No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____<>_____

EARL REYES,

Petitioner,

v.

DALE ARTUS, Superintendent,

Department of Corrections And Community Supervision

Respondent.

_____<>_____

On Petition For A Writ of Certiorari

To The United States Court of Appeals

For The Second Circuit

_____<>_____

PETITION FOR A WRIT OF CERTIORARI

_____<>_____

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QUESTIONS PRESENTED

WHETHER IT WAS PLAIN ERROR FOR A COURT OF APPEALS TO DENY IN FORMA PAUPERIS RELIEF TO AN INDIGENT APPELLANT WHO LIKE THE PETITIONER IN THIS CASE-WAS IN COMPLIANCE WITH RULE 24(a)(3),FRAP, 28 U.S.C..

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WHETHER THE COURT OF APPEALS WAS CORRECT TO REQUIRE REYES TO OBTAIN COA-BEFORE TAKING APPEAL ON A FINAL DECISION DISPOSING OF A MOTION TO VACATE THE JUDGMENT.

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WHETHER THE COURT OF APPEALS ABUSED IT'S DISCRETION IN DENYING REYES A CERTIFICATE OF APPEALABILITY.

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PETITION FOR A WRIT OF CERTIORARI

Earl Reyes, who from the custody of the New York State Department of Corrections and Community Supervision, respectfully petitions this Court for a granted writ of certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit.

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OPINIONS BELOW

The panel Orders of the Court of Appeals were not reported in the Federal Reporter, and is reported at 2018 WL 1158812, and is reproduced and annexed herewith, for viewing on pages 1 & 2 of the Appendix, hereto. The District Court's Orders were unreported, and Petitioner incorporates by reference docket numbers sixty-five, and, sixty-seven, from the docket sheet issued by the United States District Court for the Southern District of New York, CIVIL DOCKET FOR CASE # : 10-cv-07379-LAP

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The judgment that Petitioner seeks review of was entered by the Court of Appeals on the twenty-sixth day of February, two thousand eighteen. The Order denying the petition for panel rehearing, or, in the alternative, for rehearing en banc [italics added], was entered on the twenty-fifth day of April, two thousand eighteen.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Amendment XIV [1868]

Section 1. All Persons born or naturalized in the United States, and subject to the same jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life , liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. §1915 (a)

An Appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in food faith.

Federal Rule of Appellate Procedure Rule 24(a)(1)-(a)(4), Title 28 U.S.C.

(a) Leave to Proceed in Forma Pauperis

(1) Motion in the District Court Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims entitlement to redress; and

(C) states the issues that the party intends to present on appeal

(2) Action on the Motion. If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) Prior Approval. A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to

be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court--before or after the notice of appeal is filed--certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) Notice of District Court's Denial. The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

Title 28 U.S.C. §2254(a)

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Title 28 U.S.C. §2254(d)(1)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall

not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States[.]

Title 28 U.S.C. §2253(a),(a)(c)(1)-(a)(c)(2). Appeal

(a) In a habeas 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.

(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 the State court; or

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

(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.

Federal Rules of Civil Procedure Rule 60(b)(6). Relief From a Judgment or Order

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(6) any other reason that justifies relif.

Federal Rules of Appellate Procedure Rule 22 (b)(1), Title 28 U.S.C. Habeas Corpus and Section 2255 Proceedings

(b) Certificate of Appealability

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U S C. §2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U S.C §2253(c) If an applicant files a notice of appeal, the district court must send the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings under §2254 or §2255 (if any), along with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

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STATEMENT OF THE CASE

This case involves a petition for a writ of habeas corpus pursuant to Title 28 U.S.C. §2254, and a request to proceed in the district court in forma pauperis, file by Earl Reyes, who is the pro se applicant herein. On September twenty-seventh, of two-thousand-ten On said, date the district court granted Reyes's request to proceed in forma pauperis. See, page 3 of the Appendix, docket #1, therein. Subsequently, Reyes, moved in the district court for discovery, assignment of counsel, and for

leave to file a second amended complaint. See, pages 6 & 7 of the Appendix, docket #'s 36 38, and, 40-45, therein. On March 28, 2016, the district court denied Reyes, habeas relief and declined to issue a certificate of appealability. See, page 8 of the Appendix, docket # 54, therein. On April 15, 2016, Reyes filed a timely notice of appeal, and, the following day the district court granted Reyes leave to proceed on appeal in forma pauperis See, page 8, of the Appendix, docket #55, (and the unnumbered entry following docket #55, dated 04/15/2016 is also referred to here), therein. On or about February 15, and after application for a certificate of appealability to the court of appeal, and, application to this Court for writ of certiorari, Reyes, filed with the district court a motion to vacate the judgment denying habeas corpus relief. Thereafter the district court denied Reyes's motions for relief, and motion for reconsideration & reargument, and declined to issue a certificate of appealability, docket #'s 65 & 67, (incorporated here by reference to the U S. District Court, Southern District of New York, CIVIL DOCKET FOR CASE #:1:10 cv-07379-LAP). In turn, Reyes, filed notice of appeals challenging both said Orders, and applied in the court of appeals for a certificate of appealability, assignment of counsel, and was required to fill and file in forma pauperis application forms to the court of appeals See, page 10, docket #'s 1 & 2, page 11, docket #'s 13 15, 20-22, 27 & 29, of the Appendix, herewith.

On, February 26, 2018, the court of appeals denied Reyes's motion for in forma pauperis relief on appeal, and, his application for a certificate of appealability was also denied. See, pages 1 & 2 of the Appendix Reyes, now seeks review of the court of appeals decision, and asks whether the court of appeals abused it's discretion in denying him in forma pauperis relief, refusing to issue him a certificate of appealability, and, asks whether a COA is required before an appeal could be taken to the court of appeals, on a final decision dismissing A Rule 60 (b)(6) motion.

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REASONS FOR GRANTING THE WRIT

POINT ONE

THE COURT OF APPEALS ERRED BY DENYING REYES IN FORMA PAUPERIS RELIEF.

On review, this Court would find instantly, that the court of appeals overruled the permission granted to Reyes, by the District Court to proceed in forma pauperis. Cruz v. Hauck, 404 U.S. 59,63 (1971), that said court needlessly required to apply for such thereto Mc Gann v. U.S., 362 U.S. 309, (1960), and that the court of appeals should not have denied the allowance of Reyes's appeal, without affording him representation by counsel. Hardy v. U.S., 375 U.S. 277,278,281, (1964); Johnson v. United States, 352 U.S. 565,566, (1957); Ellis v. U.S., 356 U.S. 674,675, (1958); Johnson v. Zerbst, 304 U.S. 458, (1938).

On September 27, 2010, Reyes was granted leave to proceed in forma pauperis by and in the District Court. See, page 3, docket

#1, therein, of the Appendix, that status was never revoked by the district court, on the contrary Reyes was granted leave to proceed on appeal as a poor person, on appeal from the district court's decision. See, page 8 Docket dated 04/15/2016, therein, of the Appendix. After, having filed a notice of appeal to the district court's Order denying Reyes's motion to vacate the judgment, the Court of Appeals required Reyes to apply for leave to appeal in forma pauperis, thereto. See, page 11, docket #'s 13-15,21 and, 22, therein of the Appendix Subsequently the Court of Appeals denied Reyes's leave to appeal in forma pauperis, and dismissed his appeal. See, page 1 of the Appendix. This Court has indicated the law applicable to criminal appeals in general, and has explained that the provisions of Title 28 U.S.C. §1915 can be understood and applied in such cases only when read together with other provisions of the Judicial Code and Federal Rules Governing criminal appeals. Coppedge v. U.S , 389 U.S. 438,441,(1962). The relevant Federal Rule to be applied in this case is Rule 24 of the Federal Rules of Appellate Procedure, which states in part that a party who was permitted to proceed in forma pauperis in the district court action, or who was determined to be financially unable to obtain adequate defense in a criminal case. may proceed on appeal in forma pauperis without further authorization Rule 24(a)(3), FRAP, 28 U.S.C.. There being no exception to the rule to be applied available, and left with Reyes's full compliance with said rule, his in forma pauperis status should not have been revoked by the Court of Appeals. Assuming, objectively that the

Court of Appeals final resolve could have been ultimately sustained, the fore-said procedural posture, could not, whereas, here Reyes's appeal from the District Court's denial of Reyes's motion to vacate the judgment denying habeas relief, have basis in law and fact. Buck v. Davis, 137 S.Ct. 759,775 (2017). As such, the Court of Appeals, should have granted Reyes leave to appeal in forma pauperis, appoint cvounsel to represent him and proceed to consider the appeal on the merits in the same manner it considers paid appeals. Coppedge v. U.S., 369 U.S. 438,446, (1962). This Court in similar cases, has also expresses that disparate treatment has the effect of classifying appellant's according to wealth, Cruz v. Hauck, 404 U.S. 59,64,65, (1971), and concerns for equal treatment for every litigant before the bar intended to place the burdens of proof and persuasion in all cases on the same party, in this case the New York State Government. Coppedge v. U.S., 369 U.S. 438,445,447-48, (1962). Furthermore, Reyes makes a rational argument on the law or facts. Therefore, it was the burden of said government in opposing Reyes's in forma pauperis status to appeal the District Court's decision granting such in the first instance, and to show that the appeal is so lacking merit, so that the court would dismiss the case on motion of the government had the case been docketed and record been filed by an appellant able to afford the expense of complying with those requirements. Coppedge v. U.S., 369 U.S. 438,448, (1962). Instead, the government stood silent, while Reyes, without notice of a bad faith certification, aid of counsel, and, adequate record was

charged with the burden of having to establish that his appeal is meritorious. Finally, Reyes, was prejudiced by the fact that he had not notice, of the burden of having to show that his case has merit, as the District Court never certified that Reyes's appeal would not have been taken in good faith, Rule 24(a)(B)(4), FRAP, 28 U.S.C.. Reyes, could not have known that the Court of Appeals requirement of having indigents' re-apply, for in forma pauperis irrespective of Reyes, already having been granted leave to appeal in forma pauperis, by the District Court, having been proceeding in forma pauperis in the case before the District Court, and with the provisions of Rule 24(a)(3), of the Federal Rules of Appellate Procedure, which provide, in essence, that an appellant need not re-apply, was not simply a mere formality. Consequently, that constant mode has implications that seem outrageous, and warrants this Court's attention.

POINT TWO

REYES ON APPEAL FROM FINAL ORDER DENYING RULE 60 RELEIF SHOULD NOT HAVE BEEN REQUIRED TO OBTAIN A COA ON APPEAL.

The Second Circuit Court of Appeals, requires appellant's, on appeal from a final order disposing of a motion to vacate the judgment, pursuant to Rule 60(b)(6), F.R.C.P., to obtain a certificate of appealability, as a prerequisite to an appeal. This Court, has held that a Rule 60(b)(6) motion in §2254 cases is not to be treated as a successive habeas corpus petition if it does not assert, reassert, claims of error in the movant's state conviction. Gonzalez v. Crosby, 545 U.S. 524,538 (2005). That is

this Court, explaining the reason is because a Rule 60(b)(6) motion did not reach the merits, but challenged the District Court's failure to reach the merits did not warrant precertification by the Court of Appeals, pursuant to §2244(B)(3), and, alluded to the question of whether a construction, that imposes an additional limitation on appellate review by requiring a habeas petitioner to obtain a COA as a prerequisite to appealing the denial of a Rule 60(b)(6) motion. And, this Court has defined section 2253(c)(1)(A), as governing final orders that dispose of the merits of the habeas corpus proceeding, or a proceeding challenging the lawfulness of the petitioner's detention. Harbison v. Bell, 556 U.S. 180,183, (2009); Slack v. MC Daniel, 529 U.S. 473,484-485 (2000). Reyes's, motion did not address his detention, but focused solely on the errors of the District Court decisions, which precluded view of the merits of the case. Accordingly, this Court should grant writ on this question.

POINT THREE

THE COURT OF APPEALS ABUSED IT'S DISCRETION IN FAILING TO ISSUE REYES A CERTIFICATE OF APPEALABILITY

This Court, would find that the Court of Appeals abused it's discretion in failing to issue Reyes a certificate of appealability. On application to the Court of Appeals for a certificate of appealability, said court encountered the following questions, (1) whether the District Court's resolution in it's application of the AEDPA to Reyes's constitutional claims, was debatable amongst jurists of reason where he alleged

invalid waiver affecting the right to counsel, and the District Court's mis application of controlling clearly established Supreme Court precedent , whereas, the District Court assessed Reyes's invalid waiver claim under the Farreta lens, and mase a finding that Reyes was not proceeding pro se, as opposed to making a finding as to whether Reyes knowingly, intelligently, and, voluntarily waived his right to counsel, or was he denied his right to counsel when Reyes was compelled by the trial court to make the binding decision as to whether a lesser included charge should be submitted to the jury and, whether prejudice ensued from the infingement; (2) whether the District Court's procedural ruling was wrong where it denied Reyes, who was a first time petitioner, leave to amend his complaint with that of an actual innocence claim, based on untimeliness, in light of this Court's precedent in Mc Quiggins v. Perkins,, and the Second Circuit precedent, which decided the same issue in a fact like case; (3) whether the District Court's resolution of Reyes's request for an evidentiary hearing and discovery in connection to his actual innocence claim was wrong where the District Court denied such based on Title 28 U.S C §2254(e)(2), which is not applicable to first time petitions for federal habeas relief on an actual innocence claim; and (4) whether in consideration of the foregoing reasonable jurists could debate the District Court's procedural holding , that it was satisfied that no clear error is apparent from the face of the record, as Reyes was denied leave to amend as futile, that he fails to show extraordinary circumstances

justifying relief under Fed.R.Civ.P. 60(b)(6) with respect to the court's denial of Reyes's habeas petition, and that he fails to show extraordinary circumstances with respect to the court's March 28, 2016 Order overruling Reyes's objections to the Discovery Order, in which the magistrate denied Reyes's request for discovery, a hearing, and appointment of counsel. The Court of Appeals denied Reyes certificate of appealability and stated in part that:

> Upon due consideration it is hereby ORDERED that motions are DENIED and the appeal dismissed because Appellant has failed to show that(1) jurists of reason would find it debatable whether the district court abused it's discretion in denying the Rule 60(b) motion[s], and (2) jurists of reason would find it debatable whether the underlying habeas petition in light of the grounds alleged to support the [Rule] 60(b) motion[s], states a valid claim of the denial of s constitutional right See, page 1 of the Appendix.

Were this Court to view the District Court's application of AEDPA to Reyes's invalid waiver affecting his right to counsel claim, it would find the resolution debatable amongst jurists of reason. In 2010, Reyes, filed petition for habeas corpus relief, claiming that he was deprived of his right to counsel at a critical stage of the proceedings when the court compelled Reyes to waive his right for counsel to conduct the entire defense Subsequently, the District Court, adopted the magistrate court's assessment of the invalid waiver claim and stated as follows:

> In this case Reyes did not purport to waive his right to counsel [...]. The record demonstrates that during the conference counsel was consulting closely with his client on the question oOf whether to request a lesser-included-offense charge .... This sequence does not reflect any demand by the petitioner to conduct any aspect of the trial without counsel..., there is no settled Supreme Court precedent that defense attorney's accession to a client's opinion on a tactical question amounts to denial of counsel or triggers a requirement for a Faretta-type colloquy with the court..., the trial court was nor compelled by Faretta to treat that arrangement as tantamount to a demand for self-representation.... The court plainly engaged the petitioner in an on-the-record inquiry and ensured that petitioner's rejection of his counsel's suggestions to request a lesser-included offense charge was knowing and intelligent.... Under these circumstances, the rejection by the Appellate Division of Reyes's denial of counsel claim did not contradict or unreasonably apply Supreme Court precedent.

This Court has stated that the starting point for cases subject to §2254(d)(1) is to identify the clearly established Federal law, as determined by the Supreme Court of the United States that governs the habeas petitioner's claims. Marshall v. Rodgers, 133 S.Ct. 1446,1449,(2013), quoting, Williams v. Taylor, 529 U.S. 362, 412 (2000). In the context of right to counsel cases, as opposed to the right to self-representation, this Court has expressed that the Sixth Amendment right to counsel includes the right to the effective assistance of counsel. Mc Mann v. Richardson, 397 U.S. 759,771,n.14, (1970). This right extends to all critical stages of the criminal process. Iowa v. Tovar, 541 U.S. 77,80-81, (2004), the lawyer has and must have the full authority to manage the conduct of trial. Gonzalez v. U.S., 128 S.Ct. 1765,1769, (2008), quoting Taylor v. Illinois, 484 U.S. 400,417-18, (1988). In order for one accused of a crime to waive that right this Court that a waiver must reflect an intentional

relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 305 U.S. 458,469,(1938), and, has set forth a standard for assessment and adjudication of such a claim. For example, in Edwards v. Arizona,451 U.S. 477,481,(1981), this Court held that the State court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel, and where the State court found the waiver to have been voluntary, without focusing on whether the person had knowingly, or intelligently relinquished his right to counsel. In the instant case the District Court's focus was that of whether Reyes had invoked his right to self-representation, a claim which was never alleged. At best the District Court's assessment is wrong because as the record reflects indisputably that counsel nullified the accession to Reyes's trial strategy. In 2007, the defense counsel requested three times at the charging phase for the court to submit lesser included offense charges to the jury, counsel stated:

> you know its over my client's objection that I'm requesting the lesser included of manslaughter in the first degree and manslaughter in the second degree.

The second request was a tandem. In that defense counsel requested the lesser charge and a finite ruling by stating that:

> I think we need to revisit that my client does seem to be resisting the idea of any lesser included charges even if the court would give it, it would be my request I mean the court can rule.

Irrespective, of defense counsel's numerous pleas the trial court sua sponte compelled Reyes to make the binding and tactical decision on whether to submit the lesser offense charge to the

jury thereby interfering with defense counsel's ability to make a binding decision on how to conduct the defense Lainfesta v Artuz, 253 F 3d 151,154, (C A 2 2001), quoting Strickland v Washington, 466 U S 668,(1984) And, instead of defense counsel fulfilling his duty he waivered and then actually waived his duty resulting in Reyes's erroneous or unwarranted preemption of the case at hand:

> Let me withdraw my request for that lesser included and because Mr Reyes is absolutely adamant that he doesn't want it And, although, I mean, I have never faced this exact situation before I tend to think its would be my call rather than his, I'll defer to him because he's apparently thought about it a lot and absolutely adamant in not wanting it

When the trial court involved Reyes into the discussion that led to him making that. binding decision, it also adjudicated his trial strategy and informed defense counsel that Reyes's objective was to leave no option to the jury but that of guilty or not guilty of intentional murder The trial court then asked defense counsel before the court decided, whether defense counsel intends to argue before the jury inter alia that the People haven't proven the elements of murder, defense counsel answered in the affirmative indicating that he would do so. Reyes's decision which he did not ask to make, not to charge the lesser included offense charge was granted, and received a warning that he could not later complain Subsequently, before the jury at the summation proceeding, defense counsel stated to the jury that won't argue that Reyes did not intend to cause death Thereby, undermining Reyes's strategy, which he sacrificed the lesser included offense charge that the trial

court was willing to grant upon request. The court stood silent, and, did nothing to safeguard Reyes's right to counsel. This Court, has said that the constitutional right of an accused to be represented by counsel invokes of itself the protection of the trial court, in which the accused whose life or liberty is at stake-is without counsel. The protecting duty imposes serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long as thoroughly as the circumstances of the case before him demand. Von Moltke v. Gillies, 332 U S 708,723-24,(1948). This threshold showing indicates a mis-application of the AEDPA, and a substantial showing of a constitutional right, proving that Reyes received a fundamentally unfair trial

Second, the Court of Appeals abused it's discretion when it refused to issue COA on issue of the District Court's procedural rulings involving the resolution of Reyes's motion requesting leave to amend his petition with an actual innocence claim, request for an evidentiary hearing, and, motion to vacate the judgment. In 2015, Reyes, sought leave in the District Court to amend his federal habeas petition, alleging that but for his trial attorney's failure to investigate an accidental shooting as a defense, a material witness for his justification defense, and video recording of the incident retrieved by detectives in the case, has probably

resulted in the conviction who is actually innocent. See, Page 7, docket #'s ,40-44, therein of the Appendix. Reyes, also moved in the District Court for an evidentiary hearing, discovery, and, assignment of counsel. See, page 6, docket #36, therein of the Appendix. In support of his actual innocence claim Reyes, submitted evidence in the form of (1) a duplicate copy of two statements recorded, obtained, and executed by investigators , of one Roberto Basora, who is a material witness that stated in part that the deceased jumped Reyes from behind, and, then prior to the incident he heard that the deceased and some guys threatened to kill Reyes Basora's second statement added that the deceased had an object in his hand and was hitting Reyes with the object on his face; (2) the unchallenged testimony of State witness Mark Basoa. Reyes incorporated by7 reference and declared that detective Mark Basoa, who testified as a fact that the firearm retrieved in Reyes's case would discharge from a propulsion mechanism set by application of a minimal amount of pressure on the trigger; and (3) Reyes by declaration attesting to the fact of a video surveillance recording of the crime scene as the incident had occurred. The magistrate who was assigned to the motion, without making any credibility determination, or conducting any hearing, denied Reyes leave to amend his petition, denial was base on untimeliness. See, page 7, docket #51, therein of the Appendix. Subsequently, the District Court adopted the magistrate's Report and Recommendation, and made no reference as to Reyes's motion for leave to amend, and denial thereof. After, application and denial thereof, to the Court of Appeals for a COA, after petition and denial thereof, to this Court

for a writ of certiorari, Reyes, filed in the District Court motion to vacate the judgment denying habeas corpus relief, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and, in pertinent part that it was clear error for the District Court to deny leave to amend to add an actual innocence claim, and pointed to controlling Circuit law that Reyes believes that the court overlooked, that is the fact like case in, Stephenson v, Connecticut, 639 Fed Appx. 742,(2016), which held that the court abused its discretion in determining that the petitioner had not made a credible and compelling claim of actual innocence and denying petitioner's motion to amend, finding that amendment would be futile, and that Stephenson had not shown a constitutional violation had probably resulted in the conviction of one who is actually innocent. The Court of Appeals granted certificate of appealability and found that an unsworn letter submitted to the trial court on the eve of sentencing, supported his actual innocence claim, and, found that the District Court merely stating that Stephenson had not shown that a constitutional violation had probably resulted in the conviction of one who is actually innocent without addressing the newly discovered evidence, offering no legal or factual explanation for its determination beyond its conclusion, and making no credibility determinations. As, a result the Stephenson, court could not rely on the District Court's determination. It bears to repeat that the relevant facts in the Stephenson case are nearly identical to that of Reyes's case. This Court, has stated that a court must decide according to existing

laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed in violation of the law, the judgment must be set aside. Bradley v. School Bd. of City of Richmond, 426 U.S. 696,712, (1968). That stated this Court would find that Reyes has shown that the District Court's procedural ruling was wrong, and has stated a claim for ineffective assistance of counsel for failure to investigate. Wiggins v Smith, 539 U.S. 510,(2003). And, that Reyes has shown cause, against the District Court's resolution on motion to vacate the judgment. Gonzalez v. Crosby, 545 U.S. 524,(2005); Slack v. McDaniel, 529 U.S. 473,474,(2000). Therefore, this Court should review the Court of Appeals's decision.

Conclusion

For the foregone reasons this Court should grant Reyes, writ of certiorari

Respectfully submitted

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Petitioner, Pro Se

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