ORIGINAL

No. 18-7120

Case No: 17-50523

IN THE

SUPREME COURT OF THE UNITED STATES

Carlos Zuniga Hernandez, — 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 FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Carlos Zuniga Hernandez,
(Your Name)

U.S.P ATLANTA FCI P.O.BOX 150160
(Address)

Atlanta Georgia 30315
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether a Rule 60(d) motion challenging only the District Court's failure to hold an evidentiary hearing presents a successive claim within the meaning of Gonzalez V. Crosby.

2. Whether the District Court abused it discretion by denying the Rule 60(d) motion on the basis that Appellant's allegations were insufficient raise a fact issue warranting an evidentiary hearing where Appellant has stated a facially claim based upon third-party beneficiary payments to his counsel. Upon fraud on the court for cancelling conflict of interest hearing without making any inquire of conflict exist so that the judicial machinery cannot perform in the unusual manner, within meaning of Borwn, 644 Fed App 957 (11th cir 2016).

3. Whether the Court of Appeals abused its discretion by denying a second C.O.A based on the same previous C.O.A that was [granted] where the Appellant made a substantial showing of denial of a constitutional right?. The previous C.O.A was granted not because of the reasonable jurists" prong but because Hernandez sumitted a facially valid constitutional claim, i.e his conflict of interest claim based upon the third-party beneficiary. See Houser V. Dretke, 395 F.3d 560 562 (5th cir 2004); Wood V. Georgia, 450 U.S 262 268 269(1981).

4. Whether the court of appeals abused its discretion in denying a C.O.A based upon the "reasonable jurist" prong, or if the issue presented "deserve encouragement to proceed further." ?

5. Whether the court of appeals abused its discretion when it evaluated Hernandez second C.O.A differently from the "first C.O.A as" if the standards were different or distinct??

6. Whether Hernandez has made a "substantial showing of the denial of a constitutional right or due-process of law within meaning of Washington V. Johnson, 90 Fed 945 (5th cir 1996).

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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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

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

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

[X] reported at May 2, 2018; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[X] reported at May 30, 2017; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] 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 N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the N/A 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

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

The date on which the United States Court of Appeals decided my case was July 6, 2018.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 10, 2018, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/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 N/A. A copy of that decision appears at Appendix N/A.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides, in pertinent part: The right of the people to be secure in their person, houses, and effects, against unreasonable searches and seizures, shall not be violated.

2. The Fifth Amendment to the United States Constitution provides, in pertinent part: No person ... shall be deprived of life, liberty, or property, without due process of law.

3. The Sixth Amendment to the United States Constitution provides, in pertinent part: In all criminal prosecutions, the accused shall enjoy the right ... to have the effective assistance of counsel for his defense.

4. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: 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 due process of law.

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5. Pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667, 674-75 (1985); and Kyles v. Whitley, 514 U.S. 419, 432-34 (1995)(The prosecution has an affirmative duty to disclose evidence that is both favorable to the defense and material to either guilt or punishment. Kyles v. Whitley, (Supra); United States v. Bagley, (Supra); Brady, 373 U.S. at 87)(The suppression of such evidence deprives the defendant of a fair trial and thus violates due process. Brady, 373 U.S. at 86-87)(To establish a Brady violation, a defendant must demonstrate that (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial. United States v. Walton, 217 F.3d 443, 450 (7th Cir. 2000); United States v. Morris, 80 F.3d 1151, 1169 (7th Cir. 1996).

United States v. Rugendorf, 316 F.3d 589 (7th Cir. 1963)(The remaining point raised by defendant as error is the refusal of the court to require the disclosure of the name of the informer. The defendant relies on Roviaro v. United States, 353 U.S. 53 (1963). Roviaro, 353 U.S. at 60-61(When the disclosure of the informer is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.")Roviaro, 353 U.S. at 62. In Roviaro the informant was the only person, other than the defendant, who participated in the transaction charged in the indictment. He was the only witness other than the defendant who could have disclosed entrapment, if any. See Smith v. Cain, 132 S. Ct. 627, 630 (2012)(Evidence impeaching prosecutor's eyewitness testimony was "plainly material" when that eyewitness testimony "was the only evidence linking [the defendant] to the crime.

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6. Claims of ineffective assistance of counsel are governed by the two prong test set forth in Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). To succeed on any claim of ineffective assistance of counsel, a defendant must

show that: (1) the attorney's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that except for the attorney's unprofessional errors, the result would have been different. Strickland,(supra)., see Glover v. Unites States, 531 U. S. 198, 203, 121 S.Ct. 696, 148 L.Ed. 2d 602 (2001).

STATEMENT OF THE CASE

PROCEDURAL STATUS OF CASE AN APPLICATION TO THE SUPREME COURT FOR A PETITION FOR WRIT OF CERTIORARI IS APPROPRIATE AT THIS TIME BECAUSE.

1. The District court entered a final, appealable judgment in this matter September 15, 2011 that denied petitioner relief on his petition for Habeas Corpus.

2. Petitioner, desires to appeal this judgment, as is authorized by section 2255(a) of Title 28 of the United States Code. However, section 2253(c)(1) and Appellate Rule 22(b)(1) require a Certificate of appealability as a precondition of preceeding with the appeal.

3. A timely notice of appeal was filed in this matter on September 30, 2011.

4.The District Court, sua sponte declined to issue in this matter. A true and correct copy of that decision is annexed.

5. On September 15, 2011, the District court sua sponte denied a certificate of appealability. The District judge stated a certificate was not appropriate and the district judge's statement is contained in an order and is attached to this Application.

6. On April 30, 2012 The Court of Appeal for the Fifth Circuit granted C.O.A based Hernandez has also stated a facially valid constitutional claim i.e, his conflict of interest claim based upon the third-party beneficiary.

7. On June 24, 2013 the Court of Appeals for the Fifth Circuit sua sponted dismiss the appeal for want prosecution take no action on petition case.

under this extraordinary circumstances Appelllant was unable to filed his brief on timely manner. Starting on February 14, 2013, housing unit 4B was placed on lock-down status due to a chicken-pox breakout and for quarantine. As a result of the lockdown, I was not able to timely submit my brief to the Fifth Circuit Court of Appeals and my case was subsequently dismissed. In addition, I was also quarantined in the SHU due to a medical examination in which suggested I had contracted chicken-pox See Appendix...G

8. The District court on or about August 23, 2006 the court order as to Carlos Zuniga Hernandez, Ernesto Zuniga Zuniga. conflict of interest hearing set for August 39, 2006, at 9:30AM before Honorable Judge Orlando L. Garcia signed by Judge Orlando L. Garcia,[entered August 24, 2006][DK NO: 110].

9. The District court on or about August 24, 2006 order cancelling conflict of interest hearing as to Carlos Zuniga Hernandez, Ernesto Zuniga Zuniga, signed by Judge Orlando L. Garcia [entered August 24, 2006][DK NO: 115].

GROUNDS FOR APPLICATION

Nature of District Court Proceeding

On November 11, 2009, Petitioner filed a petition for a Writ of Habeas Gorpus , as authorized by Section 2255 of Title 28 of the United States Code. In that petition argued that his detention by the authorities of the United States was unconstitutional because:

> Petitioner was denied constitutionally effective assistance of counsel, and the District Court erred in the guidelines calculation.

1. Petitioner first contended the Court erred applying a two-level specific offense enhancement and a four-level role enhancement in determining his sentence because the facts supporting these enhancements were neither admitted or found by a jury.

2. Petitioner next claims his counsel was ineffective. Petitioner claims his counsel was ineffective due to a conflict of interest because his defense-counsel represented a co-defendant at the intial appearance. The record shows defense-counsel Barrera represented co-defendant Ernest Zuniga Zuniga at the intial appearance, and Petitioner was represented by another attorney. However, following the intial appearance Zuniga retained other counsel, Barrera withdrew from representing Zuniga, and Barrera

was retained by Petitioner. Barrera represented Petitioner through sentencing and entry of the judgment and commitment order.Petitioner knew Barrera previously represented Zuniga.

3. On May 11, 2017,Petitioner, filed a petition on motion under Fed. R. Civ. Pro. Rule 60(d) as authorized by Fed. R. Civ. Pro. Rule 60(d)(3) relief from a final judgment or order.

(d) Other power to grant relief.

This rule does not limit a court's power to.

(3) Set aside a judgment for fraud on the court.

In that petition argued that his due process was violated where fraud occure as a result the legal process is "contaminated"

4. Petitioner, was denied constitutionally effective assistance of counsel, and the District court erred in cancelling the conflict of intererst hearing where the Distrcit court well aware of the issue of conflict, based upon Ernesto's third-party benefactor payments to Barrera.

5. On or about 8/23/2006, the court order as to Carlos Zuniga Hernandez, Ernesto Zuniga Zuniga, conflict of interest hearing set for 8/30/2006, at 9:30Am before Honorable judge Orlando L Garcia signed by judge Orlando L. Garcia [entered 8/24/2006][DK NO; 110].

On or about 8/24/2006,The District court order of cancelling conflict of interest hearing it is repectfully submmitted that the District court abused its discretion, in cancelling the conflict of interest hearing without making an inquiry, in to a potential conflict of interest exists as to Carlos Zuniga Hernandez Ernesto Zuniga Zuniga, signed by judge Orlando L Garcia[enteret 8/24/2006][DK No: 115], Petitioner, contends that the District court clearly committed fraud, and the circuits has also defined fraud on the court's as that species

of fraud which does or attempts to defile the court itself,

Therefore when judge Orlando L Garcia, issue the order cancelling the conflict of interest hearing when a court is well aware of the conflict of interest exists.

because of these actions of the court took in cancelling the conflict hearing without making an inquiry to a potential conflict of interest exists is fraud and was done through a perpetrated by officer of the court so that the judicial machinery cannot perform in the unusual manner as a a result the petitioner, was prejudice.

When counsel's, potential conflict of interest is brought to the court's attention the trial judge in "on notice" and must "take adequate steps" to protect the defendant's right's.

To properly peform this duty, the trial judge must make an iquiry into the potential conflict, in the Sixth Amendment, when an ojection to a conflict of interest is properly raised and dismissed without a searching review a constitutional violation occure [if] the court determines that an actual conflict of interest exists, it must obtain the defendant's knowing and intelligent waive to the conflict or provide the defendant with the opportunity to seek new counsel.

In this case, the Petitioner, did not have the chance to object to a conflict of interest hearing due to the court failure making an inquiry into an potential conflict is fraud on the court actions of cancelling the conflict of interest hearing if it vital would not have been for the trial judge cancelling the conflict hearing on the proceeding the end result may have been different.

Because of these actions and because Ernesto directed, and paid for Barrera's representation petitioner, was without counsel.

Because of these actions, and because the perpetrated by officer of the court commit fraud cancelling the conflict of interest hearing during the proceeding as a resulted the process is "contaminated"

Moreover, if Petitioner, had unconflcited counsel, and not been assualted, and the perpetrated by officer of the court,and have not been committed fraud Petitioner, would have the chance to objected to a conflict of interest hearing in this case, which would have changed the outcome.

STATEMENT OF FACTS

ARGUMENT IN SUPPORT OF ISSUANCE OF PETITION FOR WRIT OF CERTIORARI

I. Petitioner Has Raised Substantial Showing of Denial of Constitutional Right on Issue of Ineffective Assistance of Counsel.

Petitioner together with 13 co-defendants, was charged in a sweeping indictment, with violations of the controlled substance Act (CSA) and money laundering.

At arraignment, Petitioner was represented by court appointed counsel, Ms. Tracy Lynn Spoor. As well Petitioner's co-defendant, Ernesto Zuniga Zuniga(Ernesto), was represented by Roberto J. Barrera (Barrera).

Following arraignment, and while incarcerated with Ernesto at(GEO) Correctional Facility (GEO C.F.), Petitioner and his sister were contacted by Ernesto.

In sum and substance, Ernesto told Peititoner ans his Sister that he would have Mr. Barrera represent Petitioner, and that Ernesto would provide Barrera's retainer fee. Ernesto further told the Petitioner that he was to plea guilty, and **not** to disclose that he (Ernesto) was the leader and organizer of the drug ring.

Ernesto did in fact provide **cash** as payment of Barrera's retainer.

On or about August 23, 2006, Barrera substituted for Spoor

Petitioner acceded to Barrera's representation, as he was in fear for his life.

Subsequently, Petitioner requested to debrief/proffer to the Government. Shortly after asking Barrera to arrange for such proffer, Petitioner was approached in GEO C.F. by three Mexican gang members, who assaulted Petitioner, and threatened his and his family's lives, should Petitioner cooperate with the Government. As a result of this assault, and threats, Petitioner was not fully forthcoming in his proffer.

On October 28, 2007, Petitioner's sister, Margarita Zuniga Hernandez was kidnapped in Jalisco, Mexico. Petitioner was told of the kidnapping, and warned that unless he did in fact plead guilty, and not cooperate with the Government, his sister would be killed.

Petitioner plead guilty on October 31, 2007, and his sister was released.

While awaiting sentencing, Petitioner was approached by two Mexican gang members at GEO C.F., assaulted, and again warned that he was not to cooperate with the Government.

On April 3, 2008, Petitioner was sentenced to a 292 month term of imprisonment in the BOP.

Petitioner, who is proceeding pro se, endeavored to raise the issue of conflict, based upon Ernesto's third-party benefactor

payments to Barrera. Unfortunately, Petitioner raised the matter inartfully, and way of response to the Government's opposition.

Plainly stated, Petitioner asserts that this court should conduct an evidentiary hearing, in the interest of justice, into the issue of conflict brought by third-party benefactor payments.

This is so, as Ernesto paid Barrera's retainer. Further, Petitioner was assaulted and forewarned against cooperation only after he had sought to proffer, but before the proffer took place. Moreover, at each critical juncture in the case, Petitioner was assaulted, and his sister was kidnapped.

Because of these actions, and because Ernesto directed, and paid for, Barrera's representation, Petitioner was without counsel.

Moreover, if Petitioner had unconflicted counsel, and not been assaulted, and his sister not been kidnapped, Petitioner would have fully cooperated in this case, which would have changed the outcome.

Issues of conflict of interest, as raised herein, are properly brought by motion under 28 U.S.C. § 2255. Massaro v. United States, 538 U.S. 500 (2003).

As defense counsel was obtained, retained, and paid by a third-party benefactor, Ernesto Zuniga-Zuniga, Petitioner did not have the representation of counsel.

REASONS FOR GRANTING THE PETITION

A motion under Rule 60 of the Federal Rules of Civil procedure can be used to reopen § 2254 or § 2255 proceeding, but only in limited circumstances. Motion that seek " to add a new ground of relief" or court's previous resolution of a claim on the marits" are not permitted and will be treated as a second or successive petition. Gonzalez V crosby, 545 U.S. 524 162 Led.2d 480(2005); Post V. Bradshaw, 422 F.3d 419 (6th cir 2005) Rule 60(b) motion that seeks to advance newly discovery concerning claim the district court previously considered and dismissed on substantive ground is second or successive petition); Sanders V. Norris, 529 F.3d 787, 790(8th cir 2008) motion that seeks "leave to present newly discovery evidence....in support of a claim previously denied" must be treated as successive).

On the other hand, Rule 60 motion that attack a "defect in the integrity of the Federal habeas porceeding," or that challehge a procedural ruling that precluded a merits determination will not be treated as second or successive. Gonzalez, 545 U.S. at 538; Canale V Quarterman, 507 F.3d 884 (5th cir 2007)(" A Rule 60(b) motion is not to be treated as a successive habeas petition if the motion attacks a defect in the integrity of the Federal Habeas proceeding and does not raise a new ground for relief or attack the district court's resolution of a claim on the merits"); Butz V. Mendoza-Powers, 474 F.3d 1193-1194(9th cir 2007)("where, as here, the district court dismisse[d] the petition for failure to pay filing fee or to comply with the court's order's the district court does not thereby reach the merits' of the claim presented in the petition and a Rule 60(b) motion challenging the

dismissal is not treated as a second or successive petition)" Phelps V. Alameida, 569 F.3d 1120(9th cir 2009)(granting **Rule** 60(b)(6) relief to habeas petitioner whose claims were erroneously time barred). A C.O.A is required to appeal the denial of a Rule 60 motion Reid V. Angelone, 369 F.3d 363, 369 n.2 (4th cir 2004)(requiering a C.O.A for "appeals from Rule 60(b) order in habeas case'); West V. Schneiter, 485 F.3d 393 (th cir)(COA required to appeal the denieal of Rule 60(b) motion that challenged procedural ruling); Williams V. Chatman,510 F.3d 1290 (11th cir 2007)(COA required to appeal the denial of Rule 60 motion). However, cases like West that require a COA when appealing a Rule 60 motion that attacks a procedural ruling may no longer be good law in light of Supreme Court's recent decision in Harbison V. Bell, 556 U.S. 173 L.ed 2d 374(2009).

In Harbison, the court held that the COA requirement applies only to "final orders that dispose of the merits of a habeas corpus proceeding achallenging the lawfulness of prisoner's deterntion." Id. at 345. An appeal from the denial of a Rule 60 motion that attacks a procedural ruling that precluded a merits determination is not a "final orde[r] that dispose[s] of the merits" of a case. Thus a COA under such circumstances, should not be required."(where as here the district court dismiss the petition for conflict of interest hearing without even making an inquiry, into a potential conflict of interest exists or did not comply with the court's proceeding the district court does not reach the "merits" of the claims presented in the petition, and a Rule 60(d)(3) motion that attack a "defect" in the integrity of the normal process, of the Federal habeas proceeding or that challenge a procedural ruling that precluded a merits determination on cancelling the conflict of

interest hearing without even making any inquiry into the conflict exists, will not be treated as second or successive Gonzalez, 545 U.S. at 538 Canales V. Quarterman, 507 F.3d 884(5th cir 2007). Also Appellant, contend that the District court clearly, abused its discretion when it construed Appellant, motion Fed R. Civ. Proc. 60(d)(3) relief from judgment or order.

(d) Other power to grant relief.

This Rule does not limit a court's power to.

(3) Set aside a judgment for fraud on the court.

The court claim into Rule 60(b) Id.

See Ayne Bristibgham, Tanya Brittingham V. well Fargo Bank N.A Federal Homes Loan Mortgege Corporation, 543 F.3d Appx 372 2013 U.S. App Lexis 21513.

However, " the catch-all-clause of Rule 60(b)(6) cannot be invoked when relief is sought under one of the other grounds enumerated in Rule 60 Id. Therefore the District Court abused its discretion when change Appellant, Rule 60(d)(3), Fruad on the court claim, also See Stoeckin, 285 Fed Appx 737 2008 U.S. App Lexis 16868 The Court has construing the motion in the atternative as a Fed. R. Civ. Proc. 60(b) the court claims the defendant failed to identify an error of law or fact or other grounds warranting relief from judgment.

Fed. R. Civ. Pro. Rule 60.(d) motion are subject to the same successive petition restriction that govern motion under 60(b).

Gonzalez V. Crosby, 545 U.S. 524 (2005). Per Curiam,

An Independant action for "Fraud on the court" under Fed. R. Civ. Proc. Rule 60(d) may be brought at any time Id. See Rozies, 573, F.2d at 1337-38 Where fraud occur evident Brown, 644 Fed. App 957(11th cir 2016) per Curiam); Rule 60(d)(3) provide that a court can "set aside a judgment

for fraud on the coutr's " we have defined fraud on the court" as that species of fraud which does or attemts to defile the court itself, or is a fraud perpetrated by officer of the court so that judicial machinery cannot porform in the unusual manner its impartial task of adjudging case that are present for adudication "Travelers Indem Co. 761 F.2d at 1551(Citation Omitted).

But [f]ruad Inter partes, without more, should not be fraud upon the court , Id. Also Delaware Corporation, 367 Fed. App 180, second circuit 2010). While fraud on the court can support Rule 60(d)(3) relief such fruad must seriously affect the intergrity of the normal process of adjudication, where as here the officer of the court cancelling the conflict of interest hearing without even making any an inquiry to a potential conflict of interest exists affect the integrity of the normal process, is because Rule 60(d)(3) action are warrant only when necessary to provent a grave miscarrige of justice, Id. See Campbell V. Bert Rice Warden, 265 Fed 878 2001(9th cir 2001). Opinion by Judge Pregerson.

Thus, its necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision" where the trial judge cancelling the conflict of interest hearing its improperly influence the normal process of the court in it's decision" to set aside a judgment on fraud on the court under Rule 60(d)(3) See Id. Gupta, 556, F.ed Appx 838(11th cir 2014).

We hold that the trial court's failure to inquire into defense counsel's potential conflict of interest deprived Hernandez, of his constitutional rights to affective assistance of counsel under Holloway, the absence of a meanigful inquiry by the trial judge.

Court resulted in structural error i.e. error falling within a class of constitutional violations [That] by their very nature cast so much doubt on the fairness of trial process that,as a matter of"law" they can never be considered harmless;;Satter,White, 486 U.S at 250 finally, because the California court of Appeal did not apply the Supreme Court's decision in Holloway, its decision denying Campbell relief was."

"Contrary to... clearly established Federal Law" under AEDPA We therefore reverse the district court's denial of Campbell's Habeas petition and remand to the district court with instructions to grant the writ, requiring that the State of California bring Campbell; to trial "again" within a resonable a mount of time or release him from custody.

Reversed and Remand,Id.

And at this time Appellant Carlos Zuniga Hernandez, contend that the Campbell, Rule apply to the case at hand and the district court abused it's discretion Gupta 556, F.ed Appx 838 (11th cir 2014)

whether a district court erred in its denial of a motion under Fed. R. Civ. Pro. Rule 60(d)(3) is a decision that is reviewed for abuse of discretion,Id. In not conducting an evidentiary hearing, where conflict was evident.United Stats V. Sotelo,97 F.ed 782,(5th cir 1996)[Althought a district court must "recognize a presumption in favor of petitioner's counsel of choice,"] that presumption may be overcome not only by a demostration of actual conflict but by a showing of a serious potential for conflict "Wheat V. United States 486, U.S 164, (1988). This is true even where a defendant expresses a desire to waive the potential conflict See Sotelo, 97 F.3d at 791

It is respectfully submitted that the Court of Appeals for the Fifth Circuit abused its discretion, in not conducting an evidentiary hearing, where fraud occured evident, Brown, 644 F.ed Appx 957 (11th cir 2016), Therefore the decision fron the Court of Appeals regarding the denial of the COA conflicted with the courts "own" proceeding

Hernandez, made a "substantial showing of denial of a constitutional right " 28 usc § 2253(c)(2). This " substantial of a showing" requires Hernandez, to demonstrate that Reasonable jurists, would find the court's denial of relief "debatable or wrong" where the District court cancelling the conflict of interest hearing without even making an a minimal inquiry to a potantial conflict exists" or that the issue Hernandez, has presented " deserve encouragement to proceed further United States V. Ariedge, 873 F.3d 471 473(5th cir 2017)(internal citations omitted); Dwayn V. Johnson, 947 F. Supp 1098 1996(D.S Lexis 16016.

To make a showing of the denial of constitutional right Hernandez, need not show that he should prevail on the merits but rather must demonstrate that the issue are debatable among jurist of reason, That a court could resolve the issue in a different mannaer; or that the questions are adquate to deserve encouragement, to proceed further" Borwn, 684 F.3d 487. Therefore Hernandez, has made a "substantial showing of the denial of a constitution rights whether the court of appeals should grant a C.O.A on this issue 28 usc § 2253(C)(2).

On April 30, 2012 the court of apepals for the Fifth Circuit grant [C.O.A] when the previous[C.O.A] was grant were the Appellant made a "substantial showing" of denial on the constitutional rights the previous [C.O.A] was granted not because of the "reasonable jurists" prong but because Hernandez, has made a facilly valid constitutional claim i.e. his conflict of interest claim based upon the Third-party beneficiary See House V. Dretke, 395 F.3d 560 562(5th Cir 2004); Wood V. Georgia, 450 U.S. 261(1981).

The Court of Appeals in its denial does not argue the fact that Appellant's previous C.O.A made out a prima facie showing of conflict of interest with counsel based upon thirt-party beneficiary payment and biased advise to Appellant.

The fact that the District court dismissed and denied Appellant's claim without any investigation withoutmaking a minimal attempt into looking into Appellant's claim concerning his counsel. The District court should have at least seeked an Affidavit from Barrera as to the source of money paid to him See Anderson V. United States, 948 F.2d 704 (11th cir 1991)[Movant entitiled to an evidentiary hearing because the record does not conclusively show that his contentions are without merits].

The allegations and claims interposed are not, and were not refuted by the record, or the Court of Appeals in itself.

Appellant's Motion under 28 usc § 2255 made out a prima facie of conflict of interest based upon thir-party beneficiary. United States V. Sotelo 97 F.3d 782 (5th cir 1996). As such Appellant's claim could not be summarily denied, or dismissed out-of-hand by statutory right, i.e. 28 usc § 2255(b) or based upon judicial determination.

Furthermore, " the motion files, and records in this case **do not** and **cannot** show conclusively that Appellant was entitled to not relief.

The Court of Appeals clearly abused its discretion and acted contrary to procedural rules in denying relief without conducting any hearing. and violation of due process clause of the Fifth, Sixth and Fourteenth Amendment to the United States constitution.

Before Hernandes can appeal the court's denial of his 60(d)(3) motion which challenged the dismissal of his 28 usc § 2255 motion chalenging this conflict of interest. As he did below, Hernandes contends that the district court committed fraud by cancelling a scheduled conflict of interest hearing without inquiring from the proponderance of evidence where a patential conflict exist when he sought to substitute a retained lawyer, Mr, Barrera. For appointed counsel in the underlying criminal proceeding. See Gupta, 556 F.3d App 838 (11th cir 2014). Hernandes maintains as he did in an early Rule 60(b) motion that this appointed Attorney was opperating under a conflict of interest because his retainer was paid by Hernandes, co-defendant Zuniga Zuniga Ernesto third-party beneficiary payment which caused Hernandes and his family to suffer threats and harm to ensure that he plead guilty and did not cooperate with the Government by providing information against the Ernesto Zuniga Zuniga.

Whether the court of appeals abused its discretion by denying the C.O.A on the Rule 60(d)(3) motion upon the bais of Hernandes' allegation regarding that the district court committed fraud by cancelling a scheduled conflict of interest hearing without inquiring upon a proponderance of evidence, where the existence of conflict regrading his third-party beneficiary claim was "insufficient to raise a fact issue" warranting an evidentiary hearing on his previous petition for C.O.A where it was grant See **Borwn** 644 Fed App 957 (11th cir 2016).Before Watson can appeal the Court's denial of habeas relief on an issue, he must obtain a certificate of apealability(C.O.A) on the issue 28 usc §2253(c)(1) Fed R. App Pr.22(b) Buck V.Davis, 137 S.ct 759 773 197 L. Ed 2d 1 (2017).

The court of appeals abused its discretion by denying a second C.O.A when the previous C.O.A was grant where the Appellant made a substantial showing of denial of a constitutional rights. ? The previous C.O.A was grant not because of the reasonable jurists" prong but because Hernandez, submitted a facially valid constitutional claim, i.e. his conflict of interest claim based upon the third-party beneficiary See Houser V. Dretke, 395 F.3d 560 562(5th cir 2004): Wood V. Georgia, 450 U.S.262 268 269(1981)

The pevious C.O.A was granted and the partys were scheduled to brief the court concerning the relevant issue a period of 40 days was given to each party to brief. But some extraordinary circumstances prevented him from filing his brief in a timely manner with court of Appeals.

As result the initial C.O.A was dismissed for want of prosecution The cour of Appeals abused its discretion when it evaluated Hernandez, second C.O.A differently from the "First C.O.A as" if the standards were different or distinct.?

[If] a prisoner attempts to file ouside this limitations period. A Supreme court may still review his motion if he is entitled to equitable tolling, San Martin V. Mcneil, 633 F.3d 1257 1267 (11th cir)cert denied 132 S.ct 158 181 L.Ed 2d 73(2011) Equitable tolling is available if the prisoner demonstrates that (1) he has pursuant his rights diligently and (2) an extraordinary circumstances prevented him from timely exercising his rights Holland V. Florida, 560 U.S. 130[469 Fed. Appx. 800]S.ct 2549-62 177 L.Ed2d 130(2010)The Supreme Court has clarified that the prisoner must pursue his rights with "reasonable diligence not maximan feasible diligence "Id" at 2565(quotation and citations omitted) A prisoner contending that his medical condition impairments justify

equitable tolling must establish a causal connection between those impairments and his ability to file a timely petition Lawrence V Florida, 421 F.3d 1221 1226-27 (11th cir 2005) The Appellant Hernandez, bears the burden of demostrating that extraordinary circumstances prevented the timely filing of a brief or any response to the court proceeding such that equitable tolling applies, and mere conclusory allegations are not sufficient to raise the issue San Martin, 633 F.3d at 1267-68 equitable tolling is a rare and extraordinary remedy.

The effects of breaching the duty of loyalty are clearest in multiple representation cases. Because multiple defendant representation poses a unique, straightforward danger of conflict, the Cuyler rule of "not quite per se" prejudice makes eminent sense. A defendant whose attorney "actively represented conflicting interests" has had no real lawyer secured to him by the Sixth Amendment. As Justice Powell put it in Cuyley, "the conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel.'" 446 U.S. at 349.

"ABA Annotated Model Rules of Professional Conduct, Rule 1.7:

Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless...

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest..."

The Supreme Court has determined that in most Sixth Amendment ineffectiveness cases, the defendant must show that counsel's errors fell below an objective standard of reasonableness and prejudiced his case, which ordinarily means establishing a reasonable probability that counsel's errors changed the result of the proceeding.

Strickland, 466 US at 686 (1984). In some cases, however, prejudice is presumed if the defendant shows that an actual conflict of interest adversely affected his lawyer's performance. Cuyler, 446 U.S. at 348 (1980). The precise nature of Cuyler test sets a lower threshold for reversal of a criminal conviction that does Strickland. The Supreme Court explained the reason for this distinction as follows:

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice [than a case in which the defendant effectively had no counsel]. In Cuyler v. Sullivan, 446 U.S. at 345-50, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the abilty of trial courts to make early inquiry in certain situations likely to give rise to conflics, see e.g., Fed. R. Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interests. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendmant claims mentioned above. Prejudice is presumed

only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, 446 U.S. at 350, Cuyler, like all the other Supreme Court cases that have discussed a lawyer's conflict of interest, solely concerning the representation of multiple clients. The Supreme Court has not expanded Cuyler's presumed prejudice standard beyond cases involving multiple representation. Although lower courts have generally extended Cuyler to "duty of loyalty" cases, their decisions have not grappled with the difficulties inherent in that position, and their reasoning has been inconsistent. The demands and reasoning of legal ethics militate against treating multiple representation cases like those in which the lawyer's self-interest is pitted against the duty of loyalty to his client. Applying Cuyler in cases arising from a lawyer's conflict of interest between himself and his client ultimately undermines the unifority and simplicity of Strickland.

Cuyler has been routinely applied to cases in which an alleged attorney conflict resulted from serial representation of criminal defendants as well as simultaneous multiple representation. See: Burger v. Kemp, 493 U.S. 776 (1987).

Third party fee arrangements can develope into the fuctional equivalent of multiple representation. Strickland cited Cuyler's

language dealing with the impact of multiple representation. Several Justices have acknowledged this apparent limitation of Cuyler. See: Illinois v. Washington, 469 U.S. 1181 (1984)(White, J., dissenting from denial of certiorari).

Glasser established that unconstitutional multiple representation is never harmless error. Thus, a defendant that shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel actively represented conflicting interests, he has not etablished the constitutional predicate for his claim of ineffective assistance. Cuyler, 446 U.S. at 349-50. Glasser v. United States, 315 U.S. 60 (1942), and Holloway v. Arkansas, 435 U.S. 475 (1978).

Thus, when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendants' comprehension

of the waiver. United v. Wheat, 486 U.S. at 162.

At issue in this case - as explicated in the statement of facts is the third-party benefactor's - Ernesto Zuniga Zuniga's control of Petitioner's defense, and payment of counsel's fees.

The pernicious effect of benefactor payments upon the "institutional interests in the rendition of just verdicts in criminal cases" and the extent to which they "gravely imperil the prospect of a fair trial" was reconized by Justice Powell in Wood v. Georgia, 450 U.S. 261 (1981) in these words:

> Courts and commentators have reconized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particulary when the third party is the operator of the alleged criminal enterprise.

Judge Sofaer captured the essence of the problem in Castellano: "Benefactor payments potentially strike at the heart of the attorney-client relationship and thus at the heart of the adversarial process." United States v. Castellano, 610 F. Supp. at 1164.

II PETITIONER'S SHOWING IS NOT ONLY SUBSTANTIAL, IT IS SUFFICIENT TO MERIT FURTHER REVIEW BY THIS COURT.

It is repectfully submitted that the district court abused its discretion, in not conducting an evidentiary hearing, where conflict was evendent. united States V. Sotelo, 97 F.3d 782 (5th cir 1996)[Although a Supreme Court must "recongnize a presumption in favor of Petitioner's counsel of choice," "that presumption may be overcome not only by a demostration of actual conflict but by a showing of a serious potential for conflict." Wheat V. United States, 486 U.S. 153 164 (1988). This is true even where a defendant expresses a desir to waive the potential conflict.

See Sotelo, 97 F.3d at 791.

Because the records and evidence in the record below did not conclusively rebut or settle the issue herein above presented, the Court of Appeals should have conducted an evidentiary hearing.

EVIDENTIARY HEARING

Pursuant to 28 U.S.C. § 2255 (b), petitioner requested an evidentiary hearing upon the issues raised in his motion. "§ 2255. (b) 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 conclusion of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." And, Owens v. United States, 483 F.3d 48, 60 (1st Cir. 2007) ("because Owens' allegations are not implausible, and because they could, if true, entitle him to relief, The District Court's decision to deny an evidentiary hearing was an abuse of discretion"); United States v. Jackson, 209 F.3d 1103,1110 (9th Cir. 2000)

(District Court abused discretion in denying evidentiary hearing, given that "the motion, files and record in this case could have shown conclusively that Jackson is not entitled to relief"); Arredondo v. United States, 178 F.3d 778, 782, 788-89 (6th Cir. 1999)(District Court abused its discretion in refusing to hold evidentiary hearing on ineffective assistance claim; given that petitioner's allegations were not "'contridicted by the record, inherently incredible, or conclusions rather than statements of fact'" (quoting Engelen v. United States, 68 F.3d 238, 240 (8th Cir. 1995))); Clark v. United States, 59 F.3d 296, 306-07 (2d Cir. 1995)(District Court should have granted evidentiary hearing because movant "alleged facts, which, if found to be true, would have entitled him to Habeas relief"); Shaw v. United States, 24 F.3d 1040, 1043 (8th Cir. 1994)(District Court erred by denying evidentiary hearing on allegations of ineffective assistance that were neither inadequate on their face nor conclusively refuted by record); United States v. Blaylock, 20 F.3d 1458, 1469 (9th Cir. 1994)(District Court abused discretion by denying evidentiary hearing on claims of ineffective assistance of counsel which, assuming accuracy of factual allegations, provided basis for relief); Government of Virgin Islands v. Weatherwax, 20 F.3d 572, 573, 580 (3rd Cir. 1994)(same as Blaylock, supra);

Frazer v. United States, 18 F.3d 778, 781, 784-85 (9th Cir. 1994) (same as Blaylock, supra); United States v. Essig, 10 F.3d 968, 976 (3d Cir. 1993)(Generally if a prisoner's § 2255 petition raises an issue of material fact, the District Court must hold a hearing to determine the truth of the allegations".); United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992)("A motion brought under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to relief."); Anderson v. United States, 948 F.2d 704 (11th Cir. 1991)(movant entitled to evidentiary hearing because "record does not conclusively show that [his] contentions are without merit"); Murchu v. United States, 926 F.2d 50, 57 & n. 12 (1st Cir.), cert. denied, 502 U.S. 828 (1991)(movant entitled to hearing, evidentiary or otherwise, on allegations that trial Judge attempted to coerce guilty plea because allegations "are not conclusory, contradicted by the record [] or so inheritly incredible as to permit them to be ignored"); United States v. Bigman, 906 F.2d 392, 394 (9th Cir. 1990)(hearing required unless record "conclusively establish[es] that movant's allegations are false); United States v. Aiello, 900 F.2d 528, 534 (2d Cir. 1990); Dziurgot v. Luther, 897 F.2d 1222, 1225-27 (1st Cir. 1990)(hearing required unless "petitioner's allegations, accepted as true, would not entitle the petitioner

to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact'"; District Judge who conducted trial may decide whether hearing is required, but different Judge should conduct hearing); Estes v. United States, 883 F.2d 645, 649 (8th Cir 1989); United States v. Popoola, 881 F.2d 811,812 (9th Cir. 1989)("An evidentiary hearing 'is mandatory whenever the record does not affirmatively manifest the factual or legal invalidty of the petitioner's claims.'"); United States v. Marr, 856 F.2d 1471, 1472 (10 Cir. 1988); United States v. Barnes, 662 F.2d 777, 783 (D.C. Cir 1980); Stokes v. United States, 652 F.2d 1, 2 (7th Cir. 1981), cert. denied, 464 U.S. 836 (1983) (reversible error for District Court not to hold hearing to resolve genuine factual dispute).

III PETITIONER HAS SATISFIED ALL PROCEDURAL PREREQUISITES FOR ACTION BY THIS COURT.

Petitioner, Carlos Zuniga Hernandez, has satisfied all of the procedural prerequisites to action by this court on petitione for a Writ Certiorari to Supreme Court on the united States:

1. The Petitioner has filed a timely notice of appeal.

2. The Court of Appeals sua sponte, denied a 28 usc § 2255, for want of prosecution the the District court prior to applying for Fed. R. Civ. Pro. Rule 60(d)(3), denial without en evidentiary hearing.

3. The Petitioner, has made more than a "good faith" effert to conform this Application to all of the requirements set out in Appellate Rule and Rule 10-14 petitioning for certiorari.

4. The petitioner has served all parties to the action with a copy of this petition for a writ certiorari and supporting papers, as is show in the attached certificate of service.

5. The petitioner has also supplied the court with the complete record of the district court's action and the court of appeals for the Fifth Circuit application and will supply this court with any additional material or argument that it deems necessary for a prompt resolution of this Application.

CONCLUSION

For the reason stated above, Petitioner and Appellant Carlos Zuniag Hernandez, respectfully requests that this court issue the requested petition for A writ Certiorari on all of the issue set forth in this Application. The petition for a Writ of Certiorari should be granted.

Date: 9/15/18
U.S.P ATLANTA FCI.

Signed under penalty of perjury under Title 28 uec § 1746 this 15 day Of September 2018,

Respectfully Submitted,

/S/
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