

ORIGINAL

CAUSE NO.: 19-5073

IN THE UNITED STATES SUPREME COURT
OF THE UNITED STATES OF AMERICA
SITTING AT WASHINGTON, DC

FILED
JAN 07 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN RE:
ELVIS RIVERA CRUZ #1835853
PRESENTLY INCARCERATED

ON PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES SUPREME COURT
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
CAUSE NO.: 17-50561

PETITION FOR WRIT OF MANDAMUS

Elvis Rivera Cruz #1835853
Dalhart Unit
11950 FM 998
Dalhart, Texas 79022

PRO SE

QUESTIONS PRESENTED

1. Did the United States Court of Appeals, For The fifth Circuit, lack federal statutory law jurisdiction under 28 U.S.C. §2244 (b),(3),(D), when more than the thirty days allowed under law, the Court ruled on Petitioner's August 14, 2017 filed request for authorization to file a second or successive 28 U.S.C. §2254 writ of habeas corpus on October 24, 2017?
2. Did the Office of the Clerk, Deputy Clerk, Cindy M. Broadhead, of the United States Court of Appeals, For the Fifth Circuit, commit obstruction of justice in violation of Title 18 U.S.C. §1512 (b),(2),(A), by interpreting 28 U.S.C. §2244 (b),(3),(E) to not permit "REVIEW" under the Federal Rules of Civil Procedure, Rule 60 (b),(4) of Petitioner's August 14, 2017 filed request for authorization to file a second or successive 28 U.S.C. §2254 writ of habeas corpus, on February 20, 2018?

INTERESTED PARTIES

1. Solicitor General of the United States
Room 5614
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
2. United States Court of Appeals, Fifth Circuit
Carl E. Stewart, Chief Judge
300 Fannin St., Room 5226
Shreveport, LA. 71101
3. United States Court of Appeals
Fifth Circuit
OFFICE OF THE CLERK
ATTENTION: Cindy M. Broadhead, Deputy Clerk
600 S. Maestri Place
New Orleans, Louisiana 70130-3408
4. Elvis Rivera Cruz #1835853
Dalhart Unit
11950 FM 998
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No corporate disclosure statement is required in this action.

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CAUSE NUMBER: _____

IN THE UNITED STATES SUPREME COURT
OF THE UNITED STATES OF AMERICA
SITTING AT WASHINGTON, DC

IN RE:
ELVIS RIVERA CRUZ #1835853
PRESENTLY INCARCERATED

PETITION FOR WRIT OF MANDAMUS

COMES NOW, Elvis Rivera Cruz, T.D.C.J. -C.I.D. No. #1835853, as the Petitioner in PRO SE, in necessity, and hereby moves this honorable Court to issue a writ of mandamus, ordering Office of the Clerk, Deputy Clerk, Cindy M. Broadhead, of the United States Court of Appeals, For the Fifth Circuit. To file and submit Petitioner's February 14, 2018 filed MOTION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, RULE 60(b) RELIEF FROM A JUDGMENT OR ORDER to the Court. As the Court took "NO ACTION" on said filed Motion under 28 U.S.C. §2244 (b), (3), (E) on February 20, 2018 when Deputy Clerk Cindy M. Broadhead interpreted subsection (E) to not permit "REVIEW" under the Federal Rules of Civil Procedure, Rule 60(b). Of the Court's prior adverse action in Petitioner's August 14, 2017 filed MOTION UNDER 28 U.S.C. §2244, (b), (3), (4) FOR ORDER GRANTING AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE 28 U.S.C. §2254 (e), (2), (A), (i) WRIT OF HABEAS CORPUS APPLICATION, on October 24, 2017 without the

federal statutory law jurisdiction under §2244 (b),(3),(D) to do so.

The Petitioner hereby shows that judgment is due pursuant to law and rule provided herein.

In support, the Petitioner would also show this honorable Court the following in support thereof:

I.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to the Federal Rules of Appellate Procedure, Rule 21 WRITS OF MANDAMUS AND PROHIBITION, AND OTHER EXTRAORDINARY WRITS. Title 28 U.S.C §1651 WRITS. The Rules of the Supreme Court of The United States, Rule 20 PROCEDURE ON A PETITION FOR AN EXTRAORDINARY WRIT. Title 28 U.S. §2244 FINALITY OF DETERMINATION. Title 28 U.S.C. §2254 STATE CUSTODY; REMEDIES IN FEDERAL COURTS. The United States Constitution, Sixth Amendment right to a SPEEDY TRIAL, and the Fourteenth Amendment right to due process and equal protection of the laws. Title 18 U.S.C., Chapter 73 - OBSTRUCTION OF JUSTICE, §1512, TAMPERING WITH A WITNESS, VICTIM, OR AN INFORMANT, (b),(2),(A). Title 18 U.S.C., Chapter 208 SPEEDY TRIAL, §3161 SPEEDY TRIAL. The Federal Rules of Civil Procedure, Rule 60(b). The Petitioner shows that he is currently in State custody, and filing in PRO SE due to financial disability and who therefore, requests that this honorable Court liberally construe his pleadings in light of Haines v Kerner, 404 U.S. 519, 521 (1972)

II.

STATEMENT OF THE CASE

- 1) On or about February 14, 2018 the Petitioner filed a meritorious MOTION under the Federal Rules of Civil Procedure, Rule 60(b) RELIEF FROM A JUDGMENT OR ORDER, in the United States Court of Appeals, For the Fifth Circuit.
- 2) On or about February 20, 2018 Office of the Clerk, Deputy Clerk, Cindy

M. Broadhead of the United States Court of Appeals, For The Fifth Circuit. Issued a Clerk's Letter in relation to Petitioner's Rule 60(b) filed Motion. In which the Court took NO ACTION on said filed motion under Title 28 U.S.C. §2244 (b), (3), (E). When Deputy Clerk, Cindy M. Broadhead interpreted subsection (E) to not permit the "REVIEW" under the Federal Rules of Civil Procedure, Rule 60 (b). Of the Court's prior action in Petitioner's August 14, 2017 filed MOTION UNDER 28 U.S.C. §2244, (b), (3), (4) FOR AN ORDER GRANTING AUTHORIZATION TO FILE SECOND OR SUCCESSIVE 28 U.S.C. §2254 (e), (2), (A), (i) WRIT OF HABEAS CORPUS APPLICATION on October 24, 2017. When the Court lacked the federal statutory law jurisdiction under Title 28 U.S.C. §2244 (b), (3), (D) to do so.

3) Herenow, the Petitioner moves this honorable Court to intervene, and/or ORDER, Deputy Clerk, Cindy M. Broadhead, of the Office of the Clerk, of the United States Court of Appeals, For The Fifth Circuit. To file and submit Petitioner's February 14, 2018 filed MOTION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, RULE 60(b) RELIEF FROM A JUDGMENT OR ORDER. So that the Court can rule on said motion.

III.

ISSUES PRESENTED

4) The Petitioner hereby shows, that the United States Court of Appeals, For The Fifth Circuit after having Petitioner's August 14, 2017 filed MOTION UNDER 28 U.S.C. §2244, (b), (3), (4) FOR ORDER GRANTING AUTHORIZATION TO FILE SECOND OR SUCCESSIVE 28 U.S.C. §2254 (e), (2), (A), (i) WRIT OF HABEAS CORPUS. The Court then took sixty-nine (69) days after the filing date to rule on the filed motion. In violation of 28 U.S.C. §2244 (b), (3), (D) which allows the Court only thirty (30) days to rule on said motion under federal statutory law jurisdiction. Thereby, the Court lacked federal statutory law jurisdiction to rule on said motion on October 24, 2017 when it issued its "ON THE MERITS" denial.

5) The Petitioner hereby shows, that the United States Court of Appeals, For The Fifth Circuit, Office of the Clerk, Deputy Clerk, Cindy M. Broadhead. Violated Title 18 U.S.C., Chapter 73 – OBSTRUCTION OF JUSTICE, §1512 TAMPERING WITH A WITNESS, VICTIM, OR AN INFORMANT, (b),(2),(A). By interpreting 28 U.S.C. §2244 (b),(3),(E) to not permit "REVIEW" under the Federal Rules of Civil Procedure, Rule 60 (b) of the Court's prior adverse action in Petitioner's August 14, 2017 filed MOTION UNDER 28 U.S.C. §2244, (b),(3),(4) FOR ORDER GRANTING AUTHORIZATION TO FILE SECOND OR SUCCESSIVE 28 U.S.C. §2254 (e),(2),(A) ,(i) WRIT OF HABEAS CORPUS. As the Court lacked the federal statutory law jurisdiction under 28 U.S.C. §2244 (b),(3),(D) on October 24, 2017 to make such a ruling on Petitioner's filing.

IV.

FACTS OF THE CASE

6) The Petitioner on or about August 14, 2017 filed a MOTION UNDER 28 U.S.C. §2244, (b),(3),(4) FOR ORDER GRANTING AUTHORIZATION TO FILE SECOND OR SUCCESSIVE 28 U.S.C. §2254 (e),(2),(A),(i) WRIT OF HABEAS CORPUS APPLICATION with the United States Court of Appeals, For the Fifth Circuit. The federal statutory, law jurisdiction time frame for hearing such a motion is set forth under 28 U.S.C. §2244 (b),(3),(D) which provides:

"(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion."

7) This federal statutory law jurisdiction allows for a court ruling in the 30 day time frame that has jurisdiction to make such a ruling. Anything the Court did outside that 30 day time frame is without the federal statutory law jurisdiction required by federal law under 28 U.S.C. §2244 (b),(3),(D) and should be dismissed as without jurisdiction.

8) The Petitioner shows that when the Court on October 24, 2017 ruled on

Petitioner's August 14, 2017 filed MOTION UNDER 28 U.S.C. §2244, (b), (3), (4) FOR ORDER GRANTING AUTHORIZATION TO FILE SUCCESSIVE 28 U.S.C. §2254 (e), (2), (A), (1) WRIT OF HABEAS CORPUS APPLICATION. The Court's ruling was sixty-nine (69) days after the filing of Petitioner's motion, and outside the 30 day time frame granting jurisdiction for the Court to rule. On October 24, 2017 the Court issued an "ON THE MERITS" denial of Petitioner's motion.

9) The Petitioner on or about February 14, 2018 filed a meritorious MOTION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, RULE 60 (b) RELIEF FROM A JUDGMENT OR ORDER, motion under Subsection (4) THE JUDGMENT IS VOID. With The United States Court of Appeals, For The Fifth Circuit, Office of the Clerk, in Cause Number 17-50561, Cruz vs. Davis, [See APPENDIX "A"].

10) On February 20, 2018 Office of the Clerk, Deputy Clerk, Cindy M. Broadhead, of the United States Court of Appeals, For The Fifth Circuit. Issued a Clerk's Letter which provided:

"28 U.S.C. Section 2244(b)(3)(E) does not permit review of the denial of your request to file a successive petition. We are taking no action on you "Motion Under the Federal Rules of Civil Procedure, Rule 60(b) Relief from a Judgment or Order". [See APPENDIX "B"]

11) The Petitioner shows, that 28 U.S.C. §2244 (b), (3), (E) provides:

"(E) The grant of denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for writ of certiorari."

12) The Petitioner now files this Petition for Writ of Mandamus as under 28 U.S.C. §2244 (b), (3), (E) Petitioner has no other remedy at law available to Petitioner.

v.

REASONS WHY THE WRIT SHOULD BE ISSUED

13) The Petition shows that, Petitioner on August 14, 2017 filed a MOTION

UNDER 28 U.S.C. §2244, (b),(3),(4) FOR ORDER GRANTING AUTHORIZATION TO FILE SUCCESSIVE 28 U.S.C. §2254 (e),(2),(A),(i) WRIT OF HABEAS CORPUS APPLICATION. And the United States Court of Appeals, For The Fifth Circuit under 28 U.S.C. §2244 (b),(3),(D) only had federal statutory law jurisdiction for thirty (30) days to rule on said filed motion. When the Court sixty-nine (69) days after the filing of said motion ruled on it on October 24, 2017, and issued an "ON THE MERITS" denial. The Court was without federal statutory law jurisdiction to do anything more than issue a "DISMISSAL" for want of jurisdiction, as the Court's jurisdiction had expired after the thirty (30) days allowed under federal statutory law on September 14, 2017. See Pena v. Bourland, 72 F. Supp. 290, S.D. Tex. 1947 ("The 'jurisdiction' of a court is the power or authority conferred upon it by the Constitution and laws to hear and determine causes between parties, and to carry its judgments into effect."); U.S. v. Santora, 711 F.2d 41, C.A.5 (Tex.) 1983 ("It is incumbent upon federal courts, trial and appellate, to constantly examine the basis of jurisdiction, doing so on its own motion if necessary.") The Petitioner would show that without jurisdiction the only power the Court had was to dismiss Petitioner's August 14, 2017 filed MOTION UNDER 28 U.S.C. §2244, (b),(3),(4) FOR ORDER GRANTING AUTHORIZATION TO FILE SUCCESSIVE 28 U.S.C. §2254 (e),(2),(A),(i) WRIT OF HABEAS CORPUS APPLICATION. See Steel Co. v. Citizens For A Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210, 118 S.Ct. at 1012, ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.") The Petitioner shows that this action of having no jurisdiction violated Petitioner's United States Constitution, Fourteenth Amendment right to "DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS." As the October 24, 2017 ruling is "VOID" under

28 U.S.C. §2244 (b),(3),(D) as the federal statutory law jurisdiction had in fact expired when the Court made it's ruling.

14) The Petitioner shows that, Petitioner on February 14, 2018 filed a MOTION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, RULE 60(b) RELIEF FROM A JUDGMENT OR ORDER motion under Subsection (4) THE JUDGMENT IS VOID. Related to the Court's prior adverse action on october 24, 2017 in Petitioner's August 14, 2017 filed MOTION UNDER 28 U.S.C. §2244, (b),(3),(4) FOR ORDER GRANTING AUTHORIZATION TO FILE SECOND OR SUCCESSIVE 28 U.S.C. §2254 (e),(2),(A),(i) WRIT OF HABEAS CORPUS APPLICATION, which was void for lack of jurisdiction. [See APPENDIX "A"].

15) On February 20, 2018 Office of the Clerk, Deputy Clerk, Cindy M. Broadhead, of the United States Court of Appeals, For The Fifth Circuit. Issued a Clerk's Letter which provided:

"28 U.S.C. Section 2244(b)(3)(E) does not permit review of the denial of your request to file a successive petition. We are taking no action on your "Motion Under the Federal Rules of Civil Procedure, Rule 60(b) Relief from a Judgment or Order"."

16) The Petitioner shows, that 28 U.S.C. §2244 (b),(3),(E) provides:

"(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for writ of certiorari."

17) The Petitioner shows that, Office of the Clerk, Deputy Clerk, Cindy M. Broadhead interpreted 28 U.S.C. §2244 (b),(3),(E) to not permit the "REVIEW" of a request to file a successive 28 U.S.C. §2254 petition. When in fact 28 U.S.C. §2244 (b),(3),(E) above only prohibits the "APPEALABLE" status of an "ON THE MERITS" decision like the Court issued on October 24, 2017 without jurisdiction to do so under 28 U.S.C. §2244 (b),(3),(D).

18) The Petitioner shows that, as shown above in paragraph 16) 28 U.S.C. §2244 (b),(3),(E) doe not prohibit "REVIEW" of the Courts' October 24, 2017

adverse action in Petitioner's August 14, 2017 filed MOTION UNDER 28 U.S.C. §2244, (b),(3),(4) FOR ORDER GRANTING AUTHORIZATION TO FILE SECOND OF SUCCESSIVE 28 U.S.C. §2254 (e),(2),(A),(i) WRIT OF HABEAS CORPUS APPLICATION. 28 U.S.C. §2244 (b),(3),(E) only prohibits the "APPEALABLE" status of an "ON THE MERITS" decision. The Petitioner "DOES NOT" appeal such an "ON THE MERITS" decision, but a defect in the integrity of the October 24, 2017 federal proceeding under Ochoa Canales v. Quarterman, 507 F.3d 884, 887 (5th Cir. 2007) ("A Rule 60(b) motion is not to be treated as a successive habeas petition if the motion attacks a defect in the integrity of the federal habeas proceeding and does not raise a new ground for relief or attack the district court's resolution of a claim on the merits).; Gonzalez v. Crosby, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480, 2005). Where the Court held at 2649:

"Rule 60(b) has an unquestionably valid role to play in habeas corpus. The rule is often used to relieve parties from the effect of a default judgment mistakenly entered against them, e.g., Klaprott, 335 U.S., at 615, 69 S.Ct. 384 (opinion of Black, J.), a function as legitimate in habeas cases as in run-of-the-mine civil cases. The rule also preserves parties' opportunity to obtain vacatur of a judgment that is void for subject-matter jurisdiction — a consideration just as valid in habeas cases as in any other. Since absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties. Steel Co. v. Citizens For Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210(1998)."

19) The Petitioner would show that, United States Court of Appeals, For The Fifth Circuit, Office of the Clerk, Deputy Clerk, Cindy M. Broadhead's interpretation of 28 U.S.C. §2244 (b),(3),(E). Caused Deputy Clerk, Cindy M. Broadhead to commit obstruction of justice in violation of Title 18 U.S.C. §1512 (b),(2),(A) which provides:

"§1512. TAMPERING WITH A WITNESS, VICTIM, OR AN INFORMANT

(b) Whoever knowingly uses intimidation of physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to —

(2) cause or induce anyperson to —

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;"

Shall be fined under this Title or imprisoned not more than [redacted] ten years, or both."

20) The Petitioner would show, that the writ of mandamus under 28 U.S.C. §1651 the ALL WRITS ACT is due. And under Title 18 U.S.C. §3161 SPEEDY TRIAL provision to enforce Petitioner's United States Constitution, Sixth Amendment "SPEEDY TRIAL", and Fourteenth Amendment "DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS" rights in this cause. As the Fifth Circuit itself held in United States v. Samples, 897 F.2d 193, 195 (5th Cir. 1990):

"In rare instances involving lengthy delays...appellate courts should enforce Rule 8(c)'s speedy trial policy by means of mandamus under the All Writs Act, 28 U.S.C. §1651."

21) The Petitioner would show that, under United States Denson, 603 F.2d 1143, 1146 (5th Cir. 1979) ("The writ is an order directing a public official or public body to perform a duty exacted by law."). And the Petitioner "MUST" show that no other adequate means exist to attain the requested relief, and that his right to issuance of the writ is clear and indisputable as outlined by the court in In Re Corrugated Container Anti-Trust Litigation v. Mead Corp., 614 F.2d 958, 961-62 (5th Cir. 1980).

22) The Petitioner would show that, Petitioner has no other adequate remedy of law to attain the requested relief, as shown by 28 U.S.C. §2244 (b), (3), (E). And that Petitioner has a clear and indisputable right to the issuance of the writ. To enforce Petitioner's United States Constitution, Sixth Amendment, "SPEEDY TRIAL", and Fourteenth Amendment "DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS" rights. In relation to this violation of Title 18 U.S.C. §1512 (b), (2), (A) by Deputy Clerk, Cindy M. Broadhead in interpreting 28 U.S.C. §2244

(b), (3), (E) to not permit "Petitioner's United States Constitution, Sixth Amendment and Fourteenth Amendment rights to be enforced under Petitioner's timely filed Federal Rules of Civil Procedure, Rule 60(b) motion.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this honorable Court grant Petitioner's petition for writ of mandamus, directing Office of the Clerk, Deputy Clerk, Cindy M. Broadhead, to submit Petitioner's timely filed Rule 60(b) motion to the Court for its ruling which is overdue in Petitioner's cause.

Pursuant to 28 U.S.C. §1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this the 27 day of December, 2018.

Respectfully submitted,

Elvis Rivera Cruz
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