No. 03-53[illegible]

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October term, 2002

In re: the matter of...

Juan Jose ZUNIGA-Hernandez,

pro-se petitioner,

vs.

Attorney General John ASHCROFT,

respondent.

SUPREME COURT, U.S.
JUL 15 2003
OFFICE OF THE CLERK

Petition for Writ of Habeas Corpus

NOW COMES the petitioner, Juan Jose ZUNIGA-Hernandez, pro-se, pursuant to this court's original jurisdiction, and petitions this court to grant a Writ of Habeas Corpus herein.

by: Juan Zuniga

Juan Jose ZUNIGA-H.
#23429-034
PMB 4000, Federal Medical
Center, Rochester, MN.
55903

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SUPREME COURT, U.S.

QUESTIONS PRESENTED.

1. IS THE PETITIONER "ACTUALLY INNOCENT" OF USING A FIREARM IN VIOLATION OF 18 USC §924(c) WHEN HE "traded" CONTROLLED SUBSTANCES (heroin) TO FEDERAL AGENTS IN EXCHANGE FOR CERTAIN FIREARMS?

2. IS 28 USC §2255 AN "INADEQUATE AND INEFFECTIVE" REMEDY TO ALLOW THE PETITIONER RELIEF, AND THUS ALLOW THE PETITIONER TO PASS THE "GATEWAY" AND PROCEED UNDER 28 USC §2241?

STATEMENT OF FACTS

This is a proceeding on an "**original writ of habeas corpus**" sought pursuant to this court's Constitutional authority under Article III, §1, and this court's stautory authority under 28 USC §2241.

The petitioner asserts that he is "actually innocent" of "using" a firearm during a drug trafficking offense (18 USC §924(c)(1)(B)(ii)), as the facts of his prosecution affirmatively show that he "traded" a controlled substance (to wit: heroin) for certain firearms provided by federal agents, of which several firearms were classified as "machineguns" pursuant to 18 USC §924(c).

LITIGATION HISTORY.

The petitioner was charged, and ultimately entered a guilty plea to, trafficking in heroin and "using" a machinegun during and in relation to the heroin trafficking offense. The facts of the case relate that the petitioner was involved in heroin trafficking and a federal informant parleyed a meeting in which the petitioner would receive "guns" for payment of the heroin he had previously provided. (see United States v. Zuniga, 18 F 3d 1254 (5 Cir 1994) for a complete recitation of relevant facts.) Following the transaction, in which the petitioner viewed several "semi- and fully-automatic firearms," and agreed to accept them as payment for the heroin. The firearms were placed in a vehicle truck [under DEA control at all times] and the petitioner and another codefendant were subsequently arrested. Following his guilty plea, the petitioner received 78 months for the heroin trafficking charge, and a mandatory 30 year sentence for receiving the machineguns from the agents as payment for the heroin.

The petitioner appealed his sentence to the Fifth Circuit, and was affirmed in a consolidated appeal, wherein the Fifth Circuit

held that "bartering a firearm for drugs was use... within the plain language of section 924(c)," following this court's decision in Smith v. United States, 508 US 223 (1993). The Zuniga court also noted that the Eleventh Circuit in United States v. Smith, 957 F 2d 835, 836-7 (1992) and the District of Columbia Circuit in United States v. Harris, 959 F 2d 246, 261-62 (1992) had recently decided the issue against the petitioner's position.

The petitioner requested counsel to seek a writ of certiorari with this court, but counsel declined to do so.

A. **Initial §2255 Motion to Vacate.**

The petitioner sought a section 2255 Motion to Vacate on the issue that bartering drugs for firearms was contrary to the holding in **Smith v. United States**, and that this court's decision in Bailey v. United States, 516 US 137 (1995) held that bartering drugs for firearms was not "use" as the firearm was not "actively employed" as required by 18 USC §924(c) under Bailey. Following a denial of relief, the petitioner appealed to the Fifth Circuit Court of Appeals in #95-30885, and was **affirmed** in an unpublished opinion at Zuniga v. United States, 79 F 3d 1144 (5 Cir 1996) table.

B. **Motion to file successive §2255 Motion to Vacate.**

The petitioner filed an application to file a successive section 2255 Motion to vacate with the Fifth Circuit Court of Appeals in #97-00080 and was denied relief. The petitioner sought a petition for writ of certiorari which this court's clerk rejected as required by law. (see 28 USC §2244(b)(3)(E)).

C. **Initial writ of habeas corpus, 28 USC §2241.**

Several years after the petitioner began serving his sentence of 36 years and 8 months, the petitioner was transferred to F.C.I.

Greenville under the care, custody, and control of then Warden Charles Gilkey. The petitioner has satisfied his release date on the 78 month sentence for the heroin offense, and was serving the remaining 30 years on the "use" of a machinegun offense. At the time the petitioner was in Warden Gilkey's custody, the Seventh Circuit jurisprudence on "bartering firearms for drugs" was found in United States v. Westmoreland, 122 F 3d 431 (7 Cir 1997). In Westmoreland, the court plainly held that "passively receiving a gun from an undercover agent in payment for drugs cannot constitute a use under section 924(c)(1)." Id at 435-36. The Westmoreland court reversed the section 924(c)(1) conviction due to the fact that:

> Where the defendant does nothing more than receive the gun in payment from a government agent, we cannot conclude that the defendant "actively employed" the gun in the transaction.

The Westmoreland court even went so far as to cite the petitioner's direct appeal and state "Nor do we think that our decision today creates a circuit split with the Fifth Circuit's decision in Zuniga." The Westmoreland court noted that the petitioner's direct appeal was "pre-Bailey," referencing this court's decision in Bailey v. United States, 516 US 137 (1995).

The petitioner sought a writ of habeas corpus pursuant to 28 USC §2241 and charged Warden Gilkey as lawful custodian. The petitioner asserted that under Westmoreland he was "actually innocent" of **using a machinegun** when he received the machinegun as payment for drugs, and actually only held the machineguns in question for a few minutes. The petitioner was ultimately denied relief by the United States District Court, Southern District of Illinois, #99-CV-974, and he appealed the denial of relief to the Seventh Circuit. In a short unpublished opinion, the Seventh Circuit affirmed, noting with great

deference the "circuit split" between Zuniga, 18 F 3d, and the law of the Seventh Circuit in Westmoreland:

> Zuniga-Hernandez's Bailey argument is based on a circuit split regarding receiving guns for payment for drugs constitutes "use" of a gun under §924(c)(1). The Fifth Circuit [in Zuniga @ 18 F 3d] has held that receiving a gun in exchange for drugs does constitute "active employment" of a firearm, thus satisfying Bailey's definition of "use." See United States v. Ulloa, 94 F 3d 949, 956 (5 Cir 1996). This Circuit has held that **passively** receiving a gun as payment for drugs does not constitute use under §924(c)(1). See Westmoreland.

When looking to the unpublished opinion, it is clear that under Seventh Circuit law the petitioner's is "actually innocent" of "using" a firearm in violation of section 924(c)(1) when he "passively received" the machineguns (for a few minutes) as payment for some heroin.

The petitioner sought a petition for writ of certiorari with this court and was denied relief in Zuniga v. Gilkey, #01-7976, 3/4/02.

D. **Second writ of habeas corpus, 28 USC §2241.**

The petitioner was transfered to FMC Rochester, Minnesota, and sought a second section 2241 writ of habeas corpus charging then Warden Constance Reese as lawful custodian. The District of Minnesota, Judge Ann D. Montgomery, dismissed the §2241 petition as an "abuse-of-the-writ" under McClesky v. Zant, 499 US 467, 490 (1991). The petitioner sought an unsuccessful appeal to the Eighth Circuit Court of Appeals, #03-1558 (2002), and this court recently denied certiorari in #02-10579, June 9, 2003.

This matter is now ripe for review in this court.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
FEB 09 1996
CHARLES R. FULBRUGE III
CLERK

No. 95-30885
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN JOSE ZUNIGA HERNANDEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(95-CA-2166)

Before POLITZ, Chief Judge, DUHÉ and PARKER, Circuit Judges.

PER CURIAM:*

The convictions on guilty pleas by Juan Jose Zuniga-Hernandez of conspiracy to distribute heroin, distribution of heroin, using and carrying machine guns in relation to a drug-trafficking offense, and possession of machine guns were affirmed on direct

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 11, 2001
Decided December 11, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

No. 01-3194

JOSE ZUNIGA-HERNANDEZ,
Petitioner-Appellant,

v.

CHARLES R. GILKEY, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois

No. 99-974-JPG

J. Phil Gilbert,
Judge

ORDER

Jose Zuniga-Hernandez has filed a Petition for Rehearing En Banc, which this court construes as a motion for reconsideration of the November 16 order affirming the dismissal of his petition under 28 U.S.C. § 2241. Zuniga-Hernandez's motion is DENIED.