No. 07-1209

In The

Supreme Court of the United States

JAMES B. PEAKE, M.D.,

Petitioner,

v.

WOODROW F. SANDERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the government (as opposed to disabled veterans and other claimants of the Veterans Disability Adjudication System) should bear the burden of proof on the issue of prejudicial error in connection with a notice violation under U.S.C. § 5103(a).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

Respondent requests that the Court deny the petition and leave in place of the judgment of the United States Court of Appeals for the Federal Circuit. The decision below should be left undisturbed as it correctly holds that the government bears the burden of proof to establish the harmlessness of a defective notice under 38 U.S.C. § 5103(a). Respondent maintains that law and policy support the lower court's decision.

I. The Decision of the Court of Appeals for the Federal Circuit Is Consistent with Supreme Court Authority

Petitioner maintains that the Federal Circuit's interpretation of the rule of prejudicial error is inconsistent with the uniform construction of the rule established by other courts of appeal and the Supreme Court. *Cert. Pet.* at 9-14.

Petitioner is wrong. *O'Neal v. McAninch*, 513 U.S. 432 (1995) stands for the proposition that, in the context of civil cases, the government bears the burden of proof on the issue of prejudicial error. To be sure, *O'Neal* is predicated, in part, upon the distinction between civil and criminal proceedings:

> Unlike the civil cases cited by the State, the errors being considered by a habeas court

> occurred in a *criminal* proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake. And, as we have explained, when reviewing errors from a criminal proceeding, this Court has consistently held that, if the harmlessness of the error is in grave doubt, relief must be granted. We hold the same here.

513 U.S. at 440.

But *O'Neal* rests upon an alternate ground; thus, it stands for a separate proposition. *Com. of Mass. v. U.S.*, 333 U.S. 611, 623 (1948); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (an opinion based upon two independent grounds is stare decisis as to both grounds). *O'Neal* said that, notwithstanding the different issues at stake in criminal and civil proceedings, the standard for "grave doubt" – i.e., the burden of showing prejudice – should apply the same way in both a civil and criminal context:

> Moreover, precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights. In *Kotteakos*, the Court interpreted the then-existing harmless-error statute, 28 U.S.C. § 391, now codified with minor change at 28 U.S.C. § 2111. . . . That statute, by its terms, applied to both civil and criminal cases, and *Kotteakos* made no distinction, at least with respect to the question at issue here, between the two types of

> cases. . . . And, more important for present purposes, the current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to § 391 as their statutory sources. . . . In fact, in recent cases, we have interpreted the nearly identical language of Rule 52(a) as treating instances of grave doubt just as we treat them here. . . . For these reasons, **even if, for argument's sake, we were to assume that the civil standard for judging harmlessness applies to habeas proceedings (despite the fact that they review errors in state *criminal* trials), it would make no difference with respect to the matter before us. For relevant authority rather clearly indicates that, either way, the courts should treat similarly the matter of "grave doubt" regarding the harmlessness of errors affecting substantial rights, and as *Kotteakos* provides**.

513 U.S. at 441-442, bold added.

Indeed, the dissenting opinion in *O'Neal* read the Court's holding as placing the burden of proof on the government on the harmless error issue in civil cases:

> *Palmer*[1] held that the party seeking relief from a judgment because of an erroneous ruling "carries the burden of showing that

[1] *Palmer v. Hoffman*, 318 U.S. 109 (1943).

> prejudice resulted"; it did not say that only those challenging "technically" erroneous rulings were so encumbered. (Citation). Accordingly, most of the Courts of Appeals that have considered the issue place the burden of showing prejudice on the civil appellant, just as *Palmer* did. . . .
>
> The Court concludes that *Palmer* and these cases may be disregarded because the federal harmless-error statute, 28 U.S.C. § 2111, makes no distinction between civil and criminal cases; *since the rule in the criminal context places the burden of persuasion on the government*, *the Court decides that the same should be true in the civil context*. . . .

Id. at 449-50 (dis. opn., J., Thomas), italics added; *see Obrey v. Johnson*, 400 F.3d 691, 700 (9th Cir. 2005).

II. The Decision of the Court of Appeals for the Federal Circuit Is in Line with the Uniquely Informal & Pro-claimant Character of the VA System

Petitioner claims that the Federal Circuit's interpretation of the rule of prejudicial error under 38 U.S.C. § 7261(b)(2) must be construed in the same manner as the rule of prejudicial error set forth in the Administrative Procedure Act (APA), 5 U.S.C. § 706. *Cert. Pet.* at 14-23.

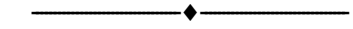
Respondent disagrees. Specifically, the rule of prejudicial error under § 7261(b)(2) cannot be divorced from the VA's uniquely pro-claimant system. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed.Cir. 1998)

("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant. (Citations omitted).").

As the lower court explained, placing the burden on claimants to establish prejudice would undermine the benevolent and informal nature of the VA system:

> The Veterans Court, however, took Congress's clear desire to create a framework conducive to efficient claim adjudication and instead created a system that practically requires a claimant asserting a notice error to seek counsel simply to be able to navigate the appeal process and assure him or herself of a fair adjudication.

Appendix at 16a; *see Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985) ("A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. This is not to say that complicated factual inquiries may be rendered simple by the expedient of informality, but surely Congress desired that the proceedings be as informal and nonadversarial as possible.").



CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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