

In the Supreme Court of the United States

MARCUS E. BARROSO, TWELVE JOHN DOES,
TWELVE JAY DOES, TWELVE JOE DOES,
and TWELVE JEFF DOES,

Petitioners,

—v—

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

Respondents.

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

REPLY BRIEF OF PETITIONERS

WILLIAM R. SCHLECHT
COUNSEL FOR PETITIONERS
ROGERS SCHLECHT PLLC
221 WEST 48TH STREET, SUITE 1801
KANSAS CITY, MO 64112-4017
(210) 216-8725
WILLIAM.SCHLECHT@ATT.NET

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¹ No amendment is needed to the notation in the Petition that no corporate disclosure statement is required pursuant to Supreme Court Rule 29.6.

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REPLY BRIEF OF PETITIONERS

Respondents have elected not to address any of the substantive reasons for granting the Petition, limiting their brief to these three questions:

1. Whether Petitioners waived their appeal.
2. Whether Petitioners raised any cognizable issue for review.
3. Whether Petitioners timely filed their motion for new trial.

Their objections are based solely on the timeliness of Petitioners' January 9, 2016 motion for new trial. County Respondents also contend that Petitioners failed to brief the timeliness issue and thereby waived all substantive issues before this Court.

I. NO WAIVER-TIMELINESS ISSUE WAS THOROUGHLY BRIEFED IN THE JURISDICTION SECTION OF THE PETITION

County Respondents argue that Petitioners waived all issues raised in this appeal by failing to brief the timeliness of their January 9, 2016 motion for new trial.

County Respondents overlook pages 2 and 3 of the Petition setting forth Petitioners' brief of the timeliness issue. Petitioners also briefed the timeliness issue before Judge Rodriguez and before the Fifth Circuit:

- Plaintiffs' Reply to Defendants' Joint Response to Plaintiffs' Motion for New Trial and to Take Testimony, p. 6 (Jan. 17, 2016);

- Brief of Plaintiffs-Appellants, pp. 1-2 (Dec. 13, 2016); Appellants' Response in Opposition to Appellees' Joint Motion to Strike Appellants' Notice of Appeal and to Dismiss Appeal. pp. 1-9 (Sept. 27, 2016);
- Reply Brief of Plaintiffs-Appellants, pp. 7-11 (Feb. 6, 2017); Appellants' Petition for Rehearing En Banc, pp. 3-4, 9, 12, and 20 (Mar. 27, 2017).

II. COGNIZABLE ISSUES ARE RAISED

Respondents assert that any challenge to Senior United States District Judge Harry Hudspeth's October 20, 2015 dispositive orders is time-barred and that Petitioners only challenge those orders and not United States District Judge Xavier Rodriguez's August 18, 2016 order reinstating those orders. Petitioners will address Respondents' timeliness argument in Section III.

Contrary to Respondents' assertion, all of the substantive issues raised by Petitioners relate to Judge Rodriguez's August 18, 2016 order and not to the otherwise dispositive orders of Senior Judge Hudspeth who had been disqualified for bias ten months earlier.

Petitioners are not appealing the disqualified judge's orders. Petitioners are instead appealing the successor judge's decision to reverse the chief judge's disqualification order and effectively reinstate the disqualified judge's orders. Petitioners argue, for example, that the successor judge lacked the judicial power to overturn the disqualification order *sua sponte*.

Pet. at 12.² Petitioners also argue that the successor judge's decision should be reversed in any event, either because it is erroneous in and of itself or because it effectively affirms or reinstates orders that should be considered void because they were issued by a judge who was disqualified for bias shown, in part, by those dispositive orders. *See* Affidavit of Petitioners' counsel at pp. 3-4 referring to "Orders" set forth in the related motion to disqualify judge for bias. R. 1062-1063.³ Also at issue are whether a disqualification order must set forth findings of fact to be effective and whether summary judgment was appropriate where disputed facts remain⁴ and Petitioners were not allowed to complete discovery. Pet. at 6-11.

² Cites to "Pet." refer to the Petition for Writ of Certiorari submitted on July 24, 2017.

³ Cites to "R." refer to the district court clerk's record, submitted to the Fifth Circuit as the Electronic Record on Appeal.

⁴ In granting summary judgment, the successor judge found as indisputable that there was no custom or practice of transferring similarly situated inmates from the county jail to a state detention facility for release. This finding contradicts uncontested written and oral communications to that effect made by County Jail representatives to Plaintiffs' counsel (R. at 1054), language in a state-mandated form sent by order of the District Court to the state for review in light of the contradiction (R. at 128-129), and by seven communications by sheriff's deputies to Mr. Barroso to the same effect in response to grievances submitted by Mr. Barroso (R. at 1057).

III. “SECOND” MOTION FOR RECONSIDERATION WAS TIMELY

The following timeline highlights the punctuality of Petitioners’ challenges to decisions of both the disqualified judge and the successor judge:

- October 20, 2015:
Senior judge’s dispositive orders⁵ R. at 1046.
- October 26, 2015:
Petitioners’ motion to disqualify senior judge and motions (collectively, “first motion”) for reconsideration of the dispositive orders. R. at 1047.
- October 30, 2015:
Chief Judge’s order granting Petitioners’ motion to disqualify senior judge. R. at 1103. Case assigned to successor judge for further action. R. at 17.
- November 4-5, 2015:
Respondents’ responses to Petitioners’ first motion for reconsideration. R. at 1104, 1107.

⁵ ORDER GRANTING Respondent Collier’s Amended Motion for Summary Judgment, and the other Respondents’ Motion for Summary Judgment; and DENYING Petitioner Barroso’s Motions for Summary Judgment. Motions No Longer Referred: Respondent Collier’s and the other Respondents’ Motions to Quash Plaintiffs’ Discovery Requests. JUDGMENT in favor of Defendants. ORDER DENYING Petitioner Barroso’s Motion for Default Judgment against Respondent Collier. R. at 1038.

- November 18, 2015:

The successor judge’s “Text Order TAKING UNDER ADVISEMENT [Petitioners’ first] motion for reconsideration. . . . In light of [advisories filed by Petitioner and Respondent Collier], the Court instructs [the other Respondents] to file an advisory in response with an estimate of how much time is needed for the hearing.” R. at 17.

- December 15 2015:

Order denying Petitioners’ motion to disqualify judge and first motion for reconsideration. R. at 1130.

- January 9, 2016:

Petitioners’ Motion for New Trial (sometimes referred to herein as Petitioners’ second motion for reconsideration).⁶ R. at 1143.

- January 13, 2016:

The successor judge’s “Text Order TAKING UNDER ADVISEMENT [Petitioners’] Motion for New Trial . . . [Respondents] are ordered to file a response to this motion. [Respondents] should specifically address why the March order appears to have an 0320 date stamp for filing, however, the Order does not

⁶ Petitioners entitled their motion as a motion for new trial pursuant to Fed. R. Civ. P. 59(a)(1), rather than a motion to amend judgment pursuant to Fed. R. Civ. P. 59(e). The court construed the motion as a motion to amend judgment.

seem to appear on the electronic docket sheet.” ⁷ R. at 18-19.

- April 6, 2016:

Text order transferring Petitioners’ Motion for New Trial to a United States magistrate. R. at 20.

- April 18, 2016:

The magistrate’s memorandum recommending the denial of Petitioners’ Motion for New Trial. R. at 1452.

- April 29, 2016:

Petitioners’ objections to the magistrate’s memorandum and recommendation. R. at 1469.

⁷ The file date on the March order supports Petitioners’ contention that Respondents recklessly or wantonly failed to confirm with the District Clerk’s office that Respondent Barroso was being incarcerated despite having served his sentence. Furthermore, the publicly available official electronic docket sheet reflects that “offender record” and “charge record” were transferred by the District Clerk to “VINE” while Petitioner Barroso continued to be incarcerated. The court did not allow Petitioners to confirm the logical conclusion that these references meant that the March 18 sentencing order was readily available to Respondent Sheriff and her counsel during the entire 15-month period opposing counsel were insisting that all Respondents were exonerated because the sentencing judge had inexplicably delayed signing any sentencing order. This fact would lend support to Petitioners’ motion for sanctions against Respondents and their counsel for their misrepresentations in pleadings and discovery responses. The disqualified judge denied Petitioners’ motion for sanctions and threatened Petitioners’ counsel with sanctions for bringing frivolous motions.

- August 18, 2016:
Successor judge's order accepting the magistrate's recommendation. R. at 1544.
- August 31, 2016:
Petitioners' Notice of Appeal. R. at 21.

Respondent Collier argues, and the court found, that the second motion for reconsideration was untimely because it was filed 53 days (*i.e.*, more than 28 days) after the disqualified judge's dispositive orders.⁸ *See* Respondents' January 15, 2016 joint response to the second motion for reconsideration. R. at 1374-1375.

This analysis, however, ignores the effect of the intervening events: (1) Petitioners' first motion for reconsideration, filed six days following the first set of dispositive orders; (2) disqualification of the judge who issued the orders, entered 10 days following the orders; (3) contemporaneous assignment of the case to a successor judge for further action; and (4) the successor judge's text order taking the first motion for reconsideration under advisement, entered 29 days following assignment of the case to him.

The text order, by happenstance, was entered 29 days following the disqualified judge's dispositive orders (*i.e.*, within the 30-day period for appealing the orders absent disqualification of the judge).⁹ This

⁸ Motions for new trial (Fed. R. Civ. P. 59(b)) and motions to amend (Fed. R. Civ. P. 59(e)) must be brought no later than 28 days after entry of the judgment.

⁹ The Federal Rules of Appellate Procedure provide that a notice of appeal must be brought within 30 days after entry of the judg-

alone is sufficient to defeat Respondents' challenge on timeliness grounds. Petitioners would otherwise be required to file an appeal at a time when the decision appealed from is either void due to the disqualification order or indeterminate due to the active review of the decision by the successor judge. Moreover, it makes no sense to include in the 28-day calculation for filing a second motion for reconsideration, the 10 days before Petitioners' secured disqualification of the issuing judge, or the 16 days between the disqualification order and its reversal by the judge to whom the case was transferred following disqualification of the first judge.



INTERIM CASE

Summary judgment was based on the court's ruling that Mr. Barroso could be incarcerated indefinitely as a matter of law until a written judgment adjudicating guilt that was supposed to memorialize the actual sentence entered at the sentencing hearing was corrected to conform to the actual sentence. In a separate decision entered after the Petition in this case was filed, the Fifth Circuit ruled that the length of incarceration is determined by the sentence imposed at the sentencing hearing and not by the sentence set forth in the subsequent judgment adjudicating guilt. *United States v. Hankton* (Case No. 16-31126), *combined with United States v. Derrick* and

ment or order appealed from. Fed. R. App. 4(a)(1)(A). Petitioners appealed successor judge's final order 13 days after it was entered.

United States v. Smothers (5th Cir. Nov. 16, 2017) (federal district court's oral pronouncement reduced a defendant's sentence for previous time served while the written judgment made no reference to the reduction; the Fifth Circuit remanded for the limited purpose of directing the district court to conform the defendant's written judgment to the oral pronouncement of his sentence). Unlike in *Hankton*, Respondents conceded that the pronouncement of the sentence was correct and argued that the written judgment was not correct. Apart from the effect of *Hankton*, Petitioners also assert that the oral and written judgment were consistent because the incorrect list of dates previously served appeared in a section of the form judgment that was supposed to be completed only if additional time was to be served, which was not the case here.



CONCLUSION

To support their timeliness argument, Respondents define the deadline for filing the second motion for reconsideration as 28 days from October 20, 2015. *See* County Respondents' Brief in Opposition at p. 7. This was the date of the dispositive orders of the senior judge who was disqualified ten days later. *See* Chief Judge's October 30, 2015 disqualification order which necessarily was based on Petitioners' objectively supported belief of bias. R. at 1103. The disqualification order arguably effected vacatur of the disqualified judge's dispositive orders.¹⁰ In any event,

¹⁰ It is equitable and logical to vacate the orders giving rise to the appearance of bias. This would include the disqualified judge's

Respondents' analysis ignores the effect of disqualification and transfer of the (otherwise dismissed) case to the successor judge for further action. The disqualified judge's dispositive orders remained indeterminate throughout the entire period prior to appeal.

On December 15, 2015, the successor judge issued an order reversing the disqualification order and denying Petitioners' motion for reconsideration of the disqualified judge's dispositive orders. Twenty five days later, Petitioners' filed their January 9, 2015 motion for reconsideration of the successor judge's order. Petitioners' second motion for reconsideration was therefore timely.

Respectfully submitted,

WILLIAM R. SCHLECHT

COUNSEL FOR PETITIONERS

ROGERS SCHLECHT PLLC

221 WEST 48TH STREET, SUITE 1801

KANSAS CITY, MO 64112-4017

(210) 216-8725

WILLIAM.SCHLECHT@ATT.NET

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dispositive orders, his factually contradictory order threatening sanctions against Petitioners' counsel for seeking sanctions for opposing counsel's admitted willful misrepresentations, and his *sua sponte* imposition of a two-day discovery deadline for interrogatories and document requests following Petitioners' motion for sanctions.