ORIGINAL

No. 03-5146

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: RIGOBERTO GALLEGO

ON PETITION FOR WRIT OF HABEAS CORPUS PURSUANT
ALL WRITS ACT 28 U.S.C. § 1651(a), § 2241

RIGOBERTO GALLEGO,
In propio persona.
Reg No. 43756-004 (Unit EB)
Federal Correctional Institution
2600 Highway 301 South
Jesup, Georgia 31599

QUESTION(S) PRESENTED

1. WHETHER THE GOVERNMENT DEPRIVED THE PETITIONER OF HIS FUNDAMENTAL FIFTH AND SIXTH SUBSTANTIAL RIGHTS TO BE REPRESENTED BY "CONFLICT-FREE COUNSEL" WHERE HIS ACT OF THE LAW CREATED A CONFLICT OF INTERST AT PETITIONER JURY TRIAL ?
2. WHETHER THE GOVERNMENT CAUSED COUNSEL'S REPRESENTATION UNDER THE APPARENT "CONFLICT OF INTEREST' AT PETITIONER'S SENTENCING PHASE WHICH CREATED AN INEQUITABLE RULING WHEREBY THE DISTRICT COURT IMPOSED AN UNLAWFUL SENTENCE ENHANCEMENT UNDER 21 U.S.C. § 851 THUS VIOLATING PETITIONER'S FIFTH AND SIXTH AMENDMENTS CONSTITUTIONAL RIGHTS ?
3. WHETHER THE CLAUSE IN 28 U.S.C. § 2244 PRECLUDES THE REVIEWING OF NEWLY DISCOVERED EVIDENCE THAT INVOLVES A CONSTITUTIONAL VIOLATION ?
4. WHETHER TITLE 28 U.S.C. § 2255 AND SECOND OR SUCCESSIVE § 2244 (§ 2255) ARE TOTALLY AND DIAMETRICALLY DIFFERENT IN NATURE FOR OBTAINING HABEAS CORPUS RELIEF IN REGARD TO CONSTITUTIONAL VIOLATIONS THEREFORE FORECLOSING NEWLY DISCOVERED CONSTITUTIONAL ERRORS ?
5. WHETHER THE APPELLATE COURT DENIED THE PETITIONER'S DUE PROCESS RIGHT OF LITIGATION WHEREBY REFUSING TO FILE PETITIONER'S " En banc Hearing " MOTION ?

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On January 27, 1995, an indictment was filed against the petitioner, Rigoberto Gallego, and co-defendants, Fernando Cifufentes-Vanegas and Alberto-Collazo, in a case No. 95-0058 CR-Nesbitt charging them with conspiracy to import cocaine, in violation of Title 21 U.S.C. § 963 (count I), importation of cocaine, in violation of Title 21 U.S.C. § 952 (count II), conspiracy to possess with the intent to distribute cocaine, in violation of Title 21 U.S.C. § 846 (count III), and possession with the intent to distribute cocaine, in violation of Title 21 U.S.C. § 841(a)(1)(count IV), and 18 U.S.C. § 2.

Additionally, there was no drug amount charged in the indictment (only "detectable amount of cocaine" was pled).

On June 19, 1995, petitioner was convicted by jury on Counts I, III and IV, and acquitted on Count II.

On November 6, 1995, petitioner was sentenced to term of imprisonment of 240 months (20 years) on Count I, III, and IV accordingly with the statutory sentence enhancement pursuant to 21 U.S.C. § 851.

On September 19, 1995 petitioner's counsel Mr, Alan I. karten filed an appeal brief in the United States Court of Appeals for the Eleventh Circuit.

On September 12, 1997, the United States Court of Appeals for the Eleventh Circuit, affirmed without opinion petitioner's initial brief.

On April 1, 1998 the petitioner filed in the Southern District of florida his first motion for post-conviction relief pursuant to

28 U.S.C. § 2255.

On July 7, 1999, the southern district of florida denied petitioner's first motion pursuant 28 U.S.C. § 2255.

On February 27, 2001, petitioner filed in the United States Court of the appeals for the 11th Circuit an application for certificate of appealability and motion to reinstate the appeal from the denial of petitioner's first 28 U.S.C. § 2255.

On September 24, 2001, the United States for the 11th Circuit granted petitioner's motion for reinstate the appeal and denied petitioner's certificate of appealability for failure to make a substantial showing of the denial of a Constitutional right.

On December 12, 2001, the United States for the 11th Circuit Court denied petitioner's motion for reconsideration of his certificate of appeallability and issue the mandate in this cause.

On March 13, 2003, petitioner sent to the United States for the 11th Circuit Court an application for leave to file a second or successive motion to vacate, set aside, or correct sentence pursuant 28 U.S.C. § 2255 supported by the newly discovered evidence.

On March 28, 2003, the United States for the 11th Circuit Court with the Clerk of the Court ordered a [Dismissal and Denied] petitioner's application for leave to file a second or succesive motion pursuant 28 U.S.C. § 2255, supported by newly discovered evidence.

On April 17, 2003, petitioner sent to the United States for the 11th Circuit Court a petition for [En banc Hearing] for the erroneous Dismissal-Denial from the three Judge panel of his application to file a second or successive 28 U.S.C. § 2255, supported by newly

discovered evidence.

On April 22, 2003, the United States for the 11th Circuit Court returned petitioner's motion for [En banc Hearing] states that the Court does not allows reconsiderations or [petitions for En banc Hearing] of successive § 2255 and § 2244 filings.

REASONS FOR GRANTING OF THE WRIT

The petitioner, Rigoberto Gallego, in durance ville, appearing in propio persona representation respectfully invokes the Rule of Haines v. Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct.594 (1972). Pro-Se litigation filed by a prisoner must be held to less stringent standards than formal pleadings drafted by lawyers. If the Court's can reasonable read pleadings to state a valid claim on which litigant could prevail, It shoul do so. Boag v. Mcdougall, 454 U.S. 364 70 L.Ed.2d 551, 102 S.Ct. 700 (1982).

First, Gallego states if he files said petition in the District Court pursuant to Title 28 U.S.C. § 2241 or FRCP Rule 60(b) motion, the application or motions will be construed as a second or successive 28 U.S.C. § 2255.

Secondly, the petitoner has already filed an application for second or successive § 2255 with the Eleventh Circuit Court of appeals, who refused to address the Constitutional violation associated with the newly discovered evidence. Notwithstanding the Court failed to inquire whether the proceedings were fair enlight of the counsel being investigated of criminal activities by the Government.

Moreover, the Government deprived Gallego from effective assistance of counsel. See, Strickland v. Washington, 466 U.S.668,686

(1984), and second or successive § 2255 does not address whether petitioner is legally innocence. In other words, irregardless of whether or not the proceedings were fair, under 28 U.S.C. §2244 the petitioner is not entitle to further review.

The exclusion of Constitutional errors limits or eliminates any other type of review, except for actual innocence claims. The plain language in § 2244 restrict due process claims that were later developed in light of newly discovered evidence.

Gallego now utilizes the statutory "escape hatch" § 2241 which is aplicable for cases where § 2255 (2244) is ineffective to challenge the judgment or sentence. The "escape hatch" allows review of a case to correcta "manifest miscarriage of justice" as in this case.

Additionally all other vehicles are inadequate or inneffective, due to the stringent standards of § 2244, which impart the "but for constitutional errors"

Finally, this Honorable Supreme Court of the United States has jurisdiction to review Gallego's writ of habeas corpus under Article III of the Constitution of the United States authorized by 28 U.S.C. § 1651(a), [28 U.S.C.S. § 1651(a)], where the relief sought by the petitioner in this case "cannot be obtained in any other form or from any other court." See, S.Ct. Rule 20.

Furthermore "A legal rule requiring issuance of the writ will, at least often, avoid the grievous wrong of holding a person in custody in violation of the Constitution and will thereby both protect individuals from unconstitutional convictions and help to guarantee the integrity of the criminal process by assuring that