NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND ALFRED GAGNON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Appellate Court properly resolved the District Court's abuse of discretion while performing the threshold Rule 60 determination required under Gonzalez v. Crosby, 545 U.S. 524 (2005), when the Appellate Court denied COA on the grounds that the petitioner failed to demonstrate that the Rule 60(b)(3) motion was debatably not a second or successive habeas petition, and that the petitioner failed to demonstrate the motion debatably presented a true fraud on the court claim, when the pleading standard required that the petitioner must prove the fraud through "clear and convincing evidence", a more demanding standard that does not permit debatability, and the petitioner submitted the required "clear and convincing evidence" that the prosecutor did in fact falsify the information used to defeat his innocence claim?
2. Whether the government's use of falsified information to improperly discredit the petitioner's evidence of his innocence constitutes a fraud perpetrated on the habeas court that renders the final judgment void as a matter of law due to the fundamental denial of due process caused by the fraud?
3. Whether the Appellate court erred by failing to address the Rule 60(b)(4) portion of the motion in its entirety when the Appellate Court was required to review the "denial of due process" portion de novo yet the Appellate Court was completely silent regarding the denial of due process and its effect on the final judgment?
4. Whether a COA is required to appeal the denial of a Rule 60(b)(3) claim of fraud on the court when the petitioner submitted clear and convincing evidence of the fraud?
5. Whether government fraud defiles the habeas courts in such a way as to create an inherent conflict of interest that biases any court downstream of the fraud, requiring a jury to determine the facts?

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TABLE OF AUTHORITIES

Raymond Alfred Gagnon, pro se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court is asked to review the denial of the petitioner's Rule 60 Motion and the Appellate Court Order that affirms that denial. The relevant Appellate Court Opinions and District Court Orders are included in the Appendix. The Memorandum Decision is included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced in the Appendix.

REASON FOR GRANTING THE PETITION

During the habeas proceedings, the prosecutor and district judge each falsified information that discredited the Sworn Declarations that prove my actual innocence claim. The falsified information specifically targeted the credibility of Declarations, and constituted a fraud perpetrated upon the habeas court. If not for the fraud, I could have proceeded to a hearing to prove my innocence. I moved the court under Rule 60 to reopen the case and the court abused its discretion by misconstruing my motion as a SSHP at the threshold inquiry. The Appellate Court acknowledged I filed a true Rule 60 motion and still denied issuing COA. When I proved the district court was wrong through clear and convincing evidence, the appellate court required me to also demonstrate debatability, although debatability is subsumed by the clear and convincing standard.

Congress enacted Section 2253 to "eliminate the abuse of the writ of habeas corpus in the courts by the undue interference ... incident to protracted appellate proceedings in frivolous cases." United States ex re. Winfield v. Cascales, 403 F. Supp. 956 (E.D.N.Y. 1975). The Fifth Circuit is not following the spirit of 2253, but instead abusing the COA requirement to frustrate my efforts to purge the falsified information from my case. Apparently, once fraud enters a habeas case, the fraud creates a conflict of

interest that corrupts all the courts. No appellate judge can make a finding that fraud was perpetrated in my case because that would be a betrayal of the district court.

The Court should take this opportunity to hold that fraud perpetrated on the habeas court interferes with the judicial machinery's role in adjudging cases by improperly influencing the court in its decision, resulting in the denial of due process and the resulting judgment is void as a matter of law.

This case presents an opportunity for this Court to address the apparent conflict of interest created when fraud is perpetrated on the court and to provide guidance for the lower courts to restore the integrity of the courts and resolve claims of fraud in a fair, equitable manner.

STATEMENT

I was prosecuted through a plea agreement that alleged I transported a certain tower computer and hard drives containing child pornography from Alabama to Texas in April 2007. When my counsel, AFPD Kurt Gene May, presented the plea agreement and I read the factual basis, I informed him that Kevin Grosenheider transported that computer when he relocated his wife from Alabama to Texas in July 2007. May told me that did not matter because I was "responsible". When I informed May that the images were deleted before the Transportation occurred, May told me that did not matter either because the FBI could recover them. Thus misadvised, I entered an involuntary, unknowing plea to a crime which did not occur.

The child pornography in my Texas case was deleted from the portable hard drive in Alabama in 2005 and forensically recovered from that hard drive in Texas in 2008. The files were also forensically recovered from the recycle bin of the Alabama computer used to delete the files because the computer's operating system automatically made a copy of the images in the recycle bin as part of the deletion process. The images were forensically recovered from the slack file space and were no longer accessible since 2005. I was prosecuted for the 2007 Transportation of the images, which occurred two years after I had the ability to exercise dominion or control over the deleted images. I was also prosecuted for the 2008 Possession of the computer under 2252A(a)(5)(B) in the Northern District of Alabama, although I did not know the images had been copied onto the Alabama computer until I was charged.

I was subjected to back to back prosecutions, first in Texas and then Alabama, and was eventually sent to FCI Bastrop on January 19, 2012, where I could finally access federal legal materials that were not

available to me during the twenty seven months I was being prosecuted in Alabama. Through my new access to federal case law I discovered that the legal advice my counsel provided was completely erroneous. Within one year of being sent to FCI Bastrop I filed a Section 2255 Petition alleging, amongst other things, that I was innocent of transporting the tower computer and hard drives indicated in my factual basis and that my plea was involuntary and unknowing. I also claimed that counsel was ineffective for failing to research my case for defenses and providing erroneous legal advice.

On December 20, 2012, AFPD Kurt Gene May mailed me a letter indicating that he had not viewed any forensic reports from my computer during my prosecution. May also indicated in that letter that the plea decision was based on Grosenheider's statements. But Grosenheider said I transported a laptop computer rather than the tower computer and counsel clearly misunderstood the facts in the case when he rendered his legal advice. Notice that May never examined any computer reports and never talked to the Grosenheiders or Chumley, but dispensed with me as he sat in front of me when he presented the plea agreement by misleading me about the law rather than investigate my defenses. May's letter constitutes new evidence of counsel's ineffectiveness.

Kevin Grosenheider was interrogated by the FBI on July 22, 2008. Grosenheider explained that I had brought the laptop computer with me when I moved from Alabama to Texas in 2007. Grosenheider had discarded my safe which contained my laptop, but he believed my laptop was with me in Vermont at the time. My factual basis states that I transported the tower computer and hard drives seized from my bedroom through the July 1, 2008 search warrant. The laptop and hard drives in the discarded safe are not mentioned in my plea agreement. My safe was never found. This did not deter the prosecutor; she prosecuted me for transporting the tower computer instead.

Grosenheider was prosecuted for misprision of a felony for discarding the safe while I was prosecuted for transporting Mary Grosenheider's tower computer. A different version of the transportation appears in Grosenheider's Plea Agreement than in mine; Grosenheider's plea agreement refers to his July 22 statements to the FBI about the laptop while mine implicates the tower computer.

Kevin Grosenheider's July 22, 2008 statements to the FBI are found on page 10 of the FBI report written July 23, 2008, which appears in the Appendix. The FBI report states that Grosenheider said he

recalled that I transported my LAPTOP computer from Alabama to San Antonio. This same statement also appears in Grosenheider's Plea Agreement, which indicates it is referring to his July 22 statement, but AUSA Tracy Thompson altered it from the original by removing the crucial word LAPTOP from the statement as it appeared in his plea agreement.

Rather than admit a mistake had been made in my prosecution or concede that my counsel misinformed me, Thompson insisted in her Response that Grosenheider stated through his Plea Agreement that I transported the TOWER computer and insisted Grosenheider's Plea Agreement contradicted his Sworn Declaration about the TOWER computer, thereby discrediting the proof of my innocence through fraud. Thompson also insisted that Grosenheider's plea agreement had a higher indicia of reliability than his Declaration, even though Thompson altered Grosenheider's July 22 statement about the LAPTOP in his Plea Agreement by removing the word LAPTOP from the statement and then misconstrued it to be about the tower computer. The only two places in the entire record that indicates Grosenheider stated I transported the TOWER computer is Thompson's RESPONSE and the MEMORANDUM DECISION.

Judge Rodriguez determined that AUSA Thomson "thoroughly discredited the Grosenheider affidavit", although everything Thompson said was a fabrication. Rodriguez also determined that there existed a contradiction between Grosenheider's and Chumley's Declarations about who loaded the tower computer even though Chumley never mentioned the tower computer. Rodriguez said this contradiction discredited both Declarations at once. Rodriguez invented this falsified contradiction when he issued the Memorandum Decision and final judgment and closed the case, so I had no opportunity to rebut it.

After I received the Memorandum Decision, I filed a Rule 59 motion and pointed out the district court's numerous errors. The district court denied that I showed any errors. I also filed a direct appeal of the Memorandum Decision and was denied a COA. I then filed the first Rule 60 Motion and carefully detailed the fraud scheme that was perpetrated on the habeas court using the altered July 22 statement in the plea agreement and complained about the court's fabricated contradiction between the Grosenheider and Chumley Declarations. The district court stated I failed to show any errors and denied issuing a COA, and misconstrued the 'fraud on the habeas court' claim in that motion as a 'fraud on the trial court' claim

and dismissed it as a SSHP. I appealed that order of denial. In my appeal brief I carefully detailed both the prosecutor's and judge's misconduct and demonstrated that I raised a true 'fraud on the habeas court' claim. The appellate court affirmed the district court's order by denying COA and stating I was time-barred by the AEDPA, in spite of the miscarriage of justice exception for innocence claims.

So I filed the second Rule 60 Motion at issue here. This time I explained the elements of fraud as required under Fed.R.Civ.P. 9 and showed that Thompson's misconduct tracked the language of 18 U.S.C. 1001, but I took great care not to state any of my original arguments so the court would have no possible reason to misconstrue my motion as a SSHP. I also argued that the fraud scheme resulted in the denial of due process, which required vacating the Memorandum Decision. The district judge again misconstrued the true Rule 60 claims as a SSHP and dismissed on the same grounds as the first Rule 60 motion, which means the judge misconstrued the 'fraud on the habeas court' claim as a 'fraud on the trial court' claim again.

I demonstrated through clear and convincing evidence that Grosenheider's true July 22 statement was about the laptop computer rather than the tower computer. Thompson's misrepresentation of his statement, a statement she altered when she wrote his plea agreement, to be about the tower computer was used to discredit my reliable third party affidavits.

I have demonstrated that AFPD Kurt Gene May provided erroneous legal advice and that he failed to research and investigate my case for defenses when I was actually innocent, which is corroborated by his own December 20, 2012 letter. I submitted three reliable third party Declarations that explain that the Grosenheiders are the ones who actually transported the tower computer and hard drives in my plea agreement, which vitiates my factual basis, a required under the law. I also showed through reliable evidence, the July 23, 2008 FBI 302 report, that Kevin Grosenheider's statement to the FBI on July 22 was that he recalled that I transported my laptop computer, which was in my safe and are not the tower computer of my plea agreement. In presenting this clear and convincing evidence, I showed that AUSA Tracy Thompson altered Grosenheider's statement and misconstrued it to the habeas court to mislead the court as to which computer was in Grosenheider's plea agreement to improperly discredit Grosenheider's Sworn Declaration. Thompson's misrepresentation through falsified information constituted a fraud perpetrated on the habeas court. I also submitted the Sworn Declarations

for comparison so that a reviewing court can see that there is no contradiction between Grosenheider and Chumley's Declarations about who loaded the computer because Chumley never mentioned the computer. I showed that the purported contradictions the district court used to discredit my evidence were fabricated by the prosecutor and the judge and do not actually exist, so my evidence was discredited and should receive full faith and credit, and if they are taken to be credible then they undeniably prove my innocence through clear and convincing evidence.

I showed through "clear and convincing evidence" that 'fraud was perpetrated on the habeas court, and in doing so I proved that my true rule 60(b)(3) motion was not a SSHP, so I proved the district court abused its discretion in misconstruing my motion when performing the threshold inquiry. The same evidence that proves the fraud also proves the court abused its discretion, so I proved the court was wrong. The appellate court committed plain error in requiring me to demonstrate "debatability" because I had to prove fraud through "clear and convincing evidence". Under Slack v. McDaniel I must prove the court was either wrong or debatable, but Slack does not require I prove that the court was wrong and demonstrate its assessment was debatable.

STANDARDS OF REVIEW

The Fifth Circuit reviews the district court's denial of relief under Rule 60(b) for abuse of discretion. Frew v. Janek, 780 F.3d 320, 326 (5th Cir. 2015). "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." United States v. Cervantes, 132 F.3d 1106, 1110 (5th Cir. 1998). The discretion of the district court is not unbounded, and must be exercised in light of the balance that is struck by Rule 60(b) between the desideratum of finality and the demands of justice. Seven Elves, Inc. v. Eskanezi, 635 F.2d 396, 401 (5th Cir. 1981). Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy Section 2253(c)(2) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Rule 60(b)(4) claims are reviewed de novo. Carter v. Fenner, 136 F.3d 1000, 1005 (5th Cir. 1998). A judgment is void under Rule 60(b)(4) only if the court "acted in a manner inconsistent with due process of law." Id., at 1006. "Rule 60(b)(4) applies only in the rare instance where a judgment is

premised on a ... violation of due process that deprives a party of notice or the opportunity to be heard." United Student Funds, Inc. v. Espinoza, 559 U.S. 260, 270 (2010). Due process "protects those rights 'so rooted in the traditions and conscience of our people a to be ranked as fundamental.'" Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). For a judgment to be void, not only must the procedural deviation rise to the level of a "fundamental infirmity," but the resulting judgment must also be "affected by" that infirmity. See United Student funds, Inc. v. Espinoza, 559 U.S. 260, 270 (2010).

ACTUAL INNOCENCE

A movant is entitled to an evidentiary hearing on an issue presented in his Section 2255 if he can provide "independent indicia of the likely merits of [his] allegations, typically in the form of one or more affidavits from reliable third parties ...". Cervantes, 132 F.3d at 1110.

The standard for actual innocence is that "no reasonable juror would have found [me] guilty". Schlup v. Delo, 513 U.S. 298, 329 (1995). That determination is based on whether one jury member could harbor a reasonable doubt of my guilt. See House v. Bell, 547 U.S. 518, 538 (2006). When considering a claim of actual innocence, the district court must consider all of the evidence, "old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial." Id. The court may consider the probative force of relevant evidence that was "wrongly excluded" or unavailable at trial. Jackson v. Virginia, 443 U.S. 307.

Since Kevin and Mary provided truthful information about the transportation of the tower computer and hard drives, and that information indicates I had given the computer to Kevin who in turn gave it to Mary, they loaded it into the moving truck at Mary's Gadsden, Alabama apartment, then they corroborate my own sworn allegations about them transporting this computer, then I have provided the required third party affidavits needed to vitiate my factual basis and prove actual innocence.

The Declarations I submitted were the type of evidence that falls under "wrongfully excluded", and it was wrongly excluded because my attorney misled me about the law when he pressed to get the plea agreement signed without researching my defenses. This was my first 2255 so I did not need new evidence as I would for a second or successive petition. All I needed was reliable evidence that vitiated the factual basis. If not for Thompson's fraud scheme, I had the "right stuff" to prove my innocence, and there is more evidence of my innocence residing on the computers to corroborate the Grosenheiders,

e-mails exchanged between Kevin and Mary right before the computer stopped working which establish that the computer was in Mary's possession and that she was the last user. A forensic examination will also prove the images were deleted years before the transportation took place.

FRAUD WAS DEMONSTRATED UNDER FED.R.CIV.P. 9 AND WAS A DUE PROCESS VIOLATION

Rule 9(b) sets the standard for pleading fraud. To satisfy rule 9(b)'s heightened pleading standard, I must "specify the statements contended to be fraudulent, identify the speaker, state where and when the statements were made, and explain why the statements were fraudulent." Williams v. WMX Technologies, Inc., 112 F.3d 175, 178 (5th Cir. 1975). In WMX Techs., the Fifth Circuit also stated "we must not dim the beacon of Rule 8(f) that "all pleadings shall be construed as to do substantial justice. "We must give a fair opportunity to plead."" WMX Techs., at 178. The federal rules of civil procedure and federal case law require that the court resolve the claim in order "to do substantial justice". In addition, I am pro se, so my pleadings must be construed liberally.

I met the Rule 9 requirements by pleading that AUSA Tracy Thompson presented information which she falsified in her Response in the federal habeas proceeding, and she did so voluntarily with the intention of discrediting the evidence of my innocence and thereby improperly influenced the court in its decision. I placed Grosenheider's July 22 true statement from the FBI report and Thompson's Response in which she misconstrues Grosenheider's July 22 statement in her argument in the Appendix for this Court to compare. I showed that Thompson altered Grosenheider's July 22 statement in his plea agreement and materially misconstrued it in her Response to the district court, and the district court said that Thompson "thoroughly discredited the Grosenheider affidavit" in the Memorandum Decision.

Thompson was placed on notice that my defense evidence was Kevin Grosenheider's Sworn Declaration stating that it was he and his wife who transported the tower computer. Thompson was therefore was placed on notice of the Declaration's probative value, (United States v. Bagley, 473 U.S. 667, 683 (1985)), so Thompson had a duty to speak truthfully on this matter. "A duty to speak the full truth arises when [the prosecutor] undertakes to say anything." First Virginia Bankshares v. Benson, 559 F.2d 1307 (5th Cir. 1977). More specifically, Thompson had a heightened duty to examine if there was any truth to my claim because I claimed I was actually innocent and she had a duty to insure that if a miscarriage of justice had occurred it was set right. Thompson whipped out her bogus evidence and lied to the court instead.

I met the pleadings standards for showing fraud was perpetrated on the habeas court; "Generally speaking, only the most egregious misconduct, such as the bribery of a judge or members of the jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). "In order to set aside a judgment or order because of fraud upon the court under Rule 60(b) ... it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978).

"There is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." Cole v. Carson, 802 F.3d 752, 768 (5th Cir. 2015). Thompson's use of deliberately falsified information to discredit my alibi evidence and to implicate me in a crime is sufficiently obvious, and sufficiently analogous, to the denial of due process caused by the fabricated evidence found in Pyle v. Kansas, 317 U.S. 213 (1942) and Cole v. Carson for Pyle and Cole to be controlling authority here. When an officer of the court falsifies information that is likely to influence the court's decision about the petitioner's innocence and forwards that information to the court, she violates the petitioner's constitutional right to a fair proceeding, and her actions are "unconscionable". See Cole at 768.

One can not overlook that Judge Rodriguez fabricated the purported contradiction between the Grosenheider and Chumley Declarations about who loaded the tower computer although Chumley never mentioned a computer, discredited the Declarations because they contradicted my factual basis (which they were required to do to be of any probative value), discredited the Declarations because I had to hire an investigator to obtain them and obtained them years after sentencing because I was prosecuted for more than two years in Alabama while Grosenheider was serving his sentence in Texas, and repeatedly misconstrued my true 'fraud on the habeas court' claims as SSHPs. Rodriguez was DEDICATED to helping Thompson pull off the fraud scheme.

This Court has held that it is a denial of due process for the government to prosecute someone using fabricated evidence in Pyle v. Kansas. In Cole v. Carson, the Fifth Circuit recognized that it was a denial of due process to bring charges against someone using falsified information based on this Court's holding in Pyle. The courts have determined that due process is denied when a person's liberty is put

at stake using falsified information; it was a denial of due process to use fabricated evidence during a trial, and it was a denial of due process to bring charges using fabricated evidence and subject a person to a trial with the potential for an error and a wrongful conviction. In my case, the government fabricated evidence to defeat a 2255 innocence claim, and denied due process in the very proceeding specifically intended to vindicate rights violations. More disturbing is that the prosecutor used Grosenheider's prosecution to obtain her bogus evidence, and had no intention of honoring the clause that preserved collateral attack in my plea agreement. My plea agreement is voided by her intent to defraud and her lack of good faith when proffering the plea agreement.

This Court should therefore take this opportunity to hold that the use of falsified information to improperly discredit a petitioner's evidence of innocence in order to maintain an erroneous conviction - a fraud perpetrated upon the habeas court - constitutes a denial of due process. Since the falsified information informed the Memorandum Decision and the courts' denials in subsequent efforts at reopening the case or appealing, the falsified information deprived the Petitioner of a meaningful opportunity to be heard, and where the court demonstrated bias by falsifying the purported contradiction between the Declarations in order to improperly discredit them, each falsified contradiction that improperly discredits my evidence of innocence constitutes a fundamental deprivation of due process of such impact they each render the Memorandum Decision and void as a matter of law.

Since the Appellate Court was required to review denial of due process that results in a "fundamental infirmity" de novo under 60(b)(4), this Court should take this opportunity to hold that the Appellate court erred in evading the required de novo review by invoking erroneous and inapplicable standards of review, and failed to follow the de novo standard of review which did apply.

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN MAKING THE THRESHOLD DETERMINATION, AND BECAUSE I MUST PROVE THE FRAUD THROUGH "CLEAR AND CONVINCING EVIDENCE" THERE IS NO NEED TO DEMONSTRATE THE "DEBATABILITY" OF THE COURT'S ABUSE OF DISCRETION

The threshold determination whether a motion is a true Rule 60(b) motion may be construed as either a procedure or a merits determination because it may be considered to be a mixed question of fact and law. The court performed a merits determination and determined that I claimed that fraud was perpetrated on the trial court rather than the habeas court, which is a clear error because the appellate court admitted I claimed fraud was perpetrated during the habeas proceedings. Gonzalez v. Crosby treats the threshold determination as a procedural matter, but the Fifth Circuit treated it as a merits issue. I have proved that the district court was wrong by either approach through clear and convincing evidence because the government's bogus evidence and misrepresention at issue was introduced in the habeas proceedings, not duringmy prosection.

Judge Owen acknowledged that I filed a true Rule 60(b)(3) motion in her Order; "He contends that he is entitled to relief because the government perpetrated fraud against the court during his initial 2255 motion proceedings. He argues that the fraud resulted in a defect in the integrity of the 2255 proceedings, and, therefore, the district court erred in denying his motion for the same reasons that it denied his earlier Rule 60(b) motion." December 20, 2017 Order, No. 16-51004.

Under Gonzalez v. Crosby, 545 U.S. 524 (2005), "when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of the claim on the merits, but some defect in the integrity of the federal habeas proceedings," it is a true Rule 60 motion and not a SSHP. Gonzalez, at 532. Claims of 'fraud on the court' are permitted. Id., at 532 n.5. When Judge Owen acknowledged from my pleadings that I claimed that "fraud resulted in a defect of the 2255 proceedings" as required under Gonzalez, she settled in my favor that the district court abused its discretion when performing the threshold inquiry as a procedural matter, because that is what is required of a true Rule 60(b)(3) motion.

When the court denies the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. See Slack at 484. I have not

submitted a petition, instead I submitted a Rule 60 motion, and the district court purported to resolve the merits of my innocence claim when performing the threshold determination, so demonstrating debatability of the procedural ruling under Slack is not required because my motion was not a petition and the court purported to resolve the merits of my claim. These circumstances distinguish me from the holding in Slack. I can simply prove the court is WRONG and satisfy the intent of 2253 without demonstrating debatability.

There is no room for debatability when I must prove by "clear and convincing evidence" that a fraud was perpetrated; either my evidence showed this or it did not. In this case I showed the fraud by comparing Kevin's true July 22 statement (in the FBI report) with Thompson altered version (in her Response), even setting both versions of those statements together for comparison in my numerous briefs. I showed that Kevin actually said I transported the LAPTOP in his plea agreement through the July 22 reference. I showed that Kevin said he transported the TOWER computer in his Sworn Declaration, and that because he spoke about two different computers in each respective sworn document there is no contradiction between the sworn documents. The purported contradiction that the prosecutor invented does not exist. The evidence is clear and convincing that Thompson misled the court using bogus evidence and misrepresentations. I did not demonstrate that the court's assessment of my constitutional claim or its procedural decision was debatable by jurists of reason. Instead I PROVED that the court was WRONG in finding the Sworn Declarations were discredited by the falsified contradictions, and I proved that fraud was perpetrated through clear and convincing evidence that left no room for debatability.

The appellate court committed an error when it required of me to demonstrate "debatability" because I was required to prove the fraud through clear and convincing evidence, and the evidence clearly shows that AUSA Tracy Thompson submitted the bogus evidence to the habeas court, not the trial court, and she made her misrepresentations to discredit Grosenheider's Declaration during the habeas proceedings, not during my prosecution. In meeting the standard that I had to meet, proving fraud through clear and convincing evidence, I surpassed demonstrating debatability of the court's assessment of the fraud, and surpassed any debatability of the court's assessment of my claim. "Debatability" is subsumed by the "clear and convincing" standard I was obligated to meet.

Whichever approach a reviewing court uses, whether treating the abuse of discretion as a procedural error or as an erroneous assessment of the constitutional claim, I have shown that the district court abused its discretion, either at the threshold inquiry into the type of my Rule 60 motion, or when it

purported to performed the merits determination, because my claim was that fraud was perpetrated on the habeas court and my evidence supported a fraud on the habeas court claim. This issue is settled in my favor. The appellate court was required to remand for a merits determination on the fraud, or else perform a de novo review to resolve the Rule 60(b)(4) claim of denial of due process. Instead of following procedure, the appellate court denied issuing a COA and evaded resolving the fraud.

MY APPEAL WAS NOT FRIVOLOUS, BUT THE APPELLATE COURT FAULTED ME FOR STRUGGLING WITH MY PRESENTATION EVEN THOUGH IT WAS THE GOVERNMENT WHO CREATED THE NEED FOR ADDITIONAL PLEADINGS AND ESCALATED MY PLEADING BURDEN TO A HEIGHTENED LEVEL

The courts devoted themselves to misconstruing my pro se pleadings liberally against me, instead of construing my pleading liberally to do substantial justice. I found the case law below to be applicable if not directly on point;

In Dillingham v. Wainwright, 422 F.Supp. 259 (S.D.Fla. 1976), the district court distinguished a "weak" argument from one that is "frivolous". Even a weak argument one which may be "well beyond the law's existing frontier but well within the frontier of rationality" is properly certified under Section 2253, whereas a frivolous argument one for which no rational argument can be made is not subject to Section 2253 certification. See Gordon v. Willis, 516 F.Supp. 911, 912, U.S. Dist. LEXIS 16848 (N.D.Ga. 1980). In the case of a petitioner pleading pro se, the Court does not expect to see arguments formulated in such a way that they belong within the "frontier of rationality", but rather, must decide whether an attorney, whose craft is to mold the facts and law into a rational thesis, could succeed in making an argument which is neither frivolous, nor so weak as to border on mere palaver. Id., at 913.

In other words, if a professional lawyer could have fashioned a rational argument for a COA from the facts in my case and the evidence I submitted, even if I did not do a workmanlike job of it, I have met my pleading burden to obtain a COA. Even though the language in my motion was awkward I pleaded sufficiently. Judge Owen proved this herself when she recognized that after three iterations, she understood my fraud claims well enough to recognize THE FRAUD SCHEME laid out in each, so my arguments were rational enough to be understood even though they presented the same issue different ways three times. While I may have struggled with communicating and conveying the facts and issues of my case, and my legal arguments, Appellate Judge Owen demonstrated that she struggled not at all with understanding me. The Honorable Judge got it right all three times. Maybe I did not do a workmanlike job, but I got it all in there three times in a row. I attribute the awkward language in my motion to

trying not to bring up anything from my 2255 proceedings except the fraud because the district court misconstrued my Rule 60 motion once before. It is difficult to follow the rules perfectly when the court won't even follow the rules, and the court knows the rules better. The district court can share responsibility for any purported pleading errors and I can be fully excused. Admittedly, my first Rule 60 Motion did a superior job of detailing the fraud and comparing it to case law for fraud on the court, but since Judge Owen recognized THE FRAUD SCHEME in each motion, the pleadings were adequate in the second Rule 60(b) motion too.

Under Section 2255, I only needed to allege facts which warranted relief in order to be able to proceed to a hearing to prove those facts. I did not even need to cite any case law. When the government introduced the falsified information, I was forced to argue 'fraud on the court' and present my evidence of fraud. The district judge refused to follow federal law in order to protect his fraud scheme so now I must debate the debatability of the debate. I would not have been forced into pleading anything at all about fraud if the prosecutor and judge had not improperly discredited my Sworn Declarations with falsified information. In fact, I would be home right now and you would not be reading this Petition. The government's own fraud has wasted the scarce resources of the courts, and now the appellate court would abuse the COA requirement intended to guard against frivolous appeals in order to protect the fraud and its perpetrators. The government is rewarded with a windfall for cheating and for wasting the resources of the courts by forcing me into having to file the post-judgment motions and appeals. That is completely absurd and fundamentally unfair.

Perpetrating fraud on the court has stood the intent behind Section 2253 on its head.

The Court should therefore take this opportunity to hold that when a petitioner alleges fraud was perpetrated on the court, and has submitted clear and convincing evidence of that fraud or misrepresentation, then there is no need for a COA because the petitioner's claim has not even been resolved on its true merits yet, and that the falsified information must be purged from the case by a fair and reliable means and replaced with the true, veritable information.

ONCE GOVERNMENT FRAUD WAS INTRODUCED INTO THE HABEAS PROCEEDINGS, THE COURTS LABORED UNDER WHAT AMOUNTS TO A CONFLICT OF INTEREST, SO A JURY SHOULD DETERMINE THE FACTS INSTEAD

Once the government introduced fraud into a habeas case, there was no reasonable possibility of fairness or justice. The fraud would not have been introduced except that my innocence claim was meritorious. To say otherwise is to say that government attorneys routinely falsify information whether they need to or not. If I were truly guilty the government could have proven it through reliable forensic reports from my computers rather than the artifice of altered statements and fabricated contradictions.

Thompson did not present Grosenheider's July 22 statement as it appeared in the FBI report, instead she removed the word "laptop" and inserted it into his plea agreement. Thompson then misconstrued the altered statement to be about the tower computer of my plea agreement to discredit Grosenheider's Sworn Declaration. After Thompson submitted her Response, my investigator obtained a Declaration from Lowell Chumley, who had helped Grosenheider and Mary load the moving truck at my Alabama residence. Chumley's Sworn Declaration corroborated Kevin Grosenheider. That presented a new problem.

Thompson had fabricated evidence to support the version of facts in my plea agreement, which she used to discredit Grosenheider, but she had nothing to discredit Chumley's Sworn Declaration. This is where the Judge Rodriguez took the case from Magistrate Mathy and invented the bogus contradiction between the two Declarations about who loaded the tower computer used to discredit both Declarations at once, and Thompson's problem was solved. Judge Rodriguez issued the Memorandum Decision with his falsified contradiction and closed my case with no possibility for rebuttal, because rebuttal would now require a COA. A clever strategy to protect the fraud scheme.

The appellate court will not grant a COA because that would be to acknowledge that fraud exists. Issuing a COA would also create a forum to dispute the falsified information, and that would require the appellate court to address my arguments and evidence properly. The fraud scheme effectively nullifies the First Amendment rights of access to the courts and the right to redress by biasing the courts in their decision to issue a COA.

The Fifth Circuit is not the only court of appeals that finds it awkward to follow the law once fraud is ratified as the facts of the case. In my habeas case from Alabama, the Eleventh Circuit

transformed the floppy disks at the heart of the Chumley Disks fraud scheme into a computer to obscure the fraud used to defeat my IAC claim, and then misconstrued the fraud claim entirely to obscure the fraud in its last order denying COA. The errors pile up while the appellate courts try to find yet another way to get out of addressing the fraud. The appellate judges simply will not openly resolve meritorious fraud claims. An inherent conflict of interest exists that prevents the appellate judges from finding fraud for me and condemning the judge or the prosecutor as a necessary consequence.

Having the district judge falsify information and protect the fraud scheme by misconstruing my Rule 60 motions presents a twist that does not exist with mere erroneous information; the court demonstrated bias and favoritism by insuring the government will win and then by also protecting the falsified information by misconstruing my motions and denying COA. If the errors were merely mistakenly erroneous findings, the court would have corrected the errors once I submitted the evidence that proved the court to be erroneous in determining that the contradictions existed, as required by law. The court's departure from the rule of law means the judge is willing to violate his sworn oath so he can work his fraud scheme.

The bias and favoritism demonstrated by the district court calls into question every determination in the Memorandum Decision, and rightfully so, because reviewing the Memorandum Decision reveals numerous factual errors and errors of law intended to deny relief and to thwart a subsequent appeal. For example, the district court said my illegally obtained statements were not used against me when resolving my IAC/Suppression claim. Of course my statements were used against me; my illegally obtained statements form the probable cause in the search warrant affidavit, requiring suppression of the warrant and its fruits. My statements were undeniably used against me in the search warrant, in clear contradiction of the court.

I also wrote a Motion for Reconsideration of my Texas sentence while I was being prosecuted in Alabama after I finally implored my counsel to bring me a copy of the sentencing guidelines. The Motion was given to my Alabama attorney to file, but she never filed it. She returned it to me once I got to FCI Bastrop. That Motion for Reconsideration of my sentence had no merit since it was written several months after my sentencing, long after any argument could be heard by the sentencing court. If anything, the Motion demonstrates through its content how limited my access was to case law while in Alabama, and

that I exercised diligence but that diligence was futile. I consider myself fortunate that the meritless Motion was not filed because it could have been construed as my first 2255 petition, thereby making the meritorious 2255 petition I did eventually file a second or successive petition requiring newly obtained evidence of my innocence to proceed. I made a huge mistake when I asked Alabama counsel to file the Motion and I was fortunate that she took no interest in helping me.

Judge Rodriguez saw it differently. Rodriguez faulted me for not filing that Motion immediately upon its return to me, even though filing it would have been detrimental to my actual 2255 petition. He construed that Motion as contradicting my claim that I did not have adequate access to federal legal materials because I was able to write a motion. The court's bias is so evident in all of its misconduct and decisions that nothing in the Memorandum Decision is trustworthy.

The district court's most prejudicial misconduct was the fabrication of the purported contradiction between the two Declarations. Misconstruing my Rule 60(b)(3) Motion and claim is also evidence of the judge's determination to keep THE FRAUD SCHEME from being scrutinized. To say the fraud corrupted the court would be inaccurate. The court was already corrupted because it was predisposed to deny relief, and the fraud was just a strategy for that purpose, just as not following the standards for issuing a COA is a strategy to protect the fraud. The COA requirement being abused to protect the fraud.

Section 2255 relief and Rule 60(b)(3) and 60(d)(3) becomes nullities once the prosecutor introduces fraud into the proceedings. If the government was bold enough to submit falsified information to the district court, then the government already knew that its misconduct would be rewarded rather than punished, and that the court was already corrupt and predisposed to find in favor of the government. Once fraud has been ratified as the facts in the case, no court downstream of the fraud, whether it be a court of appeals or a district court holding an evidentiary hearing, resolving a post-judgment motion about the fraud, or reviewing an Objection can reasonably be expected to find that fraud occurred. The truth of this statement is demonstrated in the plain errors the appellate courts have committed in order to evade my fraud claims. It is obvious that no judge can be expected to condemn a brother judge by finding that fraud was perpetrated, or even by issuing a COA to resolve the fraud claim. It is apparent that government fraud defiles any court downstream of the fraud.

Since I only had to allege facts warranting relief with no need to cite case law, and the government

has exacerbated my pleading burden to extraordinary levels by perpetrating fraud, it is appropriate to consider whether a professional attorney could write a meritorious motion for COA from the facts and evidence in my case. I considered recommending that the Court appoint professional counsel to vet my evidence and claims to be sure. That idea fails because a professional attorney would only be retaliated against by the courts if that attorney were to openly state there is evidence of fraud. I have been already been threatened with sanctions of I persist with trying to expose the fraud by the same Appellate Court that time-barred my innocence claim so I know this to be true. The threat of retaliation would deter professional counsel from advocating properly.

Fraud exacerbates the pleading burden and requires the petitioner to scour case law to determine the pleading requirements for fraud, and the appellate court is certain to invent and impose capricious and arbitrary requirements should the petitioner meet the existing requirements, as evidenced by this case. Therefore, this Court should establish a formal procedure for habeas petitioners to plead fraud on the court and for the courts to determine that a true claim of fraud has been made, taking into account the need to construe pro se pleadings liberally to do substantial justice and the influence that fraud has on the court in making its determinations. It is evident that a clear procedural rule for alleging fraud on the court should be created for the federal petitioners and courts to follow, and that the rule must be particularized to notify the petitioner each element he must show in order to proceed with a fraud on the court claim, much as Fed.R.Civ.P. 9 controls the pleadings in a fraud claim, and notify the court how to determined if a true fraud on the court claim has been alleged that does not permit the court to evade examining its own fraud scheme by misconstruing it and denying COA.

Once I submit reliable evidence that contradicts the court's findings, that evidence must trigger a hearing on the fraud in front of a jury in a different Circuit without requiring a COA. The policy of certifying an issue to prevent frivolous appeals clearly did not contemplate the inherent conflict of interest that fraud on the court causes, and did not contemplate the courts' ability to abuse the COA requirement to protect the fraud and its perpetrators. The government should not be permitted to make their own determination of fraud, because that will always yield a result favorable to the government.

Because my evidence is clear and convincing that the evidence proving my innocence was improperly discredited using falsified contradictions and misrepresentations, and because the evidence of my innocence is clear and convincing, this Court should vacate my involuntary, unknowing plea and vacate my conviction.

CONCLUSION

Based on the foregoing Petition and evidence submitted, this Court should hold that fraud renders a habeas judgment void under Rule 60(b)(4) and that a COA is not needed to appeal fraud once the petitioner submits evidence of fraud because the fraud must be proved by clear and convincing evidence anyway so the claim is not subject to debate. This Court should also hold that the appellate court erred in failing to perform the de novo review required once fraud and denial of due process were alleged.

There is also no possibility of a fair evidentiary hearing to determine the facts because the judges downstream of the fraud labor under a conflict of interest, and based on the Appellate Courts' numerous errors, a different judge would throw the case to protect his brother judge anyway, as evidenced by the appellate court's refusal to perform the required de novo review.

There is only one reasonable and fair solution, and that is to vacate my guilty plea as involuntary and unknowing and vacate the conviction. I also request an evidentiary hearing on the fraud in a neutral circuit with the right to empanel a jury to determine the facts. I also seek any other relief that this Court deems due and proper.

Respectfully submitted,

Raymond A Gagnon