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Bush v. Pliler, 04-56348

KLEINFELD, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In my view, we should not be exercising jurisdiction in this case. We submitted this case on October 20, 2005, and we issued a memorandum disposition that was filed December 13, 2005 and published at 162 F. App'x 689 (9th Cir. 2005). The mandate issued on January 4, 2006.

Issuance of the mandate means the case was all over and final. The reason we are now issuing this disposition in a case that came before the district court in 2001, and before our court in 2005, is that Bush moved to recall the mandate because his attorney failed to file a petition of certiorari to the Supreme Court. We granted this request, though I dissented. In a death penalty case where we recalled the mandate, the Supreme Court reversed us because recalling the mandate was “a grave abuse of discretion.” Calderon v. Thompson, 523 U.S. 538, 542 (1998). In Calderon v. Thompson, the Court held that we can recall the mandate “only in extraordinary circumstances,” and that our power to recall a mandate is “to be held in reserve against grave, unforeseen contingencies.” Id. at 550. I cannot see that any contingency here is “unforeseen,” nor that the circumstances are “extraordinary.”

The importance of finality is especially clear here. We are telling the district court to hold a hearing in order to form a judgment about the hidden motivations of a prosecutor during jury selection in a case tried thirteen years ago. For the lawyers and judges involved, a peremptory strike during voir dire is a routine event. I doubt that any lawyer can really remember very well what his inner, unspoken thoughts were 10 or 15 years ago during one of many voir dire, nor do I think anyone else can judge very well what someone's motives were so long ago. Maybe the lawyer who prosecuted this case in 1995 is still alive and still has his notes from that time and the notes will refresh his recollection and maybe not.

Because I do not think we may properly recall the mandate in this case, I respectfully dissent.