuit failed to address the issue of the appeal of a removed proceeding, denies due process. Until the issue of due process is addressed, it then enables Petitioner to receive a new trial by an unbiased judge to apply federal statute. A civil rights claim is met when a federal right is denied by noncompliance of Medicaid Act. Where enrollees are denied a service where the Act secures that medical care will be provided and punished, by denial of services, violates that federal right. State court is inept to address the issues of civil rights of a protected right when the Act prescribes access to medical care. Removal was necessary to ensure a civil rights claim was addressed but

also whether a protected activity by federal statute could be applied when Petitioner's third-party standing is met. By denial of the removal of state proceeding under 1443, it permitted Petitioner to appeal the denial under 1447, however when tied into the federal habeas, due process was denied of the removal done. The appeal of the removed proceeding under 1443 denied due process to address the issues of civil rights claim by enrollees in the prosecution of Petitioner.

I. DUE PROCESS

When removal was done on July 27, 2017, to invoke federal jurisdiction of state proceeding and when joined to federal habeas, the Fifth Circuit failed to address the issue of removed state proceeding under a civil rights claim. Meeting the requirement under *Rachel v. Georgia*, 86 S. Ct. 1783 (1966) rule, it imposes an appeal for the removal denied. However, joinder of the habeas proceeding with the civil rights claim removed from state court proceeding when prosecution of Petitioner was filed, and by third-party standing for denial of a federal right under the Act, the appeal did not and could not address the removal of civil rights claim. Because the joinder denied the appeal of the removed proceeding, due process was denied when it did not address the civil rights claim in the removed state proceeding. The Fifth Circuit brushed aside the removal under 1443, although a civil rights claim afforded under the *Rachel*, rule. Without attending the primary issue of the removal under 1443 denied due process, but it is unclear if the joinder of habeas with the removal occasioned for addressing the issues solely on the habeas and not the civil rights claim. Therefore, EP-17-CV-221-FM union of both the federal habeas and civil rights claim upon removal from state court permitted the appeal of the civil rights claim, and thus, when denied due process mandated an appeal of the removal under 1447. Thereby, causing denial of due process to consider the removal divested state court of jurisdiction to render conviction when the claims raised by Petitioner permitted removal to federal district court. Additionally, where joinder of a

civil rights claim onto a federal habeas petition is strictly denied, once district court added to both EP-17-CV-221-FM, it denied Petitioner due process to address the issues raised in the removal. Because the Fifth Circuit failed to address the appeal of removed proceeding under 1443, it denied due process to Petitioner when removal was united to habeas petition.

“Thus, removal is available where the state court defendant's federal civil rights would "inevitably be denied by the very act" of being brought to trial in state court.” *City of Greenwood v. Peacock*, 384 U.S. 808, 828, 86 S.Ct. 1800, 1812 (1966); *Davis v. Glanton*, 107 F.3d 1044, 1050 (3d Cir. 1997).

“In order to sustain removability under § 1443(1), a defendant must also demonstrate that he is ‘denied or cannot enforce’ his specified federal rights in the state courts.” *Rachel*, 384 U.S. at 788, 86 S.Ct. at 1788; *Id.*

“Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.” *Id.* at 1048-1049.

The COA was solely on the habeas petition not the civil rights claim. Petitioner previously addressed the issue of joinder was improper when this Court ruled in *Preiser v. Rodriguez*, 93 S. Ct. 1827 (1973), to hold both petitions in one is impermissible. Therein, this motion for rehearing addresses the one primary jurisdictional defect not addressed in the previous habeas when joinder was done of civil rights claim, when raising the jurisdictional defect. This federal habeas addressed the jurisdictional defect when removal was done prior to state trial court (21-50889), and removed proceeding holds all the requirements of a civil rights claim. Hereby meeting the requirements exclusively to federal district court. Where no appeal was done of the civil rights claim under the removed state proceeding under 1447 in EP-17-CV-221-FM, denial of due process was done when federal habeas could not attain jurisdiction of the removed state proceeding, moreover the denial of the appeal of 1443 removal prejudices Petitioner when union was done. Without due process given on the removed proceeding and explicitly denied to be joined to federal habeas, it denied the

appeal of the removed civil rights claim under 1447 to grant Petitioner due process on the third-party standing.

II. THIRD PARTY STANDING

Clearly, Petitioner attains third-party standing to represent the interest of enrollees. Where both federal statutes under 42 U.S.C. 1396u-2 and 31 U.S.C. 3730(h) provide a protected activity against any retaliatory action when Petitioner raises a federal right under the Act. This imposes for the Court to hear and consider the argument that denial of a federal right under the Act construes to a civil rights violation, not based on race, sex or gender, rather on economic disadvantage to discriminate by limiting or denying medical care. Significantly, this Court to consider the principle issue of the civil rights claim would address the manipulation of the Act denies medical care which causes a civil rights violation. The history of the Medicaid Act stems from the civil rights movement when enacted on January 01, 1966. Therefore, meeting any violation of the Act would develop to a civil rights violation for removal to federal district to assert a federal right. The federal habeas can only address that the removal divested the state court of prosecution of Petitioner. But the civil rights removal addresses whether the Act promulgates a federal right to enrollees and Petitioner's third-party standing stays prosecution. Either federal statute grants a safeguard onto Petitioner from prosecution but opens a FCA claim to the misplaced and misappropriated funding caused by THHSC, rather than secure oversight that enrollees are not denied access to medical care, they condone the practice to allow HMOs pay claims at reimbursement rate contrary to the contract signed by Petitioner and CMS. The dispute is not on the reimbursement rate is insufficient, it is a contractual nature to emphasize that services are rendered, and providers are reimbursed as dictated by CMS. The contract has to meet approval of CMS, enforcement of the contract lies onto THHSC to regulate and oversee that providers are reimbursed according to the

Act. However, THHSC fails to regard its need to oversee, and the HMOs manipulate the Act to reimburse providers less than contractually obligated as dictated by CMS. Therein, HMOs are then able to retain federal funding by denying or limiting services to meet the contract profitability and in turn deny enrollees a federal right. This Court's jurisprudence is needed to clarify denial of services or medical care for enrollees construes a civil rights violation based on economic disadvantage. The purpose of the Act was to ensure access to medical care, it was not to be manipulated to receive a profit than already stipulated under contract with CMS. Hereinafter, Petitioner, a provider, cumulates to third-party standing when affected by denial of valid claims and underpaid claims as instructed in the contract. This Court has already addressed the third-party standing in *Powers v. Ohio*, 111 S.Ct. 1364 (1991), thus res nova is not applicable in the application to assert standing for enrollees. Yet, where due process is denied by denial of appeal under 1447 of removed state proceeding in 1443, allows for federal habeas to address the void conviction when the state court was divested of jurisdiction to consider a civil rights claim by third-party standing. Plus, a protected activity under both federal statutes commands federal jurisdiction and state court is predicated to deny any relief for such a claim where subject matter jurisdiction is withdrawn.

"We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, *id.*, at 112; the litigant must have a close relation to the third party, *id.*, at 113-114; and there must exist some hindrance to the third party's ability to protect his or her own interests. *Id.*, at 115-116. See also *Craig v. Boren*, 429 U. S. 190 (1976). These criteria have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties. See, e. g., *Eisenstadt v. Baird*, 405 U. S. 438 (1972); *Griswold v. Connecticut*, 381 U. S. 479 (1965); see also *McGowan v. Maryland*, 366 U. S. 420 (1961). By similar reasoning, we have permitted litigants to raise third-party rights in order to prevent possible future prosecution. See, e. g., *Doe v. Bolton*, 410 U. S. 179 (1973)." *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

“Rachel gives such persons a clear right of removal and an immunity from state prosecution on any charge which might be sustained by proof of conduct within the federal protection.” Georgia v. Rachel, 384 U.S. 780, 792, 86 S.Ct. 1783, 1790, 16 L.Ed.2d 925.

“Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.” Washington v. Virginia, Civil Action No. 3: 18CV871 (E.D. Va. Feb. 28, 2019).

Undeniable that Petitioner's protected activity devoids the state prosecuting attorney to proceed to trial when third-party standing allows for protection of a federal right for enrollees. By claiming third-party standing a civil rights claim arises when a federal right under the Act is denied. The Act constructed under the civil rights movement, overwhelming and sufficiently establishes the need to have federal court address the fraud by THHSC. Yet, Texas is not the only state, its all non-participating states of the Medicaid expansion that manipulate the funding assessed for enrollees, principally children, while a small portion to the disabled and elderly. Saddening, many individuals who become critically ill, and meet disability are unable to acquire medical care by use of Medicaid in Texas where the limit is set so low that it disqualifies them from receiving benefits. The Medicaid expansion substantially raises the qualification, thus many individuals now become eligible for benefits to receive the care while they receive Medicare coverage. In the meantime, if unlucky to be disqualified, the individual is left without any recourse to seek aid, other than charitable foundations, which are limited. The purpose to deny the expansion is to limit accessibility to medical care, where the HMOs control the reimbursement, if it did not affect the control to reimburse, otherwise HMOs would not object to the expansion. Thus, the expansion continues to be denied. And Petitioner's proof that the manipulation is being done, would invoke that THHSC oversight is non-compliant to the act to receive equal access to medical care. Significantly, placing the premise on this Court to consider denial of a federal right under the Act

raises a civil rights claim, and third-party standing exists when in direct relation to denial of a valid claim.

WHEREFORE PREMISES CONSIDERED, Petitioner prays the motion for rehearing is GRANTED. And joinder of the civil rights claim is dissolved and remand of federal habeas. Petitioner further prays reassignment under 28 U.S.C. § 2106 to Austin Division court upon remand.

Submitted on this day 16 June 2023.



Rosa Serrano
P.O. Box 962785
El Paso, TX 79996

Certificate of Service

On this day a copy of the motion for rehearing was emailed to Edward.marshall@texasattorneygeneral.gov.




Rosa Serrano

DECLARATION 28 U.S.C. 1746

"I declare under penalty of perjury that the foregoing is true and correct. A copy of court order in 17-51086 is a true and accurate copy as entered on October 31, 2018."

Executed on June 16, 2023.



Rosa Serrano

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

October 31, 2018

Ms. Jeannette Clack
Western District of Texas, El Paso
United States District Court
525 Magoffin Avenue
Room 108
El Paso, TX 79901-0000


No. 17-51086 Rosa Serrano v. Richard Wiles, et al
USDC No. 3:17-CV-221

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By:
Mary Frances Yeager, Deputy Clerk
504-310-7686

cc w/encl:

Ms. Rosa Serrano
Mr. John E. Untereker

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-51086



A True Copy
Certified order issued Oct 31, 2018

Julie W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

ROSA SERRANO,

Petitioner-Appellant

v.

RICHARD WILES, County Sheriff, El Paso County, Texas; COUNTY COURT
OF LAW NUMBER 7,

Respondents-Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:17-CV-221

O R D E R:

Rosa Serrano, Texas prisoner # 2151723, filed the instant 28 U.S.C. § 2254 application challenging state court contempt proceedings and orders. In her application, she contended that her Fourth, Fifth, Eighth, and Fourteenth Amendment rights had been violated during the contempt proceedings. She now seeks a certificate of appealability (COA) from the district court's denial of her § 2254 application.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court rejects constitutional claims on their merits, a COA should issue only if the applicant

No. 17-51086

demonstrates “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327; *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Because Serrano has failed to make such a showing, her motion for a COA is DENIED. All remaining outstanding motions are also DENIED.

/s/ Edith Brown Clement

EDITH BROWN CLEMENT
UNITED STATES CIRCUIT JUDGE