

IN THE SUPREME COURT OF THE UNITED STATES

ROBINSON, DAVID M.

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Petitioner

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v.

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No. 19-5661

WARDEN, FORT DIX FCI, ET AL.

Respondents

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PETITIONER'S MOTION FOR REHEARING  
PURSUANT TO SUPREME COURT RULE 44

NOW COMES the Petitioner, David M. Robinson, pro se, and moves this Honorable Court for Rehearing under Supreme Court Rule 44, of the denial of his Petition for Writ of Certiorari dated November 7, 2019, and in support thereof states the following:

I. PREFACE

Petitioner hereby seeks a writ of habeas corpus pursuant to 28 U.S.C. Section 2241. The following Motion for Rehearing is restricted to **OTHER SUBSTANTIAL GROUNDS** not previously presented, and it is presented in good faith and not for delay.

II. PROCEDURAL POSTURE

Petitioner inmate seeks a writ of habeas corpus under 28 U.S.C. Section 2241, claiming "actual innocence" and the fact that due to the extraordinary circumstances in his case, the

habeas motion under 28 U.S.C. Section 2255 has become "inadequate or ineffective" to test the legality of his detention. Specifically, the sentencing district court was deliberately indifferent to applicable law, and "unilaterally converted" his post-judgment motions, **WITHOUT CONSENT**, contrary to prevailing U.S. Supreme Court authority in Castro v. United States, 540 U.S. 375, 124 S.Ct. 786 (2003) as well as its own circuit precedent in In Re: George Salemo, 130 Fed.Appx. 564; 2005 U.S.App. LEXIS 8276 (3d. Cir. 2005). As a result of these procedural "plain errors", as a matter of law, Petitioner has **NEVER** filed his "first" Section 2255 motion to have his habeas claim of "actual innocence" adjudicated "on the merits" in either a motion under 28 U.S.C. Section 2255 nor 28 U.S.C. Section 2241.

The sentencing district court admitted that it committed procedural "plain error", on the record, in violation of Castro when it erroneously recharacterized Petitioner's prior collateral motion under FRCrimP Rule 12(b)(3)(B) [now Rule 12(b)(2)] as his "first" motion under Section 2255 without providing the requisite Castro notice and warning. Consequently, the designation of former FRCrimP Rule 12(b)(3)(B) was "void" as a matter of law. Subsequently, Petitioner filed a timely collateral motion under FRCivP Rule 60(b)(4) attacking his final judgment as "void" because his indictment failed to state a crime pursuant to Supreme Court law in Neder v. United States, 527 U.S. 1, 20, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). This time, the sentencing district court did provide the requisite Castro notice and warning as well as giving him the required opportunity to "agree" or "disagree" with the court's

intention to recharacterize the civil Rule 60(b)(4) motion as his "first" Section 2255 motion. In response, Petitioner timely notified the court objecting to its intention and specifically insisting that his Rule 60(b)(4) motion be treated and ruled upon "AS FILED". However, the court deliberately disregarded his response and proceeded to "unilaterally" convert this motion as his "first" Section 2255 motion. Such a conversion (without consent) must also be "voided" as the "first" such motion in this case.

Finally, Petitioner subsequently filed his "true" Section 2255 motion in 2013. This motion was timely filed pursuant to Castro as well as prevailing Third Circuit precedent in United States v. Miller, 197 F.3d 644 (3d Cir. 1999), and should have been treated as his "first" such motion and adjudicated on the merits. Id. Instead, the court once again ignored the mandates of Castro and "unilaterally" converted his "true" Section 2255 motion as being "successive" and time-barred under AEDPA's one-year limitations period. To reiterate, Petitioner has NEVER filed his "first" Section 2255 motion in this case! Why? Because of egregious procedural "plain errors" by the sentencing court in its numerous violations of mandates promulgated in Castro.

### III. STANDARDS OF REVIEW

A district court must notify a pro se litigant that it intends to recharacterize his pleading, warn the litigant that this recharacterization means that any subsequent 28 U.S.C. Section 2255 motion will be subject to the restrictions on "second or successive" motions, and provide the litigant an opportunity to

withdraw the motion or to amend it so that it contains all the habeas claims he believes he has. Under Third Circuit law in Miller, the litigant also has the alternative option to insist that the court ruled on his motion "as filed". If the court fails to do so, the motion cannot be considered to have become a Section 2255 motion for purposes of applying to later motions the law's "second or successive" restrictions. 28 U.S.C. Section 2255, para. 8; Castro v. United States, 540 U.S. 375, 124 S.Ct. 786 (2003).

Where a petitioner has **NEVER** filed a motion pursuant to 28 U.S.C. Section 2255, he does not need a federal court of appeals' authorization to proceed with such a motion. See, In re Salemo, 130 Fed. Appx. 564; 2005 U.S.App. LEXIS 8276 (3d. Cir. 2005). The rule of law under Salemo is limited to the extraordinary circumstances in that case consisting of the sentencing court's "plain" error in violation of Supreme Court authority in Castro. The "plain" error in Salemo is based on the same extraordinary circumstance that exist in Petitioner's case.

Pursuant to Salemo, Petitioner has never filed a motion pursuant to Section 2255 and he does not need a federal court of appeals' authorization to proceed with such a motion. Consequently, the dismissal of Petitioner's 2013 Section 2255 as "successive" was procedural "plain" error.

Despite the entry of a plea of guilty, if an indictment is so defective on its face as not to charge an offense under any reasonable construction, or, if it appears from the face of the

indictment that no federal offense has been committed, then not only is the indictment vulnerable to a collateral attack under 28 U.S.C. Section 2255 but the motion to vacate the judgment of conviction and sentence must be granted. Failure to do so results in a fundamental miscarriage of justice. See, Marteney v. United States, 216 F.2d 760 (10th Cir. 1954).

The provisions of the "safety clause" in Section 2255 provide an inadequate or ineffective remedy solution (and thus permitting petitioner to access habeas review under 28 U.S.C. Section 2241 when the petitioner claims to be 1) "actually innocent" of the crime(s) for which he has been convicted; and 2) has been "obstructed" from filing a Section 2255 motion as a direct result of "extraordinary circumstances" (including a Castro violation). See, Ivy v. Pontesso, 328 F.3d 1057; 2003 U.S.App. LEXIS 8135 (9th Cir. 2003); In re Salemo, supra.

#### IV. ARGUMENT

Petitioner respects Congress' intent to streamline collateral review and to discourage repetitive and piecemeal litigation, while at the same time give meaning to Congress' express decision (reaffirmed in the AEDPA) to preserve habeas corpus for federal prisoners in those extraordinary instances where justice demands it. See, Schlup v. Delo, 513 U.S. 298, 322, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995). The denial of Petitioner's Section 2241 petition negates Congress' intent!

The Third Circuit decision in In re Salemo is a mirror-image of certain facts and principles of law as the Petitioner's case. Salemo unsuccessfully sought to challenge his conviction

and sentence over the course of several years through the filing of a petition pursuant to Section 2241 and several applications for leave to file a second or successive motion under Section 2255. His requests were based solely on violations by the sentencing district court of the Supreme Court's mandates in Castro.

Salemo argued that, like Petitioner, he had been denied his constitutional and statutory right of access to the court as a result of the sentencing district court's improper recharacterization of his "non-Section 2255 motion" (FRCivP Rule 33 motion) as one filed under Section 2255. Thus, the appellate court must restore his right to challenge his conviction and sentence in a Section 2255 proceeding. The government CONCEDED that, under Castro, the sentencing district court acted improperly in recharacterizing Salemo's motion for a new trial as a motion under Section 2255, and that Salemo should therefore be permitted to file a Section 2255 motion in the district court. Accordingly, the government suggested that his requests for a "second or successive" Section 2255 motion should be denied as UNNECESSARY on the grounds that Salemo NEVER filed a previous Section 2255 motion because of the court's Castro error! The appellate courts agreed with this assertion. (Emphasis added). The government further asserted that, in the interest of justice, it would not raise a statute of limitations defense to a single, comprehensive Section 2255 motion filed in the future.

In the case at bar, Petitioner has made the same argument presented in Salemo: namely, that repeated violations of the mandates in Castro constitutes "extraordinary circumstances" which

"limit the scope or procedure of the Section 2255 remedy to test the legality of Petitioner's detention".

Arguably, there can be no doubt that the Section 2255 remedy has become "inadequate or ineffective" when Petitioner can show "on the record" that multiple violations of Castro by the the sentencing district court has denied his constitutional and statutory right of access to the court. Therefore, Petitioner's right of access must be restored, and that he be permitted to file the subject Section 2241 motion for an adjudication "on the merits" based on the same grounds alleged in his prior 2013 motion under Section 2255. To this end, it is **UNNECESSARY** for him to attempt to file a motion (at this late date) requesting the court of appeals to grant a "second or successive" motion under Section 2255. Such a motion would be denied because of the restrictions imposed by AEDPA on "second or successive" Section 2255 motions! In the interest of justice, Petitioner must be accorded access to the court to prove his "actual innocence" in this case.

#### **V. CONCLUSION**


Pursuant to Third Circuit precedent in In re Salemo, a Section 2255 remedy becomes "inadequate or ineffective" to test the legality of detention when petitioner claims to be "actually innocent" and has **NEVER** filed a prior Section 2255 motion solely as a result of violation by the sentencing district court of the mandates promulgated by the U.S. Supreme Court in its Castro decision.

WHEREFORE, the Petitioner, David M. Robinson, pro se, prays that this Honorable Court will **GRANT** his instant motion for rehearing of the denial of his habeas motion under 28 U.S.C. Section

2241 based on the numerous violations of Castro in this case,  
and for such other and further relief deemed necessary in the  
interest of justice.

Dated: October 12, 2019

Respectfully submitted,



David M. Robinson, pro se

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Petitioner

AFFIDAVIT

As to the foregoing, Petitioner swears that the facts  
hereto are correct to the best of his knowledge and belief under  
penalty of perjury as per 28 U.S.C. Section 1746.



David M. Robinson



### IMPERATIVE REASON TO GRANT THE WRIT

Petitioner argues that his case serves a textbook example of how a district court can harm a pro se litigant by violating the Supreme Court's mandates promulgated in Castro. Specifically, the writ of habeas corpus in his case has been judicially "suspended" in violation of the Constitution's Suspension Clause (Art. 1, Section 9, Clause 2). The decision denying any habeas corpus relief for Petitioner by the dismissal of his 28 U.S.C. Section 2241 petition based on jurisdictional grounds has foreclosed his constitutional right to seek habeas relief in a single Section 2255 or Section 2241 proceeding! Moreover, he has now been deprived a forum to attack his claim of "actual innocence".

The Third Circuit is correct in its dicta in the case of U.S. v. Miller, 197 F.3d 644; 1999 U.S.App. LEXIS 30721 (3d Cir. 1999) where it stated:

"The district court's act of conversion which we approved of under pre-[AEDPA] law because it was useful and harmless might, under the [AEDPA's] new law, become extraordinarily harmful to prisoner's rights. A prisoner convicted pursuant to unconstitutional proceedings, might lose the right to have a single petition for habeas corpus adjudicated, solely by reason of a district court's having incorrectly recharacterized some prior motion as one brought under Section 2255."

The Third Circuit's denial of Petitioner's motion under Section 2241 based on lack of jurisdiction paves the way for circumventing the mandates promulgated in Castro.

**The Third Circuit's denial of Petitioner's Section**