

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of October, two thousand seventeen.

Ahmed Khalfan Ghailani,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

ORDER

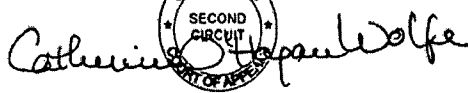
Docket No: 17-111

Appellant, Ahmed Khalfan Ghailani, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request as a motion for reconsideration, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

" APPENDIX C "

S.D.N.Y.-N.Y.C.
98-cr-1023
16-cv-4444
Kaplan, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of July, two thousand seventeen.

Present:

Rosemary S. Pooler,
Peter W. Hall,
Susan L. Carney,
Circuit Judges.

Ahmed Khalfan Ghailani,

Petitioner-Appellant,

v.

17-111

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" as to the untimeliness of Appellant's motion filed pursuant to 28 U.S.C. § 2255. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

" APPENDIX A "

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AHMED KHALFAN GHAILANI,

Movant,

—against—

UNITED STATES OF AMERICA.

Respondent
----- x

ORDER

LEWIS A. KAPLAN, *District Judge.*

This matter is before the Court on movant's June 3, 2016 motion,¹ pursuant to 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence. The government has responded to the motion. Movant has not replied to the government's response although the time within which to have done so has expired.²

Facts

The Conviction and Sentence

Ahmed Khalfan Ghailani was indicted in 1998 for his alleged complicity in the 1998 bombings of two United States embassies in east Africa in which 224 people were killed and over a thousand injured. He was apprehended in Pakistan in 2004 and then transferred to exclusive CIA custody. On June 9, 2009, Ghailani was brought to the Southern District of New York. Following

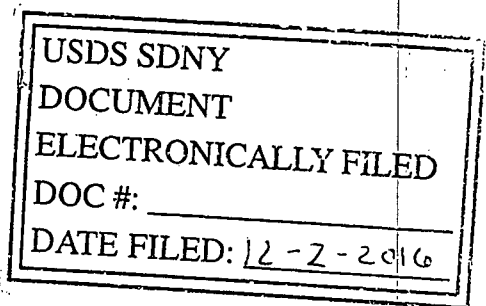
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The motion is dated June 3, 2016. Giving movant the benefit of the "mailbox rule," it assumes that the motion was made on that date although the envelope containing it bears a June 6, 2016 postmark. DI 1, at 14. (Unless otherwise indicated, all references to docket items are to papers filed in 16-cv-4444 (LAK), and all references to page numbers are to those affixed by the CM/ECF system as distinguished from any page numbers on documents, the images of which are included in particular docket items.)

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The government's response was served on October 28, 2016.

" APPENDIX B "



16-cv-4444 (LAK)
(98-cr-1023 (LAK))

a lengthy trial, the jury found Ghailani guilty of Count 5 – conspiracy to destroy buildings and property of the United States – and not guilty of the other 284 counts with which he was charged. It further found, in response to an interrogatory, that Ghailani’s conduct in Count 5 was a direct or proximate cause of the death of a person other than a conspirator. Ghailani then moved for, *inter alia*, judgment for acquittal, a motion denied in an extensive opinion which concluded that the evidence was more than sufficient to sustain Ghailani’s conviction.³ He was sentenced principally to a term of life imprisonment. The conviction and sentence both were affirmed on appeal.⁴

The Motion

The motion asserts three grounds:

1. “The trial evidence was insufficient to permit any rational trier of fact to find the essential elements of the conspiracy charged against the petitioner beyond a reasonable doubt.”⁵
2. “Petitioner’s counsel’s assistance was rendered ineffective by Government’s interference through security clearance’s restrictions, and by attorney’s conflict of interest resulted from threats on attorney’s life.”⁶
3. “Erroneous jury instruction that excluded the finding of overt act and instructions on conscious avoidance without instructing the jury to find conscious avoidance beyond reasonable doubt, together with the judge’s remarks that misrepresented to the jury the meaning of reasonable doubt were unconstitutional and resulted in conviction of innocent man.”⁷

Discussion

In view of the extensive post-verdict opinions both by this Court and the Court of

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United States v. Ghailani, 761 F. Supp.2d 167, 188-90 (S.D.N.Y. 2011)

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United States v. Ghailani, 733 F.3d 29 (2d Cir. 2013), *cert. denied*, 134 S.Ct. 1523 (U.S. Mar. 10, 2014).

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DI 1, at 4

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Id. at 5.

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Id. at 8.

Appeals, the government's comprehensive and careful response to the motion, the lack of any response by movant to the government's submission, and this Court's thorough understanding of the record in this case, it is unnecessary to write extensively in order properly to dispose of this application. It is sufficient to summarize the Court's holdings as follows:

Timeliness

The motion is manifestly untimely. It was filed more than one year and three months past the statutory deadline. Movant's attempt to toll the limitations period by claiming that he was prevented by the Bureau of Prisons Special Administrative Measures from communicating with his attorney and therefore did not know that his case had become final until after June 10, 2015 is entirely without merit for the reasons set forth by the government.⁸

The Merits

As the motion is untimely there is no need to address the merits. The Court nevertheless does so in the interest of judicial economy.

Ground 1 was procedurally defaulted by Ghailani's failure to raise it on direct appeal. In order to be heard to raise the claim of insufficiency of the evidence here, Ghailani would be obliged to demonstrate both cause and prejudice. It is unnecessary to address the issue of cause because he most assuredly has not demonstrated prejudice. The Court explained in great detail in its opinion denying the Rule 29 motion after the verdict why the evidence was more than sufficient to convict. It has reviewed the issue *de novo* in light of Ghailani's motion, and it again reaches the same conclusion. Ground 1 is foreclosed, and it would be rejected on the merits even if it were not.

Ground 2 is properly raised on this motion. It is, however, patently without merit for the reasons set forth by the government.⁹

Ground 3 attacks the jury instructions on three grounds.

So much of Ground 3 as challenges the conscious avoidance instruction was raised and rejected on direct appeal. As the government argues,¹⁰ it is barred by the mandate rule and, in

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Gov't Mem. at 12-17 including exhibits there referred to. That would be so for the reasons stated *id.* at 13 *et seq.* even if one were to accept that Ghailani only belatedly learned of the denial of his certiorari petition.

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Id. at 24-27 & Ex. E.

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Id. at 22.

any case, would be without merit.

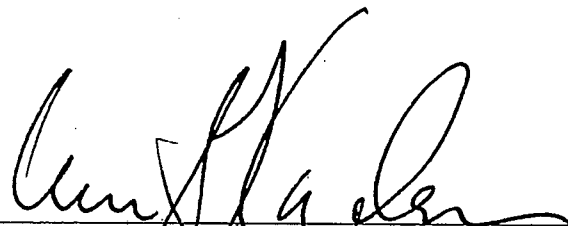
The contentions that (a) the reasonable doubt instruction was erroneous, and (b) the charge erroneously failed to require the jury to find an overt act were not raised on direct appeal and therefore was procedurally defaulted. Ghailani has not show either cause or prejudice, the latter because the reasonable doubt instruction was correct and no overt act was required.¹¹

Conclusion

The motion for relief pursuant to 28 U.S.C. § 2255 [98-cr-1023 DI 2018, 16-cv-4444 DI 1] is denied in all respects. A certificate of appealability is denied, and the Court certifies that any appeal herefrom would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a)(3).

SO ORDERED.

Dated: December 2, 2016



Lewis A. Kaplan
United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**