

ORIGINAL

No. 22-5750

FILED
NOV 10 2022
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SUPREME COURT, U.S.



In The
Supreme Court of the United States

Salvador Diaz,
Petitioner,

v.

United States of America,
Respondent,

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner hereby respectfully submits this petition for rehearing of this Court's order of October 31, 2022 denying the petition for a writ of certiorari.

Some point, or points, must be taken where the power of review of this Court ceases to be discretionary and becomes obligatory.

One such point must include a situation when laws substantially conflict with each other. Such a situation cannot be allowed to exist and must be promptly resolved by this Court. Else, any judicial action by a court with respect to one of the statutes would automatically violate the other. An obviously absurd situation which occurs every time a motion to vacate under 28 U.S.C. 2255 petitioner is denied the right to appeal, or required to file, a Certificate of Appealability (COA).

"The question whether a right has vested or not is, judicial, and must be tried by the judicial authority." *Marbury v. Madison*, 5 U.S. 137, 167 (1803).

While practicality dictates that the Court exercise discretionary review to application of the law in individual cases, common sense dictates that conflicts among the statutes must be resolved without delay to limit confusion in the various circuits and reduce appellate litigation.

BRIEF BACKGROUND

In the present case, petitioner was convicted for failure to register in the Southern District of New York (SDNY). After affirmation on direct appeal, petitioner filed 2255 motion to vacate which was denied by the same judge who presided at trial. The Second Circuit court of appeal

denied a motion for a COA without addressing any of petitioner's arguments including a claim that 2255 applicants should not be required to apply for COA because the petition Clause and 2255(d) make an appeal a matter of right.

The same argument was raised in the petition for a writ of certiorari to this Court with the resulting denial.

ARGUMENT

This Court's requirement for a rehearing of a denial on a petition for a writ of certiorari pursuant to Rule 44.2 establishes that "grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial ground not previously presented ... and that it is presented in good faith and not for delay."

This petition is presented in good faith, as the petitioner assumes this Court would welcome the opportunity to bring order to the Rube Goldberg apparatus which is the appeal process. And, if anything, the petitioner only seeks to expedite matters.

28 USC 2253 and 28 USC 2255 conflict on a very key point of law.

28 USC §2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

28 USC §2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

It appears that 2253 initial reference to a requirement for a COA only applied to applications under 28 USC 2254, then, inexplicably subparagraph (c)(1)(B) was added without apparent consideration for the Petition Clause, the vested right under 2255(d), and this Court's defining posture in *Marbury v. Madison*.

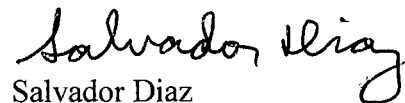
Following the addition of subparagraph (c)(1)(B), courts have adopted a universal requirement for a COA before an appeal without addressing the contradiction between paragraphs (a) and (c)(1)(B) in section 2253, as well as, 28USC 2255(d). and more importantly, the Petition Clause of the First Amendment which prohibits Congress from making any laws respecting the rights of the people to seek redress of wrongs.

To give effect to the language of 2253 is violative of the vested legal right under the language of 2255(d) and of the Petition Clause. “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. 137, 163 (1803). “The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the law furnish no remedy for the violation of a vested legal right.” *Id.*

CONCLUSION

Petitioner respectfully requests rehearing in order to reconcile the Petition Clause in the U. S. Constitution, 28 U.S.C. 2253, and 28 U.S.C. 2255 with respect to appellate rights and provide for a more efficient appeal process which would unquestionably result in reduced appeal courts’ dockets.

Respectfully submitted on November 10, 2022.



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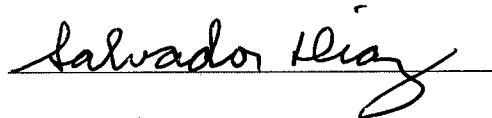
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CERTIFICATE OF PETITIONER

Pursuant to Rule 44.2, Petitioner certifies that this Petition is restricted to the grounds specified in the Rule with substantial ground not previously presented. Petitioner further certifies that this petition is presented in good faith and not for delay.

Executed on November 10, 2022.



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