No. 23-720

In the Supreme Court of the United States

OMAR AHMED KHADR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner Omar Ahmed Khadr respectfully petitions for rehearing of this Court's May 20, 2024 Order denying his petition for a writ of certiorari.

REASONS FOR GRANTING REHEARING

Petitioner's case presents an ideal vehicle for this Court to resolve a deep circuit split on an issue that bears upon the entire structure of the criminal judicial system: the enforceability of a general appellate waiver following an intervening change in law. Despite the significance of the question presented, the Court denied certiorari without the benefit of participation by all nine members of the Court. Specifically, Justice Kavanaugh and Justice Jackson took no part in the consideration of the decision to deny certiorari, citing their prior involvement in these proceedings as judges on the U.S. Court of Appeals for the D.C. Circuit. But recusal based on prior judicial service is not mandatory and, here, neither party requested disqualification of either Justice. Rehearing with the participation of all nine Justices is thus justified to allow this Court to give full consideration to the fundamental question presented by Petitioner's case. For the avoidance of doubt, Petitioner hereby waives the disqualification of Justices Kavanaugh and Jackson to the extent permitted by law.

Rule 44.2 authorizes a petition for rehearing based on "intervening circumstances of a substantial or controlling effect or . . . other substantial grounds not previously presented." Sup. Ct. R. 44.2. In this case, the *sua sponte* recusal by Justice Kavanaugh and

Justice Jackson constitutes both "intervening circumstances of substantial . . . effect," and "substantial grounds not previously presented."

In general, "[r]ecusal is a personal decision for each Justice, and when there is no sound reason for a Justice to recuse, the Justice has a duty to sit." *Moore v. United States*, 144 S. Ct. 2, 2-3 (2023) (Alito, J.). In other words, barring a compelling basis for disqualification, Justices are under an obligation to hear and decide a case to ensure the integrity of the judicial system.

Justice Kavanaugh and Justice Jackson each exercised their discretion to recuse themselves based on their previous judicial service in these proceedings, citing Canon 3B(2)(e) of the Code of Conduct for Justices of the Supreme Court of the United States (the "Code of Conduct") and 28 U.S.C. § 455(a). Neither Canon 3B(2)(e) of the Code of Conduct nor Section 455(a) makes recusal mandatory. Rather, recusal is discretionary, such that disqualification is waivable by the parties.

Canon 3(B)(2)(e) states that "[a] Justice should disqualify himself or herself in a proceeding in which the Justice's impartiality might reasonably be questioned," including where "[t]he Justice has served in government employment and in that capacity participated as a judge (in a previous judicial position) . . . concerning the proceeding[.]" Code of Conduct, Canon 3(B)(2)(e). However, the Code does not specify any grounds for disqualification which the parties are unable to waive.

By comparison, the Code of Conduct for United States Judges, applicable to federal circuit and district judges, allows remittal of disqualification based on waiver by the parties, but expressly disallows waivers in the case of prior judicial service concerning the merits of the particular case. Code of Conduct for United States Judges Canon 3(D). This Court's Code expressly "omit[s] the remittal procedure of lower court Code Canon 3D" in recognition that "the duty to sit and that the time-honored rule of necessity may override the rule of disqualification." Code of Conduct, Commentary p. 11.

Section 455 similarly does not prohibit Petitioner from waiving prior judicial service by Justice Kavanaugh and Justice Jackson as a basis for disqualification. Section 455 does not speak directly to the issue of disqualification based on prior judicial service. And even if Section 455(a) captures prior judicial service as a basis for disqualification, Section 455(e) permits waiver by the parties.

In the certiorari context, recusal by a single Justice—let alone two Justices—carries significant consequences not presented by recusals by lower court judges. When it comes to the outcome of the case, recusal of a Justice of this Court is "effectively the same as casting a vote against the petitioner." *Cheney v. United States Dist. Court*, 541 U.S. 913, 915-16 (2004). A petitioner must obtain four votes in order to obtain certiorari review, and it "makes no difference" whether one of those votes "is missing because it has been cast for the other side, or because it has not been cast at all." *Id.* Indeed, "[e]ven one unnecessary recusal impairs the functioning of the Court." *Id.* (quoting Press Release, United States Supreme Court,

Statement of Recusal Policy (Nov. 1, 1993)). Neither Justice's prior involvement at the earlier stages of the proceedings in the D.C. Circuit had any bearing on the core issue presented by the Petition. And no reasonable observer, aware of all the facts, would have concluded that either Justice harbored a bias for or against Petitioner on the merits of the question presented based upon their prior judicial involvement.

Justice Kavanaugh's involvement was limited to a collateral challenge to the CMCR's organization and procedures during the pendency of Petitioner's direct appeal. Specifically, Petitioner filed a writ of mandamus seeking to compel the disqualification of the civilian judge assigned on the grounds that, *inter alia*, the terms of his appointment violated the conflict of interest prohibitions codified in 18 U.S.C. § 203. In an opinion authored by then-Judge Kavanaugh, the Court denied the petition, concluding that Petitioner was not entitled to mandamus relief because he had raised an issue of first impression, but could "renew his arguments about [the judge] on direct appeal" if the CMCR "rule[d] against [him] in his pending appeal." *In re Khadr*, 823 F.3d 92, 100 (D.C. Cir. 2016). Justice Kavanaugh's involvement was thus limited to a collateral issue that had no bearing on the question presented here.

Justice Jackson's involvement in the proceedings in the D.C. Circuit was ministerial. Pursuant to D.C. Circuit practice, Petitioner's case was initially assigned to a motions panel, whose members are assigned on a rotational basis to dispose of routine procedural matters. *See* Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit

("Handbook"), Part VII.D (2021). Then-Judge Jackson was part of that motions panel, which *sua sponte* issued an order directing the Clerk of Court to enter a standard briefing schedule and requesting that the parties address two specified issues in their briefs. *See Khadr v. United States,* Order No. 21-1218, Doc. 1931784 (D.C. Cir. Jan. 21, 2022) (Wilkins, Rao, and Jackson, JJ). A different motions panel—that did not include Justice Jackson—handled the remainder of the preliminary proceedings. And by the time Petitioner's case was assigned to a merits panel, Justice Jackson had already been elevated to this Court.

Here, the impact of the *sua sponte* recusals of Justice Kavanaugh and Justice Jackson is even more pronounced considering this Court's narrow denial of a GVR last term in a case in which the Seventh Circuit held that a generic appellate waiver bars *habeas* petitioners from availing themselves of changes in the substantive law that rendered their convictions or sentences facially invalid. *Grzegorczyk* v. *United States*, 142 S. Ct. 2580 (2022). In *Grzegorczyk*, Justice Kavanaugh, joined by Justices Roberts, Thomas, Alito, and Barrett, found that the defendant's guilty plea was unconditional and resulted in the waiver of any right to challenge his conviction. Justice Sotomayor, joined by Justices Breyer, Kagan, and Gorsuch, dissented, observing that review would afford the Government and the courts below a chance to fulfill their responsibility "to ensure that the laws are applied fairly and accurately[.]" *Id.* at 2587. The dissent further observed that "[t]he rules of law under which people are deprived of their liberty or their lives should be made of sturdier stuff." *Id.*

If the peculiarities of collateral review made *Grzegorczyk* a close case for *habeas* petitioners, this case is even simpler, posing the fundamental question of whether a generic appellate waiver also bars a direct appellant from availing himself of changes in the substantive law. The fact that the reviewability of this question in the *habeas* context divided this Court highlights the importance of full participation by all nine Justices in a fundamental issue on which the circuits are divided.

Had Petitioner known that Justice Kavanaugh and Justice Jackson would disqualify themselves based on their prior judicial service, he would have waived their disqualification to the extent permitted by law in his initial filings to this Court. And the Government has forfeited any grounds for recusal, because it failed to raise such grounds in opposition to the Petition. Appellate courts have routinely held that "failure to raise a section 455 recusal claim can result in waiving or forfeiting judicial review." *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003); *see also*, *e.g.*, *Harris v. Wells Fargo Bank, N.A.*, No. 22-5911, 2023 U.S. App. LEXIS 18996, at *6 (6th Cir. July 25, 2023) (unpublished) ("This court has consistently deemed forfeited recusal arguments that are not brought before the district court."); *Shervin v. Partners Healthcare Sys.*, 804 F.3d 23, 41 (1st Cir. 2015) ("Dr. Shervin did not seek the judge's disqualification but, rather, by her silence acquiesced in the judge's continued participation. That was a waiver, pure and simple.") (citing *In re Cargill, Inc.*, 66 F.3d 1256, 1261 (1st Cir. 1995) ("[W]aivers based on silence are standard fare.")); *United States v. Houston*, 197 F.3d 266, 269 (7th Cir. 1999) ("A failure

to request the writ constitutes a waiver of the recusal argument.").

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Court should grant rehearing and the Petition.

Respectfully submitted,

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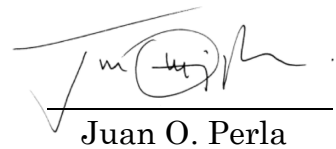
June 14, 2024

CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, I, Juan. O. Perla, counsel for petitioner Omar Ahmed Khadr, 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.

June 14, 2024



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