ORIGINAL

No. 23-5716

IN THE
SUPREME COURT OF THE UNITED STATES

JIMMY ZAVALA-PETITIONER,

VS.

UNITED STATES OF AMERICA , RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI

JIMMY ZAVALA, PRO SE
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QUESTIONS PRESENTED

1. When should the Federal Rule of Appellate Procedure 10(e) be recharacterized as a successive appeal?

2. Do the Federal Rules of Appellate Procedures: 3(c)(1)(B), 3(4),(5), 4(b)(1)(A)(i) merge a motion to Correct the Record under 10(e) decision with the final decision of the appeal at hand or with the first habeas petition?

LIST OF PARTIES

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Statutes

Rules

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION OF WRIT OF CERTIORARI

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

OPINIONS BELOW

The denial of rehearing of the United States Court of Appeals for the 5th Circuit appears at Appendix 1 to the petition and is unpublished.

The opinion of the United States Court of Appeals for the 5th Circuit appears at Appendix 2 and is unpublished.

The opinion of the United States Western District of Texas court appears at Appendix 3 and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was March 17th, 2023.

A timely petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit on April 17th 2023, and a copy of the order denying rehearing.

An extension of time to file the petition for a writ of certiorari was granted to petitioner on July 5th, 2023, in Application No. 22-50751, and extended to September 14th, 2023.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and Hohn v. United States, 524 U.S. 236 (1998) (holding that the United States Supreme Court has jurisdiction to review denials of applications for certificate of appealability.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Court should grant this petition of writ to address the issues requiring this Court's resolution concerning the application of AEDPA, the Federal Rule of Appellate Procedure 3, 4 and Federal Rule of Appellate Procedure 10(e), which will have significant implications on numerous petitioners. Review by this Court is "necessary to secure or maintain uniformity of the Court's decisions." The question is also one of "exceptional importance." as it provides uniformity with the first procedural steps and clarification on successive petitions when confronted with a habeas petition to correct the record under FRAP 10(e).

STATEMENT OF THE CASE

On August 20th, 2005, Appellant was convicted of 21 U.S.C. § 846 Conspiring to distribute and to possess with intent to distribute more than one kilogram of heroin and more than five kilograms of cocaine (Count One); 21 U.S.C. §841 Possession with intent to distribute five hundred or more grams of cocaine (Count Twenty-One); 18 U.S.C. §924(c) Conspiracy to possess, carry, and use of firearms in furtherance of a drug trafficking crime (Count Thirty) 18 U.S.C. § 924(c) Conspiracy to Use, possess, carry a firearm - drug -trafficking (Count Thirty-One) and 18 U.S.C. §924(C) Use, possess, carry a firearm during a drug trafficking crime (Count Thirty-Two); and 18 U.S.C. §1956 Money laundering (Count Thirty-Three). Appellant was found "not guilty" beyond a reasonable doubt of homicide by the jury for purposes of sentence enhancement. Appellant received life imprisonment for count one; a term of 480 months on count Twenty-One; terms of 240 months on Counts Thirty and Thirty-Three; a term of 60 months on County Thirty-One; and a term of 300 months on Count Thirty-Two.

In 2022, numerous records have come to light as missing, omitted or misstated in the record of case 5:04-cr-00425-OLG. Since petitioner did not have access to his records until 2022, once he received them, a motion was made to provide recollection within the F.R.A.P. 10(e) in place of the missing records and a request to supplement. The Western District of Texas denied the motion to correct the record on the merits. An appeal of the motion to Correct the Record under [1]F.R.A.P 10(e) was taken to the Court of Appeals for

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1

Petitioner is incarcerated and does not have access to either extra copies or to a copy machine, and limited legal materials, he is not able to include the following above referenced materials with this Certiorari.

the Fifth Circuit, in which it was construed as a successive petition, and then denied for lack of jurisdiction. Petitioner was warned for the successive petition.

REASONS FOR GRANTING THE PETITION

In light of the lack of clarity in the Federal Rules and the AEDPA, this Court should intervene to not only resolve these errors and conflict within the Fifth Circuit itself, but to provide some much needed clarity to the applicability of these rules. Below are questions that have created inconsistency within the circuits when applying federal rules on habeas petitions. I focus primarily on conflict within the 5th circuit itself, but this clarity is needed for circuits and habeas petitioners.

Doing so would provide consistency among the courts and would provide guidance to the unsuspecting and unsophisticated pro-se habeas petitioner on just how he is permitted to proceed. Without this Court's intervention, habeas petitioners will be left to guess at their peril the date on which the time to appeal commences to run," US. V. Ibarra, 122 S.ct. 4,6 (per curiam) (1991)(Banister v. Davis 140 S. Ct. 1698 (2020). The 5th circuit panel decision indicating they lack jurisdiction to entertain the appeal is inconsistent with fifth circuit precedent in numerous cases pertaining to appealable motions to Correct the Record 10(e) and is based upon incorrect application of F.R.A.P. 3 & 4. This decision is inconsistent with Supreme Court under the Rules Enabling Act, and Fifth Circuit precedent and conflicts with the authoritative decisions of other Courts of Appeals. It eliminates otherwise rightful appeals and narrows down the availability of

rules which erodes individuals' constitutional rights, in this sense, a litigant seeking to correct the record under F.R.A.P. 10(e).

For these reasons, Appellant pray this court grants certiorari.

When should the Federal Rule of Appellate Procedure 10(e) be recharacterized as a successive appeal?

In Banister v. Davis, the Supreme Court asserted, "[the AEDPA's] restrictions, like all statutes and rules pertaining to habeas, trump any 'inconsistent' Federal Rule of Civil Procedure otherwise applicable to habeas proceedings." The phrase "second or successive application," on which all this rides, is a "term of art," which "is not self-defining." Slack v. McDaniel , 529 U.S. 473, 486, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) ; Panetti v. Quarterman , 551 U.S. 930, 943, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007). We have often made clear that it does not "simply 'refer' " to all habeas filings made " 'second or successively in time,' " following an initial application.Magwood , 561 U.S. at 332, 130 S.Ct. 2788 (quoting Panetti , 551 U.S. at 944, 127 S.Ct. 2842 (alteration omitted)). Banister v. Davis, 140 S. Ct. 1698, 1705 (2020)

Recharacterization of motions as successive remains inconsistent across circuits, with outcomes varying depending on the circuit jurisdiction.

In my appeal of correcting the record, the Fifth Circuit construed the appeal (#22-50751) F.R.A.P 10(e) motion as successive, even though the Western District of Texas ruled on the merits. The Fifth circuit provided varying degrees within its circuit of handling habeas petitions of correcting the record. Other panels have treated F.R.A.P. 10(e) habeas petitions as appealable final orders and not successive.

In one of 5th Circuit decision, it was stated "In the terms of the quoted rule, something material to a party — the United States — was omitted from the record as filed. This was an account of the pre-trial conference, a conference that had in fact "occurred in the district court" and which was necessary to "truly disclose" what went on there. As soon as a "difference" arose over what occurred at that conference, a matter which became apparent with the filing of Page's opening brief to us, the United States promptly moved in the district court under Rule 10(e) to remedy the omission. The trial court conducted a hearing, with counsel for both sides present, and prepared a minute entry detailing what went on at the pre-trial conference. This is before us via supplemental transcript. United States v. Page, 661 F.2d 1080, 1081-82 (5th Cir. 1981) The predecessor of Rule 10(e), in virtually identical language, was applied by the Third Circuit to admit the trial court's statement of an important portion of the actual trial that had not been recorded by the court reporter. Marron v. Atlantic Refining Co.,176 F.2d 313 (1949), cert. denied, 339 U.S. 923, 70 S.Ct. 611, 94 L.Ed. 1345 (1950). And we have ourselves held proper for consideration on appeal a trial court's certificate describing events and circumstances, mostly of a non-verbal nature, that took place during a trial." Cockrell v. Ferrier,375 F.2d 889 (5th Cir. 1967). See 9 Moore's Federal Practice ¶ 210.08[1] (2d ed. 1948 Supp. 1980-81). United States v. Page, 661 F.2d 1080, 1082 (5th Cir. 1981) In this instance, F.R.A.P. 10(e) was allowed in a habeas proceeding.

Do the Federal Rules of Appellate Procedures: 3(c)(1)(B), 3(4),(5), 4(b)(1)(A)(i) merge a motion of FRAP 10(e) Correct the Record decision with the final decision of the appeal at hand or with the first habeas petition?

The Fifth Circuit, as well as other circuit precedent is to considers appeals of Federal Rule of Procedure 10(e), correcting the record, as conclusive decisions from the district court, and therefore within jurisdiction of the court of appeals as an appealable final order. The Court of Appeals for the 5th Circuit incorrectly applied Cunningham v. Hamilton County., Ohio, 527 U.S. 198, 204 (1999) which deals with petitions involving sanctions, and Perez v. Stephens, 784 F.3d 276, 280 (5th Cir. 2015) questioning its own jurisdiction.

The following cases of Rule 10(e) taken within the circuits.

"The purpose of Rule 10(e) is to ensure that the record on appeal accurately reflects what happened in the district court." Ghali v. United States, 455 Fed.Appx. 472, 476 (5th Cir. 2011). "Rule 10(e) is not designed to 'supply what might have been done [in the district court] but was not.'" Id.(quoting United States v. Page, 661 F.2d 1080, 1082 (5th Cir. 1981)).

Reich's motion is governed by Federal Rule of Appellate Procedure 10(e), which provides that this court "has the power to resolve a dispute over the record in the first instance." United States v. Zichettello, 208 F.3d 72, 93 (2d Cir. 2000) (interpreting Fed.R.App.P. 10(e)).

When a dispute concerning "whether the record truly discloses what occurred in the district court," Fed.R.App.P. 10(e), has been submitted to the district court, the court's determination is conclusive "absent a showing of intentional falsification or plain unreasonableness." United States v. Mori,444 F.2d 240, 246 (5th Cir.), cert. denied, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187 (1971). See J. Moore B. Ward, 9 Moore's Federal Practice ¶ 210.08[1], at 10-48 (1988). U.S. v. Serrano, 870 F.2d 1, 12 (1st Cir. 1989) see

also Brika, 416 F.3d at 529. United States v. Pagán-Ferrer, 736 F.3d 573, 582 (1st Cir. 2013)

The 5th circuit states "Our own court and one of our sister circuits have found dismissals for failure to move for authorization to file a successive application to be appealable final orders". In Spotville v. Cain, 149 F.3d 374, 375 (5th Cir. 1998) Graham v. Johnson, 168 F.3d 762, 774-75 (5th Cir. 1999)

The Court of Appeals for the 5th Circuit did not consider the 5th circuit precedent of Article III requirement of live case or controversy.

"Whether an appeal is moot is a jurisdictional matter, since it implicates the Article III requirement that there be a live case or controversy." Bailey v. Southerland,821 F.2d 277, 278 (5th Cir.1987). Under Article III's case-or-controversy requirement, "[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Lewis v. Cont'l Bank Corp.,494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. The parties must continue to have a personal stake in the outcome of the lawsuit." Spencer v. Kemna,523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (quoting Lewis,494 U.S. at 477–78, 110 S.Ct. 1249).

"Where a petitioner is incarcerated, a Habeas Petition that challenges a criminal conviction or a civil commitment order almost always presents a justiciable case or controversy, because the incarceration itself constitutes a concrete injury, which is, ordinarily, redressable by the invalidation of the conviction, or the civil commitment Order. Ayers v. Doth, 58 F. Supp. 2d 1028, 1033 (D. Minn. 1999)

The Court of Appeals for the 5th Circuit did not review the district order that presented meritable claims that were injurious.

Under the final judgment appealability rule, the district court presented meritable claims within the denial order for correcting the record. ""[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Id. (alteration in original) (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 442, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984))." United States v. Heredia-Holguin, 823 F.3d 337, 340 (5th Cir. 2016)

Court of Appeals for the 5th Circuit decision applied Federal Rule of Appellate Procedure 3 & 4.

Fifth Circuit:

The denial of Zavala's motion to correct the record, which related to his already-resolved appeal in another case, was not an appealable final order because it did not end the litigation of his prior § 2255 motion on the merits.

According to the Federal Rule of Appellate Procedure 3(c): Contents of the Notice of Appeal.

(1) The notice of appeal must:

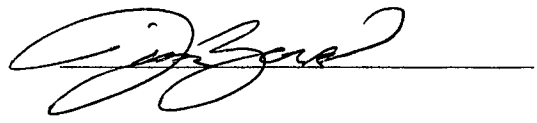
(B) designate the judgment—or the appealable order—from which the appeal is taken;

The Notice of Appeal designated the district order at docket#1552: Correcting the Record under F.R.A.P. 10(e) within the criminal case: 5:04-cr-00425-2. A motion to Correct the Record merges with the final judgment of the designated case, not the appeal. Furthermore, there are no other cases as the court states, only the designated criminal case: 5:04-cr-00425-2. Criminal Case 5:04-cr-0042502 ended on the merits, therefore, the motion to Correct the record was an appealable final order.

CONCLUSION

Not only does the 5th circuit decision create conflict with its own precedent, it will create conflict within the court, and among other circuits, causing confusion, inconsistency, while denying many with the ability to correct the record where omissions and misstatements are made. Every potential litigant who attempts to correct the record, could find their appeal mistakenly construed as succesive. The Constitution demands more. Based on the foregoing reasons, Appellant respectfully requests that this Court should grant the petition of writ of certiorari and settle these important questions of federal law.

Respectfully Submitted,



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