

No. 17-867

In the Supreme Court of the United States

MARCUS E. BARROSO, ET AL.,

Petitioners,

v.

SHERIFF OF BEXAR COUNTY, TEXAS; BRYAN COLLIER,
EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE & BEXAR COUNTY, TEXAS,

Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**RESPONDENTS BEXAR COUNTY AND SHERIFF OF
BEXAR COUNTY'S BRIEF IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether Petitioner waived his appeal of the District Court's order, dated August 18, 2016,¹ and the Fifth Circuit Court of Appeals order, dated March 13, 2017,² by failing to brief the issues on appeal at the Fifth Circuit.
2. Whether Petitioner has raised any cognizable issue for review.
3. Whether Petitioner timely filed a Motion for Reconsideration pursuant to Federal Rule of Civil Procedure 59(e).³

¹ Record 1544-1553.

² App. 1a-2a. Note that references to "App." refer to the Appendix filed with the Petition for Writ of Certiorari.

³ Record 1143-1373.

LIST OF PARTIES

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<i>Scher v. Deutsche Bank Trust Co. Ams.</i> , 634 Fed. Appx. 435 (5th Cir. 2015)	4, 8
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STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The United States Court of Appeals for the Fifth Circuit issued an opinion, dated March 13, 2017, and denied Mr. Barroso's Petition for Panel Rehearing on April 24, 2017. Barroso filed his Petition for Writ of Certiorari on July 24, 2017. Per SUP. CT. R. 30, the Petition appears to have been timely filed within the 90-day deadline set by SUP. CT. R. 13, since July 23, 2017 was a Sunday.

STATEMENT OF THE CASE

Petitioner Marcus E. Barroso's ("Barroso" or "Petitioner") lawsuit arises from his allegation that he was unlawfully held in the Bexar County Adult Detention Center for 23 days after satisfying his criminal sentence. On October 20, 2015, Senior District Judge Harry Lee Hudspeth granted Respondents' motions for summary judgment and issued final judgment.⁴ Barroso subsequently filed a Motion to Disqualify Judge Hudspeth for bias, along with a timely motion to reconsider the grant of summary judgment.⁵ The case was reassigned to District Judge Xavier Rodriguez.⁶ Judge Rodriguez issued an order on December 15, 2015, denying Barroso's Motion for Reconsideration and finding summary judgment was properly granted by Judge Hudspeth on all claims.⁷

⁴ Record 1038-45.

⁵ Record 1047.

⁶ Record 1103.

⁷ Record 1130.

On January 9, 2016, Barroso filed what he styled as a Motion for New Trial, pursuant to Rule 59(a).⁸ On August 18, 2016, Judge Rodriguez issued an opinion and order, construing Barroso's motion as a second Motion for Reconsideration under Rule 59(e), denying the motion as untimely and further denying the motion on the merits.⁹ Barroso appealed the dismissal of his lawsuit to the United States Court of Appeals for the Fifth Circuit on August 31, 2016.¹⁰ The Court of Appeals granted, in part, a Motion to Dismiss on November 8, 2016, finding that Barroso failed to timely appeal summary judgment for Respondents.¹¹ On March 13, 2017, the Court of Appeals issued a *per curiam* decision affirming judgment for Respondents and the District Court's denial of relief under Fed. R. Civ. P. 59(e).¹² Barroso seeks review of that decision.

SUMMARY OF THE ARGUMENT

Petitioner has waived any appellate points he may have properly had before this Court. Petitioner failed to timely appeal summary judgment in the District Court, failed to address the timeliness issue at the Court of Appeals, and failed to identify these issues in the Petition for Certiorari. Thus, Petitioner has waived the only issues conceivably reviewable by this Court.

⁸ Record 1143.

⁹ Record 1544.

¹⁰ Record 1553-54.

¹¹ App. 3a.

¹² App. 1a-2a.

In addition, Petitioner fails to advance any issue that meets the criteria necessary to justify this Court's review. SUP. CT. R. 10. When viewing the Petition for Certiorari in conjunction with Petitioner's Brief at the Fifth Circuit and the Motion Requesting Call for Responses that Petitioner attempted to file, it is clear that Petitioner is unable to consistently and clearly articulate the issues he perceives as appropriate for review. SUP. CT. R. 14(4). The Rules of the Supreme Court provide that review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10. Barroso does not seek the review of any issue that meets the criteria for review before this Court. Petitioner does not present the issues for which he seeks review with "accuracy, brevity and clarity." SUP. CT. R. 14(4). Nor is there any confusion, ambiguity, or dispute among the circuits on the timelines for either appeals or Rule 59 motions.

With respect to the timeliness of Petitioner's Motion for New Trial, the applicable procedural rules are clear and unequivocal. Barroso asks this Court to second-guess the lower courts' application of well-established and uncontroversial rules of civil procedure. Accordingly, this Court should deny the Petition.

ARGUMENT

I. WAIVER

Failure to brief an issue as required by Fed. R. App. P. 28(a)(4) results in the waiver of that issue in the Appellate Court.¹³ Petitioner's brief does not address the issues raised by the District Court's ruling of August 18, 2016,¹⁴ briefing only the District Court's rulings on the dispositive motions,¹⁵ not the timeliness of his Motion for New Trial.¹⁶ Petitioner's briefing fails to address manifest error of law or fact, changes in the controlling law, or new evidence as related to the appealable order. As a result, since Petitioner did not brief any alleged errors in the District Court's ruling on appeal¹⁷ and the Fifth Circuit order dated November 8, 2016 specifically dismissed Petitioner's appeal, except for an appeal from the August 18, 2016 order, Petitioner waived his appeal and the Court should deny the Petition for Certiorari.

¹³ See *Scher v. Deutsche Bank Trust Co. Ams.*, 634 Fed. Appx. 435 (5th Cir. 2015); *In re Texas Mortg. Services Corp.*, 761 F.2d 1068, 1073 (5th Cir. Tex. 1985); *Smith v. State Farm Fire & Casualty Co.*, 695 F.2d 202, 206 (5th Cir. 1983); *Gaines v. Cuna Mut. Ins. Soc'y*, 681 F.2d 982, 985 n.3 (5th Cir. 1982); *In re Mun. Bond Reporting Antitrust Litig.*, 672 F.2d 436, 439 n.6 (5th Cir. 1982); *Cannon v. Teamsters & Chauffeurs Union*, 657 F.2d 173, 177-78 (7th Cir. 1981).

¹⁴ Record 1544-1553.

¹⁵ Record 1038-1046.

¹⁶ Record 1143-1373.

¹⁷ Record 1544-1553.

II. NO COGNIZABLE ISSUES

Barroso presents three questions for review in his Petition.¹⁸ The questions do not comply with SUP. CT. R. 14(4)—Petitioner fails to present the points requested for consideration with accuracy, brevity, and clarity. Petitioner ignores the issues that might potentially satisfy this Court’s cognizable issue requirement. First, just as he did at the Court of Appeals, Petitioner ignores the Fifth Circuit order dated November 8, 2016¹⁹ granting, in part, the Respondents’ Motion to Dismiss. Petitioner does not discuss the propriety of the District Court’s order dated August 18, 2016²⁰ or the Fifth Circuit’s decision affirming that order.²¹ Second, Petitioner does not address the timeliness of his second Motion for Reconsideration before the District Court. Third, Petitioner never addresses the proper basis for his second Rule 59 motion. In short, Petitioner has ignored the issues that might have been appealed, seeks review of other issues that cannot be appealed, and provides no compelling reasons for review under SUP. CT. R. 10.

Instead, Barroso seeks review of the District Court’s orders granting summary judgment for Respondents and denying Barroso’s first Motion for Reconsideration. These orders were issued on October 20, 2015²² and

¹⁸ App. i-ii.

¹⁹ App. 3a.

²⁰ App. 4a-15a.

²¹ App. 1a-2a.

²² App. 42a-47a

December 15, 2015²³, respectively. The District Court and the Court of Appeals both found that Barroso failed to timely challenge these orders.²⁴ When Barroso filed his Notice of Appeal on August 31, 2016, the only appealable order was the District Court's order of August 18, 2016. As the Fifth Circuit held, Petitioner's second Motion for Reconsideration was untimely as to the orders granting summary judgment, leaving only the August 18, 2016 order subject to a timely appeal.²⁵ Barroso has attempted to avoid this obvious truth by not addressing any cognizable issue related to the August 18, 2016 order before the Court of Appeals or in his Petition for Certiorari.

Federal Rule of Civil Procedure 59(e) states that “[a] motion to alter or amend the judgment must be filed no later than 28 days after the entry of judgment.” Rule 6(b)(2) precludes any extension of time to act under Rule 59(e). There is no dispute that following entry of summary judgment for Respondents, rather than filing an appeal, Petitioner filed a second Rule 59 motion—well outside the mandated deadline. Petitioner offers no authority or argument that there is a circuit split, ambiguity, or confusion regarding the timeliness provisions of Rule 59(e). Petitioner chose the wrong procedural device to challenge the District Court's judgment and attempts to circumvent this error by presenting inaccurate and confusing questions for review.

²³ App. 27a-39a.

²⁴ App. 1a-3a.

²⁵ *Id.*

III. TIMELINESS

As recognized by the Fifth Circuit, the Petitioner's Motion for New Trial²⁶ was not timely. Per Fed. R. Civ. P. 59(b), "[a] motion for new trial must be filed no later than 28 days after the entry of judgment." The same deadline applies to a Motion to Alter or Amend a Judgment.²⁷

The District Court granted the Respondents' dispositive motions and denied Petitioner's dispositive motions on October 20, 2015.²⁸ Petitioner filed a Motion for Reconsideration,²⁹ under Fed. R. Civ. P. 59, on October 26, 2015. The District Court denied Petitioner's Motion for Reconsideration on December 15, 2015.³⁰ The District Court correctly evaluated Petitioner's Motion for New Trial as a motion under Fed. R. Civ. P. 59(e).³¹ However, for purposes of evaluating timeliness, it does not matter whether Petition sought relief under Fed. R. Civ. P. 59(a) or (e). The deadline is the same. Rather than appealing the District Court's ruling, Petitioner filed a Motion for

²⁶ Record 1143-1373.

²⁷ FED. R. CIV. P. 59(b) and (e).

²⁸ Record 1038-1046.

²⁹ Record 1047-1094.

³⁰ Record 1130-1140.

³¹ As the District Court notes in the order of August 18, 2016 (Record 1546), a Motion for New Trial is not the proper method for challenging an order granting summary judgment. The proper vehicle is a motion filed pursuant to Fed. R. Civ. P. 59(e), a Motion to Alter or Amend a Judgment.

New Trial³² pursuant to Fed. R. Civ. P. 59 and 60, on January 9, 2016. This was Petitioner's second attempt to set aside the District Court's adverse ruling under Fed. R. Civ. P. 59. Petitioner's deadline to file a Motion for New Trial or Motion to Modify Judgment was 28 days from October 20, 2015, which expired on November 17, 2015. Petitioner filed the Motion for New Trial fifty-three days late. Regardless of Petitioner's efforts to avoid the time demands of Rule 6(b)(2), this deadline cannot be extended.³³

Again, it appears Petitioner has failed to brief these appealable issues and has waived them.³⁴ As stated in the Fifth Circuit order dated November 8, 2016, "We find Plaintiffs did not timely appeal the grant of summary judgment and GRANT the motion to dismiss that appeal for want of jurisdiction, but that the appeal from the district court's August 18, 2016 order was timely..."³⁵ In this Court, Petitioner has not briefed, and does not seek review of, any appellate issues pertaining to the August 18, 2016 order. Accordingly, this Court should deny the Petition for Writ of Certiorari.

³² Record 1143-1373.

³³ Fed. R. Civ. P. 6(b)(2).

³⁴ *Scher v. Deutsche Bank Trust Co. Ams.*, 634 Fed. Appx. 435 (5th Cir. 2015); *In re Texas Mortg. Services Corp.*, 761 F.2d 1068, 1073 (5th Cir. Tex. 1985); *Smith v. State Farm Fire & Casualty Co.*, 695 F.2d 202, 206 (5th Cir. 1983); *Gaines v. Cuna Mut. Ins. Soc'y*, 681 F.2d 982, 985 n.3 (5th Cir. 1982); *In re Mun. Bond Reporting Antitrust Litig.*, 672 F.2d 436, 439 n.6 (5th Cir. 1982); *Cannon v. Teamsters & Chauffeurs Union*, 657 F.2d 173, 177-78 (7th Cir. 1981).

³⁵ App. 3a

CONCLUSION

Petitioner waived his right to appeal by failing to brief the proper issues at the Fifth Circuit, failed to present any cognizable issues for this Court to review, and failed to timely file his second Rule 59 motion in the District Court. Respondents Bexar County, Texas and Sheriff of Bexar County respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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