

23-7474
No. 23

IN THE SUPREME COURT OF THE UNITED STATES

BOGDAN NICOLESCU,

Petitioner,

v.

J. WADAS, Warden,

Respondent.

Supreme Court, U.S.
FILED
APR 08 2024
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BOGDAN NICOLESCU
Inmate# 64505-060
FCI Terre Haute
PO BOX 33
Terre Haute, IN 47808

Pro Se Petitioner

Handed to THE
PRISON OFFICIALS
in PERSON
April 8, 2024

QUESTION PRESENTED

Is a 3-judge merits panel of a U.S. court of appeals at liberty, perhaps over-reliant on the opposing party's counseled but uncandid briefing, to not consider a pro se litigant's meritorious argument in reaching its judgment, and to still not consider it on panel rehearing, still without offering any explanation?

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bogdan Nicolescu, pro se, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at Nicolescu v. Bobby, No. 22-3253, 2023 U.S. App. LEXIS 26982 (7th Cir., Oct. 11, 2023) and is reproduced in the appendix to this petition. Appendix A. A petition for panel rehearing was filed, and was denied at 2023 U.S. App. LEXIS 32925 (7th Cir., Dec 12, 2023). Appendix B. The court below then sua sponte vacated that order, 2023 U.S. App. LEXIS 33085 (7th Cir., Dec. 13, 2023). Appendix C. And was denied again at 2024 U.S. App. LEXIS 511 (7th Cir., Jan. 8, 2024). Appendix D.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on October 11, 2023, App'x A, and denied Nicolescu's petition for rehearing on January 8, 2024, App'x D. This Court has jurisdiction under 28 U.S.C. § 1254.

LEGAL FRAMEWORK

Fed.R.App.P. 40(a)(2) provides:

Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

STATEMENT OF THE CASE

Petitioner Bogdan Nicolescu, a federal prisoner, was sanctioned with loss of 27 days of good conduct time by the Bureau of Prisons (BOP). To justify Nicolescu's disciplinary sanctions and his 6-month-long SHU detention, the BOP mischaracterized Nicolescu's expressed intent to file grievances, together with derogatory language he used in his *personal* phone conversation, as threats with bodily harm. The BOP refused to consider the conversation's context, which was otherwise exculpatory, without explaining why.

Nicolescu petitioned for a writ of habeas corpus, whose denial in the district court was upheld by a panel of the Seventh Circuit, a judgement which is hereby challenged. See Nicolescu v. Bobby, Seventh Circuit No. 22-3253 (7th Cir. Oct 11, 2023)(per curiam)(opinion below; attached as App'x A). But the Seventh Circuit completely failed to address Nicolescu's main argument, as well as other points of fact and law.

Nicolescu petitioned for a panel rehearing, which was summarily denied on December 12, 2023 (App'x B). Continuing to offer no indication of having considered the overlooked argument, or any of the other overlooked points of fact and law, the order simply stated that "all members of the original panel voted to deny panel rehearing." Id.

Then, on December 13, 2023 the Seventh Circuit *sua sponte* vacated its order (App'x C). Perhaps somebody finally noticed the overlooked argument.

No such luck. On January 8, 2024 the Seventh Circuit *again* denied the petition, *again* without any indication of having considered the argument (App'x D).

Nicolescu's main argument was that the DHO Report (App'x E) failed to provide any explanation of why Nicolescu's exculpatory evidence was not found persuasive by the DHO. The DHO Report does not even mention this evidence, an e-mail (App'x F) and the rest of the transcript of the phone call. Under Seventh Circuit's binding precedent Nicolescu was entitled to a writ of habeas corpus.

REASONS FOR GRANTING THE PETITION

A. This question affects any litigant in the Seventh Circuit.

Precedent of this Court informs that unlike "rehearing in banc," a panel rehearing is neither a "discretionary procedure" nor "employed only to address questions of exceptional importance." Missouri v. Jenkins, 495 U.S. 33, 46 n.14, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990). Indeed, "[t]he panel is required to consider the contentions in the petition for rehearing, if only to reject them." Id. (emphasis added).

Commentators agree: "The purpose of petitions for rehearing, by and large, is to insure that the panel properly considered all relevant information in rendering its decision." 2A Federal Procedure § 3:835 (Law. Coop. 1994).

Even the Seventh Circuit's own precedent holds that "a petition for rehearing by a panel requires a response from the court[.]" United States v. Buljubasic, 828 F.2d 426, 427 (7th Cir. 1987)(emphasis added)(citing Stern, Gressman & Shapiro, Supreme Court Practice 313 (6th ed. 1986)).

But the court below just could not be persuaded to even acknowledge Nicolescu's argument, not even on panel rehearing, where Nicolescu has indicated with specificity all facts misapprehended and all arguments overlooked. App'x G (just first four pages reproduced on Nicolescu's Petition for Panel Rehearing).

What must a pro se litigant do to have his argument heard in an U.S. Court of Appeals?

Indeed, noting in the Seventh Circuit's decision even implies that the court even read any of Nicolescu's briefs.

On panel rehearing, the court below did not make things any clearer. It merely issued a terse order indicating that "all members of the original panel have voted to deny panel rehearing," App'x D, same as it would for an en banc

suggestion.

Petitioner has found 148 decisions with the same wording since 2017. Presumably there may be any number of other litigants who got the same treatment, and never got their arguments heard.

The Seventh Circuit appears to believe panel rehearings are discretionary.

B. Petitioner's argument was meritorious.

Nicolescu's argument was meritorious, and the factual inquiry to prove it is very simple: Nicolescu presented exculpatory evidence at the DHO hearing (which Respondent eventually conceded below). That evidence consisted in an e-mail (App'x F) and a passage of the phone call transcript immediately preceding the one used by the DHO. But nowhere in the DHO Report are the words "e-mail" or "transcript" even to be found. (Appx' E).

Seventh Circuit's binding precedent requires that a DHO Report provide an "explanation" of why the DHO "disregarded the exculpatory evidence" presented by Nicolescu "and refused to find it persuasive", an "explanation" to which Nicolescu was "entitled." Meeks v. McBride, 81 F.3d 717, 720 (7th Cir. 1996).^{*} Moreover, there is even binding precedent on the otherwise common-sense proposition that a DHO Report that does not mention the exculpatory evidence cannot be said to have provided the required explanation, and a writ must issue. Whitford v. Boglino, 63 F.3d 527, 536 (7th Cir. 1995). THESE 2 CASES ARE NOT EVEN MENTIONED IN THE OPINION, APPX A

One final issue must be flagged: The USAO misled the Seventh Circuit to believe that "[t]he officer wrote that he considered the transcript[and] an email to [Nicolescu's] mother," Nicolescu v. Bobby, No. 22-3253, 2023 U.S. App. LEXIS 26982 at 3 (7th Cir. 2023). But that's materially inaccurate because DHO Walalge did not write any of this in his DHO report, but rather, only later in his declaration below, which cannot cure the due process violation that occurred during the disciplinary process, prior to the declaration. USAO OMITTED THAT PART.

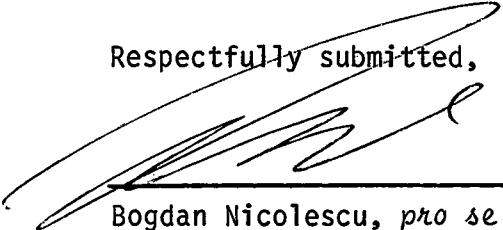
For the foregoing reasons, the Court must grant the petition for a writ

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* THESE 2 CASES ARE NOT EVEN MENTIONED IN THE OPINION BELOW, DESPITE BEING THE MAIN AUTHORITIES RELIED UPON BY NICOLESCU. APPX A.

(#) certiorari.

Dated: April 8, 2024.

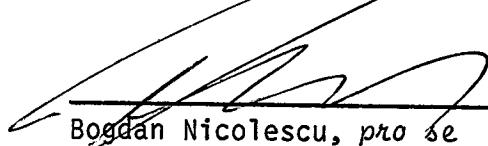
Respectfully submitted,


Bogdan Nicolescu, pro se
Inmate# 64505-060
FCI Terre Haute
PO BOX 33
Terre Haute, IN 47808

DECLARATION OF INMATE FILING

I am an inmate confined in an institution. Today, April 8, 2024, I am handing the foregoing, together with all supporting papers and attachments, to the prison staff at "Mail Call" (as is required in the Communications Management Unit where I am housed) to be mailed to the Court. First-class postage is being prepaid by me.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621). Executed on April 8, 2024.


Bogdan Nicolescu, pro se

PROOF OF SERVICE

I, BOGDAN NICOLESCU, do swear or declare that on this date, April 8, 2024, as required by Supreme Court Rule 29 I have served the enclosed Application for an Extension of Time on each party's counsel by handing the prison staff an envelope containing the above documents to be sent by U.S. Mail to each of them and with first-class postage prepaid.

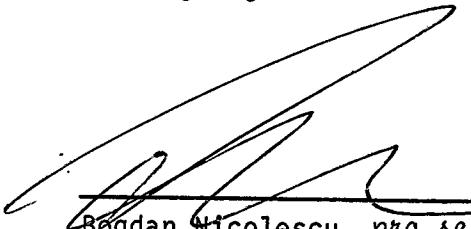
The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of April, 2024.

(#) Petitioner apologizes for running out
of time due to BOP obstruction (See
Motion for Leave to Amend; enclosed herewith),
and begs the Court to review his Petition
for Panel Rehearing, below, which
demonstrates the court below's error with much
greater specificity.


Bogdan Nicolescu, pro se