No. 18-7261

IN THE

SUPREME COURT OF THE UNITED STATES

KEITH STUART CUMBEE-PETITIONER

vs.

LORIE DAVIS, DIRECTOR-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Keith Stuart Cumbee, pro se
Petitioner, a prisoner of Texas
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(TDCJ) Inmate #1699482
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No telephone, no e-mail, no fax

QUESTION PRESENTED

Since denial of the pre-judgment Rule 60(b) motion in habeas did not address merits of attorney dishonesty (fraud-on-the-court), did lower court clearly err abusing discretion, dismissing appeal as premature/no jurisdiction, without addressing merits nor if Rule 60(b) is limited to federal judgments, whether denial is separately appealable, whether COA or permission to appeal is required and should issue?

PARTIES TO THE PROCEEDING

The parties to the proceeding include the director of the Texas Department of Criminal Justice, respondent, represented by the Honorable Attorney General of Texas, Jon R. Meador, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, and the parties to the proceeding in the state court whose judgments are the subject of this petition includes The State of Texas, the "State", and the petitioner, Keith Stuart Cumbee, also called "defendant". There are no parties to the proceeding other than those named in the petition, the State being the party in interest.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Keith Stuart Cumbee, "Cumbee", an in forma pauperis inmate in state custody, appearing pro se, respectfully petitions this Court that a writ of certiorari issue to review the judgment below.

JUDGMENT BELOW

The panel "ORDER", Cumbee v. Davis (5th Cir. Jne 7, 2018) (unpublished, per curiam), Appeal No. 17-40876, to which this petition relates, is Appendix A to this petition. The United States District Court for the Eastern District of Texas, Tyler Division ("USDC"), Civil Action No. 6:15cv1138, entered its Order Denying Motion for Relief from Judgment, Dkt.27-1 ("Dkt." refers to USDC docket entries), Cumbee v. Davis (E.D.Tex. Aug 3, 2017), Appendix B hereto, denying petitioner's Rule 60(b) motion, Dkt.12, and related motion to stay, Dkt.17. USDC also entered its Order, Dkt.32-1, Cumbee v. Davis (E.D.Tex. Sep 9, 2017), Appendix C hereto, denying Cumbee's motion, Dkt.28, to amend the Order, Dkt. 27-1, denying motions, Dkt.12, Dkt.17.

Lower state court judgments, involving identical or closely related issues, for which review is sought, are both from the 7th Judicial District, Smith County, Texas. The Judgment Adjudicating Guilt, Texas v. Cumbee (7th Jud.Dist.Ct., Smith Cty., Tex. Feb 18, 2011), Cause No. 007-1820-03, is Appendix D hereto. The Judgment of Conviction by Court-Waiver of Jury Trial, Texas v. Cumbee (7th Jud.Dist.Ct., Smith Cty., Tex. Mar 18, 2011), Cause No. 007-0219-11, is Appendix E hereto.

JURISDICTION

June 7, 2018, United States Court of Appeals for the Fifth Circuit issued its ORDER, Appendix A, denying petitioner's motions for a COA and permission to proceed in forma pauperis as moot, and dismissing petitioner's appeal of the denial of his Rule 60(b) motion and related motion to stay, from the USDC, for want of jurisdiction and for premature notice of appeal; and, within 90 days thereof, petitioner filed his petition herein. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As set out in Appendix F hereof, Rule 14.1(f):

The following constitutional provisions are involved: U.S. Const.: Art. I, §9, cl.2; U.S.Const.: Amends. V, VI, XIV.

The following federal statutory provisions are involved: 28 U.S.C. §§1292(c), 2253, 2253(c)(1), 2254, 2254(a).

The following federal rules of appellate procedure are involved: Fed.R.App. 5(a)(3), "Appellate Rules".

The following federal rules of civil procedure are involved: Fed.R.Civ.P. 1, 60, 60(b), 81(a)(4), "Civil Rules".

The following rules governing section 2254 cases in the United States District Courts are involved: Habeas Rules 1, 12, "Habeas Rules."

STATEMENT OF THE CASE

Introduction. This case seeks a clear non-arbitrary standard for processing Rule 60(b) motions filed in habeas proceedings, 28 U.S.C. §2254, as to what is required of a pro se prisoner claiming innocence in a first petition, who challegenges AEDPA's normalcy presumption (breakdown of judicial machinery resulting from attorney dishonesty in fraud on the court), which, if unaddressed prior to habeas review assuming normalcy, deprives meaningful review in fraud on the federal courts, i.e. unjustified legality/finality.

Fed.R.Civ.P. Rule 60(b) motion. Cumbee filed his 28 U.S.C. § 2254 petition, Dkt.1, December 4, 2015, and a Rule 60(b) motion, Dkt.12, October 24, 2016. USDC ordered Respondent to answer, Dkt. 15, and Cumbee filed a motion to stay the answer, Dkt.17, February 24, 2017, that proceeding to habeas review without addressing the Rule 60(b) motion, Dkt.12, denies meaningful habeas review and is fraud on the federal courts which otherwise presume normalcy and apply unjustified deference, legality/finality. Respondent filed a motion to dismiss the proceeding, Dkt.21, April 4, 2017, and Cumbee filed a motion for summary judgment, Dkt.25, May 1, 2017. Without addressing merits, USDC Order, Dkt.27, August 3, 2017, Appendix B hereof, denied Cumbee's motions, Dkt.12, Dkt.17, and Cumbee filed a motion to amend, Dkt.28, August 18, 2017, the said Order, Dkt.27, which USDC denied by Order, Dkt.32, September 9, 2017, Appendix C hereof. Cumbee filed his Notice of Appeal, Dkt.29, appealing the denial of his motions, Dkt.12, Dkt.17, docketed in the United States Court of Appeals, Fifth Circuit, No. 17-40876.

Appeal was docketed in the Fifth Circuit August 21, 2017, and Cumbee filed his IFP motion and permission for appeal or COA, if required, with supporting brief, October 19, 2017. Thereafter, on December 19, 2017, USDC issued its Memorandum Opinion and Order of Dismissal, Dkt.35, with separate Final Judgment, Dkt.36, granting Respondent's motion to dismiss, Dkt.21. June 7, 2018, lower court, Fifth Circuit, filed its ORDER, Appendix A hereof, dismissing the appeal for lack of jurisdiction, denying motions as moot.

Cumbee's Fed.R.Civ.P. Rule 60(b) motion, Dkt.12, is supported by an Unsworn Declaration, and ten exhibits ("EXHIBITS"), historic records available to Cumbee, i.e. Appendix D and E hereof include page one of state judgments, which Respondent does not deny, rather Respondent refuses to supply records, see, i.e., Respondent's motion, Dkt.21 at 4 n.2, id. at 5, "Records". Objective facts are established from historic records, that Cumbee's trial on the merits for a new charge (2011 Marijuana possession) was combined with a revocation hearing, Dkt.12 at 4. Though arrested January 13, 2011, Cumbee was not appointed an attorney until March 2, 2011, for the new charge, see EXHIBIT 2, January 14, 2011 appointment for motion to adjudicate prior charge, aggrevated assault; EXHIBIT 3, January 21, 2011 amended motion at 3, par. III, charging the new offense; EXHIBIT 7, March 2, 2011, Order appointing counsel for the new charge, almost two months after arrest and appearances.

The Rule 60(b) motion, Dkt.12, demonstrates Cumbee was twice convicted/sentenced for the new charge, id. at 5-6, and, as an indigent, entered judidicial confession prior to appointment of

counsel for the new charge, though requested, and without a waiver in the record, Dkt.12 at 6-8. Cumbee's related motion to stay, Dkt. 17, argued that double conviction/sentence does not occur absent prosecutorial malfeasance, attorney dishonesty amounting to fraud-on-the-court; presenting state convictions tainted by fraud as if they are the product of normal judicial process, to a federal court for deferenence, legality, finality of AEDPA, founded on presumption of normalcy, is fraud on the federal court, requiring Respondent to explain why procedures should be affonded legality.

Respondent's motion, Dkt.21 at 10-11, replies to the Rule 60(b) motion, admitting vital facts and offering no explanation, which is the basis for Cumbee's motion for summary judgment, Dkt.25. See Respondent's motion, Dkt.21 at 10-11 ("possession charge" "plea of true", id. at 10, compare to Rule 60(b) motion, Dkt.12, EXHIBIT 5, plea of true to par."III", id., EXHIBIT 3 at 3, par. "III"); ("formally charged" "possession of marijuana", "appointed counsel on the marijuana case on March 2, 2011, approximately two weeks after he pleaded true to the motion to revoke", Dkt.21 at 10, almost two months after his arrest for the new charge); ("The order adjudicating guilt was entered on February 18, 2011." Id. at 12); ("Cumbee pleaded guilty to possession of marijuana on March 18, 2011 and was sentenced to fifteen months' incarceration in TDCJ-SJD, cause number 007-0219-11." Id. at 13).

The State delayed appointing an attorney for the new charge for almost two months to obtain an irrevocable judicial confession in a trial/revocation, to circumvent Constitutional protections.

REASONS TO GRANT THE PETITION

Question Restated

Since denial of the pre-judgment Rule 60(b) motion in habeas did not address merits of attorney dishonesty (fraud-on-the-court), did lower court clearly err abusing discretion, dismissing appeal as premature/no jurisdiction, without addressing merits nor if Rule 60(b) is limited to federal judgments, whether denial is separately appealable, whether COA or permission to appeal is required and should issue?

Standard of review. Rule 60(b) is a tool in habeas to set aside judgments founded on fraud-on-the-court. Gonzales v. Crosby, 545 U.S. 524, 532-533, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). The application of 28 U.S.C. §2253 to Rule 60(b) motions, is an open question, but does not limit this Court's authority to review merits. Buck v. Davis, 137 S.Ct. 759, 775, 197 L.Ed.2d 1 (2017). Further, since controlling issues of law are involved, 28 U.S.C. §1292(b), permission to appeal, Fed.R.App.P. 5(a)(3), may apply.

Procedural rulings. USDC Order, Dkt.27, denied motion to stay answer, Dkt.17, pending resolution of Rule 60(b) motion, Dkt.12, which was also denied, see Appendix B. USDC Order, Dkt.32, denied motion to amend, Dkt.28, the Order, Dkt.27, denying motions, Dkt. 12, Dkt.17, see Appendix C. Error complained of is USDC clearly erroneous ruling: "Rule 60(b) only applies to judgments of the court in which relief is sought and the federal district courts lack jurisdiction to set aside state criminal judgments through application of the Federal Rules of Civil Procedure." Dkt.32 at 1, Appendix C; Dkt.27 at 1, Appendix B. "The federal courts cannot set aside a criminal conviction from the 7th District Court of Smith County Texas, under Rule 60(b) of the Federal Rules of Civil Procedure." Dkt.32 at 2, Appendix C. (Quoting A-5, A-6, see A-3).

USDC Order, Dkt.32 at 2, Appendix C, A-6, erroneouly ruled that Gonzalez, supra, "was referring to a motion for relief from a judgment disposing of a federal habeas corpus petition, not an attempt to set aside the judgment of a state court through a Rule 60(b) motion****there is no need to file a successive petition, nor is there a federal judgment to which Rule 60(b) could apply." The Order, Dkt.32 at 2, Appendix C, A-6, accuses Cumbee of using "Rule 60(b) to make an end run around the normal habeas procedures." Normal habeas procedures are highly deferential to state criminal convictions, based on a presumption of normalcy. See Harrington v. Richter, 131 S.Ct. 770, 786, 175 L.Ed.2d 624 (2011); Jackson v. Virginia, 443 U.S. 307, 322-323, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). There are no "normal habeas procedures", no meaningful habeas review, without first addressing the Rule 60(b) motion.

Of course, USDC acquired jurisdiction to set aside the state convictions upon filing of the petition, Dkt.1, 28 U.S.C. §2254(a), and Gonzalez, supra, very clearly treats a Rule 60(b) motion as any other motion allowed under the rules. Even before adoption of Rule 60(b), federal courts had authority to set aside any judgment for fraud on the court, sua sponte, see Hanzel-Atlas Glass Co. v. Hartford-Empire, 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Since Buck, supra, involved application of Rule 60(b) to a Texas conviction, it is hard to understand the basis of the USDC's rulings, contrary to Gonzalez, which clearly classifies fraud-on-the-court as a non-merits based motion, and not a successive petition.

The Fifth Circuit ORDER, Appendix A, A-1 to A-2, denied COA motion to appeal UDSC Orders, Dkt.27, Appendix B, A-3 to A-4, and Dkt.32, Appendix C, A-5 to A-6, denying Cumbee's motions, Dkt.12, Dkt.17. Error complained of with respect to the ORDER, Appendix A, A-2, referring to "final decisions and other decisions covered by the collateral order doctrine", is that: "The decision denying Cumbee's Rule 60 motion and his motion for a stay qualifies as neither type of decision." If a habeas court has jurisdiction to overturn a state judgment under 28 U.S.C. §2254, the Fifth Circuit Circuit ORDER, Appendix A, cannot be reconciled with the text of Rule 60(b) or decisions in Gonzalez and Buck, supra.

The Fifth Circuit ORDER, Appendix A, belies the purpose of Cumbee's motion with brief filed in the Fifth Circuit, requesting decisions on whether the Rule 60(b) motion is separately appealable and whether a COA is required and should issue, or whether the motion involves a controlling question of law, 28 U.S.C. §1292(b), and whether permission to appeal applies and should be granted, Fed.R.App.P. 5(a)(3), treating the denial as an interlocutory order. Rather than addressing the issues or the merits of the motions, the ORDER, Appendix A, rules "premature notice of appeal", "not rendered effective upon entry of final judgment", "we lack jurisdiction over this appeal." ORDER at 2, Appendix A, A-2. Again, the ruling conflicts with the text of Rule 60(b), Gonzalez and Buck. If Final Judgment moots all such issues, error complained of, fraud-on-the-court, will never be addressed, permitting state prosecutors to act with impunity to violate the Constitution.

ORDER, Appendix A, is contrary to the plain meaning of Rule 60(b), and facilitates the shielding of fraud from review. Rule 60(b) is the specific tool in habeas to challenge fraud and is not subject to AEDPA limitations under its text and Supreme Court law, see Gonzalez, supra. Habeas review without addressing fraud is a foregone conclusion: deference, based on presumed normalcy. Rule 60(b) motion, Dkt.12, challenged this presumption as fraud on the federal court. Motion to stay, Dkt.17, was to prevent review based on normalcy presumption until fraud was addressed, to avoid years of litigation based on unjustified deference, legality, finality, as occured in Buck, supra. Neither USDC nor Fifth Circuit addressed merits, Appendix A to C, of the documented prima facie case (state proceedings were not normal for fraud) which is not subject to limitations. ORDER, Appendix A, is clearly erroneous, that fraud claims are mooted by AEDPA limitations dismissal, Gonzales, supra.

Fraud-on-the-court standard. AEDPA deference gives way to fundamental fairness. Engles v. Issac, 465 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 517 (1991); see Jackson, 443 U.S. at 322-323. Rule 60(b) is permitted in habeas, fraud-on-the-court is a non-merits based defect, Gonzalez, 545 U.S. at 523-533 n.5, and attorney dishonest conduct is fraud-on-the-court, H.K. Porter v. Goodyear Tire & Rubber Co., 536 F.2d 115 (6th Cir. 1976); Kapferman v. Cons. Rsh. Mfg. Corp., 459 F.2d 1072 (2nd Cir. 1972). It is the appearance of impropriety itself which violates due process, U.S.Const.: Amend. XIV, Liljeberg v. Health Svcs Acq. Corp., 486 U.S. 847, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988).

Before normalcy can be presumed for deference (legality and finality), as applied to state proceedings in habeas, understanding of what Texas considers normal is essential to recognizing the fraud being perpetrated on the Judiciary, a proper function of Rule 60(b). Unlike other states, Texas courts can combine trial on the merits for a new offense with a revocation. Ex parte Doan, 169 S.W.3d 205, 210 (Tex.Crim.App. 2012); Attorney General of Texas Opinion No. JM-194; both citing Moreno v. State, 587 S.W.2d 405, 412-413 (Tex. Crim.App. 1979). It is not recommended, id., for obvious reasons. At a minimum, it allows prosecutors to exploit the rule to bypass Constitutional safeguards. Texas relies on prosecutors to abstain from malfeasance to protect a defendant's fundamental rights.

It is the attempt to present convictions in habeas as resulting from normalcy, with resulting presumptions, which is fraud on the federal Judiciary, and the Rule 60(b) motion must be resolved before there can be meaningful habeas review. In the end, it is the order of the proceedings chosen by state prosecutors and the objective historic documents which expose the fraud. Respondent's sole reply, Dkt.21, ordered by the USDC, Dkt.15, relies entirely on the normalcy presumption, procedural bar, including limitations of AEDPA, which does not even apply, see Gonzalez, supra. The reply, Dkt.21 at 10-11, refers to the Rule 60(b) motion, Dkt.12, with no explanation why, during the period from January 13, 2011 to March 2, 2011, prosecutors exploited Cumbee's Constitutional rights, to the full extend of Texas law. The following "EXHIBIT" references are to documents attached to Rule 60(b) motion, Dkt.12.

Cumbee was arrested January 13, 2011 on a "new charge", 2011 marijuana possession. See Dkt.2, Exhs.12 and 14. What is normal (automatic) is appointment of counsel for an indigent defendant for the new charge, which did not occur. next day appearance January 14, 2011, by an indigent requesting counsel, EXHIBIT 2, new charge pled a week later, January 21, 2011, EXHIBIT 3 at 3, par.III, the State seeking adjudication and all other actions necessary or or proper, id. A week after that, January 28, 2011, Cumbee appeared and his wife was appointed counsel for the new charge as potential co-defendant (automatic), see infra at 18 n.1; however, Cumbee was not. February 14, 2011, with no counsel for the new charge, Cumbee appeared, entered a judicial confession (true) to the new charge, EXHIBIT 5 (par.III refers to EXHIBIT 3 at 3, par.III), and four days later, February 18, 2011, Cumbee was then adjudicated (judge), EXHIBIT 4, convicted and sentenced concurrently, EXHIBIT 6, Appendix D hereto (12 years TDCJ), again, with no counsel for the new charge.

March 2, 2011, almost two months after arrest, Dkt.1, Exhs. 12 and 14, an information charged the exact same 2011 marijuana new charge with appointment of counsel, EXHIBITS 7 and 8. March 7, 2011 Cumbee pled, EXHIBIT 9, and was again convicted and sentenced (15 months state jail), EXHIBIT 10, March 18, 2011, Appendix E hereto. Respondent's answer, Dkt.21, confirms the sequence and documents, with no explanation, relying on federal courts to give deference to finality and legality, in blind comity. When Respondent herein was ordered to answer, Dkt.15, afforded the opportunity to explain, the answer, Dkt.21, left the matter to this Court to sort out.

Texas is a rich and powerful state and well represented and should either respond to the Rule 60(b) motion raising impropriety (fraud on the court), or waive the consequences of sua sponte relief, setting aside convictions for fraud. See Greenlaw v. United States, 554 U.S. 237, 254, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008), i.e. Texas is capable of addressing claim of impropriety. Texas is attempting to rely on this Court to defend convictions which are prima facie products of prosecutorial malfeasance, by blindy applying normalcy presumptions as the basis of deference in habeas review, although convictions are tainted with fraud.

There was almost a two month delay in appointment of counsel for the new charge, during which time Cumbee made appearances and entered an irrevocable judicial confession to the new charge. No explanation is given why prosecutors did not bring this to the court's attention earlier. Counsel was appointed on the same day the information was filed for the very same new charge. Cumbee was appointed counsel only for the revocation motion the day after his arrest for the new charge. A week later the new charge was pled in his revocation, with automatic appointment for co-defenant. It was only after his irrevocable plea to the new charge that an information was filed and counsel was appointed (identical charge).

Respondent fails to explain why counsel was appointed before (and not after) the new offense was added in the revocation, nor why, the day after arrest for the new charge, an attorney was appointed for the revocation but not for the new offense arrest, nor why new charge counsel appointment was only for co-defendant.

At the March 2011 trial, Cumbee was at the mercy of prosecutors (as they obviously intended), since there was a conviction in February based on judicial confession (without counsel). Cumbee's motion summarizes violation of fundamental fairness, Rose v. Lindy, 455 U.S. 509, 547 n.17, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977), affording Respondent opportunity to explain why this should not be considered fraud-on-the-court, infecting the criminal proceedings with unfairness, extraordinary circumstances which justify relief, Klapprott v. United States, 355 U.S. 601, 69 S.Ct. 384, 93 L.Ed.2d 266 (1949); Hazel-Atlas, 322 U.S. at 248. The Rule 60(b) motion, Dkt.12 at 5 to 8, details the resulting violations of fundamental Constitutional rights, which then follow in habeas, unless appearance of fraud can be justified; however, the fraud claim is separate from habeas claims. See Gonzalez, 545 U.S. at 528, which cites Liljeberg (appearance of impropriety violates due process, a concern of constitutional dimensions, 486 U.S. at 865 n. 12), and Klapprott (no meaningful opportunity to defend).

Precise violations (to be addressed in habeas), unless they can be explained, are obvious, Rule 60(b) motion, Dkt.12 at 5-8. Successive prosecution violates the Double Jeopardy and Due Process Clauses, U.S.Const.: Amends. V, XIV, Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); see Griffin v. United States, 502 U.S. 46, 59, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed. 2d 740 (1985). Judicial confession without waiver or appointment

of counsel for Cumbee, an indigent defendant, violates the Legal Assistance and Due Process Clauses, U.S.Const.: Amends. VI, XIV Gideon v. Wainwright, 372 U.S. 355, 339, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Argersinger v. Hamlin, 407 U.S. 25, 29-33, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); see United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Such rights cannot be circumvented by state procedures, Maine v. Moulton, 474 U.S. 169, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985); Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); see also Burgett v. Texas, 389 U.S. 109, 113-115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); separate opinion (Warren, C.J.), id. at 116 n.1 (bad faith of prosecutors is not irrelevant); United States v. Balsys, 524 U.S. 666, 672, 118 S.Ct. 2218, 141 L.Ed.2d 575 (1998)(right against self incrimination); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1967), see infa at 18 (co-defendant appointment).

Discretion. Judicial discretion exercised by lower federal courts in habeas proceedings must be exercised within the bounds of the Constitution, statutes, rules and precedents, and discretion in matters ultimtely resulting in disposition of a first filing must fall within such contraints, when acting in equity or in law. Lonchar v. Thomas, 517 U.S. 314, 320, 166 S.Ct. 1293, 134 L.Ed.2d 440 (1996). Disposition of equitable or legal claims, ultimately resulting in dismissal, should not be made on an unclear ad hoc basis in arbitrary denial of the substantive right to meaningful habeas review, which depends on resolution of the Rule 60(b) motion, Dkt.12, in this case, otherwise denies effective review.

Applicable Supreme Court law cautions that any ruling which results in denial of habeas review for a first filing should be a significant concern and should only be made based upon formal equitable doctrines in accordance with decisions of this Court which narrow and regularize discretion of lower courts to ensure fundamental Constitutional provisions are enforced on a National rather than a regional ad hoc basis. See Lonchar, supra; McCleskey v. Zant, 499 U.S. 467, 489-496, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); Kuhlman v. Wilson, 427 U.S. 436, 445-446, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1996). Exceptionally important questions involve deprevation of protections afforded by the Great Writ under U.S. Const.: Art. I, §9, cl.2. See Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010)("the only writ expressly protected by the Constitution"). Denial of due process, Liljeberg, supra (appearance of impropriety), Klapprott, supra (deprevation of meaningful right to defend, Rule 60(b) exceptional circumstances), Bounds v. Smith, 430 U.S. 817, 821, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), denies effective review of habeas issues (Legal Assistance, Double Jeopardy, Due Process violation), screening out fraud claims.

Cumbee will never receive review of the habeas issues because, although Cumbee did what is required to raise fraud-on-the-court, Rule 60(b), Gonzalez, Hazel-Atlas, supra, his motion was dismissed without addressing merits, for the reasons stated, which are clearly erroneous, contrary to Supreme Court law, Appendix A to C. Buck, involved a Texas conviction, 137 S.Ct. at 773-775, which should be no surprise, because Rule 60(b) motions are contemplated by

Civil Rule 1, 60(b), 81(a)(4), Habeas Rule 1, 12. Rule 60(b) does not require a certificate of appealability or permission.

Issues presented to the Fifth Circuit asked whether the denial of the Rule 60(b) motion in habeas should be docketed (separately appealable order), and if so, whether certificate of appealability ("COA") is required. COA is the only restriction Congress places on appeal, Barefoot v. Estelle, 463 U.S. 880, 906-907, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), and 28 U.S.C. §2253(c)(1) is limited to "the final order." If the denial is a final order, is it "the" final order? Cumbee's Fifth Circuit motion presented the threshold question of COA, 28 U.S.C. §2253, in the context of dismissal of a Rule 60(b) motion in habeas on procedural grounds (i.e. USDC ruling federal courts cannot overturn state convictions), Appendix B and C hereof. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); Buck, 137 S.Ct. at 327; Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

Based on the foregoing, the lower court clearly erred abusing discretion, by giving no clear reason why questions are unaddressed as to whether the Rule 60(b) denial is a separately appealable order, and whether COA applies or should be granted, dismissal without considering merits of the motion, which makes a prima facie case for sua sponte relief. Rulings fail to address if jurists of reason could disagree with the resolution of constitutional claims presented (for granting the Rule 60(b) motion), or if jurists of reason could conclude issues are adequate to deserve encourangement to proceed; however, COA is no bar to this Court, Buck, supra.

As documented Rule 60(b) filings demonstrate, Dkt.12, Cumbee has satisfied requirements for sua sponte relief, and for COA under the procedural dismissal standard of Slack, supra, if required. Cumbee's Fifth Circuit motion also asked for a determination under 28 U.S.C. §1292(b), whether a controlling issue of law is involved, with respect to the Rule 60(b) motion, i.e. fraud-on-the-court, applying Fed.R.App.P. 5(a)(3), if permission of appeal is required. Since Rule 60(b), if granted, can result in sua sponte relief in the case of fraud-on-the-court, Hazel-Atlas, supra, Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447 (1948), it certainly appears to be a controlling issue of law, if the denial of the Rule 60(b) motion is considered an interlocutory appeal. Again, however, this Court can determine the matter of law issue and consider the appeal.

The most perplexing ruling of the Fifth Circuit, is that it lacks jurisdiction because the habeas proceeding has been dismissed for AEDPA limitations bar, Appendix A. AEDPA limitations applies when no claim of innocence is made, innocence raised as an equitable exception to bar a first filing survived AEDPA, review should focus on merits of innocence claims taking delay into account in that context rather than treating timeliness as a threshold inquiry. McQuiggin v. Perkins, 133 S.Ct. 1924, 1930-1936, 185 L.Ed.2d 2019 (2013). Respondent recognizes that Cumbee has raised innocence in his first filing, motion, Dkt.21 at 3, "9."; at 10-11. Under Rule 60 and Supreme Court law cited above, fraud-on-the-court has no statute of limitations, abuse to moot the claim with limitations.

On its own motion without prior opportunity to brief, USDC ruled it lacked jurisdiction to grant Rule 60(b) relief, Dkt.27, Appendix B. Cumbee's motion, Dkt.28, objected that authority cited is inapplicable, USDC can grant relief, a clearly erroneous ruling under Supreme Court law and plain meaning of Rule 60(b).

Cumbee appeared January 28, 2011, and his wife was appointed an attorney for the new charge, in the criminal proceeding against Cumbee, although Cumbee was not, until the day an information was filed, March 2, 2011, Rule 60(b) motion, Dkt.12, EXHIBITS 6 & 7,[1] though pled January 21, 2011, id., EXHIBIT 3 at 3, par.III. Cumbee was arrested January 13, 2011 for the new charge, id. It is not Cumbee's responsibility to speculate or explain prosecutors' actions or motives, id. at 10-11, nor the Judiciary's. The appearance is exploitation and disregard of Cumbee's rights to the State's full advantage, in fraud-on-the-court, and Cumbee should be granted sua sponte Rule 60(b) relief (attorney malfeasance, dishonesty), setting aside convictions, Appendix B and C, acquitting Cumbee. To do otherwise renders meaningless fundamental Constitutional protections and numerous decision of this Court, cited herein, which seek to safeguard such protections. Allowing the shielding of fraud from Judicial review, Appendix A to C, buries it forever.

[1]Respondent refused to provide trial records, Dkt.21 at 5. Cumbee filed what he had as exhibits, Dkt.2, to the petition, Dkt.1, See Exh.11, Dkt.2, Orders of the Court (also attached to objections, Dkt,39, as Apx.E), and Exh.13, Dkt.2, Record of Criminal Actions, both in the case resulting in Judgment Adjudicating Guilt, Appendix D hereto. These official records show new charge arrest January 13, 2011, pled January 21, 2011, Rule 60(b) motion, Dkt.12, EXHIBIT 3 at 3, par.III. A week later, January 28, 2011, Cumbee appeared, his wife, Dawn Vanneote, was appointed counsel for the new charge; however, Cumbee was not, until March 2, 2011, id. EXHIBIT 6.

CONCLUSION

Petitioner prays that the Court grant his writ of certiorari, review merits of his Rule 60(b) motion, Dkt.12, and motion to stay, Dkt.17, entering such orders as the Court deems just; and, if remanded, order that the appeal of the denial of the motions, Appendix B and C, be docketed as ordinary appeals, with briefing, and if COA applies, order that COA issue, for the following:

(a) Would jurists of reason find it debatable whether Cumbee's motions, Dkt.12, Dkt.17, state a valid claim of the denial of a constitutional right; and whether the USDC was correct in its procedural ruling?

(b) Would reasonable jurists debate whether Cumbee's motion, Dkt.12, is a "true" Fed.R.Civ.P. Rule 60(b) motion?

(c) Would reasonable jurists debate whether Fed.R.Civ.P. Rule 60(b) "only applies to the judgments of the court in which relief is sought", Dkt.27 at 1?

(d) Would reasonable jurists debate whether a federal district court "lacks jurisdiction to set aside state criminal judgments under Federal Rules of Civil Procedure", Dkt.27 at 1?

(e) Has Cumbee made a substantial showing of the denial of a constitutional right in one or more of the Grounds in the petition (sufficient for jurisdiction to attach for a Rule 60(b) filing)?

Petitioner prays the Court modify, reverse, in whole or in part, render judgment and orders that should have been rendered, or reverse and remand to the United States Court of Appeals for the Fifth Circuit, or grant other or additional relief regarding lower

court orders, Appendix A to C, which may include remand to the USDC and may include an order that Respondent produce the record of the state court proceedings, and may include, without limitation, a determination that a controlling issue of law is involved, granting permission to appeal, determination that COA should issue, or a determination that neither is required. Petitioner further prays that the Court grant him sua sponte Rule 60(b) relief, setting aside state convictions, Appendix D, E, for fraud on the court, declaring convictions void, ordering acquittal of all charges, dismissal of all charges and immediate release; or, alternately new trial. Petitioner prays for such other or further relief that he may be entitled to, as the Court deems just.

RESPECTIVELY SUBMITTED,

Keith S Cumbee 8/29/2018

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