No. 18-7521

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

FREDDIE KING, JR. — PETITIONER
(Your Name)

vs.

DARREL VANNOY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Freddie King Jr.
(Your Name)

Dixon Correctional Institute
(Address)

Jackson, La. 70748
(City, State, Zip Code)

(Phone Number)

## QUESTION PRESENTED

1). Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state right to raise such a claim in a first post conviction proceeding, has a federal constitutional right to guaranted assistance of first post conviction counsel specifically with respect to his ineffective assistance of trial counsel claim. ? Whether King was denied a Constitutional right to counsel ?

The U.S. Supreme Court granted certiorari and the parties addressed their arguments to this question inMartinez v. Ryan, 132 S.Ct. 1309,566 (2012). The Court chose to not answer that question which avoided the Court's need to confront the established rule that there is no right to counsel in collateral proceedings. To avoid his procedural default, Martinez advocated in favor of an exception to this rule where the prisoner seeks the right to counsel in an initial review collateral proceeding. The court held: "Where under state law, ineffective assistance of counsel claims must be raised in an initial review collateral proceedings, a procedural default will not bar a federal habeas court from hearing those claims, if, in the initial review collateral proceeding there was no counsel or counsel in that proceeding was ineffective.

The equitable ruling in Martinez does not protect defendants in Louisiana who have been stripped of a constitutional right to effective assistance of counsel on a claim of "ineffective assistance of trial counsel". This is so because Courts in Louisiana ignore the mandate set forth in Martinez, and do not automatically appoint counsel on a first collateral review for a claim of ineffective assistance of trial counsel.

The U.S. Supreme Court held in Douglas v. California, 372 U.S. 353, 357, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) "that States must appoint counsel on a prisoner's first appeal.

Where as here, the initial review collateral proceedings is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective assistance claim. Louisiana prisoner's may raise claims of ineffective assistance of trial counsel only in state collateral proceedings, not on direct appeal.

Defendant's in Louisiana have a Constitutional right to effective counsel on direct appeal. Louisiana has removed from the direct appeal process claims of ineffective assistance of trial counsel, to the first collateral review (post conviction) where defendant's do not have a constitutional right to assistance of counsel, and where they are not appointed counsel unless they are able to satisfy the standards of the Code of Criminal Procedure art. 930.7 which reads:

> A) If the petitioner is indigent and alleges a claim which, if established would entitle him to relief, the court may appoint counsel.
>
> B) The court may appoint counsel for an indigent prisoner when it orders an Evidentiary Hearing, authorises the taking of depositions, or authorises request for admissions of fact or genuineness of documents, when such evidence is necessary for the disposition of procedural objections raised by the respondent.
>
> C) The court shall appoint counsel for an indigent petitioner when it orders an Evidentiary Hearing on the merits of a claim, or authorises the taking of depositions or request for admissions of fact or genuineness of documents for use as evidence in ruling upon the merits of the claim.

It is respectfully argued that for a defendant to meet the above cited requirements he needs assistance from an attorney. Without adequate representation in an

initial review collateral proceeding, a defendant will have difficulties vindicating a substantial ineffective assistance of trial counsel claim. Can the State of Louisiana be allowed to simply strip defendant's of their Constitutional Right to Counsel by refusing to allow a claim of ineffective assistance of trial counsel to be raised on direct appeal where he has a constitutional right to counsel, but allowing him to raise this claim on his first collateral review where he has no right to counsel. Petitioner has not waived this Constitutional right, and he respectfully argues that because the State of Louisiana chose to remove this claim from the direct appeal process it should be mandatory that his Constitutional right to counsel be moved with the claim of ineffective assistance of trial counsel claim.

In Martinez v. Ryan, 132 S.Ct. 1309,566 U.S. 1 (2012) this Hon. Court granted certiorari on the same issue raised here. However, this court chose not to answer this Constitutional question.

> Arizona prisoners may raise claims of ineffective assistance of trial counsel only in state collateral proceedings, not on direct review. In Petitioner Martinez's first state collateral proceeding, his counsel did not raise such a claim. On federal habeas review with new counsel, Martinez argued that he received ineffective assistance both at trial and in his first state collateral proceeding. He also claimed that he had a constitutional right to an effective attorney in the collateral proceeding because it was the first place to raise his claim of ineffective assistance at trial. The District Court denied the petition,finding that Arizona's preclusion rule was an adequate and independent state law ground barring federal review, and that under Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640, the attorney's errors in the post conviction proceeding did not qualify as cause to excuse the procedural default. The Court of Appeals for the Ninth Circuit affirmed.

Held: 1) Where, under state law, ineffective assistance of trial counsel claims

must be raised in an initial review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. The court said in Martinez, supra:

> (a) Given that the precise question here is whether ineffective assistance in an initial-review collateral proceeding on an ineffective assistance at trial claim may provide cause for a procedural default in a federal habeas proceeding, this is not the case to resolve the question left open in Coleman: whether a prisoner has a constitutional right to effective counsel in initial review collateral proceeding.

Now is the time to answer that question because to do otherwise will allow the State of Louisiana to continue to get away with illegally stripping defendant's of their Constitutional Right to counsel, on a claim of ineffective assistance of counsel.

Significant to note here also is that in Coleman v. Thompson, supra it was suggested though without holding, that the Constitution may require States to provide counsel in initial review collateral proceedings because "in these cases...state collateral review is the first place a prisoner can present a challenge to his conviction." Id. at 755, 111 S.Ct. 2546. As Coleman noted, this makes the initial-review collateral proceeding a prisoner's "one and only appeal" as to an ineffective assistance claim, id. at 756, 111 S.Ct. 2546 (emphasis(566 U.S. 9) deleted, and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings.

It is respectfully argued that this is the case to resolve whether that exception exists as a constitutional matter.

2.

The District Court erred concluding that Petitioner's Rule 60(b) Motion was an unauthorized successive 2254 application and transferring the application to the U.S. 5th Cir. Court of Appeal.

3.

Whether the District Court erred denying Petitioner a Certificate of Appealability ?

4.

Whether the 5th Circuit Court of Appeal erred refusing to allow Petitioner's Supplement concerning the U.S. Supreme Court's Ruling in McCoy v. Louisiana, May 14, 2018_____S.Ct._____2018 WL 2186174 No. 16-8255 ?

5.

Whether Petitioner was denied his Constitutional Right to Effective assistance of Counsel where his counsel told the jury in opening statements that his client was only guilty of murdering two victim's in the front room and not the two who were killed in the back room ?

## LIST OF PARTIES

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

[X] 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:

Hillar Moore, District Attorney
19Th Judicial District
East Baton Rouge Parish
Baton Rouge, La

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TABLE OF AUTHORITIES

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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 U.S. Court of Appeals, Fifth Circuit

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

The opinion of the United States district court appears at Appendix B to the petition and is Judgment of the U.S. District Court for the Middle District of Louisiana

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

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

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

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

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

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

## JURISDICTION

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

The date on which the United States Court of Appeals decided my case was Oct. 12, 2018.

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

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

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

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

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

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

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

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

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

## RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall...deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

In the early morning hours of July 27, 1989, six people were present in a mobile home owned by William Tennart, Jr. in Zachary, Louisiana. Two men entered the home. One of the men pulled a semiautomatic pistol and told those present to "freeze". The second man walked into a back bedroom. Shots were fired. The result: four people dead and two wounded. Petitioner, Freddie King, Jr. was charged with four counts of first degree murder a violation of La. R.S. 14:30. Two co-defendants were also indicted. Shortly before trial the state amended the indictment to reduce the charges to second degree murder, a violation of La. R.S. 14:30.1 After trial by jury Petitioner, Freddie King was convicted as charged. He was sentenced to serve four life sentences without benefit of parole, probation or suspension of sentence.

On February 14, 1995, petitioner filed an appeal with the First Circuit Court of Appeal. On May 22, 1995, the Court of Appeal denied the petition. On June 7, 1995, Petitioner filed an application for writ of certiorari with the Louisiana State Supreme Court. On Feb. 7, 1997, the Supreme Court denied the writ. On May 22, 1997, he filed an Application for Writ of Habeas Corpus in the Middle District of Louisiana. That court denied habeas relief under docket number: 97-388-B-M2, June 8, 1998.

On 8/31/16, Petitioner filed an Application in U.S. District Court for the Middle District of Louisiana argueing in a Rule 60 (b) Motion that his first federal habeas corpus under docket number: 97-388-B-M2 there was a defect in the proceeding and he sought to re-open the case. Petitioner sought relief pursuant to sub-

section (6) of Rule 60(b). On or about Sept. 27, 2017, the District Court transferred the Rule 60(b) (6) Motion to the U.S. Court of Appeal for the Fifth Circuit concluding that the Rule 60(b) Motion amounted to a second or successive petition. Petitioner immediately filed Notice of Intent to Appeal and requested to be allowed to proceed in forma pauperis. The District Court interpreted the Notice of Intent to Appeal to be an application for a Certificate of Appealability. The District Court on November 29, 2017, denied a Certificate of Appealability and denied him permission to appeal in forma pauperis on Appeal. Petitioner filed an Appeal into the U.S. Court of Appeal for the Fifth Circuit where he argued:

A) The District Court erred and abused its discretion transferring Petitioner's Rule 60 (b) Motion to the U.S. Court of Appeal concluding it was a second or successive petition.

B) Petitioner argued that there was a defect in the original federal habeas proceedings;

C) That he was entitled to a Certificate of Appealability.

The U.S. Fifth Circuit Court of Appeal docketed the case under number: 17-30817 and ordered Petitioner to file a Certificate of Appealability, it was filed in December of 2017. On June 21, 2018, Petitioner filed a Motion to Supplement pursuant to the United States Supreme Court ruling in McCoy v. Louisiana, May 14, 2018_____S.Ct._____2018 WL 2186174, (2018 WL ) No. 16-8255.

On Oct. 12, 2018 the U.S. Fifth Circuit Court of Appeal dismissed Petitioner's application.

REASONS FOR GRANTING THE WRIT

A review of the Rule 60(b) motion shows that petitioner sought to reopen case number 97-388-B-M2 pursuant to subsection (6) of 60(b) which reads:

> On Motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reason:
>
> Rule 60(b)(6)- Any other reason that justifies relief.

The court has interpreted Rule 60(b)(6)'s any other reason language to mean any other reason than those contained in the preceding five enumerated grounds of Rule 60(b). See Rocha, 619 F.3d at 400. "While Rule 60(b)(6) is commonly referred to as a 'grand reservoir of equitable power to do justice,' the rule is only invoked in 'extraordinary circumstances'. Id. see also Gonzalez, 545 U.S. at 535 125 S.Ct. 2641 (Our cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the re-opening of a final judgment."). A review of the attached Rule 60(b) Motion shows that petitioner cited extraordinary circumstances sufficient to satisfy Rule 60(b)(6). Petitioner also cited each component of his ineffective assistance of counsel claim raised in the first federal petition. And it should be noted that petitioner does not seek to have the resolution on the merits of his ineffective assistance of counsel claim relitigated, in fact these issues are simply cited in an effort to prove extraordinary circumstances.

Also in petitioner's Rule 60(b)(6) motion, he argues that it was extraordinary for the State of Louisiana to refuse to allow him to raise his claim of ineffective assistance of trial counsel on appeal and forced petitioner to raise this claim on post conviction relief, and because the trial court failed

to appoint petitioner counsel to represent him on his claim of ineffective assistance of trial counsel on post conviction relief. What happened is the State of Louisiana stripped petitioner of his Constitutional right to assistance of counsel on his claim of ineffective assistance of trial counsel. No-where in the record will it show that petitioner had any decision, no-where in the record will it show that petitioner waived his constitutional right to counsel. The State of Louisiana denied petitioner a Constitutional right to counsel by its action and not to just excuse a procedural default, it goes much further because the state stripped petitioner of his constitutional right and there has never been another constitutional right so easily taken without severe consequences. This is extraordinary and the state's action deprived many Louisiana prisoners of the assistance needed to pursue a claim of ineffective assistance of counsel.

2.

Petitioner argues that there is a defect in the original federal habeas proceedings.

The record in this case will reflect that petitioner raised a number of components in his ineffective assistance of counsel claim. The court ruled on the merits of all components but one and the record will reflect that petitioner argued as one ineffective component is that his attorney during opening statements told the jury that: " his client was only guilty of murdering two of the victim's in the front room, and not those two who were killed in the back room. A review of the record reflects that the district court failed to even consider this component of petitioner's ineffective assistance of counsel claim and this is where the defect comes in.

When the district court considered the merits of Petitioner's claim of ineffective assistance of trial counsel on his first federal writ application, the court neglected to considered his argument that counsel was ineffective because in his opening statement he admitted to the jury that petitioner was only guilty of killing two of the four people killed.

Here petitioner does not attempt to have the ineffective assistance of counsel claim reconsidered on the merits. What he seeks is for the court to reopen the case pursuant to Rule 60(b)(6) argueing a defect in that judgment because the court neglected to considered the merits of his argument on one conponent of his ineffective assistance of trial counsel claim. A review of the federal writ application complained of clearly reflects that petitioner was argueing that trial counsel was ineffective for telling the jury during his opening statement that petitioner was only guilty of killing two people and not four as alleged by the state. The record reflects that petitioner did not know his counsel was going to tell the jury he was guilty of killing two of the victim's. Petitioner's intent at his jury trial was to force the state to prove that he was guilty beyond a reasonable doubt and he gave counsel no permission to tell the jury he was guilty of killing two of the four victim's. This arguement was clearly written and put before the court in petitioner's first federal writ application and the record and judgment of the court clearly reflects that the court never even mentioned this issue. There is a defect in the proceeding clearly prejudicing petitioner's ineffective assistance of trial counsel claim.

Accordingly, Petitioner argues that his petition constitutes a challenge to a defect in the process of his prior federal petition rather than a challenge of the merits of that petition.

A district court's determination as to whether a Rule 60(b) motion constitutes a second or successive habeas petition is reviewed de novo. In re Jasper, 559 Fed. Appx, 366, 370 (5th Cir. 2014) (citing Ward v. Norris, 577 F. 3d 925, 932 (8th Cir. 2009).

In reviewing the district court's determinations to grant or deny relief under Rule 60(b), the court will reverse only for an abuse of discretion. Tamayo v. Stephens, 740 F.3d 986, 990 (5th Cir. 2014). "A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Hesling v. CSX Trans; Inc. 396 F.3d 632, 638 (5th Cir. 2005). It "is not enough that the granting of relief might have been permissible, or even warranted--denial must have been so unwarranted as to constitute an abuse of discretion." Dias v. Stephens, 731 F.3d 370, 374 (5th Cir. 2013).

Federal Rule of Civil Procedure 60(b)(6) is a catchall provision that allows a court to grant relief "from a final judgment, order, or proceeding" for "any other reason that justifies relief." To succedd on a Rule 60(b) motion, the movant must show: 1) that the motion be made within a reasonable time; and 2) extraordinary circumstances exist that justify the reopening of a final judgment. See Gonsales v. Crosby, 545 U.S. 524, 535, 125 S.Ct. 2641, 162 L. Ed.2d 480 (2005).

Because of the comparative leniency of Rule 60(b), petitioner's sometimes attempt to file what are in fact second or successive habeas petitions under the guise of Rule 60(b) motions. See e.g. Gonsales, 545 U.S. at 531-32, 125

S.Ct. 2641; Jasper, 559 Fed. Appx at 370. A federal court examining a Rule 60(b) motion should determine whether it either: 1) presents a new habeas claim (an "asserted federal basis for relief from a state court's judgment of conviction"), or (2) "attacks the federal courts previous resolution of a claim on the merits," Gonsalez, 545 U.S. at 530, 532, 125 S.Ct. 2641. If the Rule 60(b) motion does either, then it should be treated as a second or successive habeas petition and subjected to AEDPA's limitation on such petitions. See 28 U.S.C. 2244(b); see also Gonsalez, 545 U.S. at 531-32, 125 S.Ct. 2641 In re Sepulvado, 707 F.3d 550, 552 (5th Cir. 2013). A federal court resolves the claim on the merits when it determines that there are or are not "grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. 2254(a) and (d) " as opposed to when a petitioner alleges "that a previous ruling which precluded a merits determination was in error--for example, a denial for such reasons as failure to exhaust, procedural default, or statute of limitations bar." Gonsalez, 545 U.S. at 532 n.4, 125 S.Ct. 2641. A Rule 60(b) motion based on "habeas counsel's omissions ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably," Clark v. Stephens, 627 Fed. Appx. 305, 308 (5th Cir. 2015).

By contrast, to bring a proper Rule 60(b) claim, a movant must show " a non-merits based defect in the district courts earlier decision on the federal habeas petition." Balentine v. Thaler. 626 F.3d 842, 847 (5th Cir. 2010).Accordingly, if the Rule 60(b) motion attacks "some defect in the integrity of the federal habeas proceedings," rather than the resolution on the merits, then the

motion is not treated as a Second or successive petition. Gonzalez, 545 U.S. at 532, 125 S.Ct. 2641.

Recently, the United States Supreme Court decided that it would consider whether an attorney's performance is deficient when during a jury trial that attorney admits his clients guilt. See No. 16-8255.

Petitioner argues that the district court has jurisdiction over this matter and the question of whether the district court lacked jurisdiction over Petitioner's Rule 60(b)(6) Motion depends on whether Petitioner's motion amounts to a "second or successive" petition within the meaning of 28 U.S.C. 2244.

In Gonzalez v. Crosby, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), the Supreme Court stated that a Rule 60(b) motion does not contain a habeas corpus "claim", and thus should not be construed as a successive petition,when the motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings. Id. at 532, 125 S.Ct. 2641. Specifically, the Court held that a petitioner does not make a "habeas corpus claim when he merely asserts that a previous ruling which precluded a merits determination was in error. If the Rule 60(b) motion attacks a procedural defect in the court's handling of the previous 2254 motion, then the court may consider the motion.

See Ochoa Canales v. Quarterman, 507 F. 3d 884 C.A. 5 2007), where the Court said:

> "The Court in Gonzalez held that district courts have jurisdiction to consider Rule 60(b) motions in habeas proceedings so long as the motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S.Ct. 2641, 545 U.S.

524 (2005). In other words, a Rule 60(b) motion that attacks only a defect in the integrity of the federal habeas proceedings should not be treated as a successive habeas application.

See also Ward v. Norris, 577 F.3d 925 (2009) where the court said:

> Federal Rule of Civil Procedure 60(b) allows a habeas petitioner to seek relief from final judgment and to request the re-opening of his case in certain circumstances. Rule 60(b) applies to habeas proceedings to the extent it is not inconsistent with AEDPA. Gonzalez, 545 U.S. at 529. AEDPA imposes three requirements on second or successive habeas petitions: First, any claim that has already been adjudicated in a previous petition must be dismissed. 2244(b)(1). Second, any claim that he has not already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence. 2244(b)(2). Third, before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet 2244(b)(2)'s new rule or actual innocence provision. 2244(b)(3).
>
> A Rule 60(b) motion is a second or successive habeas corpus application if it contains a claim. For the purpose of determining whether the motion is a habeas corpus application, claim is defined as an "asserted federal basis for relief from a state court's judgment of conviction" or as an attack on the "federal court's previous resolution of the claim on the merits," Gonzalez, 545 U.S. at 530.
>
> No claim is presented if the motion attacks "some defect in the integrity of the federal habeas proceedings," id at 532. Likewise, a motion does not attack a federal court's determination on the merits if it "merely asserts that a previous ruling which precluded a merits determination was in error, for example a denial for such reasons as failure to exhaust, procedural default, or statute of limitations bar." id at n. 4 This reasoning is illustrated in Gonzalez, in which the petitioner moved for relief from judgment challenging the district courts determination that his habeas petition was time barred under AEDPA. Because the motion challenged only the statute of limitations that applied to the habeas proceedings and did not assert a claim the Supreme Court held that it was not a second or successive habeas petition.

It is respectfully argued that the district court's transfer of petitioner's Rule 60(b)(6) motion was an abuse of discretion.

The abuse of the writ doctrine dictates that courts should treat the term "second and successive" as a term of art, which is not to be read literally. Therefore, "a prisoner's application is not second or successive simply because it follows an earlier federal petition".

The defect in petitioner's first federal habeas application hinges around the court's failure to consider the merits of one of the components in petitioner's ineffective assistance of trial counsel claim, such as where petitioner argued that his attorney's representation was deficient when during opening statements the attorney told the jury his client was guilty of killing two out of the four victim's. This issue and argument were made clear in the federal writ and the court chose to ignore it and never even mentioned it. The issue cannot be considered second or successive because this component of this claim's merits were never considered, thus petitioner attacks a defect in the previous federal habeas corpus and does not seek reconsideration of his ineffective assistance of counsel claim. The issue here is substantial and it is argued that a ruling on its merits should result in a finding that counsel's action informing the jury that his client was in fact guilty of killing two of the four victim's amounts alone to deficient performance prejudicial to the defense.

Accordingly, because King's 60(b) claim attacks "some defect in the integrity of the federal habeas proceedings," rather than the resolution on the merits, then the motion should not be treated as a second or successive petition. Gonsalez, 545 U.S. at 532, 125 S.Ct. 2641.

The district court erred in transferring his Rule 60(b) Motion. See In re Coleman, 768 F.3d 367, 371 (5th Cir. 2014). It is respectfully argued that a review of King's 60(b) Motion reflects that he has not sought to have his ineffective assistance claim reconsidered, nor has he attacked the district court's resolution of that claim on the merits. King simply brings to the court's attantion that a component of this claim was not considered by the district court when deciding the merits of the claim. King argued that the defect is that the district court failed to consider an important component of the claim and that is Whether his trial attorney was ineffective when he told the jury in opening statements that King was only guilty of killing two people and not four as alleged by the state. This argument simply cannot be considered as an attack on the resolution of this claim on the merits by the district court. The district court abused its discretion transferring King's 60(b) motion.

To succeed on a Rule 60(b) motion, the movant must show: (1) that the motion be made within a reasonable time; and (2) extraordinary circumstances exist that justify the reopening of a final judgment. King argues that he has shown both in his Rule 60(b)motion.

Timeliness

A motion under Rule 60(b)(6) must be made "within a reasonable time." Fed. R.Civ.P. 60(c)(1). However, Rule 60 does not clarify what amounts to "a reason-

able time." See id. Motions under Rule 60(b)(1)-(3), on the other hand, must be made "no more than a year after the entry of judgment or order or the date or the proceeding." Fed. R.Civ. P. 60(c)(1). The Fifth Circuit was clear that the time measured for this purpose was the time between the Court's entry of judgment on December 14, 1990, and the filing of King's Motion on 8/31/16, more than 26 years later. Under this timeline King's Rule 60(b) (1)-(3) cannot apply in this case. The question here is whether a delay of 26 years is "a reasonable time" in which to bring a Rule 60(b)(6) motion.

The Fifth Circuit considers the "particular facts of the case in question" when determining whether a delay is reasonable. First RepublicBank Fort Worth v. Norglass, Inc. 958 F.2d 117, 119 (5th. Cir. 1992). The "reasonable time" requirement must contemplate that the Rule 60(b) motion cannot be brought before the motion has grounds. Id. at 120 (" The timeliness of the Rule 60(b) motion is measured as of the point in time when the moving party has grounds to make such a motion, regardless of the time that has elapsed since the entry of judgment."). In First RepublicBank Fort Worth, the Fifth Circuit analysed four cases in which timeliness was measured from the date of judicial or extrajudicial action that created grounds for the Rule 60(b) motion, not the judgment date, to the date of filing. Id. at 120-121 (citing United States v. 119.67 Acres of Land, 663 F.2d 1328 (5th Cir. 1981); Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983); Dunlop v. Pan Am. World Airways, Inc. 672 F.2d 1044 (2d Cir. 1982); Clarke v. Burkle, 570 F.2d 824 (8th Cir. 1978).

Here, King's motion under Rule 60(b)(6) is based on the defect in the federal district court's failure to consider an important component of his ineffective assistance of counsel claim, and the grounds of extraordinary circumstances in Fed. case number 97-388-B-M2, November 17, 1997.

King contends that he had no avenue or support to have this case reopened until The U.S. Fifth Circuit Court of Appeal decided Jeremy Coleman v. Jerry Goodwin, U.S.C.A. (5th Cir. 2016) No. 14-30785), a case for the first time for any court to say that Martinez v. Ryan, 132 S.Ct. 1309 (2012) and Trevino Thaler, 133 S.Ct. 1911 (2013), applies to Louisiana prisoner's.

Thus, because for the first time King was allowed to benefit from the U.S. Supreme Court's decision in these cases, King filed his Rule 60(b) petition two weeks later after Coleman v. Goodwin.

Considering that a Rule 60(b) motion cannot be brought until its grounds become evident, and in King's case until the Coleman court said Louisiana prisoners could benefit from the rules set forth in Martinez and Trevino, it is argued that King's Rule 60(b) motion would be considered timely if the delay of two weeks is a "reasonable" amount of time.

Extraordinary Circumstances

Rule 60(b)(6) allows for relief from a final judgment for "any other reason that justifies relief." Fed. R.Civ. P. 60(b)(6). Rule 60(b)(6) has two limitations: first, it is an alternative provision and, second, it only ap-

plies in extraordinary circumstances. See Klapprott v. United States, 335 U.S. 601, 613 (1949); Gonsales, 545 U.S. at 528-29, 534-35.

Extraordinary circumstances must involve circumstances beyond the petitioner's control. Edward H. Bohlin Co. v. Banning Co. 6 F.3d 350, 357 (5th. Cir. 1993) (citing United States v. O'Neil, 709 F.2d 361, 373 n. 12 (5th Cir. 1983). Rule 60(b)(6), especially, is intended to "cover unforeseen contingencies." Steverson v. GlobalSantafe Corp. 508 F.3d 300, 303 (5th Cir. 2007).

King's ability to participate in his litigation was taken from him, King in his case had no control over how his trial lawyers chose to handle his case. He never agreed to plead guilty and he never agreed for the lawyers to tell the jury he was only guilty of two murders rather than 4. In light of this undisputable fact it qualifies an extraordinary circumstance under Rule 60(b)(6). Next, King had no say when the state of Louisiana refused to allow him to raise a claim of "ineffective assistance of trial counsel on direct appeal where he had a Constitutional Right to effective representation, and where the state forced King to raise his claim of ineffective assistance of trial counsel on post conviction relief, and then where the court refused to appoint King counsel to represent him on a claim of ineffective assistance of trial counsel on post conviction relief. This qualifies as an extraordinary circumstance.

King had no say so in the district court's decision to ignore and fail to entertain an important component of his ineffective assistance of counsel claim, specifically where King argued that trial counsel was deficient by telling the jury during opening statements that he was only guilty of two rather than four of the murders he was charged with committing.

Petitioner is entitled to a Certificate of Appealability

The district Court denied Petitioner a certificate of appealability concluding that he had not made a substantial showing of the denial of a constitutional right. Section 102 of the AEDPA amended 28 U.S.C. 2253(c) which provides:

> (1) Unless a circuit justice or Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

AEDPA, 102.

The standard for granting a certificate of appealability (COA) under the AEDPA is the same as the standard for granting a certificate of probable cause (CPC) under the pre- AEDPA law. Tucker v. Johnson, 115 F.3d 276 (5th Cir. 1997); McBride v. Johnson, 118 F.3d 432 (5th Cir. 1997). Under either analysis the petitioner must make a substantial showing of the denial of a federal right. He also must show that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner or that questions are adequate to deserve encouragement to proceed further. Barefoot

v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); Sawyers v. Collins, 986 F.2d 1493 (5th Cir. 1993), cert. den. 508 U.S. 933, 113 S.Ct. 2405, 124 L.Ed.2d 300 (1993).

In the present case Petitioner has made a requisite substantial showing of the denial of a federal right because he has shown 1) that the state of Louisiana stripped him of his constitutional right to representation by counsel on a claim of "ineffective assistance of trial counsel" when it prevented him from raising said claim on direct appeal where he had a constitutional right to representation of counsel and forced him to raise that claim on post conviction relief where he had no constitutional right to counsel and then refused to appoint him counsel to represent him on a claim of "ineffective assistance of trial counsel". Petitioner did not waive his constitutional right to representation by counsel on this claim, the state of Louisiana simply stripped him of this constitutional right when it forced him to raise this "ineffective assistance of trial counsel claim" on post conviction rather than on direct appeal where he had a constitutional right to representation by counsel. 2) Petitioner has shown a substantial violation of his constitutional right to effective assistance of counsel, under the Sixth Amendment standards of review, where he has alleged that during opening statements at his trial, his counsel told the jury "that Petitioner was only guilty of murdering two of the four victims" this component of the ineffective assistance of trial counsel claim was raised and addressed on

petitioner's first federal habeas corpus application. However, when that court ruled on that claim, the court failed to even mention this component of the claim and that is alleged as a defect in petitioner's Rule 60(b) Motion. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. See Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984): that Court has a two part test: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

The United States Supreme Court has recently granted certiorari and decided to hear a case containing an identical issue and that is whether an attorney who informs a jury that his client is guilty is deficient and prejudicial to the defendant.

The COA question here is whether a reasonable jurist could conclude that the District Court abused its discretion in transferring Petitioner's Rule 60(b) motion to the U.S. Fifth Circuit Court of Appeal concluding it was a second or successive petition. Petitioner brought his Rule 60(b) motion under the Rule's catchall category, subdivision (b)(6), which permits a court to reopen a judgment for "any other reason that justifies relief".

Petitioner has demonstrated both a substantial claim of denial of a constitutional right to counsel by the state of Louisiana and ineffective assistance of counsel under Strickland and an entitlement to relief under Rule 60(b)(6) a defect in the court's proceedings on petitioner's first habeas application where the court failed to entertain petitioner's allegation that his counsel was ineffective when telling the jury that he killed two of the victim's but not four. It follows that the district court erred in denying Petitioner the COA required to pursue these claims on appeal.

The United States Supreme Court in Buck v. Davis, cited at 580 U.S. _____ 2017, recently stated:

> The COA inquiry is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. at 327. This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." Id. at 336. "When a court of appeals sidesteps the (COA) process by first deciding the merits of an appeal, and then justifying its denial of a COA based on

its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Id. at 336-337.

In Petitioner's case on Nov. 29, 2017, U.S. District Court Judge Shelly D. Dick denied Petitioner a Certificate of Appealability stating that "having considered the record in this case and the requirements of 28 U.S.C. 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure, the Court finds that a substantial showing of the denial of a constitutional right has not been made". This denial is erroneous and an abuse of discretion.

A federal writ application is not successive merely because it follows an earlier application. In re Cain, 137 F.3d 234, 235 (5th Cir. 1998); Magwood v. Patterson,---U.S.---,130 S.Ct. 2788, 2805, 177 L.Ed.2d 592 (2010)("second or successive does not refer to all 2254applications filed second or successively in time, but is rather a term of art that takes its full meaning from our case law, including decisions predating the enactment of AEDPA.") A 2254 application filed after an earlier application that was dismissed without prejudice for failure to exhaust state court remedies is not a second or successive application. Slack v. McDaniel 529 U.S. 473, 487, 120 S.Ct. 1595,146 L.Ed.2d 542 (2000);

A review of the Court's records reflects that Petitioner previously pursued federal habeas corpus relief in U.S. District Court for the Middle District of Louisiana. In Civil Action No. 97-0388-F-JP-CN, Freddie King, Jr. v. Burl Cain, that judgment denying relief was issued on June 8, 1998.

In Petitioner's 60(b)(6) motion to the district court Petitioner relied on subsection (6): Petitioner contends that the court judgment on his previous writ application contains a defect in that the court failed to rule on one component of his "ineffective assistance of counsel claim" that being "that counsel's performance was deficient and prejudicial to his defense when during his opening statement he told the jury Petitioner was only guilty of killing two rather than four people. Petitioner was being tried on four counts of second degree murder. Denying relief the ruling is defective because the court never mentioned this component of Petitioner's ineffective assistance of trial counsel claim. Arguing this issue does not amount to his rule 60(b) motion being a second or successive habeas application. Petitioner has not raised another claim and does not seek to attack the substance of the court's resolution of a claim on the merits, but only a defect in the integrity of the prior federal habeas proceeding. Additionally constitutional violations are addressed in the rule 60(b) but go only to show "extraordinary circumstances which is a requirement for relief. The district court erred transferring Petitioner's Rule 60 (b) application to the U.S. Fifth Circuit Court of Appeals as a second or successive habeas application, and the same court erred denying Petitioner a Certificate of Appealability finding no substantial violation of a constitutional right.

The Fifth Circuit Court of Appeal In re Coleman, 768 F.3d 367, 371 (2014) addressing second or successive application cited Gonzales v. Crosby, a U.S.

Supreme Court case cited at 545 U.S. 524, 538,125 S.Ct. 2641,2649, 162 L.Ed. 2d 480 (2005) which establish that district courts have jurisdiction to consider Federal Rule of Civil Procedure Rule 60(b) motions in habeas corpus proceedings as long as the Rule 60 motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect, in the integrity of the federal habeas proceedings." Id. at 532. In that case the Supreme Court said:

> ...a Rule 60(b) motion in a 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction. A motion that, like petitioner's challenges only the District Court's failure to reach the merits does not warrant such treatment, and can therefore be ruled upon by the District Court without precertification by the Court of Appeals pursuant to 2244(b)(3).

Petitioner submits that his 60(b) motion is in fact a motion that shows " a non-merit-based defect" in the district court's earlier decision on the federal habeas petition, it is not a motion challenging the substance of the federal court's resolution of a claim on the merits. The motion contends and the record will reflect that Petitioner in his prior federal habeas application raised a claim of ineffective assistance of trial counsel and that he had 14 different components, the record will reflect that Petitioner argued as one of these components deficient counsel and prejudice when counsel during his trial on opening statements told the jury that Petitioner was only guilty of killing two and not four people as the state alleged. The record will reflect that the Court in its ruling failed to even mention this component of this claim and Peti-

tioner contends here that this single component is sufficient to support a claim of "ineffective assistance of trial counsel" and the prejudice is clear.

A claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Miller-El, 537 U.S. at 338.

The statute sets forth a two step process:, an initial determination whether a claim is reasonably debatable, and then if it is an appeal in the normal course. Whatever procedures employed at the COA stage should be consonant with the limited nature of the inquiry.

Petitioner's request for a COA raises two separate questions for the Fifth Circuit, first, whether reasonable jurists could debate the District Court's conclusion that Petitioner's Rule 60(b)(6) motion is a second or successive application, and second whether reasonable jurists could debate the District Court's conclusion that Petitioner had not shown a denial of a constitutional right.

Petitioner first contends that the District Court's conclusion that his Rule 60(b)(6) motion amounts to a second or successive application. Reasonable jurists could conclude that the District Court abused its discretion finding the application a second or succession petition and transferring it to the Fifth Circuit Court of Appeal. Second, Petitioner contends that reasonable

jurists could conclude that Petitioner had shown a substantial violation of a Constitutional right.

## CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the Petition.

Respectfully submitted,

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