

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

TAE H. CHON,
Petitioner,

v.

BARRACK OBAMA; GEORGE W. BUSH; JOHN D. ASHCROFT; ERIC H. HOLDER, JR.;
LORETTA LYNCH; KEITH OLSON; LYNETTE WINGERT; JOHN MOSEMAN; ELIAH WISDEN;
VERNON G. STEJSKAL; BRENDA BEATON; COLLEEN COEBERGH; BRETT TOLMAN;
STEWART WALZ; JEFF BRIDGE; TRACY CRENO; SAMUEL ALBA; BRENT BARNES;
LINDA SANDERS; RICHARD IVES; JACK FOX; GARY BOWERS; FNU WILLIAMS, Captain;
S. WEBSTER; FNU BREWERS, Unit Manager; FNU FLORES, Unit Manager;
C. CASTILLO, Unit Manager; J. BESSE, Unit Manager; V. LIMON, Case Manager;
L. SILVEIRA Case Manager; J. HARRIS, Unit Counselor; B. MAGANA, Unit
Counselor; D. ESCALANTE, Unit Counselor; J. WEBSTER, Unit Counselor;
FNU HEURING, Education Staff; FNU DEGREGORIO, Education Staff; FNU MARSHALL,
Education Staff; FNU LEEDHAM, Education Staff; MATHEWS HOSKINS,
Education Staff; MATTHEW BROWN, Education Staff; FNU FOSTER, Security Team;
FNU MURPHY, Security Team; FNU SUA, Security Team; M. CARRIEDO,
Security Team; FNU MILLER, Security Team; FNU HARA, Security Team;
FNU BROWN, Security Team, a/k/a FNU Ruelas; FNU BENDA, Security Team;
RICHARD GROSS, Medical Clinic; FNU SALANDANAN, D.O. Administrator;
FNU RADA; FNU BLITZ; FNU CASINO; FNU TAN; N. MCCALL;
MARK SHURTLEFF, Attorney General Office of State of Utah; JOHN SWALLOW;
TYLER BOELTER; LOMPOC VALLEY MEDICAL CENTER, a/k/a Lompoc Healthcare Dist.;
STEVEN D. REICHEL, M.D.; PHILLIP A. WYNN, M.D.; VISHAL VERMA, M.D.;
UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Tae H. Chon
Pro se petitioner

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QUESTION PRESENTED

Where the United States Court of Appeals for the Tenth Circuit leaves open the question of whether or not a plain error affects the petitioner's substantial rights and implicates the fairness, integrity, or public reputation of judicial proceedings, is remand proper where the plain error was not preserved?

PARTIES

As appeared in the Tenth Circuit Panel decision (App. A1), the names of all parties to this proceeding are appeared in the caption of this Petition for Writ of Certiorari under Supreme Court Rule 14.1(b).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tae Chon ("Chon") respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit (Appendix A).

DECISIONS BELOW

The following decisions and orders below are pertinent here, all of which are unpublished and a copy of each decision or order is attached as Appendix to this petition:

- [1] Order and Judgment (12/08/17) of U.S. Court of Appeals for the Tenth Circuit were opined by Hon. Jerome A. Holmes (App. A);
- [2] Order (01/16/18) denying petition for rehearing and rehearing en banc by the Tenth Circuit Court of Appeals was entered (App. B);
- [3] Judgment (06/23/17) and Order (06/21/17) by U.S. District Court for the Central District of Utah were filed (App. C); and
- [4] Report and Recommendation (04/24/17) by U.S. Magistrate Judge were decided and filed (App. D).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Court of Appeals' decision by writ of certiorari. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment V to the United States Constitution, which provides:

"No person shall be ... deprived of life, liberty, or property, without due process of law"

STATEMENT OF THE CASE

Petitioner filed an action alleging multiple torts and constitutional violations to include violations of 42 U.S.C. §§ 1983, 1985 and 1986. The District Court used a blanket application of "Heck" to dismiss all his claims. [See Appendix C]. On appeal, the panel acknowledged the District Court's misapplication of "Heck" but "declin[ed] to opine" (see Appendix A4), whether or not remand was appropriate under "Hahn," "Elliot," and "Olano." ([T]he error must seriously affect the fairness, integrity or public reputation of judicial proceedings" *United States v. Olano*, 507 U.S. 725, 732 (1993)).

Petitioner sought Panel Rehearing and Rehearing En Banc but was denied. (App. B). He comes before this Court seeking relief through this Court's supervisory power: "[A]s a general rule, federal courts may not use their supervisory powers to circumvent the obligation to assess trial errors for their prejudicial effect." [*Nguyen v. United States*, 539 U.S. 69, 81 & headnote #6 (2003)].

SUMMARY OF ARGUMENT

Chon argues that where federal courts have discretion to remand in view of plain error, such discretion is abused where federal courts "decline" to consider the existence of prejudice, the impact on judicial integrity, and public confidence in the judiciary, in deciding whether or not remand is proper. (United States v. Olano, 507 U.S. 725, headnote #3a, 3b [1993] - "the Court of Appeals ... should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings").

Summary reversal is usually reserved for cases where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." (Schweiker v. Hansen, 450 U.S. 785, 791 [1981] - Marshall, J., dissenting). Respectfully, Chon believes this case meets that standard.

REASONS FOR GRANTING THE WRIT

A.

The Panel decision conflicts with a decision of the U.S. Supreme Court and the 10th Circuit Court of Appeals, and consideration by the Supreme Court is therefore necessary to secure and maintain uniformity of Federal Court decisions.

The decision by the Circuit Court below to ignore its obligation under United States v. Olano, 507 U.S. 725 (1993), to determine whether or not plain error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" is itself plain error and directly

contrary to its own circuit precedent:

"c. Miscarriage of Justice

The third prong of our enforcement analysis requires the court to determine whether enforcing the waiver will result in a miscarriage of justice. Andis, 333 F.3d at 891; Khattak, 273 F.3d at 562-63; Teeter, 257 F.3d at 25. We find that, like the Eighth Circuit, 'we have not previously defined this exception, [but] we have described many of its components.' Andis, 333 F.3d at 891.

Appellate waivers are subject to certain exceptions, including [1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waivers invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful. Elliott, 264 F.3d at 1173 (citing United States v. Cockerham, 237 F.3d 1179, 1182 (10th Cir. 2001)). [] We hold that enforcement of an appellate waiver does not result in a miscarriage of justice unless enforcement would result in one of the four situations enumerated in Elliott. See *id.* We further hold that to satisfy the fourth Elliott factor--where the waiver is otherwise unlawful--'the error [must] seriously affect[] the fairness, integrity or public reputation of judicial proceedings[,]' as that test was employed in United States v. Olano, 507 U.S. 725, 732, 123 L.Ed. 2d 508, 113 S.Ct. 1770 (1993)."

[United States v. Hahn, 359 F.3d 1315, 1327 (10th Cir. 2004)].

By "declin[ing] to opine on whether the district court committed reversible error in its analysis of whether Mr. Chon's abuse-of-process claim was properly subject to the Heck doctrine" (see A4 at ¶3), the Tenth Circuit fails to satisfy requirements established under "Hahn," "Elliott," and "Olano."

B.

Importance of the question presented

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of Government is to afford that protection." [Marbury v. Madison, 1 CRANCH 137, 163 (1803)]. This principle suggests the practical importance of the appeal right in a case such as this one where the lower courts' abuse of discretion forecloses the trial rights of a pro se petitioner.

This Court should exercise its equitable discretion in view of the unique importance of protecting a pro se petitioner's trial right:

"[P]ersons in [Chon's] situation are particularly handicapped as self-representatives." "[S]even out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article." "Even the intelligent and educated layman has small and sometimes no skill in the science of law."

[Halbert v. Michigan, 545 U.S. 605, 621–22 (2005)].

Navigating the appellate process is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Chon, who have a language barrier. (See *White v. Regester*, 412 U.S. 755, 768 (1973) - "The typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult." see also *Lau v. Nichols*, 413 U.S. 563 (1974) - holding unconstitutional the failure to establish a program to deal with language problems affecting non-English speaking students of Chinese ancestry). Given the circumstance, this is a question the Court should take up at its next opportunity to prevent lower court abuse of disadvantaged litigants.

Justice O'Connor has said, where a legal principle is "well-established," failure to apply it is "plain-error." [See *Stenberg v. Carhart*, 147 L.Ed. 2d 743, 800, 530 U.S. 914 (2000) - citing *Frisby v. Schultz*, 487 U.S. 474, 483 (1988)]. Moreover, once plain error has been established, the U.S. Supreme Court's position has been that a "Court of appeals should exercise its discretion to correct ... forfeited error if the error 'seriously, affects the fairness, integrity or public reputation of judicial proceedings.'" [*Molina-Martinez v. United States*, 194 L.Ed. 2d 444, 448 (2016) - citing *U.S. v. Olano*, 507 U.S. 725, 736 (1993)].

"After identifying an unpreserved but plain legal error, this Court likewise routinely remands the case so the court of appeals may resolve whether the error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings." (Hicks v. United States, 137 S.Ct. 2000 [2017] - Justice Gorsuch concurrence).

In the instant matter, the 10th Circuit Court of Appeals identified a "plain error":

"He urges us to hold that the district court neglected to perform the requisite threshold determination mandated by the Supreme Court: namely, that "district court[s] must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction." Id. at 487 (emphases added). Indeed, we have held that "[e]ach of [the plaintiff's] claims must be assessed individually to determine whether [they would be barred under Heck]." Beck v. City of Muskogee Police Dep't, 195 F.3d 553, 557 (10th Cir. 1999) (disagreeing with the district court's "blanket application of Heck to all of Beck's claims"). Our independent review of the record does lend support to Mr. Chon's view that the district court did not individually assess whether Mr. Chon's claims would necessarily imply the invalidity of his conviction." (A3 at ¶ III),

... and found such plain error to be "unpreserved":

"However, preservation concerns fatally undercut Mr. Chon's efforts to secure relief on these claims. Although Mr. Chon properly preserved his Heck objections as to his abuse-of-process claim, R., Vol. II, at 169 (Obj. to Report and Recommendation, dated May 11, 2017), he waived them by inadequately arguing them on appeal. And, as for Mr. Chon's allegedly Heck-barred civil-rights claims, the merits of those claims are not properly before us because Mr. Chon failed to preserve them in the manner that our firm-waiver rule demands." (id.).

Furthermore, the 10th Circuit Court of Appeals "decline[d] to opine on whether the district court committed reversible error in its analysis of whether Mr. Chon's abuse-of-process claim was properly subject to the Heck doctrine." (A4 at ¶3).

In light of Justice Gorsuch's Concurrence in *Hicks v. United States*, 137 S.Ct. 2000 (2017), remand is proper because it will allow the Tenth Circuit Court of Appeals to "determine of the judgment must be revised." (Id.).¹

1 The character of the reasons the Supreme Court considers for review on a writ of certiorari include where a U.S. Court of Appeals sanctioned a lower court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power. [S.Ct. Rule 10(a)].

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case. ("[T]urning to plain error's fourth prong, what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refuse to correct obvious errors of their own devise"). *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014) - see also *The Bureau of National Affairs, Inc.*, *Criminal Law Reporter*: Vol. 102, No. 21; pp. 502-503 - Kagan, J. quoting from an opinion written by Gorsuch, J. before his appointment to the Supreme Court.

DATED: March 2, 2018.

Respectfully submitted by,



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