

24-5806

No. -

ORIGINAL

In The  
Supreme Court of The United States

FILED  
AUG 26 2024

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

JACKSON PETER CHIWANGA, Pro Se Petitioner,

v.

GENTNER F. DRUMMOND, OKLAHOMA ATTORNEY GENERAL,  
Respondent.

On Petition for Writ of Certiorari to the  
United States Court of Appeals for the 10th Circuit

**PETITION FOR WRIT OF CERTIORARI**

Jackson Peter Chiwanga,  
c/o Edgar Chiwanga  
8381 East Village Lane  
Rosemead, California 91770

## **QUESTION(S) PRESENTED**

1. Whether Petitioner Satisfies the in-custody requirements of 2254 Petition when he continued to suffer consequences of deportation as a result of the underlying conviction especially in light of this court's decision in *Padilla v. Kentucky* holding that consequences of removal can no longer simply be dismissed as merely a "collateral consequence" of a conviction or plea.
2. Whether a petitioner, who was detained by Immigration and Customs Enforcement (ICE) due to deportation proceedings stemming from a conviction, satisfies the "in custody" requirement under 28 U.S.C. § 2254, even after the completion of the underlying criminal sentence.
3. Whether the erroneous legal advice regarding deportation consequences provided by defense counsel, in violation of *\*Padilla v. Kentucky* (559 U.S. 356 (2010)), can trigger a narrow exception to the "in custody" requirement, allowing a habeas corpus petition under § 2254.
4. Whether this Court should clarify that deportation, in light of *\*Padilla\**, is no longer a mere collateral consequence of a criminal conviction but constitutes a direct legal consequence that warrants relief under § 2254 when counsel was ineffective.

## **LIST OF PARTIES**

Petitioner: Jackson Peter Chiwanga, Pro Se<sup>1</sup>

Respondent: Gentner F. Drummond, Oklahoma Attorney General

Attorney for Respondent: Mary R. Incremona

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<sup>1</sup> pro se complaint[s], ‘however inartfully pleaded,’ [are] held to ‘less stringent standards than formal pleadings drafted by lawyers.’” **Haines v. Kerner** ) 404 U.S. 519(1972)

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## **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported . It was filed on May 28, 2024 and appended as **Appendix 1**. The District Court decision is also appended as **Appendix 3**

## **JURISDICTION**

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 28, 2024. See *Chiwanga v. Drummond*, No. 23-5136 (10th Cir. May 28, 2024). A motion for leave to file a late petition for rehearing was denied in August 2024 (Appendix 2)<sup>2</sup>.

## **STATUTORY PROVISIONS INVOLVED**

Section 2254 - State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States

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<sup>2</sup> it's not clear to the petitioner whether the operative date for counting the 90 days deadline for filing of this petition is the May or August day. But he is filing it on the 90th day of the May 28, 2024 court of appeal decision denying certificate of appealability.

## **STATEMENT OF THE CASE**

Jackson Peter Chiwanga is a forty-two-year-old male lawful permanent resident<sup>3</sup> of the United States and a citizen of United Republic of Tanzania.

He has lived continuously in the United States for more than two decades; He is the father of 3 minor children under the age of 17, of which 2 are American-born children. He was given full physical custody and his ex-spouse was given visitation rights and was ordered to pay base child support. He is devoted to his children, provides for them financially, ensures that they have all that they need and brings emotional stability to their lives which are crucial for their development.

Despite his length of residence, he has no criminal history but for a single altercation with his ex-spouse for which he pleaded guilty to in line with his legal counsel's advice in return for a non-custodial sentence of three years suspended sentence.

But notwithstanding the fact that he was told by his Attorney advised that pleading guilty to a non-custodial sentence and probation, will not have a consequence of removal or deportation, he was served a notice to appear and taken to Immigration and Customs Enforcement custody on August 25th 2021<sup>4</sup> from his

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<sup>3</sup>Petitioner has lived continuously in the United States since 2004

home. *This occurred three years after his bond release from County jail custody and his criminal case was determined and was coming into the final year of unsupervised probation sentence that was still ongoing until November 25<sup>th</sup> 2022.*

He has since completed his two years of probation and also completed all rehabilitative programs without any further incidence or offense. In fact, he received a recommendation letter from his probation officer, He has also completed 52 weeks of batterer intervention program under the Domestic Violence Intervention Service.

The said report states therein “there are no current reported safety concern or risk indicators”. That further, Respondent took Parent education and family stabilization course

On March 30, 2022, Chiwanga filed a letter in Tulsa County District Court asking the trial court to “reconsider the decision entered in [his] judgment and sentencing on the day of November 26, 2019.”. In the letter, Chiwanga explained that ICE detained him on August 25, 2021, pending removal proceedings.

The trial court construed the letter as an application for post-conviction relief and denied the application on April 25, 2022<sup>5</sup>.. Chiwanga subsequently filed a

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<sup>5</sup> Dkt. # 7-5

motion to reconsider. The trial court granted the motion, reconsidered his request for post-conviction relief, and issued an order on June 6, <sup>6</sup>2022, again denying his application for post-conviction relief.

Chiwanga filed a post-conviction appeal, and the Oklahoma Court of Criminal Appeals (“OCCA”) declined jurisdiction and dismissed the appeal, finding that he did not comply with the OCCA's procedural rules for perfecting that appeal. Chiwanga later filed a second application for post-conviction relief and a separate application seeking leave from the trial court to file a direct appeal out of time, and the trial court denied both forms of relief. Dkt. ## 7-10, 7-11, 7-13. Chiwanga appealed the trial court's decisions and, on February 7, 2023, the OCCA affirmed the district court's rulings. Dkt. # 7-14.

While all the shenanigans in the State Courts were ongoing the probation time or ‘custody’ necessary for filing of 2254 petition was running or has run.

In its Decision the District Court only elide on the in-custody provision of the statute. It does not consider the full panoply of the facts of petitioner's situation... to wit, the fact that he was misled into pleading guilty; the fact that he could not have been aware of immigration consequence of his conviction until when taken into custody; and the fact that he filed in the state court as early as he

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<sup>6</sup> The lower court is deliberately using all these procedural tactics to prevent to allow the probationary and custody time to run its course so Chiwanga won't be ‘in custody for the federal 2254 petition.

could. Given that he is not responsible for the time it took the state court to decide, he should not be penalized, nor deny him the privilege of the great writ<sup>7</sup> of habeas corpus.

Petitioner has been deported to his native country of Tanzania as a direct result of the underlying conviction. He has been separated from his lovely daughter for which he was given sole custody as well as his Son and other family friends.

Chiwanga commenced his post-conviction relief proceedings while still under probationary sentence for this underlying offense via a letter to the Tulsa County, Oklahoma State Court. The case dragged through the State court system until his sentence was completed.

In his habeas corpus petition filed under 28 U.S.C. § 2254, Petitioner argued that his detention by ICE rendered him "in custody" for the purposes of seeking habeas relief because his immigration detention was a direct and inevitable consequence of the criminal conviction. Petitioner also asserted that his trial counsel provided ineffective assistance in violation of *\*Padilla v. Kentucky\**, by failing to properly advise him of the deportation consequences of his guilty plea.

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<sup>7</sup> In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866): The Supreme Court held that the privilege of the writ of habeas corpus is protected by the Constitution and cannot be suspended unless in cases of rebellion or invasion when public safety require

The district court dismissed Petitioner's habeas application, concluding that he was no longer "in custody" under the challenged conviction, as required by § 2254(a). The Tenth Circuit affirmed, relying on **Maleng v. Cook** (490 U.S. 488 (1989)) and Broomes v. Ashcroft (358 F.3d 1251 (10th Cir. 2004)), which hold that collateral consequences such as deportation do not satisfy the "in custody" requirement for habeas petitions.

Petitioner now seeks review of this decision, contending that the district court and the Tenth Circuit failed to apply the evolving standards set forth by this Court in Padilla, which recognized that deportation is no longer a collateral consequence but a direct consequence of a conviction.

## **REASONS FOR GRANTING THE WRIT**

### **Petitioner Was "In Custody" Under § 2254 when he filed the Petition in State Court and Due to His ICE Detention, Which Was a Direct Consequence of His Criminal Conviction**

Petitioner acknowledges that his criminal sentence expired in November 2022. However, his proceeding has been dragging through the State Court system until the probationary sentence expired.

Custody requirement is read liberally and is not limited to physical restraint. *Id.* Rather, "custody"<sup>8</sup> refers to "significant restraints on liberty which [are] not

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<sup>8</sup> The only ground for dismissal of this petition is the 'in custody' requirement.

shared by the public generally, along with some type of continuing governmental supervision.” **Barry v. Bergen Cnty. Prob. Dep’t**, 128 F.3d 152, 160 (3d Cir. 1997). For example, a petitioner is considered to be in custody while he is on parole or probation because those terms of include many restrictions on his liberty. **Jones v. Cunningham**, 371 U.S. 236, 241-43 (1963); see also **Justices of Bos. Mun. Court v. Lydon**, 466 U.S. 294, 300-01 (1984) (holding that the petitioner was in custody after he had been released on personal recognizance pending retrial)

Petitioner reiterate as argued before the District Court and the Court of Appeals that he satisfies the ‘in custody’ requirements on two grounds.

First, he avers that at the time he wrote a letter to the sentencing judge for withdrawal of his guilty plea, he was still under the three years’ probation imposed by the sentencing court. This habeas is merely an extension of his post-conviction relief. As such, for the purpose of this 2254 petition he should still be considered to be in custody.

As Chiwanga further argues, State convicts such as Chiwanga may not challenge their sentence through a § 2254 petition until they have exhausted all available state court remedies.

To illustrate, a state court may impose a sentence of six months of incarceration followed by two years of probation on a defendant convicted of a misdemeanor. Due to a crowded appellate court docket, however, the entire state direct appeal and post-conviction review process takes five years. Under these circumstances, the defendant would no longer satisfy the traditional conception of custody so as to permit him to file a § 2254 petition<sup>9</sup>. Thus, contrary to the axiomatic justification for § 2254 review, “short-sentence” state convicts such as the petitioner will rarely have the opportunity to challenge their convictions in federal court, regardless of (1) the underlying merit of their federal constitutional claims, and (2) any significant collateral sanctions that they may suffer as a result of the now-expired sentence.

This put him in catch 22 situation. Coming to the federal court first before exhaustion of the state remedies will be counter-productive as he will be thrown out of court for failure to exhaust his remedies and as we are now, and looking at the lengthy time the State court took to adjudicate state matters in this case, you might as well suspend the privilege of habeas corpus in violation of the constitution,

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<sup>9</sup> This is exactly the kind of conundrum Chiwanga found himself.

Under the United States Constitution, Article I, Section 9, Clause 2 of the Constitution, Article I, Section 9, Clause 2 of the United States Constitution provides that the *privilege of the Writ of Habeas Corpus shall not be suspended except in cases of rebellion or invasion when public safety may require it*<sup>10</sup>. We don't know of any invasion, rebellion or public safety that requires that Jackson Chiwanga be denied the privilege of 2254 habeas corpus petition, whereas here, petitioner could not go to the federal court until he exhaust state remedies and state courts are taking their sweet time in resolving it.

The principles of habeas corpus and its suspension are deeply rooted in constitutional law and historical precedent, providing guidance to courts across the United States, , when addressing habeas corpus petitions and related matters.

Chiwanga was detained by ICE due to deportation proceedings initiated as a direct and immediate consequence of his conviction. Petitioner contends that such detention qualifies him as "in custody" under § 2254 because the immigration detention is not merely a collateral consequence but flows directly from his conviction.

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<sup>10</sup>*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)

In Maleng v. Cook<sup>11</sup>, this Court held that once the sentence for a conviction has fully expired, the collateral consequences of that conviction, such as potential deportation, do not render a petitioner "in custody." However, in \*Padilla v. Kentucky\*, this Court acknowledged that deportation has become an integral part of the penalty imposed on non-citizen defendants, and thus it should no longer be viewed as merely collateral. This Court emphasized that deportation is "intimately related to the criminal process" and that counsel's failure to inform a defendant of such a consequence constitutes ineffective assistance of counsel in violation of the Sixth Amendment.

Here, Petitioner was in ICE custody as a direct result of his criminal conviction. The logic of \*Maleng\* and \*Broomes\* fails to account for this modern understanding of deportation as a consequence integral to the conviction. Therefore, Petitioner's detention by ICE satisfies the "in custody" requirement of § 2254, given that the custody in question is a direct and ongoing consequence of his criminal conviction.

## **2. Ineffective Assistance of Counsel Under \*Padilla v. Kentucky<sup>12\*</sup> Triggers a Narrow Exception to the "In Custody" Requirement\*\***

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<sup>11</sup> Maleng v. Cook, 490 U.S. 488 (1989)

<sup>12</sup> Padilla v. Kentucky :: 559 U.S. 356 (2010)

Petitioner asserts that his trial counsel failed to provide effective assistance by erroneously advising him about the deportation consequences of his conviction. Under *\*Padilla\**, such ineffective assistance of counsel is not only cognizable but is also grounds for relief under the Sixth Amendment. Petitioner further argues that his circumstances fall within a narrow exception to the "in custody" requirement because, despite his diligent efforts to pursue relief, he was unable to obtain proper legal recourse before his criminal sentence expired.

Petitioner's claim, therefore, is not barred by the expiration of his sentence because his ineffective assistance claim is inextricably linked to the ongoing deportation proceedings.

Moreover, Petitioner had no realistic opportunity to obtain adequate relief within the criminal justice system due to the failure of his counsel to provide constitutionally adequate representation. This Court should recognize that under such circumstances, the rigid application of the "in custody" requirement would undermine the principles of justice and fairness underlying habeas corpus jurisprudence.

**3. This Court's Guidance Is Required to Clarify the Scope of *\*Padilla\** and the Impact of Deportation as a Direct Consequence of Conviction**

This case presents an opportunity for the Court to clarify the scope of *\*Padilla\** and its impact on the habeas corpus framework under § 2254. Given that

deportation is no longer considered a mere collateral consequence of a criminal conviction, this Court should hold that habeas relief under § 2254 remains available to petitioners whose counsel provided ineffective assistance by failing to adequately advise them of the deportation consequences of their plea or conviction.

If this Court does not intervene, the lower courts will continue to apply outdated precedents like *Maleng*, failing to recognize the direct consequences of deportation as articulated in *Padilla*. This Court's intervention is necessary to harmonize habeas corpus jurisprudence with its evolving recognition of the real-world impacts of criminal convictions on non-citizen defendants.

## **CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that this Court grant the writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,



Jackson Peter Chiwanga, Pro Se