No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Maurice Nichols — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Third Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Maurice Nichols #64349-066
(Your Name)

100 Prison Road
(Address)

Estill, SC 29918
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

Did the Appellate Court and District Court abuse its discretion in construing Petitioner's Rule 60(b) motion as a "Second and Successive" 2255 Petition?" See Morris v. Horn, 187 F.3d 333 (3d Cir. 1999).

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 4/6/18.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

See Attached Memorandum in Support of Certiorari.

REASONS FOR GRANTING THE PETITION

See Attachment

UNITED STATES SUPREME COURT

MAURICE NICHOLS,

Petitioner,

APPEAL NO. 17-3240

v. Crim. No. 09-730

UNITED STATES OF AMERICA,

Respondent,

MEMORANDUM IN SUPPORT

CERTIORARI

Comes Now, Maurice Nichols, Appellant in the instant matter and proceeding *pro se*, respectfully requests, pursuant to 28 U.S.C. 2253 and Rule 22(b)(2), that the Court grant a Petition of Certiorari to permit Appellate review of the District Court's denial of his Rule 60(b) motion. Appellant Nichols seeks review on the following claim: "Did the District Court abuse its discretion in construing Appellant's Rule 60(b) motion as a "Second and Successive" 2255 Petition?" *See Morris v. Horn, 187 F.3d 333 (3d Cir. 1999).*

PROCEDURAL HISTORY

On May 6, 2009, a Pennsylvania state police trooper pulled Appellant Nichols over for failing to stop at an intersection. During the traffic stop, the trooper asked Appellant Nichols for his driver's license, registration, and proof of insurance. Appellant Nichols produced a rental car agreement in the name of Dana Douglas and a license in the name of Michael

Peterson. The trooper noticed that, according to the rental agreement, the car was overdue to be returned. When he ran the license, the officer learned that "Michael Peterson"is an alias used by Appellant Nichols, that Nichol's license had been suspended, and that the individual whose photograph appears on both licenses is the same. The trooper instructed Appellant Nichols to exit the vehicle and explained that the car was going to be impounded. While searching the car, the trooper found 499 grams of cocaine in the glove compartment, $13,130 in United States currency and three cell phones. Appellant Nichols was arrested, charged and released on bail.

On November 17, 2009, a federal grand jury indicted Appellant Nichols for possessing 499 grams of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). The District Court issued a warrant for Nichol's arrest and the FBI subsequently took him into custody.

On September 22, 2010, Appellant Nichols appeared for a change of plea hearing and pled guilty. Prior to Appellant Nichol's sentencing hearing, probation prepared a presentence investigation report ("PSR"), which stated that, under 21 U.S.C. 841, statutory maximum was 30 years imprisonment, and that, in light of the crime of conviction and Nichol's past, the base offense level would ordinarily be 24 and the criminal history category would be III. Because Appellant Nichols had three prior felony convictions for drug-related offenses, he was classified as a career offender, so his offense level was increased to 34, and his criminal history category was increased to VI. See U.S.S.G. 4B1.1. Due to his guilty plea, Nichols received a two-level reduction for acceptance of responsibility, which resulted in a final offense level of 32 and a criminal history category of VI, providing for a guideline range of 210 to 262 months' imprisonment.

On February 3, 2011, the District Court sentenced Appellant Nichol's to 210 months imprisonment, six years' supervised release, a $5,000 fine and a $100 special assessment fee.

After sentencing Attorney Alva withdrew from the case and the Court appointed Walter Batty to represent Appellant Nichols on appeal. On August 22, 2011, Appellate Counsel Batty filed an *Anders* brief stating that he was unable to identify any non-frivolous issue for review and sought the court's permission to withdraw. See Anders v. California, 386 U.S. 738, 744 (1967). Appellate Counsel's brief referred to portions of the record that arguably presented non-frivolous issues, and identified the following issues: (1) whether Nichols' guilty plea was entered knowingly and voluntarily; (2) whether the district court erred by not granting Nichols a downward departure; (3) whether the district court erred by not giving Nichols a one-level deduction for timely acceptance of responsibility, pursuant to U.S.S.G. 3E1.1(b); (4) whether Nichols' sentence was procedurally erroneous; and (5) whether Nichols' sentence was substantively reasonable.

A copy of counsel's brief was furnished to Appellant Nichols, who was then given time to raise any non-frivolous arguments in a pro se brief pursuant to *Anders*. On Sept. 26, 2011, Appellant Nichols filed his first pro se brief. Appellant Nichols, after defense counsel filed an amended supplemental *Anders* brief, filed a second pro se brief on Feb. 9, 2012. Appellant Nichols' argued that the district court erred byfailing to grant him a one-level adjustment pursuant to U.S.S.G. 3E1.1(b).

On June 28, 2012, the Third Circuit affirmed Nichols' conviction and sentence. See United States v. Nichols, 486 Fed. Appx. 244 (3d Cir. 2012). The Appellate Court held that there were no errors in Nichols' guilty plea proceeding, that Nichols qualified for sentencing as a career offender, and that with limited exception the government has complete discretion to determine whether or not to make a motion to grant a defendant a third point for acceptance of responsibility.

On May 14, 2013, Appellant Nichols then filed a timely 2255 Petition arguing that (1) he received ineffective assistance of counsel during the critical stages of the criminal proceedings and that (2) he did not qualify for the Career Offender Designation pursuant to the Sentencing Guidelines.. On July 23, 2013, the District Court denied Appellant Nichols' 2255 petition, holding that:

> "Nichols' argument about his counsel being ineffective at sentencing are without merit. His counsel argued vigorously for a downward departure, and for a finding that Nichols was not a career offender. The lack of success is irrelevant. Nichols had a fair sentencing hearing and his attorney's alleged shortcomings did not cause the sentence to be any higher than it would have been otherwise. *Strickland v. Washington*, 466 U.S. 668 (1984)."

See District Court Order, pg. 2

On July 29, 2013, Appellant Nichols filed a motion to Alter or Amend the District Court's July 23, 2013 Order denying his 2255 petition. On August 19, 2013, the District Court denied Appellant Nichols' motion to Alter or Amend its July 23, 2013 Order.

On August 28, 2013 Appellant Nichols filed a Notice of Appeal and a Request for a

Certificate of Appealability. On December 20, 2013, the Third Circuit Court of Appeals denied Appellant Nichols' request for a Certificate of Appealability.

On June 6, 2014, Appellant Nichols filed a Pro Se Motion pursuant to Rule 60(B)(1),(6) seeking relief from the District Court's July 23, 2013 Order making a substantive mistake of fact. On June 13, 2014, exactly one week after Appellant Nichols filed his motion, the District Court, without issuing an opinion, denied Appellant Nichols' motion.

DISCUSSION

The Third Circuit Court of Appeals, in *Morris v. Horn, 187 F.3d 333 (3d Cir. 1999)*,adopted a two-prong standard of review on whether to issue a COA:

"A well-reasoned rule has been set forth in aseries of cases fromtheCourtAppeals for the Fifth Circuit. *See Sonnier v. Johnson, 161 F.3d 941, 943-44 (5th Cir. 1998); Whitehead, 157 F.3d at 386; Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997).* Under this approach, a certificate is granted only if the petitioner makes: (1) a credible showing that the district court's procedural ruling was incorrect; and (2) a substantial showing that the underlying habeas petition alleges a deprivation of constitutional rights.[4] At oral argument, the Commonwealth conceded the merit of the Fifth Circuit standard. In both Whitehead and Sonnier, the Fifth Circuit held that, once it concluded that the district court's decision on the procedural issue was erroneous, it should grant a certificate of appealability and remand if the district court had not considered the merits of the constitutional claims or the second step

In *Pridgen v. Shannon*, 380 F.3d 721 (3d Cir. 2004), the Third Circuit Court of Appeals explained:

"The standards for deciding a Rule 60(b)(6) motion are well settled and familiar. "[L]egal error does not by itself warrant the application of Rule 60(b). .... Since legal error can usually be corrected on appeal, that factor without more does not justify the granting of relief under Rule 60(b)(6)." *Martinez-McBean v. Government of Virgin Islands*, 562 F.2d, 908, 912 (3 d Cir.1977). In *Page v. Schweiker*, 786 F.2d 150 , 158 (3 rd Cir.1986), the court held that only "extraordinary, and special circumstances" justify relief under Rule 60(b)(6) ."

See Pridgen v. Shannon, 380 F.3d at 722-723 (3d Cir. 2004)

In *Gonzalez*, the Supreme Court clarified that a Rule 60(b) motion should not be construed as a "Second and Successive" 2255 habeas Corpus Petition when a Rule 60(b) motion does not attack the substance of the federal court's resolution of a claim(s) on the merits but attacks some defect in the integrity of the federal habeas proceedings.

See Gonzalez v. Crosby, 545 U.S. 524, 532 (2005).

ARGUMENT

In the instant matter, Appellant Nichols' issue concerns a defect in the integrity of the federal habeas proceedings. Specifically, Appellant Nichols argues that the District Court abused its discretion in regard to the procedural steps concerning the review of Appellant Nichols' 2255 motion. The District Court should have held an Evidentiary Hearing to determine the allegations concerning Defense Counsel Alva's conduct and advice concerning Appellant Nichols' open plea.

28 U.S.C. 2255 provides that:

"A prisoner in custody under a sentence of a court established by an Act of Congress ... may move the court which imposed the sentence to vacate, set aside or correct the sentence. 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. . . ."

See 28 U.S.C. 2255 (emphasis added)

In Appellant Nichols' case, Appellant Nichols raised to two grounds for relief in his 2255 Petition. The First Ground raised was that Defense Counsel provided Ineffective Assistance of Counsel. The Second Ground raised was that Appellant Nichols did not qualify for the Career Offender Designation pursuant to the Sentencing Guidelines.[1] Specifically, Defense Counsel Daniel Alva's son, Jeremy Alva, visited Appellant Nichols' at the Federal Detention Center in Philadelphia in early September of 2010. At this time, Jeremy Alva informed Appellant that his father directed him to notify Appellant Nichols that the Motion to Suppress Evidence had no chance of success. Jeremy Alva then informed Appellant that he "had just got off the phone with the prosecutor and he said that if you take the open plea that you still would receive the three (3) points for acceptance of responsibility." Under the belief that he would receive three points for acceptance of responsibility, Appellant Nichols agreed to withdraw the Motion to Suppress and enter an open plea of guilty. Following up, Defense Counsel Daniel Alva visited Appellant the following day at FDC-Philadelphia and confirmed that "if you take the open plea, the government would agree to you (Appellant Nichols) receiving three (3) points deduction for acceptance of responsibility at sentencing."

After Appellant Nichols made an open plea of guilty, a Pre-sentence Report (PSR) was provided to Defense Counsel Alva. No Objections were made by Defense Counsel Alva to the PSR. The problem with Defense Counsel not objecting to the PSR

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[1] In designating Appellant Nichols as a Career Offender, the District Court relied on three prior Pennsylvania State drug convictions. The District Court's decision comes under scrutiny due to the fact that Appellant Nichols was convicted of violating 35 Pa. C.S. 780-113(a)(30) but the State Judgments do not list "cocaine" as the substance charged. *See United States v. Tucker*, No. 12-1483 (Dec. 12 , 2012). The reason for this absence is the fact that it was part of the "negotiated" plea deal in which Appellant Nichols would plead guilty to the generic charge of 35 Pa. C.S. 780-113(a)(30) without listing a specific "substance" in order for Appellant Nichols to qualify for an "intermediate punishment" sentence. The maximum sentence Appellant Nichols could receive under the intermediate punishment statute was 12 months of either 1.)House Arrest with Electronic Monitoring; 2.) Residential In-Patient Drug and Alcohol Treatment Programs; and 3.) Intensive Out-Patient with Monitor or any combination of the three not to exceed 12 months. See 42 Pa. C.S. 9801. In *Comm. v. Koskey*, 812 A.2d 509, 514 (Pa. 2002), the Pennsylvania Supreme Court held that imprisonment and intermediate punishment are "mutually exclusive". Thus, these prior convictions did not qualify as "controlled substance offenses" because there maximum range did not exceed 1 year of imprisonment as required to qualify as an offense under the Career Offender Guideline.

is the fact that the PSR stated that "because the [movant] did not provide timely notification of his intent to plead guilty, the [government] had to prepare for trial and that movant was not entitled to a third level reduction for acceptance of responsibility in a timely manner. See PSR Paragraph 17. Defense Counsel should have objected due to the fact that he informed Appellant Nichols that if he agreed to take the open plea the government would agree that Appellant Nichols should receive a three level reduction for acceptance of responsibility at Sentencing. The District Court denied Appellant Nichols' 2255 motion without holding an evidentiary hearing. In its opinion, the Court held:

> "Nichols' arguments about his counsel being ineffective at sentencing are

Without merit. His counsel argued vigorously for a downward departure, And for a finding that Nichols was not a career offender. The lack of success Is irrelevant. Nichols had a fair sentencing hearing and his attorney's alleged Shortcomings did not cause the sentence to be any higher than it would have Been otherwise. *Strickland v. Washington*, 466 U.S. 668 (1984) ."

See District Court Opinion, pg. 2

The District Court's decision is inconsistent with Third Circuit precedent. In *United States v. Booth*, 432 F.3d 542 (2005), the Third Circuit Court of Appeals held that:

"Although a district court has discretion whether to order a hearing when a defendant brings a motion to vacate sentence pursuant to 28 U.S.C. § 2255 , our case law has imposed limitations on the exercise of that discretion. In considering a motion to vacate a defendant's sentence, "the court must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record." *Government of the Virgin Islands v. Forte*, 865 F.2d 59 , 62 (3 d Cir.1989). *See also* R. GOVERNING § 2255 CASES R. 4(b). The district court is required to hold an evidentiary hearing "unless the motion and files and records of the case show conclusively that the movant is not entitled to relief." *Id.* We have characterized this standard as creating a "reasonably low threshold for habeas petitioners to meet." *McCoy*, 410 F.3d at 134 (quoting *Phillips v. Woodford*, 267 F.3d 966 , 973 (9th Cir.2001)). Thus, the district court abuses its discretion if it fails to hold an evidentiary hearing when the files and records of the case are inconclusive as to whether the movant is entitled to relief. *Id.* at 131, 134 ("If [the] petition allege[s] any facts warranting relief under § 2255 that are not clearly resolved by the record, the District Court [is] obligated to follow the statutory mandate to hold an evidentiary hearing.")."

See Booth, 432 F.3d at 543-544 (3d Cir. 2005)

Due to the the lack of a statement from Defense Counsel Alva, the files and records of the case are inconclusive and the District Court was mandated to hold an evidentiary hearing.

CONCLUSION

Appellant Nichols respectfully requests the Court to grant a Writ of Certiorari and vacate the Appellate Court's April 6, 2018 Order denying my COA motion due to the procedural errors explained in the instant petition and grant an evidentiary hearing in the instant matter.

Respectfully Submitted,

DATE: 7/5/18

Maurice Nichols

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F.C.I.-Estill (Camp)
100 Prison Road
Estill, South Carolina 29918

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Maurice Nichols

Date: 7/5/18