23-6653

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

ORIGINAL

In re: MARK MARVIN, EX REL.

GARRET MILLER, Defendant

Against

THE UNITED STATES OF AMERICA, Respondent

(In Re: MILLER v. UNITED STATES, 23-94)

PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, pro se
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QUESTIONS PRESENTED

I, WHETHER PETITIONER HAS STANDING TO FILE A HABEAS AND MANDAMUS PETITION WITH THE COURT OF APPEALS WHEN THE QUESTION OF FREEDOM OF SPEECH AFFECTS HIM AS A MATTER OF LAW?

II, WHETHER, FOLLOWING MILLER'S ARREST AT A PROTEST AT THE U.S. CAPITOL, THE COURT SHOULD HAVE CHARGED THE JURY WITH THE ELEMENTS OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION, AND WHETHER THE FIRST AMENDMENT RIGHTS APPLY TO A PROTEST AT THE CAPITOL?

III, WHETHER COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE A FIRST AMENDMENT DEFENSE FOR DEFENDANT WHO WAS ARRESTED FOR CRIMINAL VIOLATION OF THE FIRST AMENDMENT?

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The Opinion of the Court of Appeals for the District of Columbia is annexed. See: *Miller v. U.S.* 23-94 as a related case.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254. And to grant habeas relief. This Court has supervisory authority over courts below.

CONSTITUTIONAL PROVISIONS

The protections of the First and Sixth Amendment are invoked.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page and respondents are represented by the United States Attorney General.

SUMMARY OF THE CASE

GARRET MILLER, Defendant pleaded guilty to some nine variations of criminal violation of the First Amendment before the Honorable Carl J. Nichols. The court previously dismissed a charge of felony obstruction (1512 (c)) which is reportedly before the District of Columbia Court of Appeals, as a frivolous question of the technical meaning of the term "otherwise" , not properly whether the government can outlaw the First

Amendment. (See: Indictment, page 1, annexed)

Your petitioner has filed habeas petitions in some 80 January 6 cases where the defendants were charged with criminal violation of the First Amendment because they participated in free speech demonstrations in Washington D.C. and in the Capitol building which was almost entirely open to the public. In none of the cases for which he filed, was the First Amendment ever raised as a defense to criminal free speech.

When this Miller case was appealed to the Court of Appeals by the government on the meaning of "otherwise" petitioner filed a petition for habeas corpus and a motion for mandamus to the district court to instruct the court in the elements of the protections of the First Amendment. The Court of Appeals insisted he pay a filing fee of $500 despite his poverty, then claimed no filing fee was received. He produced a cancelled bank money order, just in case his filing fee were lost, and his petition was reinstated, then dismissed for lack of standing. (annexed) Shortly after his filings, the district court heard a pro se motion for First Amendment rights which was denied. (*U.S. v. Bru*, 2023 WL 4174293, (or) 2023 WL 4174292) The District Court held that the First Amendment did not apply to free speech, freedom of assembly, nor to petitioning the government for redress

of grievances. Given that, to his knowledge, as seen in some 80 January 6 cases, the D.C. District court did not apply the First Amendment protections to protests at the capitol.

The Court of Appeals should have instantly denied the government's appeal on the meaning of the term "otherwise" and remanded for further action on whether the government has *carte blanche* authority to suspend the Constitution and prosecute for criminal violation of the First Amendment.

PROCEDURAL HISTORY OF THE CASE

He learned that this Miller case is presently before this Court not on his pleadings, and he seeks a Writ of Certiorari so that this Court can determine the legality of the particular First Amendment issue he raised and for which was denied as lack of standing.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the public has been denied the protections of THE FIRST AMENDMENT without which the government has no legitimacy.

ARGUMENT

I, PETITIONER HAS STANDING TO FILE A HABEAS AND MANDAMUS PETITION WITH THE COURT OF APPEALS WHEN THE QUESTION OF FREEDOM OF SPEECH AFFECTS HIM AS A MATTER OF LAW.

1, MARK MARVIN, as State Agent , Someone Petitioner (*Coolidge v. New Hampshire,* 403 U.S. 443, 487, 91 S.Ct. 2022, 2049; and responsible citizen, *Miranda v. Arizona,* 1966, 384 U.S. 436, 477-478, 86 S.Ct. 1602, 1629, *Darr v. Birford,* 339 U.S. 200, 203, 70 S.Ct. 587, 590, "Rule 52(b) [Fed. Rule Crim. Proc.]) hereby moves this honorable court for reversal, by motion or *sua sponte* in this matter in the public interest for the additional following reasons:

2, "The writ of habeas corpus commands general recognition a (sic) the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights. To make this protection effective for unlettered prisoners without friends or funds, federal courts have long disregarded legalistic requirements in examining applications for the writ and judged papers 204 by the simple statutory test of whether facts are alleged that entitle the applicant to relief." (*Darr v. Birford,* 339 U.S.

200, 203, 70 S.Ct. 587, 590)

3, "Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement (for standing) where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder (*Susan B. Anthony List v. Driehause*, 2014, 573 U.S. 149, 158, [10-11], 134 S.Ct. 2334, 2342, citing *MedImmune, Inc. Genentech Inc.* 549 U.S. 118, 128-129, 127 S.Ct. 764, *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301) such as abridgement of free speech rights.

4, "(W)e need not resolve the continuing vitality of the prudential ripeness doctrine in this case because the 'fitness' and 'hardship' factors are easily satisfied here. First petitioner's challenge ... is purely legal and will not be clarified by further factual development. (*Thomas v. Union Carbide Ag. Products Co.* 473 U.S. 568, 581, 105 S.Ct. 3325, 1985) And denying prompt judicial review would impose a substantial 168 hardship on petitioner, forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other. (*Id. Susan B. Anthony,* 167-8, 2347 [18])

5, Since petitioner is in jeopardy under courts' holding that there is no First Amendment, he has standing. The district court has recently affirmed that there is no First Amendment applicable to First Amendment situations. (*U.S. v. Bru*, 2023 WL 4174293)

II, FOLLOWING MILLER'S ARREST AT A PROTEST AT THE U.S. CAPITOL, THE COURT SHOULD HAVE CHARGED THE JURY WITH THE ELEMENTS OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION, AND WHETHER THE FIRST AMENDMENT RIGHTS APPLY TO A PROTEST AT THE CAPITOL

INDICTMENT AND THE UNDERLYING PROSECUTION VIOLATE DUE PROCESS AND CANNOT BE USED TO DENY FIRST AMENDMENT RIGHTS.

Preliminary hearing and the grand jury both determine whether there is probable cause with regard to the suspect. (*Coleman v. Alabama,* 1957, 339 U.S. 1) "Its historic office has been to provide a shield against arbitrary or oppressive action, by ensuring that serious criminal accusations will be

brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." (*U.S. v. Mandujano*, 1976, 425 U.S. 564, 571) Judicial supervision is properly exercised in such (First Amendment) cases to prevent the wrong before it occurs." (*United States v. Calandra,* 1974, 414 U.S. 338, 346)

Grand juries must operate within the limits of the First Amendment and may not harass the exercise of speech and press rights. (*Branzburg v. Hayes,* 1972, 408 U.S. 665, 707-08) "(G)rand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."

This indictment is facially defective and deprives this Court of subject matter jurisdiction over the case. (*United States v. Cotton*, 2002, 535 U.S. 625)

THE CAPITOL GROUNDS ARE A PUBLIC FORUM BY REQUIREMENT OF THE FIRST AMENDMENT, AND GOVERNMENTAL ATTEMPTS TO DESTROY THE PUBLIC FORUM ARE PRESUMPTIVELY IMPERMISSIBLE.

"Yet, a function (463) of free speech under our system of government is to invite dispute.

It may indeed best serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with (552) conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech *** is *** protected against censorship or punishment. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5, 69 S.Ct. 894. (*Cox v. State of La.* 1965, 379 U.S. 536, 551, 85 S.Ct. 453, 462-3)

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing (2303 public questions." (*Graynerd v. City of Rockford,* 1972, 408 U.S. 104, 92 S.Ct. 2294)

Regarding the "concurrently scheduled rallies and protests" on January 6 (2021) (note: the Court of Appeals does not use the term: "rioters" or "riot" or "mob") Munchel and Eisenhart -- two individuals who did not

engage in any violence … seemingly would have posed little threat." (*U.S. v. Munchel,* CoA. D.C., 991 F.3d 1273, 2021)

Being oblivious to the question of Freedom of Speech, The Hon. Beryl Howell considers an "entrapment by estoppel defense" (*U.S. v. Chrestman*, 2021, 525 F.Supp. 3d 14, 31, 32). Judge Howell opines that Freedom of Speech is a crime that suggests an affirmative defense of entrapment, if he could prove that the government 1, actively misled him about the state of law (defining his Constitutional right to free speech), 2, the government agent was responsible for enforcing the law of freedom of speech, 3, the defendant actually relied on the government agent's misleading pronouncement in commiting freedom of speech. (*Chrestman*, p. 31)

The (Supreme Court) "explained public places historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks, are considered without more to be public forums. (*U.S. v. Grace*, 461 U.S. 171, 177 , 103 S.Ct. 1702, 1983) In such places (1153) the government's ability to permissibly restrict expressive conduct is very limited such that an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling

government interest." (*Hodge v. Talkin*, 2015, D.C. Cir. 799 F.3d 1145p. 1152-3)

"Some public property, as a matter of tradition, is deemed dedicated to the exercise of expressive activity by the public. The quintessential examples of such traditional public forums are streets, sidewalks, and parks, all of which, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (*Hodge,* p. 1157) "A public forum can also arise by specific designation when government property … is intentionally opened up for that purpose." (Hundreds allowed into Capitol) "The government must respect the open character of a public forum.... In such places accordingly, the government's ability to permissibly restrict expressive conduct is very limited. *Grace*, 461 U.S. at 177, 103 S.Ct. 1702" (*Hodge*, 1157-58)

"Whereas the fundamental function of a legislature in a democratic society assumes accessibility to public opinion… the grounds of the **United States Capitol** are considered a public forum." (*Hodge v. Talkin*, 2015, D.C. Cir. 799 F.3d 1145, 1159, reversing 949 F.Supp. 2d 152, Howell, on other grounds) ("leafleting on Capitol's East Front sidewalk" (see: *Letterman v. U.S.*, 291 F.3d 36, D.C. Cir. 2002)

"(T)he Capitol grounds are a public forum by requirement of the First Amendment." (*Hodge*, p. 1161) "The Supreme Court has been clear that the government may not by its own *ipse dixit* destroy the public forum status of streets and parks which have historically been public forums.... The Court (*U.S. v. Grace*, 461 U.S. 171, , 103 S.Ct. 1702, 1983) explained that governmental attempts to destroy public forum status via such restrictions are presumptively impermissible. 461 U.S. at 179-80, 103 S.Ct. 1702." (*Hodge*, 1161)

GOVERNMENT HAS NO POWER TO RESTRICT FIRST AMENDMENT ACTIVITY BECAUSE OF ITS MESSAGE.

It is apparent that the government's position is that the speaker's criticism of the election is not permitted as free speech, and invites suppression.

However, "Government has no power to restrict such activity because of its message." (*Graynerd v. City of Rockford*, 1972, 408 U.S. 104, 115, 92 S.Ct. 2294, 2303) Regulation is not permitted to "suppress speaker's activity due to disagreement with speaker's view" (*Hodge v. Talkin*, 7799 F.3d 1145, 1158 citing *Perry*, 460 U.S. at 46, 103 S.Ct. 948) (*Patterson v. U.S.*, 2013, 999 F.Supp. 300)

INDUCED GUILTY PLEA TO NON-CRIME RAISES SUBSTANTIVE CLAIM OF ERROR COGNIZABLE AS MISCARRIAGE OF JUSTICE.

"Innocence requirement of 42 Pa.C.S. 9543(a)(2)(iii) in the Pennsylvania Post-Conviction Relief Act Pa. Cons. Stat 9541 et seq. in connection with the petitioner's claim of unlawfully induced guilty plea was substantive, not procedural, and could not give rise to a procedural default of inmate's federal claims." (*Villot v. Varner*, 373 F.3d 327, 2004 U.S. App. LEXIS 13486 (3d. Cir Pa. 2004)

Counsel was ineffective for counseling defendant to plead guilty. Defendant's plea was irrational, involuntary, not willful, nor knowing and not based on effective assistance of counsel. (*McMann v. Richardson*, 397 U.S. 759) Defendant made an unfavorable plea on defective advice of counsel. (*Bradshaw v. Stumpf*, 545 U.S. 175) Subsequent counsel was ineffective and "counsel did not act in any greater capacity than merely as amicus curiae" and counsel's bare conclusions(s) that there was no merit to petitioner's appeal (or post-conviction petitions) was not enough . (*Anders v. California, 386 U.S. 738)* Before he allows his client to plead guilty, the attorney must also communicate the results of his analysis of the case. (*McMann v. Richardson,* Id. Pp. 769-71) Although the attorney's analysis

need not provide a precisely accurate prediction of the respective consequences of pleading guilty or going to trial, the scrutiny must be undertaken on good faith. (See also *U.S. v. Aranitis,* 902 F.2d 489, 494, 7th. Cir, 1990)

"Petitioner's conviction and punishment on the ... charge are for an act that the law does not make criminal. There can be no doubt room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under 28 U.S.C. 2255 (*Bousley v. U.S.*, 118 S.Ct. 1604, 1611, 523 U.S. 614, 623) (W)here the conviction or sentence in fact is not authorized by substantive law, then finality interests are at their weakest. As Justice Harlan wrote, "there is little societal interest in permitting the criminal process to rest at a point where it ought properly never repose." (*Welsh v. U.S.* , 2016, 136 S.Ct. 1257, 1266)

Indeed the government invented a criminal law: "Criminal Violation of the First Amendment" which was impermissibly validated by the court. Federal judiciary cannot create crimes or enlarge the reach of enacted crimes. (*Morissette v. U.S.*, 342 U.S. 246, 1952, [1,2,3,4] 263, 72 S.Ct. 240, 249-50) The government cannot prosecute for First Amendment

"violations."

"Instead, the emphasis on actual innocence allows the tribunal also to consider the probative force of relevant evidence (p. 328) that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the *Carrier* standard, we believe that Judge Friendly's description of the inquiry is appropriate. The habeas court must make its determination concerning the petitioner's innocence in light of all evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tentatively claimed to have been wrongly excluded or to have become available only after trial." (*Schlup v. Delo*, 513 U.S. 298, 327-28, 115 S.Ct. 851)

"Pure legal impossibility is always a defense.... (Legal impossibility occurs when the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime") (*U.S. v. Rhodes,* 2022 WL-2315554 C [8]) (APM)

III, COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE A FIRST AMENDMENT DEFENSE FOR DEFENDANT WHO WAS ARRESTED FOR CRIMINAL VIOLATION OF THE FIRST AMENDMENT.

Counsel was ineffective for failing to assert and litigate these rights to defendant's prejudice resulting in a miscarriage of justice. (*Strickland* 466 U.S. 668, 694) (Re appeal: Evits v. Lucey, 469 U.S. 387, 396-97)

CONCLUSION

The government's prosecution of those practicing freedom of speech at the Capitol and subsequent resultant convictions are constitutionally impermissible.

Respectfully submitted,

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October 10, 2023