No. 22-6765

MAMBERTO, REAL

Petitioner,

v.

MICHAEL PERRY,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondent, MICHAEL PERRY, respectfully submits this Response in Opposition to the Petition for Writ of Certiorari, filed by Petitioner, MAMBERTO REAL who for relevant purposes as to this Brief's preparation, is proceeding *in forma pauperis*. The Petition for Writ of Certiorari should be denied because Petitioner has failed to raise any constitutional issue of sufficient import to justify use of this Honorable Court's time and resources, a split of authority between the United States court of appeals on the same important matter, or that any other criteria stated in the United States Supreme Court Rule 10 has been met.

COUNTERSTATEMENT OF THE FACTS AND OF THE CASE

This matter comes before this Honorable Court by way of the Petitioner's Petition for Writ of Certiorari, requesting review of the United States Court of Appeals for the Eleventh Circuit's decision in Mamberto Real v. Michael Perry, et al., No. 21-14496 (11th Cir. 2022). Therein, the Eleventh Circuit issued its Opinion of the Court affirming the United States District Court for the Middle District of Florida's denial of Petitioner's motion brought pursuant to Federal Rule of Civil Procedure 60(b)(2) for a new trial based on newly discovered evidence.

The facts relevant to this matter are as follows. On February 15, 2017, at approximately 12:40 a.m., Officer Michael Perry, a Police Officer with the City of Fort Myers, approached Petitioner's car where it was then alleged that Respondent, Officer Perry shined a flashlight into Petitioner's car, and abruptly yelled a racial

slur. It was further alleged that Officer Perry started counting, and when he reached five he removed his firearm from its holster and pointed it at Petitioner's face. The Second Amended Complaint then alleged Officer Adam J. Miller intervened and placed his body between the gun and Petitioner. Petitioner alleged that after he showed his hands were empty, brandishing no weapon and being of no threat to the Officers, Petitioner left the parking lot on his own, without injury or arrest. Officer Perry was the subject of an internal investigation and was exonerated of any wrongdoing.

Ultimately, this case arrived at a trial and a jury verdict was reached in the Respondent's favor on December 3, 2021, in less than an hour's time. No excessive force was used upon Petitioner and all claims brought by Petitioner failed entirely as they were without merit. On December 23, 2021, Petitioner filed his Notice of Appeal *pro se*. On January 13, 2022, Petitioner filed a motion with the district court for relief under Rule 60(b)(3) which was denied on February 28, 2022. Fourteen days after that order was issued, Petitioner then filed his motion on March 14, 2022, for relief under Rule 60(b)(2) raising for the first-time allegations that a juror and witness called by the Respondent, Dana Cuffe, engaged in conversations inappropriately. This motion was also denied by the district court on April 12, 2022. Petitioner's appeal was derived from that denial of his March 14, 2022, motion. No transcript of the trial proceedings was ordered or supplied by Petitioner and Petitioner's Initial Brief did not raise any objections or claims of error with how trial was conducted.

ARGUMENT

I. Petitioner Fails to Satisfy Rule 10

The granting of a petition for writ of certiorari is not a matter of right, but of sound judicial discretion; and a petition for a writ of certiorari will be granted only for compelling reasons. U.S. Supreme Court Rule 10. Specifically, Rule 10 states, with respect to the considerations this Honorable Court uses to determine whether or not to grant a petition for writ of certiorari:

> The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> 1. a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> 2. a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> 3. a state court or a United. States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

See also Fay v. Noia, 372 U.S. 391, 436 (1963) (the issuance of a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor); Rice v. Sioux City Memorial Park

Cemetery, Inc., 349 U.S. 70, 73 (1955) (given its discretionary power of review, this Court decided the case before it was not one in which there were special and important reasons for granting the writ of certiorari).

As this Honorable Court has further espoused:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Rice, 349 U.S. at 79 (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). See also Rowell v. Nevada., 511 U.S. 79, 86-87 (1994) (Thomas, J., dissenting) Cf. Magnum Import Co., Inc. v. Coty, 262 U.S. 159, 163 (1923) (jurisdiction to bring up cases by certiorari was not conferred on the Supreme Court merely to give the defeated party in the circuit court of appeals another hearing). Thus, the primary function of this Court on a Petition for a writ of certiorari is not to decide whether the court below correctly decided the case, but to determine whether the case raises legal issues of sufficient importance to the public to warrant this Honorable Court's review.

Even if a petition raises a substantial or interesting question, review should not be allowed unless legal issues of importance to the public are involved.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [citations omitted] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice, 349 U.S. at 74.

Respondent respectfully submits that Petitioner has failed to articulate, in their Petition for Writ of Certiorari or elsewhere, any reason that this Honorable Court should review the decisions of the Eleventh Circuit Court of Appeals. Instead, Petitioner attempts to re-argue his Rule 60(b)(2) motion and urges this court to act as "supervisory authority" to afford him relief. Simply disagreeing or finding your argument to be decided in a manner inconsistent with your desires is not an appropriate reason to be granted relief for Writ of Certiorari.

II. Petitioner Misstates Applicable Law

"Deference to the district court is particularly appropriate where a new trial is denied, and the jury's verdict is left undisturbed." *See McGinnis v. Am. Home Mortg. Servicing, Inc.*, 817 F.3d 1241, 1255 (11th Cir. 2016). "[The Eleventh Circuit] ha[s] made clear that '[m]otions for a new trial based on newly discovered evidence are highly disfavored' and 'should be granted only with great caution.'" *Dear*, 933 F.3d at 1301 (11th Cir. 2019) (quoting *United States v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006) (en banc)).

Under Rule 60(b)(2), a party is entitled to a new trial if it shows that: 1) evidence has been newly discovered; 2) the failure to discover the evidence was not caused by a lack of due diligence; 3) the evidence is not merely cumulative or impeaching; 4) the evidence is material; and 5) the evidence is such that a new trial would probably produce a new result. *See Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1316 (11th Cir. 2000). Under Rule 60(b)(2), the newly discovered

evidence must not be merely cumulative and impeaching, it must be material. *Id.* "Material evidence means: [t]hat quality of evidence which tends to influence the trier of fact because of its logical connection with the issue. Evidence which has an effective influence or bearing on a question in issue is 'material.'" *Hunnicutt v. Bd. of Regents of Univ. Sys. of Ga.*, 122 F.R.D. 605, 607 (M.D. Ga. 1988) (citing *Barr v. Dolphin Holding Corp.*, 141 N.Y.S. 2d 906, 908 (N.Y. Sup. Ct. 1955)).

The District Court properly denied Appellant's Rule 60(b)(2) motion as it wholly failed to establish the essential requirements for entitlement to relief based on newly discovered evidence. Petitioner has failed to raise any "newly discovered evidence" warranting a basis of granting his motion and merely raised an unsubstantiated suspicion that a juror may have spoken with a witness called by Respondent at trial – a fact which was alleged to have been seen by Petitioner's trial counsel as well, but was never an issue raised at trial, and not raised in Petitioner's initial motions for new trial that were likewise denied. The district court was well within its proper exercise of discretion in denying Petitioner's meritless request for relief under Rule 60(b)(2) filed March 14, 2022. Likewise, the United States Court of Appeals for the Eleventh Circuit properly noted the alleged "newly discovered evidence" was not in fact new because the jury rendered a verdict <u>after</u> Petitioner allegedly saw the witness with the jurors. As Petitioner had the opportunity to raise his concerns at trial but did not, his evidence did not qualify as newly discovered within the confines of Fed. R. Civ. P. 60(b)(2).

None of what is alleged to have occurred qualifies as "newly discovered

evidence" and thus, relief under Rule 60(b) was properly denied and well within the discretion of the district court. Even under a less stringent standard of review would Petitioner's argument fail. The suspicions and threadbare allegations that a conversation, of unknown context, took place between a witness and juror in and of itself does not on its face create a sufficient showing of substantial and irreparable prejudice being made. Nothing raised at trial by Petitioner or his counsel, or articulated in Petitioner's motions for relief pursuant to Rule 60(b) warrant reversal of the judgment entered by the district court, or that an abuse of discretion took place in denying said motions.

Further, in review of the Writ of Certiorari filed by the Petitioner he does not cite to, nor allude to any United States court of appeals decision which runs in conflict with the Opinion of the Court issued in this matter by the United States Court of Appeals for the Eleventh Circuit, or an important federal question of law that has not been, but should be , settled by this Court. Both the United States District Court and the Eleventh Circuit fully examined the record before them respectively, were briefed on all argument and relevant case law, and affirmed a decision in which ultimately rested within the broad discretion of the trial court. Given the stringent nature applied to a motion for new trial pursuant to Fed. R. Civ. P. 60(b)(2), Petitioner respectfully fails to even argue there was a misapplication of law, one that even if existed, still falls short of the extraordinary relief sought in this Petition for Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, Respondent, MICHAEL PERRY, respectfully requests that this Honorable Court deny Petitioner's Petitioner for Writ of Certiorari in this matter.

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