No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

GREGORY DEAN BANISTER ---PETITIONER

vs.

LORI DAVIS, DIRECTOR, TDCJ--RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gregory Dean Banister #1265563

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Petitioner, pro-se

QUESTIONS PRESENTED

Question One: In Gonzalez v. Crosby this Court held that a Rule 60(b) motion that either adds new habeas claims, or attacks the court's previous resolution of the habeas claims, should be treated as a successive habeas petition under AEDPA's §2244. Does Gonzalez extend to post-judgment motions filed under Rule 59(e) of the Federal Rules of Civil Procedure?

a. If so, should a timely filed Rule 59(e) motion toll the the time to file a notice of appeal under Federal Rules of Appellate Procedure, Rule 4(a)(4)(A)(iv)?

Question Two: Whether a pro se petitioner must be warned and given an opportunity to withdraw a post-judgment motion which has been recharacterized as a successive habeas petition if that recharacterization will effect his ability to file a timely notice of appeal?

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(All of the above Statutes and Rules are included with this writ of Certiorari at Appendix-E.).

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Gregory Dean Banister, proceeding pro-se, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fifth Circuit Court of Appeals, rendered in these proceedings on May 8, 2018.

OPINIONS BELOW

The Fifth Circuit Court of Appeals affirmed Banister's conviction in Cause no. 17-10826 and it refused to address the merits of his Certificate of Appealability. The order denying the C.O.A. is reprinted in the appendix to this petition at Appendix-C infra. The order of the Fifth Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition. (Appendix-D, infra.).

JURISDICTION

The original order of the Fifth Circuit Court of Appeals was entered May 8, 2018. A timely motion to that court for rehearing En Banc and Reconsideration was denied on June 18, 2018.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Please see Appendix-E, Infra.

STATEMENT OF THE CASE

Gregory Dean Banister, Petitioner, was convicted by a jury of aggravated assault with a deadly weapon and sentenced to thirty years imprisonment. He filed a 28 U.S.C. §2254 habeas petition asserting numerous claims, which were denied by the district court on May 15, 2017. (Appendix-A p.1 & 4). In that same order, the court denied Banister a Certificate of Appealability. (Id. p.4).

On June 12, 2017 Banister filed a motion to Amend or Alter the judgement of the district pursuant to Rule 59(e) of the Federal Rule of Civil Procedure. (Id. p. 4). After "consideration" and review, the court denied the motion on the merits on June 20, 2017. (Id.).

On July 20, 2017 Banister filed a notice of appeal and a Application for a Certificate of Appealability in the district court. (Id. p4-5). Although the district court had previously denied Banister a COA when it denied the habeas petition, the court's order shows that it "considered" the COA application but ultimately denied it on July 28, 2017. (Id. p.5).

After the denial in district court, the Fifth Circuit granted Banister an extension of time to file a COA application with them. (Appendix-B). Banister timely filed a COA with the Fifth Circuit Court on October 11, 2017. On May 8, 2018 the Fifth Circuit issued an order denying the COA. (Appendix-C). The Court found that Banister's notice of appeal was not timely filed and that it lacked jurisdiction to address the merits of the COA.

On May 22, 2018 Banister timely filed a petition for rehearing[1] but the Court denied rehearing on June 18, 2018. (Appendix-D).

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1. Because Banister is incarcerated and does not have access to either extra copies of the district courts orders or to a copy machine, he is not able to include the following above refrenced materials with this Certiorari: the order denying his §2254; the Rule 59(e) motion; the order denying the 59 (e) motion; the order denying his COA in the district court; and Banister's motion for rehearing in the Fifth Circuit. The best Banister could do is provide the district court's docket sheet which indicates when the orders and motions were filed and what the rulings were. (See Appendix-A).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS APPROPRIATE TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS AND TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Introduction

This case involves a §2254 petitioner who is being unfairly denied his ability to have the merits of his Application for a Certificate of Appealability considered.

After the district court denied Petitioner Banister's §2254 petition (Appendix-A p.4), Banister filed a timely Rule 59(e) motion to "Amend or Alter" the court's judgment. (Id. p.4). Banister filed this motion because he believed that the court had made errors in its order, and because he believed that he could properly bring the perceived errors to the court's attention and then file his notice of appeal after receiving a ruling on the motion. In light of the text of Rule 4(a)(4)(A)(iv) of the Federal Rules of Appellate Procedure, and in light of the fact that the Federal Rules of Civil Procedure apply in habeas proceedings, this was a reasonable expectation .

The Rule 59(e) motion did not raise any new claims but instead pointed out perceived errors in the district court's reasons for denying the habeas petition. The perceived errors raised could not have been raised prior to the court's order and were raised in an attempt to give the court an opportunity to reconsider and correct flaws in its reasoning before Banister proceeded to the

Court of Appeals. This approach, alebeit in a different type of case, has been previously recognized by this Court. See United States v. Dieter, 429 U.S. 6 (Stating that the purpose of Rule 59(e) is to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings.

The district court never treated the motion as a successive habeas petition, but instead,"considered" and then denied the motion on the merits.(Id. p.4). Less than thirty days after the court denied the Rule 59(e) motion, Banister filed a notice of appeal and an Application for a COA directly with the district court. (Id. p. 4-5). After "consideration" of Banister's COA the, district court issued an order denying the COA Application. (Id. p.5).[2]

After this Banister sought, and was granted, an extension of time to file his Application for a COA with the Fifth Cirucit Court. (Appendix-B). Banister then filed his COA Application in the Fifth Circuit Court. On 05-08-2018, United States Circuit Judge, Jennifer Walker Elrod, issued an order to "Deny Banister's petition for a COA because it lacked jurisdiction over the appeal." (Appendix-C p.4). Although Judge Elrod Acknowledged that "Banister timely filed a Rule 59(e) motion, which could extend the time for filing a notice of appeal until entry of an order disposing of the motion," she determined that the motion was really a successive habeas petition and thus its filing did not toll the time period for filing a notice

2. Although the district court's order denying Banister's §2254 petition also denied him a COA, the district court filed and "considered" the COA Application filed after that order.

of appeal.

The Fifth Circuit reached this conclusion and relied on this Court's decision in Gonzalez v. Crosby as authority. (Id.). In Gonzalez, this Court held that a Rule 60(b) motion is a succesive §2254 petition if it adds a new ground for relief or if it attacks the Federal court's previous resolution of a claim on the merits. Gonzalez v. Crosby, 545 U.S. 524 (2005). It also relied on Fifth Circuit precedent interpreting the Gonzalez decision to include Rule 59(e) motions. Williams v. Thaler, 602 F.3d 291,302 (5th Cir. 2010) Contrary to the Fifth Circuit's position, and the Fourth, Eighth, and Tenth Circuit's interpretaion of Gonzalez, this Court's Gonzalez decision never included Rule 59(e) motions in its analysis. See Gonzalez, 545 U.S. 545 n. 3 (Pointing out that "[i]n this case we consider only the extent to which Rule 60(b) applies to habeas proceedings under 28 U.S.C. §2254...".).

The Fifth, Fourth, Eighth and the Tenth Circuits have extended this Court's Gonzalez decision to include Rule 59 (e) motions. However, the Seventh, Sixth and the Third Circuits have went the other way and have refused to extend Gonzalez to include Rule 59(e) motions.

In light of the opposing positions and conflict between the Circuit courts on the scope of this Court's Gonzalez decision, Certiorari is appropriate in this case. Additionaly, Certiorari is appropriate so that this Court can decide important questions of Federal habeas law that will bring much needed clarity to Federal Habeas jurisprudence.

A. Does a Timely Filed Rule 59(e) Motion Suspend a §2254 Petitioner's Time to File a Notice of Appeal Under Federal Rules of Appellate Procedure, Rule 4 (a)(4)(A)(iv)?

It is well settled that habeas corpus is a civil proceeding and the Federal Rules of Civil Procedure apply in habeas corpus proceedings to the extent that they are not inconsistent with any of the AEDPA statutory provisions or Rules. Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257,269 (1978). In the instant case, the relevant Federal Rules are Rule 59(e) of the Federal Rules of Civil Procedure, and Rule 4(a)(4)(A)(iv) of the Federal Rules of Appellate Procedure. (See Rules in Appendix-E). The questions are whether either of these Rules are available to habeas petitioners, and whether their use is somehow "inconsistent" with the spirit of AEDPA and the intent of Congress?

Rule 59(e) is a post-judgment motion seeking reconsideration and correction of a previous order. (Id.). Rule 4(a)(4)(A)(iv) is a rule which allows tolling to file a notice of appeal while a timely Rule 59(e) motion is pending. Neither these rules, nor the AEDPA statutes or rules, provide any indication or notice to habeas petitioners that they may be excluded from utilizing these rules. In fact, the plain text of Rule 4(a)(4)(A)(iv) would lead a reasonable person to conclude that habeas petitioners can utilize this Rule: "If a party files [a Rule 59(e)] motion...and does so within the time allowed by those rules--the time to file an appeal

runs for **all parties** from the entry of the order disposing of the last such remaining motion." See Fed. R. App. P. 4(a)(4)(A)(emphasis mine).

In addition, this Court has previously determined that "[i]t is undisputed that Federal Rule of Appellate Procedure 4(a) is applicable to habeas proceedings." Browder at 265 n.9 . And in that same case, this Court recognized that "[a]lthough this Court has not had occasion to hold Rules 52(b) and 59 applicable in habeas corpus proceedings, the Courts of Appeals uniformly have so held or assumed." Id. at 271.

In the instant case, the Fifth Cirucit Court has in essence determined that neither Rule 59(e) nor Rule 4(a)(4)(A) apply to Banister because he's a habeas petitioner. (Appendix-C). The Court has determined that a Rule 59(e) motion filed by a habeas petitioner seeking reconsideration of a district court's order is really not a motion for reconsideration but a successive petition, which will not toll the time period for filing a notice of appeal under Rule 4(a)(4)(A)(iv). (Appendix-C).

In spite of its recognition in another case, that "the Supreme court has not yet examined when a Rule 59(e) motion should be treated as a successive habeas petition[,]" United States v. Brown, 547 Fed. Appx. 637,641 (5th Cir. 2013), and in spite of the Gonzalez decision's "consider[ation] of only the extent to which Rule 60(b) applies to habeas proceedings", the Fifth Circuit has extended the Gonzalez decision to

Rule 59(e) motions. (See Appendix-C p.4). But the Fifth Circuit is not alone in its extension of this Court's Gonzalez decision. The Fourth, Eighth and Tenth Circuit Courts have extended this Court's Gonzalez decision to include Rule 59(e) motions. See United States v. Pedraza, 466 F.3d 932, 933-34 (10th Cir. 2006); Williams v. Norris, 461 F.3d 999,1004 (8th Cir. 2006); United States v. Martin, 132 Appx. 450,451 (4th Cir. 2005); and Uranga v. Davis, 879 F.3d 646,648 (5th Cir. 2018).[3]

The Third, Sixth, and the Seventh Circuit Courts disagree with the Fifth, Fourth, Eighth, and the Tenth Circuit Courts and have found the exact opposite: that "Rule 59(e) motion[s] [are] not subject to the strict procedural requirements imposed on second or successive habeas petitions...". See Howard v. United States, 533 F.3d 472, 473 (6th Cir. 2008)(Stating that "extending the holding of Gonzalez to Rule 59(e) motions would attribute to Congress the unlikely intent to preclude broadly the reconsideration of just-entered judgments." And that "if the holding in Gonzalez applied to Rule 59(e) motions, it would almost always be effectively impossible for a district court to correct flaws in its reasoning...".(Id. 475)). Howard explained that "[t]he purpose behind Rule 59(e) as well as the mechanics of its operation, counsel in favor of non-applicability of second-or-successive limitations," even if

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3. The Eleventh Circuit has yet to weight in on whether Gonzalez should extend to Rule 59(e) motions. However, the district courts in their region have also disagreed as to whether Gonzalez should apply to rule 59(e) motions. See Aird v. United States, 339 F. Supp. 2d 1305,1311 (S.D. Ala. 2004); also see divergent view in Thomas v. Owens, 2009 U.S. Dist. LEXIS 103683, at *6-8 n.1 (M.D. G.A. Nov. 4 2009(noting Aird but finding the court "has habeas jurisdiction to entertain a Rule 59(e) motion for reconsideration.").

the motion advances a claim. Howard, 533 F.3d at 474.

In Blystone v. Horn, 664 F.3d 397 (3rd cir. 2011), the Third Circuit recognized that its "sister Circuits have split on the issue of whether a Rule 59(e) motion to alter or amend judgment that raises a cognizable habeas claim is properly construed as a successive habeas petition." Id. 412. The Court also discussed the differences between 60(b) motions and 59(e) motions and found these differences significant: "a Rule 60(b) motion is , in substance, both a collateral attack on the first habeas judgment and a new collateral attack on the underlying criminal judgment because Rule 60(b) does not prevent the original habeas judgment from becoming final; instead it seeks to set aside the already final judgment...[t]his is not so in the case of a Rule 59(e) motion." Id. 413-414. "Quite to the contrary, a timely Rule 59(e) motion suspends the finality of the judgment by tolling the time for appeal." Id. at 414 "Accordingly, we cannot logically subject a Rule 59(e) motion to the statutory limitations imposed upon second or succesive collateral attacks on criminal judgment because, unlike a Rule 60(b) motion, it is neither a collateral attack on the initial habeas judgment, nor a new collateral attack on the undelying criminal judgment- rather it is part and parcel of the petitioner's 'one full opportunity to seek collateral review." Id.

The Blystone Court explicitly disagreed with the Fifth Circuit's holding in Williams v. Thaler, 602 F.3d 291, 303-04 (5th Cir. 2010), because it does "not believe that the differences between Rule 60(b) and 59(e) are merely technical." Blystone

at 415. Ultimately, the Third Circuit decided to "join the Court of Appeals for the Sixth Circuit in holding that a timely Rule 59(e) motion to amend or alter a judgment is not a second or successive petition, whether or not it advances a claim, and therefore such a motion lies outside the reach of the jurisdictional limitations that AEDPA imposes upon mulitple collateral attacks." Id.

And in Curry v. United States, 307 F.3d 664, 665 (7th Cir. 2002), although decided prior to this Court's Gonzalez decision, the Seventh Circuit recognized that: "A Rule 60(b) motion is a collateral attack on a judgment, which is to say an effort to set aside a judgment that has become final through exhaustion of judicial remedies. A Rule 59(e) motion is not...it suspends the time for appealing. Since such a motion does not seek collateral relief, it is not subject to the statutory limitations on such relief." (Id.). This take is consistent with this Court's Osterneck decision finding that: "a post-judgment motion will be considered a Rule 59(e) motion where it involves reconsideration of matters properly encompased in a decision on the merits." Osterneck v. Ernst & Whinney, 489 U.S. 169,174 (1989). It is also consistent with this Court's Dieter decision where it recognized the "wisdom of giving district courts the opportunity promptly to correct their own alleged errors...". United States v. Dieter, 429 U.S. 6,9 (1976).

In light of the stark divergence between the Circuit Courts, and in light of the lack of clarity in the Federal Rules and the AEDPA, this Court should intervene to not only resolve this divergence, but to provide some much needed clarity to the applicability of these Rules. Doing so would provide consistancy

among the courts and would provide guidance to the unsuspecting and unsophisticated pro-se habeas petitioner on just how he is permitted to procede.[4] Without this Court's intervetnion, habeas petitioners will be left "to guess at their peril the date on which the time to appeal commences to run," U.S. v. Ibarra, 122 S.ct. 4,6 (per curiam) (1991), and the above mentioned Circuit Courts will continue to stretch this Court's Gonzalez decision beyond the boundaries of its holding, and beyond the boundaries and intentions of Congress when it enacted AEDPA. e.g., Blystone, 664 F.3d at 414 ("We are unwilling to attribute to Congress the 'unlikely intent' to so impede Rule 59(e)'s operation by way of AEDPA's 'second or successive' restrictions."); U.S. v. Palmer,296 F.3d 1135,1146 n.16 (D.C. Cir. 2002) ("Nothing in the AEDPA indicates tht a post-conviction motion not styled as a section 2255 motion must be deemed one simply because it could be so styled. Indeed, the AEDPA does not define a 'second or successive' motion at all."); Castro v. United, 540 U.S. 375, 380 (2003)(Resisting an interpretation of AEDPA that would produce troublesome results, create procedural anomalies, and "close the doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.")

B. Should A Petitioner Be Warned And Given An Opportunity To Withdraw A Post-Judgment Motion That Has Been Recharacterized As A Successive Habeas Petition If That Recharacterization Will Effect His Ability To File A Timely Notice of Appeal?

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4. See Gitten v. U.S., 311 F.3d 529,533 (2nd Cir. 2002)(Pointing out that "understanding the new AEDPA procedures is difficult enough for judges and lawyers, and pro se prisoners can not be expected to have all the complexities of these procedures in mind.")

In Castro v. United States this Court unanimously held that "[a] federal court cannot recharacterize a pro se litigant's motion as a first §2255 motion unless it first informs the litigant of its intent to recharacterize, warns the litigant that this recharacterization means that any subsequent §2255 motion will be subject to the restictions on 'second or successive' motions, and provides the litigant an opportunity to withdraw the motion or to amend it." Castro v. United States, 540 U.S. 375,377 (2003). It further held that "[i]f these warnings are not given, the motion cannot be considered to have become a §2255 motion...". Id. 383.

Banister concedes that the facts in Castro are somewhat different than his. In particular, Castro involved a Rule 33 motion for a new trial that was recharacterized as Castro's first §2255 habeas petition, which had the effect of preventing him from filing a future §2255 petition. Id. 378. Whereas Banister's case involves a Rule 59(e) motion to "Alter or Amend" judgment which was recaracterized as his second §2254 petition, which had the effect of preventing him from filing a timely notice of appeal.

Although there are differences in Banister's and Castor's cases, the rationale expressed in Castro equally applies to Banister's case. Specifically, the Castro Court recognized the "serious consequences" of recharacterization on Castro, those consequences being that the recharacterization would "subject [] any subsequent motion under §2255 to the restrictions that federal law imposes upon a 'second or successive' federal habeas motion." Id. 377. This Court determined that the lack of warning

prevented Castro from making an informed judgment "not only (1) whether he should withdraw or amend his motion, but also (2) whether he should contest the recharacterization say on appeal." Id. 384.

In Banister's case he filed a rule 59(e) motion believing that he could convince the district court to alter or amend his judgment. Banister believed that the court had made some errors in its order denying his §2254 petition, and his Rule 59(e) motion presented those perceived errors to the court hoping it would exercise its discretion and reconsider. (See Rule 59(e) motion filed in the District Court, Doc. Entry. 28).

The district court filed and "considered" the Rule 59(e) motion and never treated the motion as a "second or successive" §2254 pettiion but "considered" it on its merits. (Appendix-A p.4) It wasn't until some Ten months later that Banister's motion was recharacterized as a successive habeas petition. (Appendix-C p. 3-4). This recharacterization came in the Fifth Circuit's order denying Banister's Application for a COA. The Court used the recharacterization to justify denying Banister's Application for a COA on jurisdictional grounds. (Id.). The Fifth Circuit's order was the first that Banister had heard that his Rule 59(e) motion was being construed as a successive petition. This belated notice was extremely unfair to Banister because by the time he recieved notice that his Rule 59(e) motion was recharacterized, his time to file a notice of appeal had expired.

Like Castro, Banister was not able to make an informed judgment to withdraw his motion. Had Banister been warned that

that the rule 59(e) motion would be recharacterized as a successive petition, and in effect deny him the tolling in Rule 4(a)(4)(A)(iv) of the Rules of Appellate Procedure, he would have withdrew the motion and imediately filed his notice of appeal. Then the Fifth Circuit Court would have had to review the merits of Banister Application for a COA.[5]

The district court's failure to treat Banister's Rule 59(e) motion as a successive §2254 petition when it was filed lulled Banister into believing that the motion was accepted as a Rule 59(e) motion and that he would therefore recieve the benefit of the tolling in Rule 4(a)(4)(A)(iv). Fed. R. App. P. Banister never anticipated that Rule 4(a)(4)(A)'s tolling provision would not apply to him. This is so because neither that Rule, nor the text of Rule 59(e), mentions anything about Rule 59(e) motions not tolling the appeal period if you are a habeas petitioner. Neither do any of the AEDPA Statutes or Rules warn a habeas petitioner that his 59(e) motion could be recharacterized into a successive 2254 petition, and thus deny the petitioner the tolling in Rule 4(a)(4)(A)(iv).

This lack of notice from the court, and lack of guidance from the applicable rules and statutes, creates extremely detremental pitfalls for the majority of habeas petitioners, such as Banister, who are mostly unsophisticated and proceding without the aid of counsel. Banister's case provides a perfect

5. This belated recharacterization is inconsistent with what this Court expressed in Castro, at 382 where it discussed the purpose of recharacterization. (Recognizing "the overriding rule of judicial intervention must be 'First do no harm.") Id. 386; also U.S. v. Miller, 197 F.3d 664,651 (3rd Cir. 1999)("We recognize that the practice of recharacterizing pro-se post conviction motions as §2255 motions developed, in part, as an attempt to be fair to habeas petitioners.").

opportunity for this Court to not only further the jurisprudence of federal habeas corpus law, but also to provide habeas petitioners with protection from arbitrary and capricious application of 28 U.S.C.'s §2244 subsequent writ bar to situations that Congress never intended them to apply. This case also provides a perfect opportunity for this Court to resolve the split amoung the Circuits.

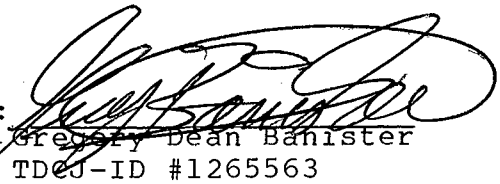
This Court should grant Mr. Banister's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

DATED: September 16, 2018.

Respectfully submitted,



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