

No. 10-1350

In the Supreme Court of the United States

IN RE JOHN HOBART ZENTMYER, PETITIONER

*ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's request for a writ of mandamus directing the court of appeals to rule on his request for a certificate of appealability is moot.

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OPINIONS BELOW

The district court's order dismissing petitioner's action under 28 U.S.C. 2255 (Supp. II 2008) and denying his request for a certificate of appealability is unreported. The court of appeals' order denying petitioner's subsequent request for a certificate of appealability (App., *infra*, 1a) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of making a false statement to a financial institution, in violation of 18 U.S.C. 1014; income tax evasion, in violation of 26 U.S.C. 7201; and three counts of structuring financial transactions, in violation of

31 U.S.C. 5324(a)(3) and (d)(1). Petitioner was sentenced to 33 months of imprisonment, to be followed by five years of supervised release. Gov't C.A. Br. 3. The court of appeals affirmed. *United States v. Zentmyer*, 221 Fed. Appx. 598 (9th Cir. 2007). Petitioner did not seek this Court's review.

1. In 1993, petitioner, together with two partners, formed a company to develop and market a locking differential that petitioner had designed and patented, which was used in vehicles driven in off-road conditions. Gov't C.A. Br. 6. In 1996, petitioner made false statements on a home loan application relating to his then-fiancée's employment with the company. *Id.* at 8. In the same year, petitioner failed to report and pay taxes on approximately \$750,000 in deferred salary and other income from the company. *Id.* at 6, 10-11. Finally, in 1999 and 2000, petitioner withdrew those funds from a bank account in the form of structured transactions designed to avoid reporting requirements. *Id.* at 6, 11, 13.

In October 2004, a federal grand jury returned a second superseding indictment charging petitioner with several offenses arising out of this conduct. Gov't C.A. Br. 2-3. In November 2004, a jury found petitioner guilty on one count of making a false statement to a financial institution, in violation of 18 U.S.C. 1014; one count of income tax evasion, in violation of 26 U.S.C. 7201; and three counts of structuring financial transactions, in violation of 31 U.S.C. 5324(a)(3) and (d)(1).¹ The district court sentenced petitioner to 33 months of imprisonment, to be followed by five years of supervised

¹ The jury acquitted petitioner on a second count of making a false statement to a financial institution.

release. Gov't C.A. Br. 3. The court of appeals affirmed, *United States v. Zentmyer, supra*, and petitioner did not seek this Court's review, D. Ct. Order Dismissing Motion to Vacate Sentence 1 (Mar. 4, 2010) (Order).

In February 2009, petitioner was released from custody. He remains on supervised release. Order 1; Pet. 3.

2. In June 2009, petitioner filed a motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b)(4). Order 1. The district court rejected the motion on the ground that the Civil Rules do not govern a challenge to a criminal conviction. *Ibid.*

On December 7, 2009, petitioner filed a motion to vacate the sentence under 28 U.S.C. 2255 (Supp. II 2008); he amended the motion later that month. Order 1. In March 2010, the district court dismissed the motion as untimely. Order 1-2. The court noted that petitioner's conviction had become final on May 24, 2007, 90 days after the court of appeals affirmed his conviction. Order 1; see *Clay v. United States*, 537 U.S. 522, 525 (2003); Sup. Ct. R. 13.1. Petitioner thus had until May 24, 2008 to file a timely Section 2255 motion, but he failed to file the motion until December 2009. Order 1; see 28 U.S.C. 2255(f)(1) (Supp. II 2008). In addition, the district court pointed out that even if it construed petitioner's earlier Rule 60(b) motion as an attempt to seek relief under Section 2255, that motion was untimely by more than a year. Order 1. Finding no "extraordinary circumstances" that would justify applying equitable tolling to petitioner's case, see *United States v. Battles*, 362 F.3d 1195, 1196-1197 (9th Cir. 2004), the district court dismissed petitioner's motion as untimely. Order 1-2. The court also denied petitioner's request for a certificate of appealability. Order 2.

On April 9, 2010, petitioner filed in the Ninth Circuit a notice of appeal along with a request for a certificate of appealability. Pet. 7 (Exh. 1). That same day, the court of appeals sent petitioner a letter acknowledging his filing and explaining that no briefing schedule would be set until the court acted upon the request for a certificate of appealability. Pet. 8 (Exh. 2); see 28 U.S.C. 2253(c)(2) (“A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.”).

On October 13, 2010, petitioner filed this petition for mandamus in this Court, seeking an order directing the court of appeals to act on his then-pending request for a certificate of appealability. Pet. 1-6.

On May 13, 2011, after petitioner had filed the instant petition, the court of appeals issued an order denying petitioner’s request for a certificate of appealability. App., *infra*, 1a.

ARGUMENT

Petitioner asserts that, although he filed a notice of appeal and a request for a certificate of appealability more than one year ago, the court of appeals has not issued a ruling, “preclud[ing] the ultimate resolution of the merits of Petitioner’s case.” Pet. 1. Petitioner therefore seeks a writ of mandamus directing the court of appeals to act on his request for a certificate of appealability. Pet. 6. This claim is moot.

In April 2010, petitioner filed a notice of appeal and a request that the court of appeals issue a certificate of appealability. Pet. 7 (Exh. 1); see 28 U.S.C.

2253(c)(1)(B).² When petitioner filed the instant mandamus petition, the court of appeals had not yet acted on his request. But on May 13, 2011, the court of appeals issued an order denying a certificate of appealability. See App., *infra*, 1a. Because the Ninth Circuit has acted on petitioner’s request for a certificate of appealability, petitioner’s claim that this Court should order the court of appeals to render a decision on his request—the only relief petitioner seeks—is moot. See, e.g., *Clayton v. UAW*, 451 U.S. 679, 692 (1981).

CONCLUSION

The petition for a writ of mandamus should be denied.
Respectfully submitted.

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JULY 2011

² 28 U.S.C. 2253 provides:

(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—

* * * * *

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

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-55534

D.C. Nos.: 2:09-cv-08964-ABC,
2:03-cr-00337-ABC-1

Central District of California, Los Angeles

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN HOBART ZENTMEYER, DEFENDANT-APPELLANT

[Filed: May 13, 2011]

ORDER

Before: SCHROEDER and HAWKINS, Circuit Judges.

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2). All pending motions, if any, are denied as moot.