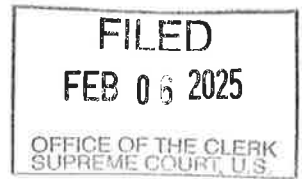


ORIGINAL

No. 24-5806



In The
Supreme Court of The United States

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 REHEARING

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

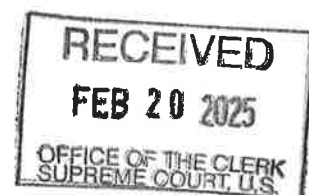


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PETITION FOR REHEARING

Petitioner, Jackson Peter Chiwanga, respectfully petitions for rehearing of this Court's January 13, 2025, order denying petition for writ of certiorari. This rehearing is warranted under Rule 44.2 as the Court overlooked significant legal questions of exceptional importance.

REASONS FOR GRANTING REHEARING

This petition raises three critical questions that were overlooked or misapplied in the denial of certiorari. The resolution of these issues is essential to safeguarding the constitutional rights of individuals with short sentences who face irreversible immigration consequences and lack meaningful access to federal habeas review

I. The “In Custody” Requirement Is Unconstitutional as Applied

As applied to Petitioner, the “in custody” requirement of § 2254 violates due process by creating an insurmountable barrier to federal habeas review. In *Graham v. Richardson*, 403 U.S. 365, 377 (1971), this Court recognized that state laws that create insurmountable barriers to federal benefits violate the Equal Protection Clause. Similarly, applying the “in custody” requirement to individuals with short

sentences, who must exhaust state remedies before seeking federal relief, effectively denies them access to federal habeas review. This application is unconstitutional as it deprives individuals of a meaningful opportunity to challenge their convictions, particularly when facing severe collateral consequences such as deportation.

In the instant matter, Petitioner received non-custodial sentence with probation, he pleaded guilty upon assurance from his attorney that pleading guilty will not affect his immigration status, but contrary to the attorneys advise (or misadvise as some courts called it), towards the end of his probation, the immigration took him into custody, He wasted no time in writing a letter to the state court. (A letter construed as application for post-conviction relief)

As Chiwanga illustrates in the Petition for writ of certiorari, “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 .

Thus, contrary to the axiomatic justification for § 2254 review, “short-sentence” state convicts such as Chiwanga.

II. Petitioner should be deemed to be “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

In dismissing this matter, this court also overlooked a matter of national importance and constitutional matter which is that the privilege of habeas corpus cannot be suspended because of the vagaries of the State Courts.

Under the United States Constitution, Article I, Section 9, Clause 2 of the 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*¹. 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 the Custody requirement is read liberally and is not limited to physical restraint. *Id.* Rather, “custody”² refers to “significant restraints on liberty which [are] not shared by the public generally, along with some type of continuing governmental supervision.”

¹*Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)

² The only ground for dismissal of this petition is the ‘in custody’ requirement.

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 in his petition for writ of certiorari 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.

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

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.

In *Maleng v. Cook*³, 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."

³ *Maleng v. Cook*, 490 U.S. 488 (1989)

1. Immigration Consequences Are No Longer Collateral Post-Padilla

In *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010), this Court held that counsel must inform clients of the immigration consequences of a guilty plea, recognizing that such consequences are integral to the conviction. This decision abrogated the distinction between direct and collateral consequences in the context of effective assistance of counsel. Therefore, erroneous advice regarding immigration consequences constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). The lower courts failed to apply *Padilla* faithfully, ignoring its implications for ineffective assistance claims and treating immigration consequences as collateral despite their profound impact on individuals like Petitioner.

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.

(A) Ineffective Assistance of Counsel Under *Padilla v. Kentucky*⁴*Triggers a Narrow Exception to the "In Custody" Requirement**

Another important aspect of this case this Supreme court overlooked is the 'narrow exception created by the statute when as here trial counsel's performance falls below the type envisaged by the sixth amendment to the constitution.

This court overlooked the fact that 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's 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.**

⁴ *Padilla v. Kentucky* :: 559 U.S. 356 (2010)

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.

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

As noted in the certiorari petition, "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.”

This court probably overlooked the important nature of clarifying and intervening in this exceptional question of national importance especially in this new Donald Trump into immigration administration. Thus, 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, and those stated in the writ of certiorari; Petitioner respectfully requests that this Court grant rehearing and reconsider its order denying a writ of certiorari.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'J. Chiwanga', with a stylized flourish at the end.

Jackson Peter Chiwanga, *Pro Se*

CERTIFICATE OF COUNSEL

I, Jackson Peter Chiwanga *Pro Se*, hereby certify that the petition for rehearing is restricted to the grounds specified in Rule 44.2. I further certify that the petition for rehearing is presented in good faith and not for delay.

January 31, 2025.



Jackson Peter Chiwanga, *Pro Se*.

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 13, 2025

Mr. Jackson Peter Chiwanga
c/o Edgar Chiwanga
8381 E Village Lange
Rosemead, CA 91770

Re: Jackson Peter Chiwanga
v. Gentner F. Drummond, Attorney General of Oklahoma
No. 24-5806

Dear Mr. Chiwanga:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

A handwritten signature in dark ink, appearing to read "Scott S. Harris", written in a cursive style.

Scott S. Harris, Clerk