

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JESUS A. TINAJERO-PORRAS - Petitioner,

V.

UNITED STATES OF AMERICA - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

[1] Whether the Ruling of the Court of Appeals for the Tenth Circuit Err in Misreading the District Court's Conclusion that "Petitioner's 28 U.S.C. § 1651 was Denied," and thus was **not required** a Certificate of Appealability to Appeal such Common-Law Writ?

[2] Whether the Ruling of the Tenth Circuit Court of Appeals **Contradict** this Honorable Court's Ruling in **UNITED STATES v. MORGAN**, 346 U.S. 502 (1954), "that the enactment of 28 U.S.C. § 2255 **Does Not Bar** Federal Courts from considering Common-Law Writs?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Jesus Adolfo Tinajero-Porras, through PRO SE (hereinafter "Mr. Tinajero"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in Case No. 17-6108, entered on September 25, 2017. Mr. Tinajero's petition for rehearing EN BANC and petition for rehearing by the panel were denied on October 23, 2017.

OPINION BELOW

On September 25, 2017, a panel of the Court of Appeals entered its ruling affirming the denial of Mr. Tinajero's 28 U.S.C. § 2241. Mr. Tinajero filed a Writ of Error Audita Querela Pursuant to the ALL WRITS ACT under 28 U.S.C. § 1651

in the district court that sentence him, the Western District of Oklahoma, on March of 2017. The district court denied Mr. Tinajero's § 1651 and published its opinion under:

TINAJERO-PORRAS v. UNITED STATES, No. CR-06-115-R, 2017 U.S. Dist. LEXIS 65743 (W.D. Okla. May 1, 2017).

JURISDICTION

The Court of Appeals entered its judgment on September 25, 2017, and denied Mr. Tinajero's petition for rehearing EN BANC and petition for hearing by the panel on October 23, 2017. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1651 (ALL WRITS ACT - AUDITA QUERELA)

28 U.S.C. § 2255

28 U.S.C. § 2255(e)

OTHER AUTHORITY PROVISION INVOLVED:

U.S.S.G. § 1B1.3(a)(1)(B)

STATEMENT OF THE CASE

On or around May 17, 2006, a Grand Jury for the Western District of Oklahoma returned an Eleven (11) count indictment against Mr. Tinajero. Count One alleged that Mr. Tinajero had engaged in a conspiracy to possess with intent to distribute controlled substances, including 5 kilograms or more of COCAINE POWDER (not Crack Cocaine), a Schedule II controlled substance, and 1,000 kilograms or more of MARIJUANA, a Schedule I

controlled substance, in violation of 21 U.S.C. § 846. Counts Two, Three, and Nine alleged violations of 21 U.S.C. § 856(a)(2), that is, managing or controlling premises for the purpose of unlawfully storing and distributing controlled substances. Count Four alleged that Mr. Tinajero distributed TWO to THREE kilograms of COCAINE POWDER (not Crack Cocaine), a Schedule II controlled substance, per week to Robert McDaniel, a co-conspirator (but not a Co-Defendant) herein, in violation of 21 U.S.C. § 841(a)(1). Count Six alleged that Mr. Tinajero caused a money laundering financial transaction with drug proceeds, in violation of 18 U.S.C. § 1956(a)(1)(I) and (a)(1)(B)(I) and 18 U.S.C. § 2. Counts Seven and Ten charged Mr. Tinajero with specific distributions of marijuana, in violation of 21 U.S.C. § 841(a)(1). Counts Eight charged Mr. Tinajero with using a telephone to facilitate a drug trafficking offense, in violation of 21 U.S.C. § 843(b). Count 11 charged Mr. Tinajero with Possession of a Firearm after having been convicted of a felony, in violation of 18 U.S.S.G. § 922(g). The indictment also included criminal forfeiture of assets under 21 U.S.C. § 853. **However, the Indictment never charged Mr. Tinajero with Conspiracy to Possess and/or Distribute "COCAINE BASE."**

On September 14, 2006, a jury convicted Mr. Tinajero **only** of the drug charges arising out of a Conspiracy to Possess with intent to distribute 5 kilograms or more of COCAINE POWDER and 1,000 kilograms or more of Marijuana. Mr. Tinajero's Trial Counsel did not raise any objections to

the Pre-Sentence Report (PSR) prepared by the Probation Office and Mr. Tinajero was therefore sentenced to 30-years of imprisonment under the RELEVANT CONDUCT ENHANCEMENTS of § 1B1.3(a) (1) (B) of the U.S.S.G.

On Direct Appeal, Mr. Tinajero filed a Notice of Appeal from his judgment. On April 29, 2008, his conviction and sentence were affirmed by the Honorable Tenth Circuit. See, UNITED STATES v. TINAJERO-PORRAS, 275 Fed. Appx. 794 (10th Cir. 2008) (unpublished). On October 6, 2008, the U.S. Supreme Court denied his Writ of Certiorari.

On 2009, Mr. Tinajero filed a Motion under 28 U.S.C. § 2255. Among the grounds asserted for relief, Mr. Tinajero argued, that he received Ineffective Assistance of Counsel, based on the fact that his Trial Counsel's performance was unreasonable and had failed to object to the PSR, and had further failed to object to the drug quantities. On September 15, 2009, the Honorable District Court denied his motion.

On or around March of 2017, Mr. Tinajero filed his "All Writs Act Petition" under "Writ of Error Audita Querela (28 U.S.C. § 1651)" pursuant to this Court's ruling in UNITED STATES v. MORGAN, 346 U.S. 502 (1954). Mr. Tinajero argued that due to the Clarifying Amendment of the U.S.S.G., his judgment that was correct at the time rendered, --based on the District Court's understanding of a **TWO-STEP ANALYSIS** of

§ 1B1.3(a)(1)(B), as well as to the understanding of the Court of Appeals, including the Government's and that of the Defense Counsel--, had now been **INFIRMED** by matter which arise after its rendition; in this case, a **CLARIFYING AMENDMENT**.

On May 01, 2017, without ordering the Government to Respond to Mr. Tinajero's Petition, the Honorable District Court denied his Petition for a Writ of Error Audita Querela pursuant to 28 U.S.C. § 1651. It was the district court's **CONCLUSION**, that "Petitioner's Motion under 28 U.S.C. § 1651 is Denied..." See TINAJERO-PORRAS v. UNITED STATES, 2017 U.S. Dist. LEXIS 65743 (W.D. Okla. - May 1, 2017).

Thereafter, Mr. Tinajero filed an Appeal (and not a **Certificate of Appealability**) to the Denial of his ALL WRITS ACT PETITION under 28 U.S.C. § 1651, raising the following **Two Issues**:

- [1] Did the Decision of the District Court **Contradict** the Decision in United States v. Morgan,... that the enactment of 28 U.S.C. § 2255, **Did Not Bar** Federal Courts from considering Common-Law Writs?
- [2] Did the District Court Err in Denying Tinajero's All Writs Act Petition (Audita Querela), because it held that Tinajero had other remedies that he could exhaust, and thus did not have jurisdiction to entertain his All Writs Act Petition?

Nevertheless, the Tenth Circuit Court of Appeals ignored his arguments and held that Mr. Tinajero was in fact seeking a "Certificate of Appealability," when a COA is not required to Appeal a Petition under 28 U.S.C. § 1651 (Audita Querela).

Hence, this Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

First Argument:

[1] Whether the Ruling of the Court of Appeals for the Tenth Circuit Err in **Misreading** the District Court's **Conclusion** that "Petitioner's 28 U.S.C. § 1651 was Denied," and thus was **not required** a Certificate of Appealability to Appeal such Common-Law Writ?

The question whether Mr. Tinajero was required to seek a "Certificate of Appealability" to seek review of his ALL WRITS ACT PETITION under 28 U.S.C. § 1651 (Audita Querela), turns on whether the Tenth Circuit Court's panel decision **contradicted** its own holding in **UNITED STATES v. TORRES**, 282 F.3d 1241 (10th Cir. 2002) (A Certificate of Appealability is **not required** to appeal the dismissal of a petition for a Writ of Audita Querela). Id. 282 F.3d at 1247 [n.9]. Including the decision of the **Third Circuit** in **UNITED STATES v. BAPTISTE**, 223 F.3d 188 (3rd Cir. 2000) where the Court held that a "Certificate of Appealability is **not required** in order to seek review of Denial of a Petition for Coram Nobis under 28 U.S.C. § 1651." Id. 223 F.3d at 189 n.1.

Thus, this Honorable Court should GRANT Review to resolve the question of whether a Certificate of Appealability is required to Appeal the Dismissal of a Petition for a Writ of

Audita Querela pursuant to 28 U.S.C. § 1651.

SECOND QUESTION

[2] Whether the Ruling of the Tenth Circuit Court of Appeals **CONTRADICT** this Honorable Court's ruling in UNITED STATES v. MORGAN, 346 U.S. 502 (1954), "that the **ENACTMENT** of 28 U.S.C. § 2255 **Does Not Bar** Federal Courts from considering Common-Law Writs?

The question of grave importance herein, is whether the ruling of the Tenth Circuit Court of Appeals **CONTRADICTS** the Ruling of this Honorable Court in UNITED STATES v. MORGAN, supra, and whether MORGAN still stands as good law in the Federal Court System?

In MORGAN, this Honorable Court held that under Section 1651 of the Judicial Code, 28 U.S.C. § 1651 (All Writs Act), Federal Courts have jurisdiction to hear and adjudicate these Common Law Writ **regardless of the enactment** of 28 U.S.C. § 2255.

Audita Querela is an ancient Common Law Writ, which translated means "the complaint having been heard." **BLACK'S LAW DICTIONARY 150 (9th ed. 2009)**. According to Blackstone, Audita Querela originally issued following actions for debt: Where a defendant, against who judgment [was] recovered, and who [was] therefore in danger of execution, may be relieved upong good matter of discharge, which has happened since the

judgment: [such as situations in which] the plaintiff hath given [the judgment debtor] a general release; or if the [judgment debtor] hath paid the debt to the plaintiff, without procuring the satisfaction to be entered on the record.

WILLIAM BLACKSTONE, COMMENTARIES *405-06. The Writ was eventually extended to "like cases" where post-judgment circumstances provided the defendant "good matter to plead." Id. at *406.

The upshot was that some **Unanticipated Circumstances Arising Post-Judgment** made continuing enforcement of the judgment unfair. **"It would be contrary to justice,"** according to law practice, for a judgment to be enforced **"because of matters arising subsequent to the rendition thereof, or because of prior existing defenses which were not available to the judgment debtor in the original suit, by reason of the judgment creditor's fraudulent conduct, or through circumstances over which the judgment debtor had no control."** See **2 Ruling Case Law 1159** (William M. McKinney & Burdett A. Rich ed., 1914).

Thus, while the Writ of Audita Querela has been abolished in **CIVIL CASES**, the Tenth Circuit has indeed acknowledged that a petitioner may be able to invoke it to "afford post-conviction relief to a criminal defendant to challenge a conviction or sentence to the extent it fills gaps in the current system of Post-Conviction Relief." See, **UNITED STATES v. TORRES**, 282 F.3d

1241, 1245 n.6 (10th Cir. 2002). Nevertheless, the Tenth Circuit **[CONTRADICTS]** its own ruling when it **BARS** a defendant from proceeding with his Common-Law Writ because of the **ENACTMENT of 28 U.S.C. § 2255.**

This Honorable Court clearly held in **UNITED STATES v. MORGAN**, supra, that Federal Courts **STILL HAVE AUTHORITY** to issue Writs of Coram Nobis or **Audita Querelas** in collateral **[CRIMINAL PROCEEDINGS]**. Id. at 506-510. This Court initially noted that Rule 60(b) **governs ONLY Civil Proceedings.** Id. at 505 n.4. Hence, this Court **[EXPRESSLY REJECTED]** the argument that the federal habeas statute --28 U.S.C. § 2255-- had the effect of abolishing common law writs in **CRIMINAL PROCEEDINGS.** Id. at 511.

Furthermore, this Honorable Court emphasized that the "[C]ontinuation of litigation **AFTER** final judgment and exhaustion or waiver of any statutory right of review **[SHOULD BE ALLOWED]** through this extraordinary remedy only under circumstances compelling such action existing for failure to seek appropriate earlier relief, this Motion in the nature of the extraordinary writ of coram nobis **[MUST]** be heard by the Federal Trial Court." Id. at 512.

"OTHERWISE A WRONG MAY STAND UNCORRECTED WHICH THE AVAILABLE REMEDY WOULD RIGHT." Id.

Therefore, the District Court and the Court of Appeals for the Tenth Circuit **clearly erred in BARRING** the practice

of the ALL WRITS ACT pursuant to 28 U.S.C. § 1651 (Audita Querela) under MORGAN, by erroneously using the enactment of 28 U.S.C. § 2255, and its proceedings under subsection (e)'s "SAVINGS CLAUSE" (requirements of proving "INADEQUACY" or "INEFFECTIVENESS" to test the legality of a defendant's detention).

HENCE, contrary to the Tenth Circuit's conclusion, the enactment of 28 U.S.C. § 2255 [DOES NOT BAR] Mr. Tinajero from properly proceeding with his ALL WRIT ACT PETITION in the [Criminal Context] under UNITED STATES v. MORGAN, 346 U.S. 502, 98 L.Ed. 248, 74 S.Ct. 247 (1954). Mr. Tinajero has clearly shown that a GAP exist in this Criminal Context, based on the fact that his judgment has been clearly **informed** by the **Clarification** made by the U.S. Sentencing Commission. A clarification that can not be corrected under 28 U.S.C. § 2255(h)(2) and/or Section (e)'s [Savings Clause]. In fact no other remedy exist to correct this **grave error**.

Amendment 790 "restructure[d] the guideline and its commentary to set out more clearly the **THREE-STEP ANALYSIS** the court applies in determining whether a defendant is accountable for the conduct of others in a jointly undertaken criminal activity under [U.S.S.G.] § 1B1.3(a)(1)(B)." This was **NOT** a change in the law; it was a **CLARIFICATION** of the **EXISTING LAW**. A Law that many Federal Courts MISINTERPRETED, and thus **FORCED** the Sentencing Commission to Clarify the proper procedures in Amendment 790. "Such an Amendment

(like Amendment 790) **CHANGES NOTHING** concerning the legal effect of the guidelines, but merely **CLARIFIES** what the Commission deems the guidelines to **HAVE ALREADY MEANT.**" See, UNITED STATES v. SMAW, 306 U.S. App. D.C. 21; 22 F.3d 330, 333 (D.C. Cir. 1994); UNITED STATES v. CAPERS, 61 F.3d 1100, 1109 (4th Cir. Aug. 10, 1995); UNITED STATES v. KISSICK, 69 F.3d 1048, 1052 (10th Cir. - Nov. 6, 1995).

Thus, based on the fact that MORGAN still stands as the **LAW OF THE LAND**, the district court and court of appeals erred in barring Mr. Tinajero's ALL WRIT ACT PETITION under 28 U.S.C. § 1651 (Audita Querela), with the enactment of 28 U.S.C. § 2255.

CONCLUSION

For the foregoing reasons, Mr. Tinajero respectfully prays that this Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

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