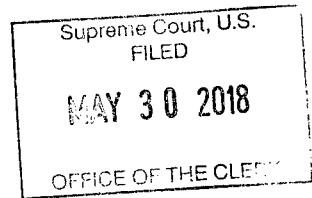


18-7111 ORIGINAL

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM

Ct of App #



UNITED STATES OF AMERICA,
Respondent-Appellee

v.

JOHNNY JOE GUERRA,
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit erred when it did not recall the mandate in order to prevent an injustice relative to two unadjudicated claims in the district court?

CONSTITUTIONAL PROVISION

Fifth Amendment of the Federal Constitution provides that "Nor shall any person be deprived of life, liberty, or property, without Due Process of Law."

I. JURISDICTIONAL STATEMENT

The Court of Appeals for the Fifth Circuit had jurisdiction over this matter to recall the mandate pursuant to 28 U.S.C. Section 1291; and denied that application on April 26, 2018. (See Fifth Circuit Panel order and Clerk's Memorandum to parties, Appendix A); the Supreme Court retains jurisdiction over this controversy.

II. STATEMENT OF THE ISSUE

Whether the Court of Appeals denial of the recall of the mandate appeal abridged Petitioner's right of Due Process of Law relevant to the two unadjudicated claims still pending in the United States District Court for the Southern District of Texas?

III. STATEMENT OF THE CASE

Petitioner Johnny Joë Guerra (Petitioner) hereby moves this Court for the issuance of a Writ of Certiorari to prevent a miscarriage of justice. As shall be demonstrated below, Petitioner requested that the Fifth Circuit recall its mandate pursuant to its own Rule 41.2 in order to prevent injustice. To be more specific, Petitioner contended that the United States District Court Judge -- when ruling on his Section 2255 Motion -- failed to make a disposition on two timely filed claims raised in his post-conviction motion. Petitioner further argued that the district court judge never issued a final order and for those reasons, the application for a recall of the mandate should be granted, and the case remanded to the district court with instructions to enter a final judgment on the two pending claims.

On October 28, 2013, Petitioner filed his pro-se motion pursuant to 28 U.S.C. Section 2255. The District Court held an evidentiary hearing on one of the several claims enumerated in that motion. On February 28, 2014, Judge Jack issued a 17-page order denying Petitioner's motion and denying a certificate

of appealability.

On June 23, 2014, a brief was filed in support of an application for a Certificate of Appealability pursuant to Section 2253(c) which was denied on October 9, 2014 order signed by Circuit Judge Edith H. Jones.

On February 4, 2015, Petitioner filed a Rule 60 (b) motion in district court and he moved to amend that motion on February 27, 2015. The district court denied the Rule 60(b) motion on August 13, 2015 and also declined to issue a Certificate of Appealability.

On April 28, 2017, Petitioner filed a motion to recall the mandate in regard to the District Court's October 28, 2013 order and subsequent orders all of which did not render a final disposition on two of the several claims raised in the Section 2255 Motion.

On April 26, 2018 the Fifth Circuit issued an order denying Petitioner's motion to recall the mandate.

IV. ARGUMENT*

The only question before this Court is whether Petitioner raised the two grounds in the Section 2255 Motion, and if the answer is in the affirmative, then this Court must grant the Petition for a Writ of Certiorari in order to correct the apparent injustice. In its August 13, 2015 order, the district court wrongly ruled that Petitioner did not raise his counsel's conflict of

* In order to avoid redundancy Petitioner has attached a copy of the Recall of the Mandate Motion which contains details of all filings and particulars surrounding erroneous rulings in the district court including the appellate court. (See Recall of the Mandate, Appendix D, 4/28/17).

interest claim nor his trial and appellate counsels' ineffective assistance relative to the deficient plea representation. (See Section 2255 Motion, dated October 28, 2013 Appendix B @ pg 2) Cf. with (See Court Order, dated August 13, 2015, Appendix C @ pgs 4-5). A brief review of the Section 2255.)
Petition demonstrates that the two issues were in fact presented for judicial consideration but never ruled on by the district court. Therefore, the district court's holding that the claims were not part of the Section 2255 Motion and that their presentation to the district court in the Rule 60(b) Proceeding amounted to a second and successive motion under Section 2255 was obviously incorrect.

Petitioner appealed this adverse ruling to the Fifth Circuit which basically rubber stamped the decision of the circuit's panel. Thus, two claims continue to be unresolved in the lowest court and must be resolved in order for Due Process of law to be satisfied.

Petitioner met the requirements of Local Rule 41.2 of the Fifth Circuit to recall the mandate which provided that a Court's mandate will not be recalled except to prevent injustice.

Whether the Fifth Circuit erred when it did not recall the mandate in order to prevent an injustice relative to two unadjudicated claims in the district court?

It is evident by the record before this honorable Court that the lower courts inadvertently misapprehended the record before them and mistakenly found that these issues were never presented; as a result, they denied the motions including the recall of the mandate petition specifically finding that the issues were the equivalent of second or successive filing and were not authorized under the gate-keeping provisions of habeas-corpus reform.

In Collins v. Miller, 252 U.S 364, 370 (1920)(habeas corpus proceeding) this Honorable Court held that the rule of finality "requires that the judgment to be appealed should be final not only to all the parties, but as to the whole of subject-matter and as to all causes of action involved." The Eleventh Circuit, in Lindsey v. Smith, 820 F.3d 1137, 155 (1987) explained that Collins v. Miller, 252 U.S. 364, 365 (1920) renders a court of appeals powerless to review an order denying a writ of habeas corpus that does not dispose of all the claims that the petitioner presented See also Andrews v. United States, 373 U.S. 334, 340 (1963)(same) and United States v. Richardson, 204 F.3d 552 (5th Cir. 1952)(mandating the prohibition of piecemeal appeals).

Therefore, Petitioner's two unadjudicated claims in the district court should have rendered the court of appeals without jurisdictional power to decide over the previous controversies that it ruled on adversely against Petitioner. There is only one remedy to this legal dilemma, being; this Court must grant the petition for Writ of Certiorari so this matter can be corrected and Petitioner's Due Process right re-instated so the unheard two claims can finally be resolved in the lowest federal court. Petitioner is entitled to this right of Due Process and a deprivation of such right amounts to a miscarriage of justice to say the least.

V. CONCLUSION

WHEREFORE, Petitioner humbly request that this petition for Writ of Certiorari be granted for the foregoing reasons and that counsel be appointed by the Court to represent Petitioner in this complex constitutional matter and for any other and further relief that this Court deems to be just and proper.

may 29, 2018

Respectfully Submitted

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