

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Kevin Leon Mormon — PETITIONER
(Your Name)

vs.

United States Of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
and
APPLICATION FOR CERTIFICATE OF APPEALABILITY

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kevin Leon Mormon 38442-037
(Your Name)

FCI Berlin, P.O. Box 9000
(Address)

Berlin, NH. 03570
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Government can use an implied knowing and voluntary waiver of miranda to protect the Government against knowingly and intentionally circumventing petitioner's Sixth Amendment Constitutional Right to the assistance of Counsel by using hearsay statements, that were without a doubt Deliberately Elicited by agents after the finding of a indictment, outside the presence of counsel, as an allege confession in their case in chief to obtain an unconstitutional conviction?. *1

2. Whether an attorney's ignorance of the difference between two separate Constitutional Amendments, which caused him to not raise a colorable Sixth Amendment violation under Massiah which pertained to subtantial evidence that greatly prejudiced his client amounts to ineffective representation?

* 1

The Sixth Amendment "deliberate elicitation" standard is different from the custodial interrogation **Miranda** standard. **Fellers v. United States**, 540 U.S. 519, 524, 124 S.Ct. 1019, 157 L.Ed. 2d 1016 (2004).

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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 _____; 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☒ is unpublished.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 C to the petition and is

☒ reported at 2017 U.S. Dist. Lexis 107084; 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☐ is unpublished.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.

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:

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 28, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 5, 2018, and a copy of the order denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides in pertinent part:

The accused the right to have Counsel present at all "Critical" stages of Criminal Proceedings. The Sixth Amendment Guarantees the accused ... The right to rely on counsel as a 'Medium' between him and the State ... This Guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused. The Sixth Amendment Right to counsel prohibits the Government from deliberately eliciting incriminating evidence or statements from an accused after he has been indicted and in the absence of his Counsel.

INTRODUCTION

Kevin Mormon Respectfully directs this Honorable Court to construe his pleading under the legal doctrine prescribed in **Haines v. Kerner**, 404 U.S. 519, 520-21 (1972).

A.) COLLATERAL CHALLENGE TO JUDGEMENT

Petitioner Kevin Leon Mormon hereby respectfully petitions this Honorable Court on Petition for Writ of Certiorari, and for a Certificate of Appealability. Mormon seeks to collaterally appeal (28 U.S.C. § 2255) his 262 Months Sentence and Conviction of conspiracy to distribute Cocaine base, in violation of 21 U.S.C. § 846, on the grounds that the district court erred in never reaching or addressing the question of whether the Sixth Amendment required suppression of the deliberately elicited, allege, hearsay incriminating statements/confession.

B.) STATEMENT OF THE CASE

On November 14, 2012, Mormon was indicted on Felony Counts of Conspiracy to distribute Controlled Substances, 21 U.S.C. § 846; Distribution of Controlled Substance, 21 U.S.C. § 841. Count One Charged Conspiracy to distribute, and possess with the intent to distribute 280 grams or more of cocaine base, and Count Two Charged Distribution of 280 grams or more of Cocaine base. (ECF. No. 1)

On November 26, 2012, approximately twelve day's after securing the indictment, Two (2) F.B.I. Agent's confronted Mormon, interrogated him outside of Counsels presence with the sole purpose of deliberately eliciting statements from him concerning the pending charges.

On December 5, 2012 Mormon appeared in court for initial appearance with Counsel William C. Brennan, Jr. at which time the Government informed Counsel of their intentions to use the hearsay statements, allegedly made to the agents by Mormon, during the uncounseled interrogation on November 26, 2012. (ECF. No. 5)

On April 15, 2013 a Motion Hearing was held in front of Judge Roger W. Titus to suppress alleged statements made under Fifth and Sixth Amendment. However, at this Motion Hearing the Court only heard arguments concerning the Fifth Amendment, and Miranda's "Knowing and Voluntarily" inquiry under the '**Custodial Interrogation Standard**'. Despite the Agents openly admitting that Mormon in fact never waived any right or ever consenting to being interrogated in the first place, Judge Titus made a finding that Mormon alleged willingness to answer some question, but refusal to identify an alleged cocaine supplier, implied that Mormon knowingly and voluntarily gave statements thereby implicitly waiving Miranda. The District Court's decision to deny the motion to suppress statement was solely based on the Fifth Amendment and Miranda, the Court erred by never reaching the question of: Does the Sixth Amendment require suppression of the alleged statements that were deliberately elicited within the meaning of *Massiah v. United States*, 377, U.S. 201, 206, 84 S.Ct. 1199 12 L.Ed. 2d 246 (1964)(ECF. No. 18)?

On April 18, 2013, a detention hearing was held in front of Judge William Connelly, at which time the Government presented the "**Deliberately Elicited**" statements to the court which ruled that the alleged confession was enough to deny Mormon's release from custody. (ECF. No. 21)

On August 1, 2013, after trial by jury, that used the "**Deliberately Elicited**" statements in the government's case in chief, Mormon was found guilty on Count 1, and a mistrial was declared by the court as to Count 2. (ECF. No. 40-42)

On November 18, 2013, a sentencing hearing was held in which the government used the **"deliberately elicited statements"** to aggravate Mormon's sentence. (ECF. No. 54)

On November 26, 2013 a timely notice of Appeal was filed. (ECF. No. 58)

On November 12, 2014. The United States Court of Appeals (USCA) Affirmed the Conviction, in a unpublished Per Curiam Opinion. The USCA Affirmed the Conviction based off of the District Courts fact finding based on the Fifth Amendment and Miranda. The Appeals Court never reached the question of whether the Sixth Amendment required suppression of the statements. (See Appeals Docket # 13-4899 ECF. No. 41)

On, December 2, 2014. Mormon filed a Pro-Se petition for Rehearing, specifically raising the Sixth Amendment **"Deliberate Elicitation Standard"** under **Massiah v. United States**, 377, U.S. 201, 206, 84 S.Ct. 1199 12 L.Ed. 2d 246 (1964)(Appeals Docket # 13-4899, ECF. No. 44)

On December 30, 2014 USCA denied motion for Rehearing and Rehearing En Banc, without addressing the question of whether the Sixth Amendment required suppression of the **Deliberately Elicited Statements**. (Docket # 13-4899, ECF. No. 46)

On April 9, 2015, Mormon filed a Pro-Se writ of Certiorari, which was denied on May 5, 2015. (Docket # 13-4899, ECF. No. 55-56)

On April 18, 2016, Mormon filed a Pro-Se Motion to vacate under 28 U.S.C. 2255, raising his Sixth Amendment claim under **Massiah v. United States**, 377, U.S. 201, 206, 84 S.Ct. 1199 12 L.Ed. 2d (1964)(ECF. No. 85)

On July 25, 2016, Mormon filed his response to the Governments Opposition to 2255 motion. (ECF. No. 92)(See also. Mormon reply in Appendix-symbolB)

On July 11, 2017, United States District Court(USDC) denied Mormon's motion

under 28 U.S.C. § 2255, under Fifth Amendment grounds that was not a basis or a part of the motion, refusing to address the actual Sixth Amendment ground the motion was based on. Chose to ignore Mormon's constitutional right and straight forward Massiah violation that exist in this case. The district court takes the position that the Fifth and Sixth Amendments to the constitution are essentially one and the same, therefore they refused to address or answer the question of whether the Sixth Amendment required suppression. (ECF. No. 112, see also memo. op. in Appendix Symbol C)

On August 22, 2017, Mormon filed a Pro-Se informal brief for Habeas and Section 2255 Cases, requesting a C.O.A. Which was denied, and on November 28, 2017, without the Court addressing or answering Mormon's Sixth Amendment rights question.

On December 18, 2017, Mormon filed a timely petition for rehearing and rehearing En-Banc meeting all the standards and requirements and raising a colorable Massiah Violation. The USCA denied the motion for rehearing on February 5, 2018, and once again ignored Mormon's Sixth Amendment Rights under Massiah v. United States, 8, 4, S.Ct. 1199 12 L.Ed. 2d. (1964) refusing to address or even answer the question of whether the Sixth Amendment requires Suppression of the statements. (See Appendix Symbol-A)

C.) STATEMENT OF FACTS

On November 14, 2012, a Grand Jury Indicted Mormon. After which two (2) FBI Agents spoke with the lead prosecutor in charge of the case to inform him of their intentions and obtain his approval in the matter of creating a situation to have Mormon isolated, without counsel present in order to interrogate him and 'Deliberately Elicit Statements' from him about the charges pending against him.

(ECF. No. 64, Tr. 40: 7-25 (hunter), Tr. 58: 19-25(perry)) After speaking to the prosecutor and obtaining his approval, agents contacted F.C.I. Gilmer and Co-ordinated with Prison Officers a date, time, and their opportunity to confront Mormon without him being able to have counsel present to act as a medium between himself and the agents. (ECF. No. 64, Tr. 9: 18-23, (hunter) Tr. 58 : 12-18 (perry)). On November 26, 2012, FBI Agents S. Hunter, and M. Perry drove from the FBI's feild office in Washington, D.C. for over Five (5) hours, and Farther than 300 Miles to F.C.I. Gilmer in Glenville, WVA. To Confront and uncounseled Mormon. (ECF. No. 64, Tr. 28: 22-25, Tr. 29: 1-25, Tr. 30: 1-10 (hunter)) with specific intentions of "Deliberately Eliciting Statements" from him concerning the charges pending against him. (Tr. 9: 11-17 (hunter) Tr. 11: 13-24 (hunter))

Once inside F.C.I. Gilmer, agents had a handcuffed Mormon brought into an isolated office against his will by prison officers. (ECF. No. 64 Tr. 30: 11-25 (hunter), ECF. No. 85, Mormon's Affidavit attached also in Appendix Symbol B) Agents immediately began to execute their plan of "Deliberately Eliciting Statements" by confronting Mormon, informing him of their identities, that they already possessed an indictment, and their reasons for being there was to "Elicit" his Co-operation in the investigation they already had him indicted for and to get information from him about his involvement, his allege customers, and allege supplier. (ECF. No. 64, Tr. 11: 11-24 (hunter), Tr. 52: 1-9 (perry)) Agents testified that Mormon irfact never waived any rights at all, because he was literally "pretty shocked," "pretty upset," and "visibly grieving" after agents told him of the pending charges. (ECF. No. 64, Tr. 13: 15-25, Tr. 14: 1-3 (hunter), Tr. 64: 7-16 (perry))

Next without obtaining a Sixth Amendment waiver or even consent from Mormon to be interrogated, agents exploited this opportunity they created of having a mentally traumatized Mormon handcuffed, in a room with out counsel and

"Deliberately Elicited" statements by continually questioning petitioner for 45 minutes to an hour, while he was "pretty shocked, pretty upset, visibly grieving, silent" (ECF. No. 64, Tr. 14: 7-25, Tr. 15: 2-20, Tr. 16: 1-18, Tr. 38: 11-25, Tr. 45: 7-16 (hunter), Tr. 64: 17-25, Tr. 65: 1-25, Tr. 66: 1-25 (perry))

Agents testified that all of Mormon's allege statements were responses to their questioning. (ECF. No. 64 Tr. 16: 12-13 (hunter), Tr. 17: 3-5(hunter)). Yet there is no proof in existence of any of these allege statements made by Mormon, Mormon never adopted or repeted these allege statements to the agents, nor is there any proof that Mormon was ever read or waived his rights. (Ecf. No. 64, ^{Tr.} 35-37 (Hunter), Tr. -58-67 (Perry))

REASONS FOR GRANTING

Under **Massiah v. United States**, 377, U.S. 201, 206, 84 S.Ct. 1199 12 L.Ed. 2d 246 (1964) and subsequent case, once a suspect such as Mormon in this case is formally charged; the Sixth Amendment provides greater protection of the right to counsel than the Fifth Amendment's Miranda doctrine. The United States District Court, along with the United States Court of Appeals for the Fourth Circuit has continually denied, and dismissed Mormon's motions using the Fifth Amendment and Miranda, while blatantly ignoring Mormon's Sixth Amendment rights under **Massiah's 'Deliberate Elicitation Standard.'** These lower courts have deliberately not addressed Mormon's Sixth Amendment rights, nor have they ever reached the question of whether the Sixth Amendment Requires suppression of the "Deliberately Elicited Statements".

These actions and decisions by the Fourth Circuit are resulting in a conflict with their own previous rulings concerning a **Massiah Violation**, (See also, **United States v. Love**, 134 F.3d 595, 604 (4th Cir. 1998), **United States v. Henry**, 590 F.2d 544 U.S. App. Lexis 6756 (4th Cir. 1978), **Bellamy v. Wells**, 626 F.Supp. 2d 595 (W.D. Va., 2009); **United States v. Williamson**, 447. Fed. Appx. 446 (4th Cir. 2011); **United States v Whisonant**, 2000 U.S. App. Lexis 21135 (4th Cir. 2000).

These actions and decisions are also conflicting with various sister circuits concerning a **Massiah Violation**. (See **Smith v. Fischer**, 957 F.Supp. 2d 418 (2nd Cir. 2013); **United States v. Singer**, 785 F.2d 228, 234 (8th Cir. 1986); **Honeycutt v. Donat**, 535 Fed. Appx. 624 (9th Cir. 2013).

An even more serious conflict these action and decisions by the lower courts create is the refusal to abide by the unequivocal commands of the United States

Supreme Court's decisions in **Massiah v. United States**, 377, U.S. 201, 206, 84 S.Ct. 1199 12 L.Ed. 2d 246 (1964); **United States v. Henry**, 447 U.S. 264, 265, L.Ed. 115, 100 S.Ct. 2183 (1980); **Rhode Island v. Innis**, 446 U.S. 291, 300 n.4 100 S.Ct. 1682 64 L.Ed 2d 297 (1980); **Main v. Moulton**, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed. 2d 481 (1985); **Fellers v United States**, 540 U.S. 519, 524, 124 S.Ct. 1019, 157 L.Ed. 2d 1016 (2004); **Kansas v. Ventris**, 129 S.Ct. 1841, 173 L.Ed 2d 801 (2009); and **Spano v. New York**, 360 U.S. 315 (1959))

This Court should Grant this Petition because the actions and decisions of the lower courts were clearly erroneous, and if left uncorrected by this court, they would have grave affects not only on Mormon, but also to others with similarly situated cases. By allowing the government to manipulate the Constitution to use one Constitutional Amendment (**The Fifth Amendment**) to knowingly, intentionally, and deliberately violate another Constitutional Amendment (**The Sixth Amendment**) to obtain, and maintain unconstitutional convictions. This would truly undermine the pre-existing comands of this Court inregard to the Sixth Amendment's Right to Counsel and **Massiah's** Deliberate Elicitation Standard.

Based on the aforementioned cases applied to the facts of this case, Mormon's Constitutional Rights were violated, and Mormon was literally stripped of his Sixth Amendment Rights by the actions of the government and the court resulting in a total miscarriage of Justice. Also because petitioners Attorneys were aware of all the facts of this case they were infact, ineffective for failing to raise or even alert the courts to the straight forward **Massiah** issue in this case. Mormon believes that the Ends of Justice finally require an answer on the merits of his **Massiah** claim, and this petition should be granted.

CONCLUSION

For all the Forgoing reasons, and in light of **Buck v. Davis**, 865 F. 3d 215 (April 13, 2017) Mormon prays that his petition and C.O.A. be granted, conviction and sentence be vacated, and remanded with instructions to grant the 2255 in regards to Mormon's **Massiah violation**, and his ineffective assistance counsel claim. In accordance with the Sixth Amendment, Mormon should be released immediately, or given a new trial without the evidence of the deliberately elicited statements.

Date: This 22 day of February 2018.

Respectfully submitted,



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