No. 19-104

In The

# Supreme Court of the United States

FLAVIO TAMEZ,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

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

## PETITION FOR REHEARING


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## PETITION FOR REHEARING

Pursuant to Rule 44 of this Court, Flavio Tamez, hereby respectfully petitions for rehearing of this case.

On Monday, October 7, 2019, this Court denied Flavio Tamez's Petition for a Writ of Certiorari ("Pet."). The questions presented, Pet. at i-ii, are not appropriate for this Court's argument calendar.

However, for the following reasons, Petitioner submits that this Court should consider, in the interest of justice, exercising its supervisory authority to reverse the denial of a certificate of appealability (COA), remanding this case to the Fifth Circuit for further proceedings.

### I.

1. This Court will summarily dispose of a case where a court of appeals has "departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court." S. Ct. Rule 10(a). See also Tolan v. Cotton, 572 U.S. 650, 659-60 (2014) (discussing standard for summary reversal).

In this case, the only court to articulate a reasoned decision was the district court. Pet. App. 13. That "reasoning" was so bad, however, that no competent jurist could imagine that it was correct. See id., at 21-22. The Fifth Circuit's unexplained denial of a COA simply rubber-stamped the district court's lawless opinion, making it their own. Pet. App. 1-3.

The remedy for a district court that refused to follow the law is reversal on appeal. What remedy is appropriate for a court of appeals that abdicates its obligation to reverse lawless decisions?

## II.

2. This case arises from Petitioner's motion under 28 U.S.C. § 2255 raising claims of ineffective assistance of counsel. Pet. at 12-13. Petitioner's earlier attempt at a direct appeal had been dismissed on the government's motion to enforce a plea-agreement waiver. Pet. at 10-11.

But there was, in fact, no operative waiver – the plea agreement had been dissolved prior to sentencing, and the government itself had previously acknowledged Petitioner's right to appeal. Pet. at 6-10; cf. Munoz-Vargas v. United States, Civ. No. B:14-48, Crim. No. 11-966-1, 2016 U.S. Dist. LEXIS 58104 (S.D.Tex. Mar. 24, 2016) (allowing § 2255 claims to proceed in identical circumstances).

Petitioner's appellate counsel was served with a copy of the government's motion to dismiss the appeal and was notified by the clerk of the circuit court of the requirement of an answer within 10 days. Yet, counsel for Petitioner simply did nothing to oppose the government's motion to dismiss the appeal, and it was granted by default in a 13-word per curiam order. Pet. at 11-12.

## III.

3. On September 26, 2017, the district court dismissed Petitioner's § 2255 motion as barred by a waiver that did not exist. Although Petitioner's habeas motion had expressly alleged the invalidation of the waiver due to ineffective assistance of counsel, the district court invoked the "law of the case doctrine" to hold that Petitioner could not collaterally attack the failure of appellate counsel – on the premise that the Fifth Circuit's order granting the government's motion to dismiss the direct appeal "implicitly" compelled the opposite conclusion. Pet. at 12-14; Pet. App. 20-21.

The "law of the case doctrine" is flexible and subject to exceptions, including where substantially different evidence is presented, where the prior decision was clearly erroneous, or where it would work a manifest injustice. See Pet. at 17-19. See also Bravo-Fernandez v. United States, 196 L.Ed.2d 242, 247-49 (2010) (issue preclusion generally inapplicable in circumstances lacking an "underlying confidence that the result achieved in the initial litigation was substantially correct").

All of that aside, the doctrine is simply not applicable to block review of a § 2255 movant's claim of ineffective assistance of counsel. See, e.g., Fay v. Noia, 372 U.S. 391, 423 (1963) ("res judicata is inapplicable in habeas proceedings"). If the fact that there is a final judgment is enough to defeat Petitioner's § 2255 motion at the outset, then collateral review under § 2255 does not exist; in effect, the action of the district court

here unconstitutionally suspends the writ of habeas corpus. Cf. U.S. Const., Article I, § 9.

## IV.

4. "[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." Massaro v. United States, 538 U.S. 500, 504 (2003). Indeed, the district court is "the forum best suited to developing the facts necessary to determining the adequacy of representation" because such a collateral proceeding affords "a full opportunity" to create "a factual record bearing precisely on the issue," id. at 505-06.

Despite the unquestionable (and uncontested) multiple acts of negligence and ineffective assistance from the appellate counsel, the district court denied Tamez' habeas petition and denied him a certificate of appealability. Tamez petitioned the U.S. Court of Appeals for the Fifth Circuit to issue a certificate of appealability, but that court denied his request correctly reciting the standards articulated in 28 U.S.C. § 2253(c)(2) and Slack v. McDaniel, 529 U.S. 473, 484 (2000), but holding that he had not made the "required showing."

In the district court's view, the "law of the case doctrine" is so powerful that it precludes the court's looking past a debatable (if not clearly erroneous) conclusion "inferred from" the appellate dismissal order to evaluate the facts under the applicable law.

Petitioner's appellate loss cannot destroy his ability to assert that, had his lawyer filed something – indeed, nearly anything at all – to rebut the government's dismissal motion, the outcome would have been different.

Petitioner's pro se § 2255 motion was timely filed, and of course it was intended to attack a "final judgment." Even if the appellate dismissal order were to "imply" the existence of a material waiver, Petitioner should still have the right to judicial review of his Sixth Amendment claims. Foreclosure of his one and only bite at the postconviction apple in this manner, and by such circular logic, should not be allowed to stand. Cf. McGee v. McFadden, No. 18-7277, 139 S.Ct. 2608, 2608 (2019) (Sotomayor, J., dissenting from denial of certiorari, and discussing ease with which "hasty" COA review results in miscarriages of justice).

It must be noted also that while this matter was on appeal, the Justice Department issued a memorandum directing a uniform policy change relating to waivers of claims of ineffective assistance. On 10/4/2014, all federal prosecutors were advised that they should no longer include provisions in plea agreements that ask criminal defendants to waive claims of ineffectiveness of counsel, regardless of when the claims are raised. See https://www.justice.gov/file/70111/download. The memorandum specifically stated that "For cases in which a defendant's ineffective assistance claim would be barred by a previously executed waiver, prosecutors should decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when the

defendant's ineffective assistance claim raises a serious debatable issue that a court should resolve." This procedure was apparently not followed in this cause.

**V.**

5. The district court's blind deference to Petitioner's "final judgment" to foreclose consideration of his § 2255 motion, relying on the "law of the case doctrine," was so wrong that no jurist could reasonably argue otherwise. The Fifth Circuit's rubber-stamp affirmation of that decision plainly ignored this Court's COA standard, working a gross injustice. Cf. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (setting legal standard applicable to COA review).

Under these clear circumstances, this Court should summarily reverse the denial of a COA and remand this case to the court below for further proceedings consistent with the Miller-El standard.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

Pursuant to Rule 44, Rules of the Supreme Court, counsel hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44, paragraph 2, Rules of the Supreme Court, and is being presented in good faith and not for delay.

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