04-6002

Docket Number: _____

Supreme Court, U.S.
FILED
AUG 18 2004
OFFICE OF THE CLERK

IN THE UNITED STATES

SUPREME COURT

IN RE HUGO P. ABSALON

Petitioner/Defendant

Vs.

Harley G. Lappin, Director

Federal Bureau of Prisons

John Ashcroft, Attorney General

The UNITED STATES OF AMERICA

RESPONDENT/CUSTODIAN/PLAINTIFF

Case No. CR B-98-506-01

CCA 99-40280

CCA 01-40048

CCa 01-40293

On Petition for Writ of Habeas Corpus on actions by the Southern District of Texas District Court, and the Fifth Circuit Court of Appeals.

PETITION FOR WRIT OF HABEAS CORPUS

AD SUBJICIENDUM BY A PERSON IN FEDERAL CUSTODY (28 U.S.C. § 2241)

Hugo P. Absalon, Pro-se
BOP 82491-079 - RCDC 77028 - Box 714
RCDC - P.O. Box. 1560
Pecos, Texas 79772.

RECEIVED
AUG 24 2004
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SUPREME COURT, U.S.

A. QUESTIONS PRESENTED FOR REVIEW:

(A). Whether district court's jurisdiction was challenged ;

(B). Whether the Law provides that once jurisdiction is challenged the court must come forth with documented proof of its jurisdiction ;

(C). Whether the U.S. District Court for the Southern District of Texas, Brownsville Division met its burden of establishing, and documenting its challenged jurisdiction :(i) as mandated by Article I,Section 8, Clause 17 of the U.S. Constitution (using the 9th, and 10th Amendment to support) , and as provided by statutory law (18 USC § (7), and 40 USC § 255, and relevant case law (ii) district court's extraterritorial jurisdiction under the "protective" and "objective territorial" theories.

(D). Whether deliberate concealment of information, essential for the support of important defense contentions, that shocks the conscience and interferes with rights implicit in the concept of ordered liberty, can be attacked as a violation of due process under the "Napue/Giglio/Brady" doctrine.

(E). Whether a continued, apparently booby-trapped trail with obvious blockades flanked by apparent detours that lead only into ambush, constitute a departure,by the District, and Circuit Courts, from the accepted and usual course of judicial proceedings sanctioning such a departure by the lower courts, as to call for an exercise of this Court's Supervisory powers in aid of this Court's appellate jurisdiction.

(F). Whether Congress has authorized penalty for possession of a firearm by a felon pursuant to the legislative created laws for violation of title 18 USC §922 , Pub. Law 90-618(82Stat.1233-34), and Pu. Law 99-308(100 Stat. 456-59) Section 924 Penalties.

Whether Absalon was eligible to receive the sentence, and that the degree of fundamental fairness essential to the very concept of justice, as required by the Due Process Clause of the Fifth Amendment to the U.S. Constitution, was achieved in Absalon's punishment for the firearm charge.

(D). CITATIONS OF THE OFFICIAL AN UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS, OR ADMINISTRATIVE AGENCIES :

(i) District Court :

December 1,2000 - Magistrate Judge's Report and Recommendation on Ex parte Motion (CD : 46).

January 10,2001 - ORDER: adopting, construing and dismissing Ex Parte motion (CD : 46) without a hearing.

February 19, 2002 - ORDER : of denial of Motion to Vacate Judgment pursuant to Rule 12(b) of the Fed.R.Cr.P. and by authority of Apprendi v New Jersey (CD : 54), and denial of Motion to Compel Prosecutors Constitutional Duty to Disclose duly requested evidence relevant to guilt and punishment, favorable to the defense, in the possession of, and under control of the government(CD : 52); and granting of Government's Motion for Summary Denial

March 19,2002 - ORDER : granting Certificate of Appealability to CCA No. 01-40293 (lead).

May 08,2002 - ORDER : by U.S. Magistrate Judge Felix Recio "Mooting" Petitioner's Motin to Amend and Supplement Certified Copy of Docket Sheet, alleging lack of Jurisdiction.

May 22, 2002 - NOTICE : by U.S. Magistrate Judge Felix Recio "Mooting" Absalon's objections to Magistrate ORDER of May 08,2002.

May 31, 2002 - ORDER : submitting RESPONSE to Fifth Circuit remand requesting specification of the issues upon which the district court granted COA. (filed at district court)

June 19,2002 - ORDER: submitting AMENDED RESPONSE to Fifth Circuit remand requesting specification of the issues upon which the district court granted COA.. IDENTICAL to the first, nothing changed, added or amended.

September 13,2002 - ORDER: granting Petition for Certified Copy of Criminal Docket Sheet.

(ii) In the U.S. Court of Appeals:

February 24,2000 ORDER : from politz,Gibson, Higginbotham Circuit Judges, affirming conviction and sentence (CCA No. 40280).

March 6,2001 - ORDER: from Circuit Panel by Reavley, DeMoss, and Stewart Circuit Judges (CCA No. 01-40048) (USDC No. 1-98-CR.506). Ruling "that the district court erred in failing to grant him the requested discovery before constuing the pleading as one under 28 USC § 2255 and dismiss it" [without a hearing].

May 7,2002 - ORDER: from Circuit Panel by Davis, Barksdale, and Emilio Garza Circuit Judges (CCA No. 01-40293)(USDC No. B-00-CV-186 (B-98-CR-506-1). Case remanded to the district court for the limited purpose of of specification of the issue or issues upon which the district court granted COA.

October 10,2002 - ORDER : from single judge W. Eugene Davis, Circuit Judge. (No. 01-40293)(USDC No. B-00-CV-186, B-98-CR-506-1). Denial of request for an expansion of the district court's grant of COA to include all the issues on appeal CCCA 01-40293) that were evaded by U.S. District Judge Hilda G. Tagle on her grant for COA.

November 14, 2002 - ORDER : from Davis, Wiener and Emilio M. Garza Circuit Judges. (No. 01-40293). Denial of petition for reconsideration of the single judge order, and expressed denial of incorporated request for the Court to rule with particularity on all issues offered for review.

January 31,2003 ORDER: from the appeal court to submit a brief on the issue of "disqualification of federal judge "(U.S. District Judge Hilda G. Tagle). Which issue was not submitted on appeal for the Court's review.

June 25, 2003 ORDER : from Barksdale, DcMoss, and Benavides Circuit Judges (No. 01-40293 summary Calendar). Ruling that: "the only issue before us is whether the district judge should have disqualified herself from Absalon's 28 USC § 2255 Proceedings". Therefore, all the issues offered on appeals 01-40293 (lead) and 02-40587(member) ESCAPED ADJUDICATION.

August 25,2003 - ORDER : from Harold R. DeMoss, single Circuit Judge (No. 01-40293). Denial of petition for Rehearing en Banc of the June 25,2003 order.

(G) STATEMENT OF THE CASE setting out the facts material to consideration of the questions preesented on review of a judgment of a U.S. District Court affirmed by a U.S. Court of Appeals

Indictment charged Petitioner Absalon with , and he was convicted for, alleged violations of 18 USC §922(g)(1) (illegal possession of a firearm) , and 8 USC §1324(a)(1)(A)(ii) (transportation of one illegal alien within the jurisdictional boundaries of the Sovereign State of Texas.

Under retained defense counsel advice that the mere possession of a firearm by a felon would support such conviction (which was critically incorrect as shown in Johnny Lynn Old Chief v United States, 136 LEd 2d 574 at 584, U.S. Supreme Court Reports, 519 US 172 at 174, 117 S.Ct. 644(1997) where the Court held that :"the prohibited posseion of a firearm by anyone who has been convicted of a felony IS SUBJECT TO CERTAIN LIMITATIONS" (emphasis added),[the instant case falls within certain limitations][APP 21 Inc.herein]At the Arraignment Hearing[APP 22 ,TA 42(8-15) p.1, incorporated herein] Absalon admitted during the plea colloquy that he violated 18 USC§922(g)(1). He was in the position of pleading voluntarily with an understanding of the nature of the charge, without realizing that his conduct did not actually fall within the charge.

The offense level range was established at 27 to 33 months imprisonment. Probation Officer cecommended a sentence of 30 months [APP 23 p.2:"recommendation", inc. herein]. Government had no objection to the presentence report [APP24 p.4 (page 13 of addendum to the PSR) inc. herein]. A subsequent upward departure,based only on allegedly offensive conduct by Absalon IN THE SOVEREIGN COUNTRY OF MEXICO INVOLVING A Mexican Citizen resident of the So-

vereign Country of Mexico and the 75 years old Absalon who is also a Citizen of Mexico legal resident of the United States for the last forty eight (48)years (since 1956).Alleged conduct previously dismissed on Government's Motion [APP 25 p.3, Criminal doc ket for case 98-CR-506 , inc. herein] ; [APP 26 p.1, and 2, Plea Agreement, inc. herein]. Absalon was sentenced to 87 months impri sonment[APP 20 p.3, Judgment of 2/25/99(CD 40) incorporated herein

On appeal retained defense counsel Richard B. Gould asserted that"the district court erred in obtaining a guilty plea before admonishing him of the three core concerns envisioned by Federal Rules of Criminal Procedure 11 and ensuring that he understood the nature of the charges against him. He also contended that the court erred in failing to provide timely and specific notice of its intention to depart from the sentencing guilines, as required by Federal Rule of Criminal Procedure 32(c)(1)"[APP 27 p.2 inc. herein] .The Court further found :"Absalon (Defense counsel) chal langes on appeal only the propiety of the district court's notice of upward departure. He does not contend (defense counsel) that the reasons for upward departure were unacceptable or the degree of departure was unreasonable. Having concluded that the court's notice was proper we need not and do not address whwther the district court abused its discretion in its upward departure. The conviction and sentence are AFFIRMED " [APP 27 p.3 inc. herein] .

While Absalon's direct appeal was still pending he filed a 33 Ex parte Motion challenging the U.S. District Court for the Southern district of Texas, Brownsville Division's Criminal Legislative Jurisdiction [APP "1", incorporated herein] over alleged vio lations within the jurisdictional boundaries of the Sovereign Sta te of Texas, and Extraterritorial Jurisdiction over allegedly vio lative conduct within the jurisdictional boundaries of the Sovereign Country of Mexico. Subsequently, while the Ex parte Motion was still pending he filed a Motion to Compel Prosecutor's Constitutional Duty to Disclose duly requested evidence relevant to guilt and punishment favorable to the defense. [APP 28 inc.herein]

United States Court of Appeals
Fifth Circuit
FILED
June 25, 2003
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40293
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUGO P. ABSALON,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
USDC Nos. B-00-CV-186 &
B-98-CR-506-1

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Hugo P. Absalon, federal prisoner # 82491-079, appeals the denial of his motion to vacate, set aside, or correct sentence. The only issue before us is whether the district judge should have disqualified herself from Absalon's 28 U.S.C. § 2255 proceedings. Cf. Trevino v. Johnson, 168 F.3d 173, 177 (5th Cir. 1999) (habeas petitioner did not need COA to appeal denial of motion for disqualification).

Absalon contends that recusal was mandated under 28 U.S.C.

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*Pursuant to 5TH CIR. R. 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 5TH CIR. R. 47.5.4.

§ 455(a), and we review the denial of a motion to disqualify made pursuant to that section for an abuse of discretion. United States v. Bremers, 195 F.3d 221, 226 (5th Cir. 1999). Absalon argues that Judge Tagle's legal rulings evidence a bias against him. The record, however, is devoid of evidence that Judge Tagle's rulings involved an extrajudicial source and, standing alone, they do not show "a deep-seated favoritism or antagonism" required to constitute grounds for disqualification. Liteky v. United States, 510 U.S. 540, 555 (1994).

Absalon's argument that Judge Tagle knew that false testimony was presented to his grand jury is conclusional and therefore an insufficient basis on which to require recusal. See United States v. Schoenhoff, 919 F.2d 936, 940 (5th Cir. 1990). We additionally reject the argument that recusal was mandated because Judge Tagle presided over Absalon's conviction and sentencing proceedings; we have refused to create a mandatory recusal rule in cases where the district judge has made determinations in earlier proceedings on ultimate issues. United States v. Mizell, 88 F.3d 288, 300 (5th Cir. 1996). Moreover, any opinions formed by Judge Tagle on the basis of facts introduced at Absalon's prior proceedings cannot constitute a basis for a partiality motion, because they do not "display a deep-seated favoritism or antagonism that would make a fair judgment impossible." See Liteky, 510 U.S. at 555.

Finally, we hold harmless any alleged error on Judge Tagle's

United States District Court
Southern District of Texas
ENTERED

FEB 19 2002

Michael N. Milby, Clerk of Court
By Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

HUGO P. ABSALON, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	§ § § § § § §	CIVIL ACTION NO. B-00-186

ORDER

BACKGROUND

On September 30, 1998, Petitioner Hugo Absalon was indicted in federal court on an eight-count indictment. Absalon was charged with inducing a minor alien to enter the United States unlawfully in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii) and (a)(1)(A)(v)(II) (count one), transporting an alien within the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (a)(1)(A)(v)(II) (count two), kidnaping in violation of 18 U.S.C. § 1201(a)(1) and (d) (count three), transporting a minor with intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(a) (count four), and felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (counts five through eight).[1]

On November 5, 1998, Absalon appeared before United States District Judge Hilda Tagle and entered pleas of guilty to count two and five (transporting an alien and felon in possession of a firearm), pursuant to a written plea agreement with the government by which the government agreed to dismiss the remaining counts against Absalon at sentencing and recommend a three-

[1] See PSR, ¶ 1-6.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
FEB 24 2000
CHARLES R. FULBRUGE III
CLERK

No. 99-40280

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUGO P. ABSALON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(USDC Docket No. B-98-CR-506-1)

Before POLITZ, GIBSON,* and HIGGINBOTHAM, Circuit Judges.

POLITZ, Circuit Judge:**

Hugo P. Absalon appeals his guilty-plea convictions and sentences for transporting an alien within the United States and being a felon in possession of

*Cicruit of the Eighth Circuit, sitting by designation.

**Pursuant to 5TH CIR. R. 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 5TH CIR. R. 47.5.4.