No. 21-6072

IN THE

SUPREME COURT OF THE UNITED STATES

PATSY N. SAKUMA - PETITIONER PRO SE

---

vs.

ASSOCIATION OF APARTMENT OWNERS –RESPONDENTS
OF THE TROPICS AT WAIKELE ET. AL

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

PATSY N. SAKUMA
Petitioner Pro Se
1232 Makaloa Street # 7
Honolulu, HI 96814
808-454-3171

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES CITED

Page No.(s.)

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rules of the Supreme Court of the United States

Federal Rules of Civil Procedure

OTHER

Pursuant to Supreme Court Rule 44.2, Patsy N. Sakuma, Petitioner Pro Se, respectfully petitions the Court for an order granting rehearing and vacating the Court's order denying certiorari in this case. By separate motion accompanying this petition, Petitioner Pro Se further requests that the Court defer consideration of this petition, pending the Court's decisions in *Kemp v. United States*, No. 21-5726, and *Dobbs v. Jackson W.H.O.*, No. 19-1392, which raised the same or similarly related issues in this case.

GROUNDS FOR REHEARING

1. Intervening circumstances of a substantial or controlling effect, or other substantial grounds not previously presented exist here.

This petition, coupled with a grant of the accompanying motion for deferred consideration, will present the civil side to the very important questions presented in *Kemp* and adds a bright-line test to resolve the *fifty- year* conflict dividing the court of appeals.

On January 10, 2022, the Court granted certiorari review to the petition in *Kemp v. United States*, No. 21-5726, and on that same day and on that same day it denied certiorari review to the petition in this case.

The question presented in *Kemp*, a criminal case, raises the same or similar issues in this civil case, and under Supr. Ct. R. 44.2, constitute intervening circumstances of substantial or controlling effect, or other substantial grounds not previously presented, which warrant rehearing of the order denying the petition for writ of certiorari in this case.

The question presented in *Kemp* is "whether Federal Rule of Civil Procedure 60(b)(1) authorizes relief based on a district court's error of law." Kemp Pet. at 1.

Respondent Government states it differently. The question presented is: whether the district court correctly denied petitioner's motion under FRCP 60(b), which sought relief from an earlier order dismissing his motion under 28 U.S.C. 2255 as untimely. BIO at 1.

Petitioner Pro Se's questions presented address the jurisdictional question in the law mistaken in *Kemp's* question presented, and which must go first in order to answer what Rule 60(b) motion applies to a district court's error of law.

Petitioner Pro Se's question presented is: "Whether a putative claim under 42 U.S.C. §1985(2), clause 2 for obstruction of justice in a state proceeding, like [a] state judicial foreclosure action, is jurisdictional because of its special jurisdictional provision 28 U.S.C §1343(a)(1), so that a federal court or judge must sua sponte raise it and/ or if imperfectly raised by a plaintiff pro se, who is also an attorney, giving the federal court or judge actual notice before dismissing an action at the pleading stage? " Pet. Pro Se Pet. at 1.

In *White v. Texas,* 309 U.S. 631 (1939), 310 U.S. 530, 531 &n.1 (1940), the Court stated that questions not presented in the original petition are not foreclosed upon rehearing, even though the statutory period for bringing a petition may have expired in the meantime. The Court's jurisdiction over the case is established by a timely petition for certiorari. The issues that may then or thereafter be considered depend solely on the discretion of the Court. *See,* B. Boskey, *Mechanics of the*

Supreme Court's Certiorari Jurisdiction, 46 Colum. L. Rev. 255, 261-264 (1946). Therefore, even if Petitioner Pro Se's question presented did not refer to Rule 60(b)(1) or mention that the courts of appeals' are divided on that question presented in *Kemp,* these factors alone should not preclude rehearing here.

2. <u>The 50-Year Conflict capable of repetition and evading review</u>.

Kemp maintains that the Government has conceded the fifty-year conflict. RB at 1. The court of appeals are aligned into three camps. At a minimum the split is 4-4-1. Contrary to the Government's position, Kemp contends the split is actually 4-4-4. *Id.*

Four circuits apply Rule 60(b)(1) consistently for a district court's judgment entered by mistake of law. RB at 2. The four circuits are: the Second, Sixth, Seventh, and Eleventh Circuits consistently apply Rule 60(b)(1) to provide relief from a judgment based on legal error, provided the motion is filled within the time to appeal or does not seek to circumvent that limit. Kemp. RB at 1.

Only one circuit, the First Circuit, rejects Rule 60(b) to correct a district court's legal error. *Id.* The First Circuit has consistently applied Rule 59(e)'s post-judgment tolling motion that must be filed within 28 days after the entry of the judgment. *Id.*

Two circuits, the Ninth and D.C. Circuit apply either Rule 60(b)(1) or 60(b)(6) depending on the circumstances in a case: Ninth Circuit applies Rule 60(b)(1) to errors on the law of the case and Rule 60(b)(6) for procedural or substantive mistakes of law. *Id.* Two circuits the Fifth and Tenth Circuits have held that Rule

60(b)(1) encompasses "obvious" legal errors, apparent on the record and apply Rule 60(b)(6) for mistakes of law. *Id.* Kemp maintains the Third, Fourth and Eighth, have joined the First Circuit and only apply Rule 60(b)(1) to correct a court's obvious mistakes of law. *Id.*

3. Both cases involve multiple mistakes of law, putative subject-matter jurisdiction, and the converting the Rule 60(b)(6) motion to 60(b)(1) to petitioners' detriment.

In many ways, this case mirrors *Kemp*. In both cases, the lower federal courts converted petitioners' FRCP Rule 60(b)(6) motion for multiple mistakes of law by the parties and the lower federal courts, substantively, and procedurally, to a Rule 60(b)(1) motion, and then denied relief in unpublished orders and opinions. Kemp Pet. at 4, 21; BIO at 8-9; Pet. Pro Se Pet. at 28-30. App. 1-2;3-8.

In both cases, there were multiple mistakes of law and procedure by the parties and the lower federal courts, substantive and procedural. Kemp Pet. at 21; BIO at 5-10; Pet. Pro Se Pet. at 25-30. In *Kemp,* the mistake of law that broke the camel's back was the district court miscalculating the starting date of the one-year limitation period under 28 U.S.C. § 2255(f)(1) using the start date in Supr. Ct. R. 13.1, 13.3,clause 1 and not 13.3, clause 2, to establish the district court's power to hear Kemp's §2255 motion on the merits for 9 instances of ineffective assistance of counsel to vacate his 35-year sentence. Kemp Pet. at 21; BIO at 5-10. Kemp did not appeal the denial of his §2255 motion. Kemp Pet. at 21; BIO at 21-22.

More than one year after the dismissal of his §2255 motion, Kemp brought a FRCP Rule 60(b)(6) motion to vacate that order. Kemp. Pet. at 8. BIO at 7-8. For

the first time, Kemp alleged that the district court made a legal mistake in not applying Supreme Court Rule (Supr. Ct.R.) 13.3, clause 2 to the §2255(f)(1)'s one-year deadline from the "final judgment of conviction," which term is undefined in §2255(f)(1). *Id.*

Sup. Ct. R. 13.3, clause 2, extends the time in which "a party may file a petition for writ of certiorari upon the conclusion of a petition for rehearing filed by any party in the lower court." Kemp Pet. at 10.

The district court denied the Rule 60(b)(6) motion. Because of an Eleventh circuit precedent, only Rule 60(b)(1) applies to a district court's mistake of law. The district court then converted Kemp's Rule 60(b)(6) motion to Rule 60(b)(1), which has a one-year limitation period under (c)(1), and found it untimely. Kemp Pet. at 9.

Therefore, Kemp maintains that the denial of his §2255 motion for untimeliness due to the district court's error of law was based only on untimeliness under Rule 60(c)(1) and Rule 60(b)(1). Kemp Pet. at 21-22. There was no ruling in the alternative on Kemp's Rule 60(b)(6) motion or the merits of his claims of ineffective assistance of counsel. Kemp Pet. at 22. What is more exceptional Kemp states is that the Government and Eleventh Circuit conceded that the district court made a mistake of law, and that his §2255 motion was timely but for the Eleventh Circuit's precedence. Kemp. Pet. at 21. Thus, Kemp asserts his case is the ideal vehicle for the Court to resolve this fifty-year conflict and to ensure that Rule 60(b) be evenly applied. Kemp Pet. at 19.

Petitioner Pro Se's Rule 60(b) case alleged multiple lower federal court mistakes of substantive and procedural law on the district court's failure to require a RICO Statement from Petitioner Pro Se and First Ninth Circuit Panel's failure to sua sponte raise her §1985(2) putative civil rights claim for conspiracy to obstruct justice in a state proceeding, party's mistake of law on the deadline to file the rehearing and en banc petition, and party litigation conduct in mistakenly choosing a late petition over three-timely filed ones. The Second Ninth Circuit Panel first converted Petitioner Pro Se's Rule 60(b)(6) motion to a Rule 60(b)(1) motion by eliminating her grounds of the lower federal courts' mistake of substantive and procedural law, under the doctrine of the law of the case and under Browder's limitation on appellate review without citing *Browder. Pet. Pro Se,* App. 1-2. *See, Browder v. Dir. Of Dept. Of Corrections, Ill.,* 434 U.S. 257, 263 n.7 (1978), as cited in *Banister v. Davis,* 140 S. Ct. 1698, 1710 (2020) stating that a denial of a Rule 60(b) motion brings up review of the grounds for the denial of the Rule 60(b) motion and not the underlying judgment.

Once the Second Panel had eliminated Petitioner Pro Se's contentions of the lower court's legal errors, they did not have to apply Ninth Circuit precedent, *In re Int'l Fibercom, Inc.*, 503 F.3d 933, 940 n. 7 (9th Cir. 2007), that would have required the Second Panel to apply Rule 60(b)(6)in this mixed case of the court's legal errors and a party's. Pet. Pro Se, App. 1-2, Kemp at 15. In *Int'l Fibercom,* the Ninth Circuit stated that Rule 60(b)(1) may apply to mistakes of "law of the case" that was proper in *Liberty Mut. Ins. Co v. EEOC,* 691 F.2d 438, 441 & n. 5 (9 th Cir. 1982). *Accord,*

Kemp. Pet. at 15. *See, also Molloy v. Wilson*, 878 F.2d 313, 316-17 (9th Cir. 1989)(vacating the judgment under Rule 60(b)(6) even if the mixed errors of attorney inadvertence and clerk of the court's legal error did not strictly constitute "any other basis," under the rule).

The Second Panel then found Petitioner Pro Se failed to establish "extraordinary" circumstance and applied Rule 60(b)(1) her mistakes of procedural law and litigation conduct. The Second Panel, however, concluded that: **1)** her mistake of imperfectly raising her putative §1985(2) claim was not the kind of mistake covered under Rule 60(b)(1), and cited *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F. 3d 1097, 1102-04 (9th Cir. 2006); and **2)** her alleged mistake of legal procedure in filing voluminous but unorganized documents to refute dismissal at the pleading stage, which she disputed, would not be considered under *School District No. 1 Multnomah, OR v. ACandS, Inc.*, 5 F. 3d 1255, 1262-63 (9th Cir. 1993), (rejecting voluminous and unorganized document filings to support affidavits on summary judgment in this asbestos lawsuit).

The putative subject-matter jurisdiction of the district court was established when on appeal the Government and the Eleventh Circuit conceded that Kemp's §2255 motion was timely. BIO at 9; Kemp's Pet. at 11.

The putative subject-matter jurisdiction in this case is Petitioner Pro Se's unlabeled, putative §1985(2) civil rights claim that parallels her state claim against Respondents for Unfair and Deceptive Acts and Practices and civil federal and state RICO claims in her first-amended verified complaint (FAVC), which was unlabeled

in the FAVC and which she imperfectly raised for the first time in her hearing and hearing en banc petitions in her first appeal No. 16-16791. Pet. Pro Se Pet. at 28-30.

4. The Kontrick-Rule 82 Solution

What the appeal of this converted Rule 60(b)(1) motion may lack in simplicity, it makes up for it in presenting a "**bright-line solution**" to *Kemp's* 50-year old conflict. Petitioner applied this bright-line solution in her Petition by adopting the process used in *Kontrick v. Ryan,* 540 U.S. 433 (2004). Pet. Pro Se Pet. at 25-30. In *Kontrick*, the Court had to determine whether a bankruptcy rule was jurisdictional or not in order to decide whether debtor's late objections to an out-of-time complaint filed by the creditor to object to his discharge were permissible or not. The Court in *Kontrick* further stated the bankruptcy rules are like the federal rule rules of civil procedure: **Rule 82 states: "the federal rules of civil procedure may not expand or limit the jurisdiction of the United States district courts.**" Only Congress can. Petitioner Pro Se dubs the *Kontrick* Court's legal analysis as the **"Kontrick-Rule 82 Solution."** It is a straight-forward test that resolves whether Rule 60(b)(1) applies to a court's mistake of law.

5. Step One of the Kontrick-Rule 82 Solution is apply Arbaugh's test for statutory jurisdiction to the "law" mistaken.

Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006), applied the following principle: A rule is jurisdictional "if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional. But if Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional." *Accord, Gonzales v. Thaler*, 565 U.S. 134, 142

(2012). In *Thaler*, the majority applied *Arbaugh's* test to determine whether similar statutes under the Anti-Terrorism Death Penalty Act (AEDPA), 28 U.S. §2253(c)(1), (2), and (3) are jurisdictional to ultimately determine if a state convicted defendant's habeas corpus petition under §2253(c) was timely filed. 565 U.S. at 648;

6. Step Two : Apply Rule 82

Determine if Rule 60(b)(1) and the one-year limitation under Rule 60(c)(1), as applied, expand or limit the statutory law. *See*, FRCP 82.

7. Step Three: If the law is jurisdictional then apply *U.S. v. Cotton.*

Arbaugh v. Y& H Corp., 500 U.S. 506, 514 (2005) citing *U.S. v. Cotton*, 535 U.S. 620, 630 (2002) states that subject-matter jurisdiction because it involves a court's power to hear a case may never be forfeited or waived. Therefore, mistakes of a party's litigation action going to subject-matter jurisdiction may not be mistakenly forfeited or waived. Pet. Pro Se Pet. at 26.

8. *Kontrick's* Rule 82 test is a bright-line test to resolve Kemp's Question Presented.

In *Kemp*, under the *Kontrick*- Rule 82 Solution, Rule 60(b)(1) fails. The one-year limitation under Rule 60(c)(1) limits a district court's jurisdiction to hear Kemp's now putative §2255 motion pursuant to the Government and Eleventh Circuit concession of timeliness on second appeal. Kemp, Pet. at 10-11. The issue of the court's mistake of law regarding calculating the start date of the final judgment of conviction under 28 U.S.C. §2255(f)(1) is or should be moot. Therefore, Rule 60(b)(1) and (c)(1), as applied violates §2255 because Kemp can assert the district court has jurisdiction pursuant to a putative §2255 claim. Under *Arbaugh* §2255 is

jurisdictional because it uses jurisdictional terms. Because §2255 is jurisdictional, Kemp could raise his objections after the Rule 60(b)(1)'s one-year deadline. The Rule 60(b) rule most favorable to Kemp should apply in order for Kemp to obtain justice. *See, Gonzales v. Crosby,* 545 U.S. 524, 542 (2005) quoting *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 864 (1988).

9. *Browder's* appellate limitation does not apply to mistakes of law that are jurisdictional under Rule 60(b)(1)

Again, *Browder's* limitation on an appeal of the denial of a Rule 60(b) motion, however, does not apply to an appeal of a Rule 60(b)(1) motion for relief based on a court's mistake of law. The reason is the word "law" is part of the definition of Rule 60(b)(1) motion." *See, United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 272 (2010)(the same for appeal of denial of Rule 60(b)(4) motion for void judgment).

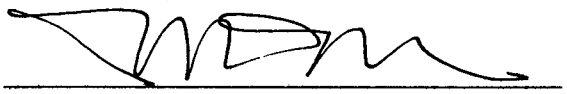
10. The Court's pending decision in *DOBBS v. W.H.O*

On December 9, 2022, the Court heard oral arguments in *Dobbs* and a decision in that case is expected sometime this spring.

The Court accepted certiorari only on the first question presented but not the second question presented in *Dobbs*. The second question presented in *Dobbs* was whether the petitioner "waived" his right to object to respondent Jackson W.H.O.'s third-party standing to bring the underlying action, based on the district court's jurisdiction over the 14th Amendment 28 U.S.C. §1343(a)(3). The Second Ninth Circuit Panel's Memorandum, therefore, in this case conflicts with the Court's December 9, 2021 announcement of not considering waiver of §1343(a)(3), since §1343(a)(3), is the jurisdictional sister of §1343(a)(1) at issue in this case.

rehearing should be granted and the order dismissing the petition for writ of certiorari should be vacated.

Respectfully submitted,



Patsy N. Sakuma
Petitioner Pro Se
1232 Makaloa Street #7
Honolulu, HI 96814
Telephone: (808) 454-3171

February 3, 2022