22-7519

No. 22A888 In Ref.

IN THE

SUPREME COURT OF THE UNITED STATES

Danny Rodriguez — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Danny Rodriguez #48128-004
(Your Name)

FCI Edgefield, P.O. Box 725
(Address)

Edgefield, SC 29824
(City, State, Zip Code)

N/A
(Phone Number)

D/R

QUESTION(S) PRESENTED

I. Whether it is a Structural Error for a District Judge to preside over proceedings that he has been directly recused from.

II. When the Circuit Court is presented with review of a sentence that is unquestionably, statutory illegal, does it require an automatic remand without consideration of how a District Court will exercise its discretion on remand.

III. Whether the Eleventh Circuit's ruling conflicts with the Court's decision in Garlotte v. Fordice, 515 U.S. 39 (1995).

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Rodriguez, 1:17-cr-20904-CMA (S.D. Fla)

United States v. Rodriguez, 22-22058-CIV-ALTARGA (S.D.Fla.)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 02/24/2023.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 3/29/2023, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including July 19, 2023 (date) on April 11, 2023 (date) in Application No. 22 A 888.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**: N/A

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment to the United States Constitution

18 U.S.C. §2255

STATEMENT OF THE CASE

In 1995, Mr. Rodriguez was convicted in the Southern District of Florida of two counts of being a Felon in Possession of a Firearm.

At sentencing. he was subject to the Armed Career Criminal Act ("ACCA"), which triggered a 15-year mandatory minimum. 18 U.S.C. §924(e). The Court sentenced him to 272 months. (Case No. 94-cr-402, DE 140).

In 2015, Rodriguez moved to correct his ACCA sentence under 28 U.S.C. §2255 (Case No. 15-cv-22901). He argued. and the government agreed, that he was no longer an armed career criminal in light of Johnson v. United States. 576 U.S. 591 (2015). Without the ACCA enhancement. he was subject to a ten-year statutory maximum. 18 U.S.C. §924(e)(2). And, because he had over-served that maximum by about a decade, he sought immediate release. The district court granted his motion. reduced his term of imprisonment to ten years, ordered hi release, and imposed a three-year term of supervision. (Cr. DE 200. 201).

In 2018. the district court found that Rodriguez violated his supervised release by committing drug and money-laundering offenses. (Cr. DE 213). At the revocation hearing, the court determined that the applicable guideline range was 30-37 months. and it asked the government for its position on an appropriate sentence. (Cr. De 221:4-5). The government responded that the sentence was

"really just academic because he has so much credit time served that no matter what Your Honor sentences him to, he did more time in his original case than he was legally supposed to". Id at 5. In other words, becasuse Rodriguez had over-served the maximum by about a decade, he had "a lot of time in the bank. More time than Your Honor can sentence him to". Id.

Defense counsel expressed his view that court could sentence Rodriguez up to 37 months imprisonment. Id at 5-6. And to "simplify things", defense counsel urged the court to "[m]ax him out to whatever you need to max him out to and let's close this case and you won't have to see him again". Id at 6. At that point, a probation office interjected that, while the guideline range was 30-37 months, the statutory maximum was only 24 months. Id at 7. Without explaining why, the court expressed the contrary view that the maximum was 37 months, and defense counsel agreed with the court. Id. The court added "that's what the Court of Appeals is for. I'm giving him 37 months". Id at 8. After pronouncing that sentence, defense counsel declined to object. Id. Rodriguexz appealed the sentence, but counsel subsequently advised him to voluntarily dismiss the appeal. (Cr. DE 214, 215, 223).

Critically, however, the 37-month was not "academic". The conduct underlying that sentence had already formed the basis of new criminal charges in a case before another judge in the district. Rodriguez ultimately pled guilty to those charges, and, in June 2019, the district court in that criminal case sentenced him to

400 months imprisonment. (Case No. 17-cr-20904, DE 471). Althought Rodriguez had about 9 years of banked time that could be credited toward that 400-month sentence, the 37-month sentence reduced that credit, thereby increasing the amount of prison time that he would have to serve.

In 2019, Rodriguez, through counsel, moved to vacate the 37-month sentence, pursuant to §2255. (Case No. 19-cv-23867, DE 1). He argued, inter alia, that he received ineffective assistance of counsel during the revocation proceeding because: counsel failed to properly calculate the statutory maximum; failed to object to that illegal sentence; and instructed Rodriguez to dismiss his direct appeal of the 37-month sentence. Id. at 4-5.

In response, the government did not address the merits or dispute that the 37-month sentence exceeded the 24-month statutory maximum. Instead, it argued that the district lacked subject matter jurisdiction over the §2255 motion because Rodriguez was not "in custody". (DE 14). Relying on Maleng v. Cook, 490 U.S. 488 (1989) (per curiam), the government argued that due to his banked time, Rodriguez completed the 37-month sentence the moment it was imposed, and so he was not "in custody" when he filed the §2255 motion. Id. at 4-5..

In reply, Rodriguez attached a document from the Bureau of Prisons ("BOP") showing that the "amount of credit time from his over sentence...can in fact be used by the [BOP] as credit in his new case". (DE 28:2). In response to his question about whether

the "remaining 2461 days [of banked time will] be credited to my new case sentence", a BOP official answered: "yes, you will receive credit". (DE 28, Exh. A.). Thus, Rodriguez argued that, due to the 37-month sentence, he was "being denied valuable gain time because for the second time, on the same case, he has been oversentenced". (DE 28:7). In other words, he would have to serve at least 13 extra months on his 400-month sentence.

The district court dismissed Rodriguez's §2255 motion for lack of jurisdiction. (DE 36). Relying on Maleng, the court held that Rodriguez was not "in custody". It agreed with the government that, due to the 9 years of banked time, Rodriguez completed the 37-month sentence the moment it was imposed and he was therefore not "in custody" on that sentence when he filed the §2255 motion. Id. at 5-6. But the court made no mention of the credit issue. Because it concluded that it lacked jurisdiction, it recognized that no COA was required. Id. at 7 (citing Hubbard, 379 F.3d at 1147).

Rodriguez moved pro se for reconsideration. (DE 42). He argued that Garlotte v. Fordice, 515 U.S. 39 (1995), not Maleng, controlled because, as in Garlotte, his 37-month sentence ran consecutive to his current 400-month sentence. Id. at 1-3. He attached BOP documentation confirming that fact. Id at 8. He further emphasized that the 37-month sentence "affected [his] current release date". Id at 4,6. He attached BOP documentation showing

that, by over-serving his original sentence, he had accrued 3,587 days (i.e. over 9 years) of credit, but that 1,126 days (i.e. 37 months) were applied to that credit. leaving him with 2,461 days of credit. Id at 12, 14, 16). Thus, he explained, if the court imposed the 24-month statutory maximum, he would receive 13 additional months of credit toward his current sentence. Id. at 4, 6).

The district court denied Rodriguez's motion, finding that he had repeated old arguments. (DE 48). Rodriguez appealed. (DE 37, 50).

The Court of Appeals affirmed the District Court and subsequently denied rehearing.

Finally, Rodriguez seeks this Courts review.

REASONS FOR GRANTING THE PETITION

In summary, discussed further below, the Court should Grant a Petition for Writ of Certiorari to answer these questions:

One - The United States Court of Appeals has decided an important question of Federal Law that has not been, but should be, settled by this Court, i.e., whether a United States District Court under an Order of Recusal, adjudicating and rendering judgment in the criminal matter it was recused from, constitutes a structural error, and warrants automatic reversal and vacating of the judgment.

Two - The United States Court of Appeals has departed from the accepted and usual course of Judicial proceedings, and/or sanctioned such a departue by a lower Court, as to call for an exercise of this Court's supervisary power. That is, the United States District Court under an order from the Chief Judge of recusal, adjudicated and imposed an undisputed illegal sentence, and yet again exercised unauthorized discretion to deny any post conviction review for lack of jurisdiction. The Court's supervisory power is needed to intervene and maintain Due Process of Law in our Criminal Justice System.

Third - The United States Court of Appeals has entered a decision in conflict with the Court's ruling in Garlotte v. Fordice, 515 U.S. 39 (1995). Although Petitioner has pushed the limits by presenting this Court with three questions, these questions are intertwined and are presented to this Court for a plea to exercise its supervisory power, to maintain fundamental fairness and maintain the accepted and usual course of Judicial proceedings. Accordingly, for the reasons discussed below, the Court should Grant review.

DISCUSSION

I.) The United States Court of Appeals For The Eleventh Circuit Sanctioned A Structural Error Of A Recused Judge Violating A Standing Order of Recusal

The United States District Court was undisputedly recused from all matters concerning the relevant Criminal Case. (See Appendix E). However, the Court violated that order and adjudicated in Section 2255 proceedings. It should be noted that the Government attempted to justify a violation of that order by arguing that a Section 2255 was not part of the criminal proceeding.

However, Judge Newson of the Appeals Court panel, firmly rejected that argument (See Appendix D, Page 9, 3rd¶).

The question now is whether, when the panel concluded that the District Judge was prohibited from sitting the bench in the matter, should the Court have remanded the matter back under the doctrine

of a structural error.

"Structural error" refers to a constitutional error which so deprives a defendant of 'basic protections' that the 'criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair". Rose v. Clark, 478 U.S. 570, 577-78, 106 S.Ct 3101 92 L.Ed.2d 460 (1986). Although they occur in a "very limited class of cases", Neder v. United States, 527 U.S. 1, 8, 119 S.Ct 1827, 144 L.Ed.2d 35 (1999), structural errors "defy analysis by 'harmless error' standards", Arizona v. Fulminante, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), and "necessitate automatic reversal", Neder, 527 U.S. at 8. In collateral proceedings, Courts look to "whether the [structural errors alleged....could have rendered [the] trial fundamentally unfair". McBee v. Grant, 763 F.2d 811, 818 (6th Cir. 1985).

A trial judge's bias, under certain circumstances, may constitute structural error. Neder, 527 U.S. at 8. The Supreme Court has held that due process entitles criminal defendants to a "fair trial in a fair tribunal...before a judge with no actual bias against the defendant or interest in the outcome of his particular case". Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); see Tanner v. United States, 483 U.S. 107, 126, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (holding that a fair tribunal must be "both impartial and mentally competent to afford a hearing"). The Supreme Court has set out "an objective standard that, in the usual case, avoids having to determine

whether actual basis is present", which instead of proof of subjective bias, asks whether "the average judge in his position is likely to be neutral or whether there is an unconstitutional potential for bias". William v. Pennsylvania, 579 U.S. 136 S.Ct. 1899, 1905, 195 L.Ed.2d 132 (2016) (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009)) (internal quotations omitted). Such bias "has traditionally been proved by citation to facts, external to the judicial proceedings in question, such as a judge's pecuniary or personal interest in the outcome of the proceedings before her". Mason v. Burton, 720 F.App'x 241, 245 (6th Cir. 2017) (citing In re Murchison, 349 U.S. 133, 142, 75 S.Ct. 623, 99 L.Ed 942 (1955)).

Recusal of a trial judge may be required even when a judge "has no actual bias", but "the probability of actual bias on the part of the judge or decisionmaker" is too high to be constitutionally tolerable'". Rippo, 137 S.Ct. at 907 (quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct 1456, 43 L.Ed.2d 712 (1975)); Coley v. Bagley, 706 F.3d 741, 752 (6th Cir. 2013) (stating that a petitioner had "to show an unconstitutionally high probability of actual bias" in part of the trial judge to prevail on claim that trial counsel was ineffective by failing to raise an argument that the trial judge should have recused herself). "To violate a defendant's right to a fair trial, 'a trial judge's intervention in the conduct of a criminal trial would have to reach a significant extent and be adverse to the defendant to a substantial degree'". McBee, 763 F.2d at 818 (quoting Daye v. Att'y Gen. of N.Y., 712 F.2d 1566, 1572 (2d Cir. 1983)).

There is no question here whether the District Court should have been recused. (See Appendix E). The question here is whether the District Judge committed a structural error by violating the recusal order.

Moreover, whether the statutory provisions governing recusal of District Judge's carries any weight or authority, or should it be discarded as an inconvenience.

In this case, rather than embrace a clear and undisputed structural error. the Panel inquired "is it possible that we just say" "hey look, the Judge never should have heard any of this", "We're going to remand it to a new judge and they can do the jurisdictioal thing afresh"? (See Appendix D-4, 7th Para.).

This Court's supervisory power is needed to answer not only is it possible to remand this case back, but because of the undisputed structural error that violated the Fifth Amendment's Due Process protection clause, it should be Mandatory.

Accordingly, the Court should take this case to answer the Appeals Court's questions and affirmitavely establish that 28 U.S.C. § 455 is a valid Law of Congress that should be recognized and when a Judge violates the Law, it constitutes a structural error that mandates vacation of the Judgment without further review.

II.) The Appeals Court Sanctioned A District Court's Leave Taking Of The Accepted And Unusual Course Of Judicial Proceedings

Notwithstanding the cloud of questionable jurisdiction and authority of an unquestionably recused District Judge that runs afoul of the United States Constitutional guarantee of Due Process and standing Laws of Congress, is the circumstance of the District Court imposing a statutory illegal sentence. Then (emphasis added) the District Judge effectively procedurally barred any correction of an illegal sentence for (emphasis added) "lack of jurisdiction".

The questions this Court must answer is, if the District Court admittedly exceeded its jurisdictional limits to impose an unlawful sentence: where would the Court get lawful jurisdiction to validate the sentence, by applying procedural barrs. Moreover, the Court should answer the question: does a jurisdiction barr apply to an illegal sentence, or can a challenge to an illegal sentence be raised at any time. In other words, does a jurisdictional defect protect an expired, illegal sentence that has a Liberty Interest of recognized, banked time.

Accordingly, the Court should exercise its supervisory authority to address these questions that have Constitutional and Nationwide significance.

III.) The United States Court of Appeals For The Eleventh Circuit Has Entered A Decision That Conflicts With This Court's Precedent On An Important Matter

As stated in the Statement of the Case, Petitioner over-served the original sentence by approximately 4,000 days (hereinafter "Banked Time"). While imposing the supervised release sentence, the Court exceeded the statutory limit by 13 months. Most importantly, in a new conviction which was the root of the supervised release violation, the Court made clear in the Statement of Reasons, it was intending to credit Petitioner all banked time left. However, the Appeals Court decided that because the District Court retained discretion, Petitioner could not establish a Liberty Interest and thus in-custody requirement.

That decision conflicts with this Court's decision in Garlotte v Fordice, 515 U.S. 39 (1995) (See Appendix G). In Garlotte at relevant part and in sum, the Court found that because the correction of illegality would shorten the accused's term of incarceration it implicated the core purpose of habeas corpus review. Which stands to reason, is to remove a unconstitutional and ongoing infringement on one's Liberty.

Importantly, the Facts in Garlotte allowed for the District Court to execute its discretion if the conviction was vacated. Therefore for the Eleventh Circuit to affirm the (emphasis added) illegal sentence, imposed by a recused Judge, because if the jurisdictional barr was rejected, the District Court would have discretion to formulate a new sentence is in direct conflict with this

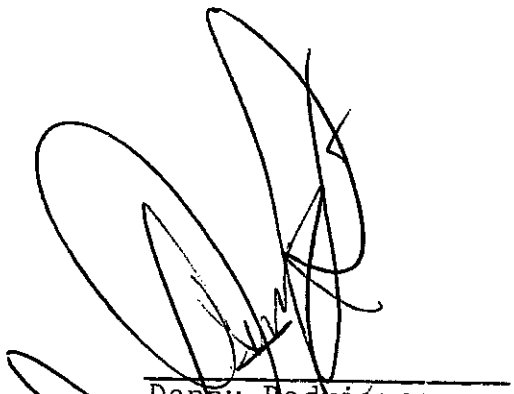
Court's ruling in Garlotte.

Accordingly, the Court should Grant review here to maintain uniformity and enforce its previous rulings.

CONCLUSION

For the Above Reasons The Court Should Grant Review Of This Case And Exercise Its Supervisory Power.

Respectfully submitted on 4|19|2023.



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