

APR 17 2019

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Case No. 18-9215

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DALE GILES,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals for the Eighth Circuit  
(USDC No. 8:11-CV-00017 (D. of Neb.); USCA No. 18-1680)

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PETITION FOR A WRIT OF CERTIORARI

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**ORIGINAL**

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QUESTIONS PRESENTED

I.

DID THE EIGHTH CIRCUIT COURT OF APPEALS VIOLATE PETITIONER'S DUE PROCESS RIGHTS TO FAIR NOTICE AND AN OPPORTUNITY TO BE HEARD BY THE COURT'S PROCESS OF LEADING PETITIONER TO BELIEVE THAT A DUE DATE FOR HIS CERTIFICATE OF APPEALABILITY ("COA") BRIEF WOULD BE ESTABLISHED AFTER THE RULING ON HIS MOTION TO PROCEED IN FORMA PAUPERIS — BUT ABRUPTLY DENIED HIS IN FORMA PAUPERIS MOTION AND COA SIMULTANEOUSLY?

II.

DID THE EIGHTH CIRCUIT'S FAILURE TO FIND THE DISTRICT COURT'S RESOLUTION WRONG OR DEBATABLE FOR PURPOSES OF A CERTIFICATE OF APPEALABILITY DETERMINATION CONTRAVENE THE PRECEDENTS OF THE SUPREME COURT?

LIST OF PARTIES

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

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DECISIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit denying Mr. Giles's Application for a Certificate of Appealability ("COA") appears at Appendix D, and is unpublished.

The Judgment of the United States District Court for the District of Nebraska appears at Appendix B, and is unpublished.

STATEMENT OF JURISDICTION 1/

The decision of the United States Court of Appeals for the Eighth Circuit denying Mr. Giles's Application for a Certificate of Appealability was filed on August 29, 2018. SEE: Appendix D

A subsequent Petition for Panel Rehearing was denied on November 19, 2018. SEE: Appendix E SEE ALSO: Appendix F (Mandate)

The instant petition is timely filed because, prior to the 90-day deadline following the denial of the Petition for Panel Rehearing, Mr. Giles filed a Motion for an Extension of Time to File a Petition for a Writ of Certiorari with the Supreme Court. On March 8, 2019, Justice Gorsuch granted the motion, extending the time for Giles to file his petition to and including April 18, 2019. Mr. Giles affirms that he timely mailed the instant Petition for a Writ of Certiorari on April 17, 2019. SEE: PROOF OF SERVICE and AFFIDAVIT OF MAILING submitted herewith.

This Honorable Court has jurisdiction to entertain this cause pursuant to 28 U.S.C. §1254(1).

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1/ Giles, proceeding pro se, respectfully asks the Court to liberally construe his pleadings so as to best achieve substantial justice. HAINES v. KERNER, 404 U.S. 519, 520 (1972); ERICKSON v. PARDUS, 551 U.S. 89, 94 (2007).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, as well as the statutory provision of 28 U.S.C. §2253(c)(2). Each of which, state:

### AMENDMENT V

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

### 28 U.S.C. §2253(c)(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."

## STATEMENT OF THE CASE

### **A.) Nature of the Case.**

This case involves important constitutional questions related to a pro se criminal defendant's Fifth Amendment due process rights of fair notice and a meaningful opportunity to be heard. Petitioner Giles's due process rights are submitted to have been denied through processes favored by the Eighth Circuit Court of Appeals and the U.S. District Court for the District of Nebraska.

**First,** while awaiting the Eighth Circuit's decision of his pending Motion for Leave to Proceed In Forma Pauperis on Appeal, and having clearly expressed his intent to the Court of wanting to file a brief in support of a requested Certificate of Appealability ('COA'), the Eighth Circuit abruptly denied the in forma pauperis motion and a COA simultaneously. The Eighth Circuit never provided Giles with any notice or an opportunity to be heard.

**Second,** the Eighth Circuit, as a result of this erroneous process, failed to find wrong or debatable for purposes of a COA, that the record evidenced apparent error by the District Court. Specifically, without any notice of its intent to do so, the District Court recharacterized Giles's Fed.R.Civ.P. 60(b) motion as a 28 U.S.C. §2255 motion, and simultaneously dismissed the motion as untimely without giving Giles any opportunity to be heard. Additionally, the District Court's determination was erroneous because the Rule 60(b) motion raised only a procedural challenge that is not even cognizable in a Section 2255 motion. Also apparent was the debatability of the District Court's decision that the utilization of Fed.R.Crim.P. 48(a) to dismiss counts of conviction in the post-conviction context was appropriate. Such apparent errors warranted a COA so that they could be properly considered in an appeal.

This case is compelling because it raises significant questions of federal law, as well as issues of importance beyond the particular facts and parties involved, that touch closely the fair administration of justice. Criminal defendants and other litigants have a reasonable expectation that the due process protections afforded them by the Constitution and this Court's precedents will be abided by and enforced. Both the public and criminal defendants alike have a substantial interest in the congruent and consistent application of this Court's precedents, establishing federal law, amongst our domestic courts. Based upon the point and authorities set forth herein, Petitioner Giles respectfully beseeches this Honorable Court to grant certiorari review and vacate the prior judgment.

**B.) Salient Summary of Background Facts.**

Following a jury trial in the U.S. District Court for the District of Nebraska, Giles was convicted of COUNT 1: Conspiracy to Distribute or Possess w/intent to Distribute 1,000 Kilograms or more of Marijuana, 21 U.S.C. §841(a)(1) and §846; COUNTS 2, 4 and 7: Using, Carrying, or Possessing a Firearm During and in Relation to a Drug Trafficking Crime, 18 U.S.C. §924(c); COUNTS 3, 5 and 8: Felon in Possession of a Firearm, 18 U.S.C. §922(g)(1); and COUNT 6: Possessing at least 100 Kilograms of Marijuana w/intent to Distribute, 21 U.S.C. §841(a)(1).

The District Court subsequently imposed the following sentences: LIFE imprisonment on COUNTS 1 and 6, which were grouped; 120 months on COUNTS 3, 5 and 8, to be served concurrently with the LIFE sentence; 120 months on COUNT 2, to be served consecutively to all other counts; 300 months on COUNT 4, to be served consecutively to all other counts; and 300 months on COUNT 7, to be served consecutively to all other counts.

### Direct Appeal

Giles appealed to the Eighth Circuit Court of Appeals. Appeal No.

08-1378. On March 20, 2009, the Eighth Circuit **AFFIRMED** Giles's conviction and sentence. Significantly, however, the Eighth Circuit had determined that the jury instruction corresponding to the 18 U.S.C. §924(c) offense under COUNT 7 constituted reversible plain error. Although the error under COUNT 7 applied equally to Giles, only his codefendant, Charmar Brown, was immediately advantaged by the ruling because Giles's attorney failed to brief the issue.

### Petition for Writ of Certiorari

Thereafter, Giles filed a timely Petition for a Writ of Certiorari which, in pertinent part, sought Supreme Court review of his claim that his counsel had rendered ineffective assistance. SEE: GILES v. UNITED STATES, No. 09-5455, Petition, at p. 8-13. Significantly, in the Brief of the United States in Opposition to the petition, then Solicitor General, Elena Kagan, now Justice Kagan of the Supreme Court, detailed the COUNT 7 §924(c) error, at p. 4-5, as well as the Eighth Circuit's finding of plain error, at p. 7-8, and acknowledged that Giles had been equally affected — but his counsel failed to raise the argument at trial or on appeal. Brf. of U.S., at p. 8-9. Notably, Solicitor Kagan advised that:

"Petitioner's proper avenue for seeking relief is to file a motion under 28 U.S.C. §2255[.] In such a motion, petitioner can rely on the analysis of the court of appeals to establish instructional error and prejudice. He can also seek to show ineffective assistance of counsel [ ] as a freestanding claim for relief[.]"

This important mentioning aside, the Petition for a Writ of Certiorari was denied by the Supreme Court on January 19, 2010. 558 U.S. 1150, 130 S.Ct. 1135.

28 U.S.C. §2255 Motion

On January 19, 2011, Mr. Giles filed his Section 2255 motion. Giles argued, *inter alia*, that his counsel had rendered ineffective assistance by failing to object to legally erroneous jury instructions in relation to COUNT 7, a firearm offense in violation of 18 U.S.C. §924(c). Giles also referenced Solicitor Kagan's advisements for the presentation of this claim. SEE: (Mem. of Law in Supp. of §2255, at p. 4-7). The District Court's initial assessment of Giles's §2255 motion acknowledged the jury instruction error of COUNT 7 to be an ineffective assistance of counsel claim for failure to object at trial or raise the issue on direct appeal. SEE: (Dist. Crt. Order, DOC. 803-1, at p. 6-7, 10). Case No. 8:11-CV-00017 (D. of Neb.)

On June 30, 2011, the Government filed a Motion for Dismissal of Counts, pursuant to Fed.R.Crim.P. 48(a), requesting "leave to dismiss, without prejudice, Count VII of the Fifth Superseding Indictment (filing #298), as relates to the Defendant, Dale Giles."(emphasis added).

On November 10, 2011, the District Court denied Mr. Giles's §2255 motion, (DOC. Nos. 839, 840), but granted the Government's motion to dismiss COUNT 7, as reflected by the entry of an AMENDED judgment on November 15, 2011. (DOC. 841).

A subsequent application for a Certificate of Appealability, as well as a Petition for a Writ of Certiorari to the supreme Court were denied.

Fed.R.Civ.P. 60(b)(6) Motion

In August 2017, Giles filed a Fed.R.Civ.P. 60(b)(6) Motion for Relief from the Final Judgment Order Denying his 28 U.S.C. §2255 Motion by the District Court. SEE: (Appendix A). Giles urged that the District Court's

granting of the Government's motion to dismiss COUNT 7, pursuant to **Fed.R.Crim.P. 48(a)**, constituted a defect in the integrity of the Section 2255 proceedings that was not an appropriate procedure in the post-conviction context since the procedural ruling had the force and effect of precluding Giles from obtaining a merits determination of his ineffective assistance of counsel claim(s) related to COUNT 7. Giles asked the District Court to vacate the prior Section 2255 judgment to allow for a merits determination that was wrongly precluded.

On November 29, 2017, the District Court issued a Memorandum and Order. (DOC. 985). SEE: (Appendix B). The District Court, without any notice of its intent or any opportunity to be heard, summarily recharacterized Giles's Rule 60(b)(6) motion as a 28 U.S.C. §2255 motion. (Mem. Order, at 1). The District Court then concluded, without any analysis of the Rule 60(b)(6) procedural challenge, that the "§2255" was untimely and denied it. (Mem. Order, at 3). Giles then filed a timely Notice of Appeal on January 22, 2018. SEE: (Appendix C).

#### Application for a Certificate of Appealability

Giles sought a Certificate of Appealability from the Eighth Circuit Court of Appeals so that he could present his Fed.R.Civ.P. 60(b)(6) motion issues and the propriety of the District Court's resolution in an appeal. Appeal No. 18-1680. Following the filing of his Notice of Appeal, the Eighth Circuit informed Giles that he had to pay the filing fee or submit a Motion for Leave to Proceed In Forma Pauperis. Giles submitted an in forma pauperis motion. On several occasions, both in phone calls to the Clerk and in letters to the Court, Giles clearly expressed his desire to file an Application for a Certificate of Appealability **brief** setting forth his

showing that the resolution of the District Court was wrong or debatable for purposes of warranting a Certificate of Appealability ("COA"), and the pertinent points and authorities in support. Giles never received any notice from the Eighth Circuit that his COA brief should be filed prior to a ruling on his in forma pauperis motion to address the filing fee.

While awaiting the Eight Circuit decision on the in forma pauperis motion, and anticipating that a due date for his COA brief would then be given, the Court abruptly issued an Order simultaneously denying Giles's Motion for Leave to Proceed In Forma Pauperis and denying the issuance of a COA. SEE: (Appendix D, Order, August 29, 2018). The Eighth Circuit did not give any reason whatsoever for the decision. Giles then filed a Petition for Panel Rehearing, but it was summarily denied on November 19, 2018. SEE: (Appendix E). The Mandate then issued on November 27, 2018. SEE: (Appendix F). Giles never received any notice of the Court's intent to simultaneously decide his case with the in forma pauperis determination or that his COA brief was expected of him by the Court — nor did he ever have a meaningful opportunity to be heard through the filing of his COA brief.

The instant Petition for a Writ of Certiorari now timely follows.<sup>2/</sup>

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2/ On March 8, 2019, Justice Gorsuch granted Giles's Motion for Extension of Time, requiring Giles to file his petition on or before April 18, 2019. SEE: PROOF OF SERVICE and AFFIDAVIT OF MAILING submitted herewith.

Law and Argument in Support of Granting Certiorari

QUESTION ONE

DID THE EIGHTH CIRCUIT COURT OF APPEALS VIOLATE PETITIONER'S DUE PROCESS RIGHTS TO FAIR NOTICE AND AN OPPORTUNITY TO BE HEARD BY THE COURT'S PROCESS OF LEADING PETITIONER TO BELIEVE THAT A DUE DATE FOR HIS CERTIFICATE OF APPEALABILITY ("COA") BRIEF WOULD BE ESTABLISHED AFTER THE RULING ON HIS MOTION TO PROCEED IN FORMA PAUPERIS — BUT ABRUPTLY DENIED HIS IN FORMA PAUPERIS MOTION AND A COA SIMULTANEOUSLY?

Petitioner Giles respectfully submits that the Eighth Circuit Court of Appeals process for the consideration of a pro se litigant's application for a Certificate of Appealability, ("COA"), is constitutionally defective because it creates a situation where some pro se litigants, like himself, are erroneously deprived of the opportunity for the Court to consider their COA brief on the issues. This occurs simply because the Eighth Circuit does not inform a pro se petitioner of the due date for the COA brief to be filed with the Court. Petitioner Giles experience makes apparent the denial of due process that results for many pro se litigants.

Following the District Court's denial of Giles's Fed.R.Civ.P. 60(b) motion, (Appendix B), he filed a timely Notice of Appeal. (Appendix C). The Eighth Circuit Court of Appeals acknowledged the filing of the Notice of Appeal in due course and advised Giles that the filing fee must be paid or he must file a Motion for Leave to Proceed In Forma Pauperis. Giles timely filed his Motion for Leave to Proceed In Forma Pauperis. To this point Giles was never informed of any scheduled deadline for him to file his COA

brief with the Court. Following Giles's filing of his Motion for Leave to Proceed In Forma Pauperis on April 24, 2018, Giles affirms that he waited for the Eighth Circuit to rule on his in forma pauperis status and notice of the established deadline for the filing of his COA brief. Giles's prior experience with an appeal to the Eighth Circuit was that a briefing schedule was set by the Court after the filing fee has been paid. Nothing from the Court had indicated that his COA brief would be treated any differently.

After waiting for more than a month to hear from the Court, Giles affirms that he wrote to the Court to check on the status of the in forma pauperis motion and specifically expressed his desire to file his COA brief with his issues for the Court. Giles affirms that he also wrote another motion requesting a definite statement of the Court on the status of the in forma pauperis motion and his intention to file a COA brief. Giles affirms that he also called the Eighth Circuit Clerk to inquire on at least two separate occasions to inquire about the in forma pauperis status and his intention to file his COA brief. At each of these inquiries he was told simply that the in forma pauperis motion was still pending and that he would be notified of the decision. Giles affirms that he was specifically told by the Clerk of the Court that he would be given an opportunity to file his COA brief with the Court after it determined his in forma pauperis status. Because this is indeed the process Giles had experienced on a prior appeal he had no cause to doubt the Clerk's advisement of the Court's procedure.

Abruptly, however, on August 29, 2018 the Eighth Circuit issued an Order in which it simultaneously denied Giles's in forma pauperis motion and any COA. No reason was given. SEE: (Order, Appendix D). Dismayed and confused, Giles filed a Petition for Panel Rehearing, which was summarily denied on November 19, 2018. SEE: (Order, Appendix E).

Inherent within the Fifth Amendment is the essential principle that the constitutional guarantee of due process requires fair notice and an opportunity to be heard. U.S. Constitution, Amend. V SEE: CLEVELAND BD. OF EDUC. v. LOUDERMILL, 470 U.S. 532, 546 (1985) ("The essential requirements of due process ... are notice and an opportunity to respond."); MOORE v. EAST CLEVELAND, 431 U.S. 494, 542 (1977) ("The emphasis of the Due Process Clause is on 'process.'"); GRANNIS v. ORDEAN, 234 U.S. 385, 394 (1914) ("A fundamental requirement of due process is the opportunity to be heard."); UNITED STATES v. PARKER, 762 F.3d 801, 810 (8th Cir. 2014) ("Our justice system rests on a foundation of fair notice.").

Equally an essential principle of fair notice and an opportunity to be heard is that the notice and opportunity occur at a meaningful time and in a meaningful manner. SEE: ARMSTRONG v. MANZO, 380 U.S. 545, 552 (1965). Giles respectfully urges that the Eighth Circuit Court of Appeals process for pro se litigants to file a COA brief with their issues violates due process simply because it does not routinely notify them of the deadline by which they must do so. This result in a situation where pro se litigants, like Mr. Giles, end up losing the opportunity to present their issues in a COA brief altogether because the Eighth Circuit rules on their case based solely on the Notice of Appeal. Although this circumstance is easily remedied by the Eighth Circuit providing clear notice of a COA brief deadline, the Court is not doing so. The failure to provide notice of a fixed deadline in the COA brief context is inconsistent with the way the Eighth Circuit handles a pro se prisoner's direct appeal. In that context, the Eighth Circuit does provide notice of a brief deadline after it rules on a motion to proceed in forma pauperis. The Eighth Circuit Court of Appeals process of not notifying

a pro se prisoner of an established deadline for their COA brief is also in direct conflict with the established procedure of other courts of appeals that routinely inform a pro se prisoner of the deadline to file their COA brief — and do so even after they determine the pro se litigant's in forma pauperis status.

Petitioner Giles respectfully beseeches this Court to grant certiorari review of the Eighth Circuit Court of Appeals favoring a COA briefing process that does not afford adequate notice of a clear deadline for the filing of the COA brief, and unreasonably risks the pro se prisoner's loss of the opportunity to be heard altogether. This due process issue affects all pro se prisoners in the Eighth Circuit's jurisdiction and is worthy of the Supreme Courts attention based upon the experience of Petitioner Giles. Giles asks that the Court would grant his Petition for a Writ of Certiorari, vacate the prior judgment of the Eighth Circuit Court of Appeals, and remand this matter to allow him a fair opportunity to file his COA brief for a full consideration *de novo* by the Eighth Circuit Court of Appeals.

#### QUESTION TWO

DID THE EIGHTH CIRCUIT'S FAILURE TO FIND  
THE DISTRICT COURT'S RESOLUTION WRONG OR  
DEBATEABLE FOR PURPOSES OF A CERTIFICATE  
OF APPEALABILITY DETERMINATION CONTRAVENE  
THE PRECEDENTS OF THE SUPREME COURT?

Although Mr. Giles was not afforded an opportunity to present his Certificate of Appealability ("COA") brief issues for consideration, the Eighth Circuit Court of Appeals Order indicates that the Court nevertheless

conducted a review of the record and determined that any COA is denied. SEE: (Order, Appendix D). The Eighth Circuit never gave any reason for the denial. Giles respectfully urges that the Eighth Circuit's denial of a COA is tantamount to a violation or conflict with the Supreme Court's precedents because the District Court's recharacterization of his Fed.R.Civ.P. 60(b) motion as a 28 U.S.C. §2255 motion — and then sua sponte dismissing it as untimely — was apparently wrong or debatable for purposes of a COA in light of GONZALEZ v. CROSBY, 545 U.S. 524, 531, 532-533, 538 (2005)(holding that the necessity to reopen the prior §2255 proceeding based on a defective procedural ruling that precluded a determination of the merits is a most appropriate utilization of Fed.R.Civ.P. 60(b)); DAY v. MCDONOUGH, 547 U.S. 198, 210 (2006)(holding that before acting on its own initiative a court must accord the parties fair notice and an opportunity to present their positions). In Giles's case, the resolution of the District Court was so apparently contrary to clearly established law that the Eighth Circuit's denial of a COA is itself representative of a violation or conflict with existing Supreme Court precedents.

Giles's Fed.R.Civ.P. 60(b) claim and the District Court's resolution.

The arrival of Giles's case at the Eighth Circuit Court of Appeals was preceded by his filing of a Fed.R.Civ.P. 60(b) motion in the District Court. SEE: (Rule 60(b) Motion, Appendix A). In his Rule 60(b) motion, Giles urged that the Court's granting of the Government's motion to dismiss COUNT 7 through the utilization of Fed.R.Crim.P. 48(a) in the §2255 post-conviction context constituted a defect in the federal habeas proceedings because the procedural ruling had the force and affect of precluding a merits determination of his ineffective assistance of counsel claim.(Rule 60(b) Mot., at 1, 6-13).

The District Court resolved Giles's Rule 60(b) motion by sua sponte recharacterizing it as a 28 U.S.C. §2255 motion — and sua sponte determined that the Section 2255 motion was untimely and dismissed it. Significantly, the District Court never gave Giles or the government any notice of its intent to do either of these things, nor did it give the parties any opportunity to present their respective positions. SEE: (Order, Appendix B). The District Court did not make any determination of the procedural utilization of Fed.R.Crim.P. 48(a) to dismiss COUNT 7 in the prior §2255 proceeding.

The Eighth Circuit's denial of a COA violates Supreme Court precedents.

When the District Court has denied a motion under either 28 U.S.C. §2255 or Fed.R.Civ.P. 60(b), the Petitioner may not appeal without first obtaining a Certificate of Appealability ("COA"). Such a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). SEE ALSO: Fed.R.App.P. 22(b). Under this standard, an applicant can make such a showing by demonstrating that jurists of reason would find the District Court's resolution "wrong or debatable," or "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." SEE: MILLER-EL v. COCKRELL, 537 U.S. 322, 123 S.Ct. 1029, 1034 (2003)(citing SLACK v. MCDANIEL, 529 U.S. 473, 484 (2000)). Purportedly applying these standards, the Eighth Circuit's denial of a COA is representative of a conflict with the Supreme Court's precedents dictating that the District Court's resolution of Giles's Rule 60(b) motion was apparently "wrong or debatable" so have to warrant the issuance of a COA.

The Eighth Circuit's denial of a COA in light of the District Court's recharacterization of Giles's Fed.R.Civ.P. 60(b) motion as a Section 2255 motion is in conflict with the Supreme Court's decision in GONZALEZ v. CROSBY, 545 U.S. 524 (2005). In GONZALEZ, the Court held that a Rule 60(b) motion that attacks a "defect in the integrity of the federal proceedings," or that challenges a "procedural ruling that precluded a merits determination," will not be treated as a "second or successive" §2255 motion. Id., 545 U.S. at 532-533, 538. It necessarily follows that, as in Giles's case, because his Rule 60(b) motion only attacked a procedural decision of the District Court's utilization of Fed.R.Crim.P. 48(a) to dismiss a count of conviction that precluded a merits determination of his ineffective assistance of counsel claim, the 60(b) motion could not be recharacterized as a "second or successive" §2255 under GONZALEZ could not be a §2255 either. The whole point of GONZALEZ is that the Rule 60(b) motion remains just that, a Rule 60(b) motion. Here, Giles's Rule 60(b) motion falls squarely within the rubric of GONZALEZ because it attacks only the Rule 48(a) procedural ruling that precluded a merits determination. Giles does not attack at all the underlying conviction or sentence.

The District Court's sua sponte recharacterization of Giles's Rule 60(b) motion as a Section 2255 motion was also apparently inappropriate because his 60(b) motion did not even state a cognizable claim for purposes of §2255(a). Giles's Rule 60(b) motion was totally a procedural challenge to a prior §2255 proceeding, which does not state a cognizable §2255 claim. SEE: DYAB v. UNITED STATES, 855 F.3d 919, 922 (8th Cir. 2016) (holding Section 2255 is not the correct vehicle to raise a procedural argument and is not cognizable in a Section 2255 motion). SEE ALSO: SUNBEAR v. UNITED STATES,

644 F.3d 700, 704 (8th Cir. 2011)(explaining scope of §2255 motion is an attack on a final conviction or sentence and severely limited ... an "error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice.")(citing, UNITED STATES v. ADDONIZIO, 442 U.S. 178, 185 (1979)); UNITED STATES v. APFEL, 97 F.3d 1074, 1076 (8th Cir. 1996)(same). "To prevail on a §2255 motion, the petitioner must demonstrate a violation of the Constitution or the laws of the United States." BEAR STOPS v. UNITED STATES, 339 F.3d 777, 781 (8th Cir. 2003). Here, the limited scope of Section 2255 did not provide any vehicle for Giles to have hoped to raise his Rule 60(b) purely procedural attack on the District Court's permitting the use of Fed.R.Crim.P. 48(a). Giles's procedural attack was apparently not cognizable under Section 2255. In sum, the District Court's recharacterization of Giles's Rule 60(b) motion as a Section 2255 motion — knowing that it was not cognizable — is shown to have been "debatable or wrong" so as to have warranted a COA. Moreover, under GONZALEZ, Giles's Rule 60(b) motion was not properly construed as a Section 2255 motion in any event because it was a "true" 60(b) motion attacking a "procedural ruling that precluded a merits determination." With all due respect, the District Court recharacterization of Giles's 60(b) motion as a §2255 is also somewhat disingenuous because it placed Giles in an unnecessary "second or successive" posture when the 60(b) motion was cognizable and Section 2255 was not. The Eighth Circuit's denial of a COA in this instance is contrary to this Court's decision in GONZALEZ. It was debatable or wrong for purposes of a COA that the District Court recharacterized Giles's 60(b) motion as a §2255 motion, since his claim was plainly cognizable under Rule 60(b) and not cognizable under §2255.

The failure of the Eighth Circuit to have granted Giles a COA based on the District Court's resolution of his Rule 60(b) motion is also in conflict with the Supreme Court's precedent in DAY v. MCDONOUGH, 547 U.S. 198, 210 (2006). The District Court's sua sponte recharacterization of Giles's Rule 60(b) motion as a Section 2255 motion — and then sua sponte dismissing the Section 2255 motion as untimely — violate the parties due process rights of fair notice and an opportunity to be heard. In DAY, the Supreme Court instructed that, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions. Id., 547 U.S. at 210.

In Giles's case, the District Court never provided notice of its intent to recharacterize his Rule 60(b) motion as a §2255 motion, nor that it was intent upon dismissing the §2255 as untimely. This process favored by the District Court, and unrecognized by the Eighth Circuit, was debatable or wrong so as to warrant the issuance of a COA because it was contrary to the Supreme Court holding in DAY, and violates the fundamental principles of the Fifth Amendment right to due process. Significantly, in MARTINEZ v. UNITED STATES, 423 Fed. Appx. 650 (8th Cir. 2011), the Eighth Circuit applied DAY and granted a COA based upon a finding that the District Court erred in dismissing the §2255 motion on timeliness grounds without first providing the parties fair notice and an opportunity to be heard. The Eighth Circuit granted a COA in MARTINEZ and remanded to the District Court. Notably, in MARTINEZ the Eighth Circuit observed that timeliness of a §2255 motion is not jurisdictional and may be waived by the Government, so that the parties must be given notice and an opportunity to present their positions.

Giles further submits that the District Court's resolution of his Rule 60(b) motion — recharacterizing it as a §2255 motion and dismissing as untimely without any notice of its intent or opportunity to be heard — amounted to an apparent abuse of discretion since these actions represent a clear error of law. SEE: SANDUSKY WELLNESS CTR. LLC v. MEDTOX SCI., INC., 821 F.3d 992, 995 (8th Cir. 2016)(cit. omit.)("A district court abuses its discretion when it makes an error of law."). Cf. UNITED STATES v. WEILAND, 284 F.3d 878, 882 (8th Cir. 2001)(same)(citing KOON v. UNITED STATES, 518 U.S. 81, 100 (1996)("A district court by definition abuses its discretion when it makes an error of law.")); COOTER & GELL v. HARTMAX CORP., 496 U.S. 384, 405 (1990)(same). To the extent that the District Court's resolution of Giles's motion contravenes the Supreme Court's decisions in GONZALEZ and DAY, supra, the Eighth Circuit should have found it debatable as to whether the District Court abused its discretion in committing an error of law.

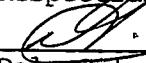
For these foregoing reasons, Giles respectfully submits that this Court should grant certiorari review and remand this matter to the Eighth Circuit Court of Appeals to permit it to consider his COA brief de novo.

#### CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Mr. Giles respectfully prays this Court grants his Petition for Writ of Certiorari.

I, DALE GILES, declare under the penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is both true and correct.

Dated this 17th day of April, 2019. Respectfully Submitted,

  
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