No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

In Re: Jesus Avila

_____ ____PETITIONER
(Your Name)

vs.

United States of America

_____ ____RESPONDENT(S)

ON PETITION FOR A WRIT OF PROHIBITION PURSUANT TO THE ALL WRITS ACT 28 U.S.C. 1651(a) DIRECTED TO ASSOCIATE JUSTICE WITH SUPERVISORY CONTROL OVER THE FIFTH CIRCUIT UNDER SUPREME COURT RULE 22-1

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

_____
(NAME OF COURT THAT LAST RULED ON THE MERITS OF YOUR CASE

PETITIONER FOR A WRIT OF PROHIBITION

JESUS AVILA

_____
(Your Name)

FEDERAL CORRECTIONAL INSTITUTION

_____
(Address)

P.O. BOX 3000, ANTHONY NM/TX 88021

_____
(City, State, Zip Code)
N/A

_____
(Phone Number)

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE RE-CHARACTERIZATION OF JESUS AVILA'S PROPERLY FILED RULE 60(b)(6) MOTION CONSTITUTES AN IMPERMISSIBLE MISCARRIAGE OF JUSTICE

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LIST OF PARTIES

IN RE: JESUS AVILA

-V-

UNITED STATES OF AMERICA

THE NAMES OF ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE. THERE ARE NO ADDITIONAL PARTIES.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has original jurisdiction over three categories of cases. First, the Supreme Court can exercise original jurisdiction over "actions proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." See, Maryland v. Louisiana, 451 U.S. 725, 737 (1981). Second, the Supreme Court also possesses original jurisdiction for "(all) controversies between the United States and a State." 28 U.S.C. Section 1251 (b)(2). Finally, Section 1251 provides for original jurisdiction in the Supreme Court, for "all actions or proceedings by a state against the citizens of another state or against aliens." See, e.g. Oregon v. Mitchell, 400 U.S. 112 (1970); United States v. Louisiana, 339 U.S. 699 (1951); United States v. California, 332 U.S. 19 (1947).

The statutes defining the Supreme Court's jurisdiction between "appeals" and "certiorari" as vehicles for appellate review of the decisions of state and lower federal courts. Where the statute provides for "appeal" to the Supreme Court, the Court is obligated to take and decide the case when appellate review is requested. Where the state provides for review by "writ of certiorari," the Court has complete discretion to hear the matter.

The Court takes the case if there are four votes to grant certiorari. Effective September 25, 1988, the distinction between appeal and certiorari as a vehicle for Supreme Court review virtually eliminated. Now almost all cases come to the Supreme Court by writ of certiorari. Pub. L. No. 100-352, 102 Stat., 662 (1988).

WRIT OF PROHIBITION PURSUANT TO 28 U.S.C. SECTION 1651(a) IN AID OF THE SUPREME COURT'S JURISDICTION.

(A) The Supreme Court and all courts established in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(B) An alternative writ or rule may be issued by a justice (Chief Justice Roberts) to whom an application to a writ of Prohibition is submitted may refer to the Court for determination.

CONSTITUTIONAL AND STATUTORY PROVISIONS

LAW RELATED TO STRUCTURAL ERRORS IN PEREZ'S JUDICIAL PROCEEDINGS

In conducting harmless error analysis of constitutional violations, including direct appeals and especially habeas generally, The Supreme Court repeatedly has reaffirmed that "(s)ome constitutional violations ...by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Safferwhite v. Texas, 486 U.S. 249, 256 (1988); accord Neder v. United States, 527 U.S. 1, 7 (1999)("W)e have recognized a limited class of fundamental constitutional errors that defy analysis by "harmless error:" standards.'...Errors of this type are so intrinsically harmful as to require automatic reversal (i.e. 'affect substantial rights') without regard to their effect on the outcome.").

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)("Although most constitutional errors have been held to harmless-error analysis, some will always invalidate the conviction "(citations omitted); id at 283 (Rehnquist, C.J., concurring); United states v. Olano, 507 U.S. 725, 735 (1993); Rose v. Clark, 478 U.S. 570. 577-78 (1986)("some constitutional errors require reversal without regard to the evidence in the particular case ...(because they) render a trial fundamentally unfair"), Vasquez v. Hillary, 474 U.S. 254, 283-264 (1986); Chapman v. California, 386 U.S. 18, 23 (1967)("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error").

A JUDICIAL NOTICE/STATEMENT OF ADJUDICATIVE FACTS PURSUANT TO RULE 201 OF THE FEDERAL RULES OF EVIDENCE.

The Right to Effective Assistance of Counsel. See, Kyles v.. Whitley, 514 U.S. at 435-436; United States v. Cronic, 466 U.S. 648, 654-57 (1984); Hill v. Lockhart, 28 F.2d 832, 839 (8th Cir. 1994)("It is unnecessary to add a separate layer of harmless-error analysis to bar evaluation of whether a petitioner has presented a constitutionally significant claim for ineffective assistance of counsel").

LAW RELATED TO STRUCTURAL ERROR OR MANIPULATION OF EVIDENCE

Included in the rights granted by the U.S. Constitution, is the protection against prosecutorial suppression or manipulation of exculpatory evidence and other prosecutorial and judicial failures that amount to fraud upon the court. Failure to make available to defendant's counsel, information that could well lead to the assertion of an affirmative defense is material, when 'materiality' is defined as at least a "reasonable probability that had the evidence been disclosed tot he defense, the result of the judicial proceedings would have been different. Kyles v. Whitley, 514 U.S. at 435 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)(plurality opinion); id at 685 (White, J,. concurring in judgment)).

In addition to Bagley, which addresses claims of prosecutorial suppression of evidence, the decisions listed below-all arising in "what might be loosely be called the area of constitutionally guaranteed access to evidence," Arizona v. Youngblood, 488 U.S. 51, 55 (1988)(quoting United states v. Valenzuela-Bernal, 458 U.S. 856, 867 (1982) or require proof of "materiality" or prejudice.

The standard of materiality adopted in each case is not always clear, but if that standard requires at least a "reasonable probability" of a different outcome, its satisfaction also automatically satisfies the Brecht harmless error rule. See, e.g. Arizona v. Youngblood, supra at 55 (recognizing the due process violation based on state's loss ort destruction before trial go material evidence); Pennsylvania v. Richie, 480 U.S. 39, 57-58 (1987)(recognizing due process violation based on state agency's refusal to turn over material social services records; "information is Material" if it "probably would have changed the outcome of his trial "citing United States v. Bagley, supra at 685 (White, J,. concurring in judgment)).

Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (denial of access by indigent defendant to expert psychiatrist violates Due Process Clause when defendant's mental condition is "significant factor" at guilt-innocence or capital sentencing phase of trial); California v. Trombetta, 467 U.S. 479, 489-90 (1984)(destruction of blood samples might violate Due Process Clause, if there were more than slim chance that evidence would affect outcome of trail and if there were no alternative means of demonstrating innocence).

STATEMENT OF CASE

Jesus Avila was charged with a conspiracy to Possess and distribute controlled substances. The district Court in Tampa Florida sentenced him to 240 months. In his most recent filing, he submitted a petition for relief under Amendment 782, which the District Court denied. He subsequently filed a Rule 60(b)(6) petition under the Federal Rules of Civil Procedure. The District Court denied the motion, stating it was timely. The court of Appeals for Eleventh Circuit, upheld the untimely ruling of the District Court.

REASONS FOR GRANTING

It is settled, that a decision of the Supreme Court of the United States, based solely upon its construction of Rule 11 of the Federal Rules of Criminal Procedure, with regard to the acceptance of a guilty plea, is made pursuant to the Supreme Court's Supervisory Power over the lower courts. See, e.g. Arizona v. California, 373 U.S. 546 (1963); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 300 (1888), Kennedy v. Denison, 65 U.S. (24 How) 66, 98 (1860).

As a logical corollary of this Supreme Court Supervisory Power, Petitioner is bringing this petition for a Writ of Prohibition to the supreme Court, and invoking Rule 22-1 of the Supreme Court Rules, which in pertinent part states the following;

> "1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned, if an individual Justice has the authority to grant the relief sought."

Petitioner Jesus Avila, invoking Rule 22-1 for the Supreme Court Rules respectfully to utilize the powers granted it to address what appears to be a abuse of power by the District Court, and the rubber-stamping of that abuse by the Eleventh Circuit Court of Appeals. He invokes this rule for the following reason;

(1) Jesus Avila has no other adequate means to obtain relief.
(2) He is prepared to show a clear and indisputable right to the writ.
(3) The court must be satisfied that the writ is appropriate under the circumstances.

The abuse of discretion Jesus Avila alleges arises from the impermissible re-characterization of his properly files petition for the relief under Rule 60(b)(6), and thereby making a judgment that his motion was procedurally defaulted. The Eleventh Circuit Court of Appeals filed to condition the statutory scheme of rule 60(b)(6) which allows such a filing by reason of extraordinary circumstances, he contended in his filing, to avoid a miscarriage of justice of justice, in refusing to grant relief pursuant to Amendment 782, especially in light of the Supreme Court ruling in Hughes v. United States (citations omitted).

Applying the analytical framework for sentence reduction under 18 U.S.C. 3582(c)(2) based on the Amendment 782 which lowered the base offense levels in the drug quantity table of U.S.S.G. Section 2D1.1(c) petitioner avers the denial of relief by the circuit court , in light of his Rule 60(b)(6) petition constitutes among other reasons, "an imprimatur for a miscarriage of justice," for which the legal standards adopted by the Eleventh circuit are appropriate.

The 782 Amendment revises the guidelines, inter alia, of to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table of Section 2B1.1 (unlawful manufacturing, importing or trafficking, including possession with intent to commit these offenses); Attempt or conspiracy incorporate the statutory minimum for such offenses.

When congress passed the anti-Drug Act in 1086, PUB 1, 99-570, the Commission responded and extrapolating upward and downward to set guidelines sentencing ranges for all drug quantities. The quantity thresholds into he drug quantity table were set so as to provide base offense levels, corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five year statutory minimum were assigned a base level (level 26) corresponding to a sentence of 63-78 months for a defendant with a Criminal History Category 1 (a guideline range that exceeds the five year statutory minimum for such offenses by at least three months).

Similarly, offenses that trigger a ten year minimum were assigned a base offense level (level 32) corresponding to sentences guideline range that exceeds ten year statutory minimum for such offenses by at least one month. The base levels for drug quantities above an d below the mandatory minimum threshold quantities. See 2B1.1 comment (backg'd) with a minimum base offense level of 6 and a maximum offense level of 38 for drug offenses.

This analysis is very critical in assessing the degree for the goals of the Amendment, not only by the district court, but the wholesale adoption of it by the Court of Appeals. Critically, the amendment stresses how the applicable statutory mandatory minimum penalties are incorporated in the Drug Quantity table while maintaining consistency with such penalties. See 28 U.S.C. 994(b)(1)(providing that each sentencing range must be "consistent with all penalties of Title 18, United States Code");

WHETHER THE RE-CHARACTERIZATION OF JESUS AVILA'S PROPERLY FILED RULE 60(b)(6) CONSTITUTES AN IMPERMISSIBLE MISCARRIAGE OF JUSTICE.

Jesus Avila avers that in considering the Court of Appeals' judgment in this case, it cannot ignore the savings clause that specifically provides that 60(b) does not limit the power of the court to entertain such an action. It is important to emphasize 'independent action, 'as used in this clause, was meant to refer to a procedure which has been historically known simply as independent action in equity to obtain relief from a judgment. This action should under no circumstances be confused with ancillary common law and equitable remedies or their modern substitute, the 60(b) motion.

Jesus Avila further avers that, when a court grants relief from a judgment by one of the ancillary common law or equitable remedies or their modern substitute, a motion, it is exercising a supervisory power of that court over its judgment, but the original bill, or independent action, to impeach for fraud, accident, mistake or other equitable ground is founded upon an independent and substantive equitable jurisdiction. If the litigant's right to make a Rule 60(b) motion is lost by the expiration of the time limits fixed in the rules, the only procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. " Id. at 81 n.13.

This directly implicates the the judgment of this Honorable Court. In Bonner v. City of Prichard; 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as binding precedent all decisions that the former Fifth Circuit handed down prior to October 1, 1981. In part because it failed to appreciate this history, the majority overlooked the important distinctions between the motions and independent actions Rule 60(b) authorizes and SSHPs.

Like the ancient procedures it replaced, Rule 60(b) was never (366 F.3d 1292) intended to permit parties to relitigate the merits of claims or defenses, or to raise new claims or defenses that could have been asserted during the litigation of the case. Rather, the aim of Rule 60(b) was to allow a district court to grant relief when its judgment rests upon a defective foundation.

As applied to Jesus Avila, the "factual predicate of his Rule 60(b) motion deals primarily with some irregularity or procedural defect in the procurement of the judgment ..." Rodwell v. Pepe, 324 F.3d 66, 70 (1st. Cir. 2003). The same is true with respect to an independent action, brought under the rule's savings clause. See Buell v. Anderson, 48 Fed. Appx. 491, 498 (6th Cir. 2002)(explaining the elements of an independent action, all of which concern the integrity of the habeas judgment); Hess v. Cockrell, 281 F.3d 212, 217 (5th Cir. 2002)(same).

A true Rule 60(b) motion "seeks relief from a federal court's final order entered ... on one or more of the grounds set forth in "the Rule. Abdur'Rahman v. Bell, 537 U.S. 88, 94, 154 L.Ed.2d 501, 123 S.Ct. 594, 597, 2002 U.S. LEXIS 9240, 2002 Day 13901 (2003) (Stevens, J., dissenting). Neither proceeding constitutes a collateral attack on the underlying conviction and sentence.

What Jesus Avila is alleging in his Rule 60(b) Motion is that, the contextual circumstances of his proceedings have changed so much that the petition's conviction or sentence now runs afoul of the constitution. Mobley, 306 F.3d at 1101 (Tjoflat, J., dissenting).

CONCLUSION

WHEREFORE, Petitioner Jesus Avila Respectfully moves the Associate Justice with Supervisory Control over the eleventh Circuit to rule on his 782 Amendment by reason of a recent Supreme Court ruling in Hughes v. United States (citations omitted)

Date: April 29, 2019

Respectfully Submitted,

Jesus Avila

CERTIFICATE OF SERVICE

I, Petitioner Jesus Avila, hereby certify that I have served a true and correct copy of "PETITION FOR WRIT OF PROHIBITION" to the following parties to the above entitled action, by placing a complete copy of the described material in a sealed envelope, affixed with the appropriate pre-paid first Class United State Postage;

CLERK OF THE SUPREME COURT
1ST FIRST STREET, N.E.
WASHINGTON D.C. 20549

U.S. SOLICITOR GENERAL
950 PENNSYLVANIA AVENUE
WASHINGTON, D.C. 20530

U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
56 FORSYTH STREET N.W.
ATLANTA GA 30303

and deposited same with prison officials here at the Federal Correctional institution, La Tuna, P.O. Box 3000, Anthony, NM/TX 88021 on the 29th day of April, 2019, pursuant to title 28 United States Code, Section 1746. I declare under penalty of perjury that the above is true.

Executed this 29th day of April 2019.

RESPECTFULLY SUBMITTED,
Jesus Avila

JESUS AVILA

FEDERAL CORRECTIONAL

INSTITUTION - LA TUNA
P.O. BOX 3000
ANTHONY, NM/TX 88021