

No. 24-5340

IN THE
SUPREME COURT OF THE UNITED STATES

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U.S. SUPREME COURT

EDWIN PAWLowski

Petitioner

Supreme Court, U.S.
FILED

AUG 15 2024

OFFICE OF THE CLERK

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Submitted by:

Edwin Pawlowski

Petitioner, Pro Se

FPC Cumberland

P.O. Box 1000

Cumberland, MD 21501

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QUESTIONS PRESENTED

Several of the foundational rights enshrined in the Constitution after centuries of persecution and struggle are that "No person...shall be compelled in any criminal case to be a witness against himself," and that "the accused shall...have assistance of counsel." These rights are so basic to our system of jurisprudence and a fair trial, that their infraction can never be treated as harmless. Yet, it is these very rights which are put in jeopardy in this case through official government overbearing and which must be addressed by this Court if the scales of justice are to be equipoised.

Neither the government, the District Court nor the Third Circuit addressed two questions of exceptional importance:

1. **Can the government without warrant or consent and in violation of state and federal statute, covertly record a non-custodial conversation which ignores Miranda obligations and then utilize that covertly recorded conversation during trial to convict the accused;**

and,

2. **Can the government seize funds through the indictment of another who has no fiduciary claim to those funds, simply to hinder an individual from obtaining the assistance of counsel prior to indictment or conviction regardless of the intended use of the funds.**

These are important questions of federal law that have not been, but should be, settled by this Court. In the interest of justice and pursuant to Supreme Court Rule 10(c), these questions need to be addressed for the following reasons herein.

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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:

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 A to the petition and is

reported at June 26, 2024; 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 to the petition and is

reported at January 5, 2023; 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 _____ 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.

JURISDICTION

This is a petition to the United States Supreme Court for Writ of Certiorari under 28 U.S.C. §1254(1).

The United States Court of Appeals for the Third Circuit decided this case and entered judgement on June 26, 2024.

A timely petition for rehearing En Banc was submitted on July 7, 2024. It was denied by the Third Circuit Court of Appeals on July 26, 2024. (See Exhibit C)

This petition raises important constitutional issue and questions of federal law that have not been, but should be, settled by this Court. It is thus submitted to this esteemed Court for review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Right to privacy and security of individuals against arbitrary intrusion by government officials under the Fourth and Fourteenth Amendments of the Constitution and in violation of 18 U.S.C. §2510 and 18 PA §5701.
- The right of an individual not to be compelled in a criminal case to be a witness against himself and the right against self incrimination via Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
- The deprivation of property without due process of law under the Fifth Amendment and in violation of 21 U.S.C. §853(p).
- The right to assistance of counsel for a proper defense under the Sixth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Edwin Pawlowski, the former Mayor of Allentown, Pennsylvania, was arrested in July of 2017 for soliciting campaign contributions in return for government contracts or favorable government treatment. On March 2, 2018, a jury in the Eastern District of Pennsylvania convicted Mr. Pawlowski of various counts. On October 23, 2018, Mr. Pawlowski was sentenced to 180 months.

On May 2, 2019, retired FBI Special Agent Scott Curtis participated in a podcast interview where he discussed the Petitioner's case in detail and made material admissions as to improper and unlawful acts in conjunction with the Petitioner's case.

The Petitioner filed a motion with the District Court for an "Evidentiary Hearing Contingent Upon Newly Discovered Exculpatory Brady Type Material and Occurrence of Prosecutorial Unlawful Acts under 18 U.S.C. §3504 on March 13, 2020. On January 29, 2021, the District Court ruled it would hold the motion in abeyance until disposition of the Petitioner's direct appeal in relation to his criminal case. On March 4, 2022, the Third Circuit Court of Appeals affirmed the District Court's judgement and shortly after this decision the Petitioner filed a motion to advance the above mentioned evidentiary hearing.

On January 5, 2023, the District Court denied the Petitioner's motion for evidentiary hearing under Rule 33 and a timely notice of appeal was filed on January 7, 2023. On June 26, 2024, the appellate court issued an opinion affirming the judgement of the District Court. The Petitioner submitted arguments in support of Rehearing En Banc and/or Rehearing by panel pursuant to Federal Rules of Appellate Procedure 35 and 40 on July 10, 2024. On July 26, 2024, the Third Circuit denied the Petitioner's request for an En Banc Rehearing (See Exhibit C). This Writ of Certiorari is now submitted pursuant to Article III of the Constitution of the United States and 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE PETITION

I. Can the government without warrant or consent and in violation of state and federal statute, covertly record a non-custodial conversation which ignores Miranda obligations and then utilize that covertly recorded conversation during trial to convict the accused.

Illegally Recorded Conversation with the FBI

Without a doubt, the most egregious violation of the Petitioner's rights was the illegal recording discussed by FBI Special Agent Scott Curtis during a May 2, 2019 podcast interview conducted over a year after the Petitioner's trial.

During this interview Agent Curtis stated that, for the first time in his long career, he covertly recorded a non-custodial interview which was later utilized during a criminal trial. Throughout this conversation the Petitioner asked Agent Curtis numerous times if the conversation was being recorded and was told empathically NO. Curtis stated, "He (Pawlowski) came voluntarily, we explained to him we had been conducting an investigation. We asked him some questions and focused the line of questioning toward Fran Dougherty to put his mind at ease, and so for a three hour period Pawlowski was answering questions." The host of the podcast (a retired FBI agent) was shocked at Agent Curtis' statement and interjected, "I don't know if others caught what you said, this was covertly...he did not know you were also recording his answers." To which Agent Curtis replied, "Exactly, in the past we didn't record an interview like that, the Agent took the stand to testify as to what was said." The host further responds, "I wasn't aware of this, I'm retired 10 years, and we couldn't record these conversations." (See Exhibit D: Podcast Interview, Jerri Williams Show, May 2, 2019.)

This is true, because unlike other states, Pennsylvania State Law requires "two-party consent," meaning it is illegal to record someone without their consent or a court order in compliance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Both 18 U.S.C. §2510 and 18 PA §5701 presume an expectation that oral communication is not subject to interpretation under circumstances justifying such expectation and prohibit the unauthorized interception of oral communication. "When an individual seeks to preserve something as private and his expectation of privacy is one that society is prepared to recognize as a reasonable, official intrusion into that private sphere, generally qualifies as a search and requires a warrant supplemented by probable cause," Smith v. Maryland, 442 U.S. 735, 61 L. Ed. 2d 220, 99 S. Ct. 2577 (1979). Since Agent Curtis had neither an order from the court sanctioning the covert recording or consent to record the conversation by the Petitioner, the recorded conversation was illegal and blatantly violated the Petitioner's protections under the Constitution's Fourth and Fourteenth Amendments. The FBI and prosecution then violated the Exclusionary Rule and proceeded to utilize this illegal recording by playing it before a jury in a criminal proceeding, thus further violating the Petitioner's constitutional rights. See Weeks v. United States, 232 U.S. 383, 388, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914).

Relevant Legal Standard

The Basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary intrusion by government officials. It protects people, not places, and this Court has expanded on its conception of the Amendment to also protect certain expectations of privacy by recognizing several basic guideposts; the ability to "secure privacies of life against arbitrary power and relatedly, that a central aim of the Founders was to place obstacles in the way of a too permeating police surveillance." See Carpenter v. United States, 585 U.S. 296, 138 S. Ct. 2006, 201 L. Ed. 2d 507 (2018).

In Katz v. United States, 389 U.S. 347, 353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the Supreme Court uniformly held that application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. See Rakas v. Illinois, 439 U.S. 128, 143, 58 L. Ed. 2d 287, 99 S. Ct. 421 (1978). In this case the Agents interviewing the Petitioner invaded the reasonable expectation of privacy by responding NO multiple times when directly asked if the conversation was being recorded. The Petitioner thus had an expectation of privacy which most in society would traditionally recognize as reasonable. The government practiced deceit both in its motives for the interview and then in their implicit lying regarding the recording of the conversation. As the Court stated in Flaherty v. Arkansas, 415 U.S. 995, 39 L. Ed. 2d 893, 94 SCT 1599 (1974), "Allowing the government to practice deception...carries the seeds of destroying a substantial part of the congressional plan in Title III and its constitutional underpinnings."

In Lopez v. United States, 373 U.S. 427, 439, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963) and United States v. Caceres, 440 U.S. 74, 99, S. Ct. 1495, 59 L. Ed. 2d 733 (1979), the Court held that the government does not violate the Fourth Amendment by recording and transmitting private conversations with the consent of one of the parties, even though the other party does not know the conversation is being recorded or transmitted (third-party doctrine), but these cases are unpersuasive in the context of this case. Here the FBI's conduct went far beyond the familiar cases of a revenue agent approached with a corrupt proposal who recorded the encounter and into a situation which involved a complete deception of an individual who was not in custody and who voluntarily went to assist law enforcement with an investigation. This dynamic is meaningfully different from the above cases as law enforcement in this case identified themselves as such but misrepresented their purpose and practices. Because citizens will respond to law

enforcement with a sense of obligation and presumption of trustworthiness, multiple courts have held facially consensual searches to be invalid where the "consent" was elicited through officers' lies about the nature and scope of their investigations. See United States v. Bosse, 898 F. 2d 113, 115 (9th Cir. 1990); United States v. Turpin, 707 F. 2d 332, 334 (8th Cir. 1983)(upholding lawfulness of consent search, but stating that "misrepresentations about the nature of an investigation may be evidence of coercion").

Even though the Court has established that the third-party doctrine reduces an individuals expectation of privacy in information knowingly shared with another, the fact of diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. See Carpenter at 9. Third-party electronic monitoring subject only to self-restraint of law enforcement officials has no place in a free society. The courts need to intervene, but to date have not, and by not doing so has lent its aid in the enforcement of the criminal law when the government itself is guilty of misconduct. "Decency, security and liberty alike demand that government officials shall be subjected to the same rules and conduct that are commands to the citizens." Olmstead v. United States, 277 U.S. 438, 471-485, 72 L. Ed. 944, 48 S. Ct. 564, 66 ALR 376 (1928).

In the interest of justice, the Court should consider restraining the government and limiting the use of such a recording which was obtained by means of deception, then admitted as evidence in federal court which caused the lower court to depart from the usual course of judicial proceedings.

Evasion of Miranda Warning

But the abuse does not stop there. During the course of the interview Agent Curtis conducted express questioning and held the Petitioner to statements normally restricted

for custodial interrogations. See United States v. Cooper, 19 F. 3d 1154; 1994 U.S. App. LEXIS 5409 (7th Cir., 1994) (Where an objective observer would believe that the encounter was reasonably likely to elicit an incriminating response from the defendant, the court will find the encounter constituted the functional equivalent of interrogation) citing Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

Several courts have held that voluntary statements are admissible and not subject to Miranda warnings but since the Petitioner was deceived on the reason for the encounter and was lied to by the FBI Agents who secretly recorded the meeting without the Petitioner's consent, the question is whether the deception in this context rendered the consent by the Petitioner involuntary and thus can be construed as an interrogation. The Eleventh Circuit has acknowledged that, "fraud, deceit or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable," Spivey v. United States, 861 F. 3d 1214 (11th Cir. 2017) (quoting United States v. Prudden, 424 F. 2d 1021, 1032 (5th Cir. 1970)).

In this case the FBI was allowed through deception to avoid any obligation to the Petitioner of his rights against self incrimination via Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). **THIS IS UNPRECEDENTED** and undercuts the very basis of the Fifth Amendment and numerous precedential court decisions relating to interrogations/interviews by law enforcement. Agent Curtis himself states during the podcast that he "was a little hesitant to proceed" in recording and questioning someone covertly who was not in custody or under arrest.

Since the events regarding the recording were unknown to the Petitioner until the Curtis podcast interview which occurred after his trial and since the recording was illegally obtained and used prominently in the prosecution's arguments during trial, this illegally recorded conversation was undoubtedly material. Its impact on the jury

was INCALCULABLE and most certainly tainted the proceedings, poisoning the jury's deliberations, thus violating the Petitioner's constitutional rights.

Need for Action

This illegal recording involves a question of exceptional importance which needs to be addressed by the Court. Agent Curtis's statements are direct admissions of guilt and in his own voice he brags that the Petitioner's rights were violated. This was highlighted in the motion to the District Court and the Petitioner's brief of appeal but was ignored completely and never addressed by the 3rd Circuit, Government or Lower Court.

It has been over 40 years since the High Court has addressed a similar issue in Lopez and Caceres, and the government has continued to stretch the frontiers of reasonableness in its interpretation and abuse of the Fourth and Fifth Amendments. In light of its immense constitutional implications, the Petitioner requests the Court to review and decide this important issue which has tilted the scales of justice far beyond what the average citizen understanding of privacy and interrogation by granting this Writ of Certiorari.

II. Can the government seize funds through the indictment of another who has no fiduciary claim to those funds, simply to hinder an individual from obtaining assistance of counsel of choice prior to indictment or conviction regardless of the intended use of funds.

During the May 2, 2019 podcast/interview, Special Agent curtis also makes a glaring and brazen admission:

SC: "Another thing we did during this period, we obtained a warrant to seize all the remaining contributions out of Mayor Pawlowski's campaign accounts, because I also realized, as soon as we went overt in the investigation, he could utilize those campaign funds to pay for attorneys to defend himself in this investigation. So we wanted to minimize his opportunity to do that and cut off funding there. So we got a warrant from the court to seize his campaign contributions, which was, I think, one of the only or few times that has occurred too."

(See Exhibit E: Podcast Interview, Jerri Williams Show, May 2, 2019)

This outrageous statement by Agent Curtis clearly exposes the government's motives and intent for seizing these funds, to derail the Petitioner's ability to hire counsel for an adequate defense. The government simply dismisses this statement as "strategic musings" but they are more than harmless musings, they are a direct admission of Agent Curtis' "strategic intent" which directly contravenes the Sixth Amendment and volumes of precedential case law -- the right to representation.

Improper Seizure

This statement by Agent Curtis not only provides a reason for the seizure but also calls into question the Notice of Forfeiture which initiated the fund's confiscation. These funds were NOT seized through the indictment of the Petitioner, but strangely

and suspiciously through the indictment of the Petitioner's campaign manager (Michael Fleck) who had **absolutely NO fiduciary claim to the funds**. He was neither a signatory on the accounts nor an officer in the political action committees which were established to administer the funds. (See Exhibit F: Fleck Notice of Forfeiture).

The seizure was enforced pursuant to 21 U.S.C. 853(p) in relation to the Forfeiture of Substitute Property. In Honeycutt v. United States, 581 __, 137 S. Ct. __, 198 L. Ed 2d 73 (2017) the Supreme Court explicitly stated that under this statute, "Congress did not authorize the government to confiscate substitute property from other defendants or co-conspirators; it authorized the government to confiscate assets only from the defendant who initially acquired the property and who bears responsibility for its dissipation." Yet, in this case, the Petitioner's assets were seized for the crimes of a co-conspirator who had absolutely no connection to the funds a year before the Petitioner was even charged with a crime. Like in Honeycutt, the individual in which the seizure was executed (Michael Fleck), did not acquire the funds, had zero ownership interest in the funds and he bore no responsibility for these funds dissipation. Thus the funds seized by the government under 853(p) were illegally confiscated from the Petitioner.

It is highly unusual for the government to seize an individual's assets through the indictment of another who had no fiduciary interest, it is even more curious that the government did it OVER A YEAR before a Grand Jury even charged the Petitioner with a single crime. FBI Agent Curtis' podcast statements now provide the reason why...to **deny the Petitioner an adequate defense**, which in this case, the government succeeded.

The Supreme Court in Luis v. United States, 578 U.S. 136 S. Ct. 1083, 194 L. Ed. 2d 256 (2016) states that, "the government undermines the value of the right to counsel by taking away the ability to use funds which the defendant needs to pay for an attorney of his choice." The Court then states that the "Sixth Amendment denies the government

unchecked power to freeze a defendant's assets before trial simply to secure potential forfeiture upon conviction," but this is exactly what the prosecution allowed the FBI to do in this case. "Without pre-trial protection for at least some of the Petitioner's assets, the government could nullify the right to counsel of choice, eviscerating the Sixth Amendment's original meaning and purpose," Luis at 275-276. As in Luis, the limitation of funds forced the Petitioner to rely on counsel who was far less experienced, thus impacting materially his overall defense, which is EXACTLY what the Supreme Court opined as a constitutional violation.

The District Court and Appellate Court completely misapprehended the argument made by the Petitioner in relation to this seizure. The issue is not about tainted or untainted funds, but that the seizure on its face was improper under the law and by seizing these funds the government severely limited the Petitioner's right to the counsel of his choice as outlined in Luis.

Extraordinary measures of deception and evasion were used in an attempt to undercut the Petitioner's defense and derail his ability to hire counsel with the knowledge and capacity to mount an effective defense. Agent Curtis alludes to this when he states during the podcast, "I think, this was one of the only or few times that occurred too," indicating that in his long career as an FBI agent, he never or rarely was allowed to seize funds pre-trial in this manner. Yet, the prosecution allowed Agent Curtis to initiate this extraordinary measure. See Bennis v. Michigan, 134 L. Ed. 2d 68, 116 S. Ct. 994 (1996) ("improperly used, forfeiture could become more like a roulette wheel employed to raise revenues from innocent but hapless owners...or a tool wielded to punish those who associate with criminals, [rather] than a component of a system of justice").

These actions by the government not only offend basic notions of fair play, but also erode public confidence rooted in the trust that government power will be exercised with restraint and discretion. "Government interest in a criminal prosecution is not that it shall win a case, but that justice shall be done," Turner v. United States, 137 S. Ct. 1885, 1893, 198 L. Ed 2d 433 (2017).

Need for Action

Agent Curtis' podcast remarks are clear, direct and damaging. They expose the government's motives and intent in seizing these funds which were never articulated to the lower court in the warrant for seizure. The government's desire to win at all costs resulted in a complete and total disregard for the Petitioner's Sixth Amendment rights. In the interest of justice, this question of exceptional importance and in conflict with relevant decisions of the United States Supreme Court should be addressed so as to rein in this reckless abuse of prosecutorial overreach and uphold the provisions articulated by the High Court in Honeycutt and Luis.

CONCLUSION

The government in this case has played fast and loose with the Rules of Criminal Procedure and Evidence. They have attempted at every turn to deprive the Petitioner the safeguards which Article III was created to uphold and it is now in the hands of this esteemed Court to correct this imbalance.

For all these reasons, the Petitioner, Edwin Pawlowski, respectfully petitions this Court to grant this Writ of Certiorari to right these wrongs and equate the scales of justice.

Respectfully submitted on this 12th day of August, 2024.



Edwin Pawlowski

Petitioner, Pro Se

76166-066

FPC Cumberland

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Cumberland, MD 21501

PROOF OF SERVICE

I, Edwin Pawlowski, Petitioner, Pro Se, hereby certify pursuant to 28 U.S.C. §1746, that a true and correct copy was sent, First Class Mail, postage paid on the 12th day of August, 2024, to the following:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, NW Room 5616
Washington, DC 20530-0001

Edwin Pawlowski

Edwin Pawlowski
Petitioner, Pro Se
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FPC Cumberland
14601 Burbridge Road, SE
Cumberland, MD 21502

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1078

UNITED STATES OF AMERICA

v.

EDWIN PAWLOWSKI,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 5:17-cr-00390-001)
District Judge: Honorable Juan R. Sánchez

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 14, 2024
Before: JORDAN, PHIPPS, and NYGAARD, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on June 14, 2024. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered January 5, 2023, be and the same is hereby affirmed. Costs not taxed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: June 26, 2024