

NO 22-7031

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ANDREW DIEHL, PETITIONER
V.
UNITED STATES OF AMERICA

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

PETITIONERS REPLY BRIEF

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QUESTION PRESENTED

Reply To

Whether the lower courts correctly determined that petitioner is entitled to relief on his motion under Federal Rule of Civil Procedure 60 (b).

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OPINIONS BELOW

The opinion of the Court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is available at 2022 WL 19073965. The order of the district court (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the Court of appeals was entered on October 4, 2022. A petition for rehearing was denied on Dec 9, 2022 (Pet. App. C1). The Petition for writ of certiorari was filed March 8, 2023. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (2).

Petitioner's Reply

This is a Reply to the Brief For The United States In opposition. (Herein after Reply).

I.

In the Reply the government chose not to address petitioner's individual questions (Points), but instead posed a single question: Whether the lower courts correctly determined that petitioner is not entitled to relief on his motion under Fed. R. Civ. P 60(b). To be clear Petitioner's motion raised claims under Rule 60(b) and 60(d)(3).

II.

The government also mistakenly argues that only one of petitioner's raised claims were classified as true Rule 60(b) claims. See Reply brief p. 9. Both petitioner's Statute of limitation and ex post facto sentence claims were found to be 60(b) claims. The Reply argues what made the claim 60(b) was the fact an additional brief was filed and denied during the 2255 process and presumably this may have been procedural error that prevented a merits review.

III

The only merit review that took place on these two raised issues was the Court's statement "Dien's properly asserted Rule 60(b) claims are without merit and denied. A proper review is necessary as Petitioner's Petition for Certiorari explains on Page 7. See Fratta v. Davis, 2017 U.S. Dist. Lexis 152488 (S.D. TX, Sept 18 2017) (Court reviewed and rejected both claims on the merit.) Cited from Fratta v. Lumpkin, 2022 U.S. App. Lexis 258 (5th Cir, 2022). Neither the Statute of Limitations fraud claim or the ex post facto claims were evaluated properly on appeal where the record wasn't developed. See Trevino v. Thaler, 569 U.S. 413 (2013) (Ineffective counsel claims can be raised in second habeas despite AEDPA if appellate court did not provide meaningful review.) Petitioner has therefore been denied proper due process on these two issues.

IV

Procedural errors also caused the merits of petitioner's fraud claim not to be reached. In the statement of the case section of petitioner's petition for certiorary ^{En 2} he cites a slew of motions affecting discovery of fraud in this case. As demonstrated in the certiorary petition the fraud occurred on direct appeal and on 2255.

A quick review of these motions is necessary. After submitting several letters to petitioner's counsel and requesting case information and not getting it, Petitioner filed a motion to the court to get the information. Doc 200 on 7-23-2016. This request was misconstrued as a 2255 Rule 6 discovery request and denied. Petitioner's attorney contacted the government and said he was serving notice he was going to provide petitioner with his copy of the material. Petitioner also objected. Doc 205. ¹

¹ See United States v. Jordan, 2007 U.S. Dist. Lexis 45984 (6th Cir. 2007) (Government shall reveal and permit copying of all information and material known ... which may be favorable ... " Citing Rule 16 (a) (1) (A)-(F); Local Rule WDTX CR-16 agrees "Counsel may retain work product"

Petitioner also filed a motion For In camera Review (Doc 208). Judge Yenkel referred the motions to the magistrate who recommended the government provide a redacted inventory list. Doc #206. Petitioner filed a motion to stay his 2255 (Doc 209). The government provided a highly redacted list of inventory Doc 215. On 11-18 (Doc 216) Petitioner was ordered to justify the need for each item. Petitioner objected (Doc 220.) The Court responded saying the magistrates request was not "erroneous nor contrary to law" which it surely was. Petitioner filed an interlocutory appeal which was denied for want of jurisdiction. Doc 223, 236, 244. Following this Petitioner capitulated and did his best to justify based on the redacted list. Doc 246. In the First Report and Recommendation (Doc 253) the magistrate recommended denying any work product based on a laundry list of excuses. Petitioner submitted an amended 2255 adding three new grounds including the Fourth Amendment illegal search and seizure of Petitioner's equipment which again was used on appeal to uphold the conviction.

In the Second Report and Recommendation the justification for denying the work product became "Dichtl's prosecutorial misconduct claims are either based on legal theories the Fifth Circuit has rejected, or are otherwise legally baseless... Dichtl's arguments are an improper attempt to reopen and retry his case. Dichtl provides no explanation as to why some items ... are necessary to him." The court dismissed Petitioners 255, Doc 275. The government's motion to return discovery was granted (Doc No 202.) The in camera request was #208 was never formally ruled on. Despite objections (Doc 288, 289, 290) on 7-11-19 and prior to petitioner's appeal the court ordered petitioner's attorney to destroy his copy/work product. In the court's order (Doc 275) it was said petitioner was served with a copy. This was repeated in the government's 60(b) Reply Doc 301.

Since the government had repeatedly said the seized hard drives weren't decrypted, it made no sense that there was a file list in Item 0 of the inventory list. There was not enough detail to be sure what it represented.

Petitioner's Real Motion For Discovery

Per Rule 6

Petitioner's motion For Discovery #240 was also submitted shortly after Petitioner's first 2255 (#209). In the first Report and Recommendation #253 the discovery motion is briefly described as 1) a request for documentation concerning the limitation at §3283 from the United States 2) a declaration from the trial judge explaining his legal and factual findings (since it was altered on appeal) 3) Disclosure of what device decryption had taken place if any, 4) Particular discovery concerning government witness Ken Cavittory, 5) discovery concerning the origins of where exactly charged visual depictions were first found, and 1. Permission to depose petitioner's trial counsel. Petitioner's motion was backed up with extensive justification. The first Report dismissed the discovery request as a fishing expedition in one sentence.

Following petitioner's amended 2255, where three new grounds were added, the court did not refer #240. In place of any new ruling is a ruling on a completely different motion titled "First Petition For Particular FBI Report" #267. The court not ruling on #240 was an integrity error in the proceeding.

→ See United States v. Tenge, 2021 U.S. App. Lexis 31301 (10th Cir. 2021) (Remanded for procedural error under 60(k)); Urecland v. Zupan, 801 Fed. Appx. 629 (10th Cir. 2022) (wrongly decided procedural ruling precluded merits determination); Phelps v. Almeida, 569 F.3d 1120 (9th Cir. 2009) (Incorrectly applying per se rule was extraordinary circumstances.)

41(g)

In a separate Fed. R. Civ. P. Rule 41(g) motion the government lied when they were ordered to respond and name what equipment they seized. They said they had only what was named in the second warrant: 2 hard drives and 1 iPhone. This second warrant was drastically narrowed in scope from the first denied warrant. Petitioner knowing the government possessed his computer also filed a motion to return one Black Computer Doc 177 which the court denied Doc 178.

The result of this denial was that once again petitioner could not determine what could have produced the Inventory Item O list. See petition

for cert page 19.

FOIAS

Extensive FOIA requests were submitted to determine the same information. As the cert petition says, the FBI said they had a 4900 page file list, but subsequent FOIA's were all denied hiding behind exemptions.

Consequence

Since reproductions being "on the Internet" or found outside of Texas would not be sufficient evidence to convict, the illegally seized / non-evidence computer drives were critical to the governments case. See United States v. Lively, 852 F.3d 549, 559 (6th Cir. 2017); United States v. Downs, 56 F.4th 1314 (11th Cir. 2023) (reproductions by third parties don't trigger 18 USC 2251(a)'s nexus); United States v. Kloeber - (M.D. FL 2014) (His reproductions crossed state lines).

The foregoing facts were procedural errors that prevented a merits determination. The In Camera motion #208 and discovery motion #240 weren't even ruled upon.

Another procedural error involves the fact that the government wasn't even ordered to respond to Petitioner's amended 2255. See 2255 Rule 4(b)

"... if the motion is not dismissed, the judge must order the U.S. attorney to file an answer"

Furthermore, the government wasn't even given time to respond. The amendments included the Fourth Amendment violation as 2255 Ground 13.

Due to the government's injunction (Supra) the only copy of the item 0 discovery is destroyed. Only they now have a copy of a file list (Inventory item 0) which could prove outrageous fraud, as described in the Petition for Certiorary. Petitioner has done everything imaginable to develop the record from prison and without aid. See Mitchell v. United States, 958 F.3d 775 (9th Cir. 2019)

(District Court can consider motion for discovery per 60(b)(6) to develop potential Napue claim per Gonzalez if new evidence would have led to new claim) id 786. Here, fraud on the court.

Fraud

Petitioners Point 4 highlights the governments egregious on going fraud in this case and the government should not be permitted to take refuge behind the AEDPA. Most circuits are in agreement with this feeling. See Wogenstahl v. Warden, 2023 U.S. Dist. Lexis 44984 (S.D. Ohio 2023) (explaining the issue and citing circuits).

Here the fraud alleged greatly exceeds just withholding exculpatory evidence. In this case the government promised not to use illegally seized equipment twice: once in their response to a motion to suppress (10-19-10), and at trial. At trial they assured the court that the equipment wasn't necessary for a conviction and it wasn't entered as evidence. They assured the court that finding reproductions "on the internet" and outside of Texas was sufficient. This was based on a colossal misapplication of United States v. Ronyan which counsel's incompetence led to. On appeal and then again on 2255 the government through fraud misrepresented the courts original finding.

Consider the way Runyan is applied in their appeal brief, leaving off the fact it was he who was going to transport. The Fifth Circuit also ignored Petitioners raised issue. Per the government's recommendation the Fifth Circuit relied on the non-evidence hard drives.

On 2255 the government sought to Consolidate
1) They misrepresented the Courts Credibility finding. See government reply Doc 218 P. 13, 14, 22-23. The court specifically determined Courtnees testimony was if credible at all was limited to finding a visual depiction on the internet. 2) The government tried to allude petitioner produced the exhibits P. 7, "Digital copies of analog masters." 3) argued that the Fifth Circuit actually considered Petitioners raised ineffective Counsel issue on appeal P 5, 6, 12, then equivocating by saying, "such visual depiction" includes third party reproductions. 4) saying "Dient physically transported the videos ... when he physically shipped his computers to his ex-wife ... [FBI agent] p. 15.

The government has concealed what they seized, the file list, and elaborately violated Petitioners rights to due process. They have violated Petitioners Fourth Amendment.

Government COA Required Argument

Relying on Bracy Superintendant v. Rockview SCI 986 F.3d 274 (3rd Cir. 2020) the government argues that all circuits agree that a COA is required to appeal 60(b) motions. There is no cross-circuit agreement fraud on the court claims require a Certificate - see Field v. Johnson 197 F.3d 147 (5th 1999).

It's also the case that not all 60(b) motions are final orders on the merits, because as here, the merits on the 2255 grounds in Point 3 were never evaluated on their merits. They weren't evaluated on 2255, nor were they evaluated in the 60(b) process. The merits of the statute of limitation fraud claim and ex post facto claims at Cert Petition point 6 and 7 were also not given any convincing merit review. See Peach v. United States, 1468 F.3d 1269, 1271 (10th Cir. 2006); Saenu v. United States (11th Cir. 2018); United States v. Schmutzler, 2017 U.S. Dist. Lexis 108498 (3rd Cir 2017). These cases stand for the logical conclusion that ignoring legitimate 2255 grounds is an integrity issue Per Fed. R. Civ. R. Rule 60(b)(6).

United States v. McRae, 793 F.3d 392 (4th Cir 2015) is not distinguishable based on the fact the parties agreed a 606b was impermissibly successive (Reply p.14). The McRae court acknowledged that per Gonzalez, 545 U.S. at 524 and Harbison v. Bell, 556 U.S. 180 (2009) a Circuit Court could review a petition without issuing a COA, an order dismissing a Rule 606b motion as an improper successive habeas petition. Lex 13. Here 2255 counts Two, Four, Ten, Eleven, and Thirteen, and the fraud counts were all labeled successive. It shouldn't require a COA just to determine if that crucial categorization was correct. Its a jurisdictional question in large part.

Finally, the government alludes that because the Fifth Circuit denied a COA that "necessarily means that petitioner would not obtain relief even if his claims were entitled to merits consideration." Reply p. 14.

The Fifth Circuit has in the past been cited for failing to provide proper review under the COA standard, and COA isn't relevant here and now, because this wasn't a final order on the merits. Petitioner's claims are reasonably debatable.

CONCLUSION

The petition for a writ of Certiorari
should be affirmed.

Respectfully Submitted

David A. Diehl

David A. Diehl

7-18-2023