

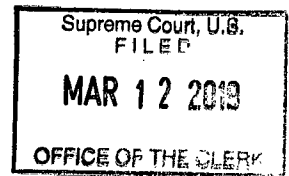
No. 18-9680

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Elester Middlebrook,
Petitioner,



vs.

United States of America,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
ELEVENTH CIRCUIT COURT OF APPEALS

Elester Middlebrook
Federal Correctional Complex
Unit B-2 (Low Custody)
P.O. Box 1031
Coleman, FL 33521-1031

QUESTIONS PRESENTED

QUESTION 1

This Court holds that factual innocence equates to an extraordinary circumstance that overrides a statute of limitation. **McQuiggin v. Perkins**, 133 S.Ct. 1924 (2013). Nonetheless, the Eleventh Circuit found Mr. Middlebrook's habeas-related Rule 60(b) motion untimely despite his underlying claim sounding in actual innocence.

When a Rule 60(b) motion seeks adjudication of an unanswered actual-innocence-related claim, can the motion be untimely?

QUESTION 2

Federal bank robbery requires the institutional victim to be insured by the Federal Deposit Insurance Corporation. After more than a decade, the government released evidence established that the corporate victim was not insured. If the government had timely released this evidence, then the original § 2255 court would have addressed two questions: (1) did constitutional error result in the conviction of an actually innocent person, and (2) did the district court have subject-matter jurisdiction since the indictment's did not identify a crime?

Does a corroborated claim of actual innocence constitute an extraordinary circumstance that justifies reopening the habeas proceedings to adjudicate the unresolved claims?

QUESTION 3

In the Rule 60(b) context, the Eleventh Circuit's standard for granting a certificate of appealability conflicts with this Court's holdings. The Eleventh Circuit implicitly conducts a merits analysis, and denies the COA based on that review. Then, the appeals court exacerbates its error by issuing a boilerplate order that obfuscates its departure from 28 U.S.C. § 2253(c)(2)'s requirements, as this Court defines them. **Buck v. Davis**, 137 S. Ct. 759 (2017); **Miller-El v. Cockrell**, 537 U.S. 322 (2003).

Should the Eleventh Circuit limit its COA analysis to the debatability of the threshold questions for Rule 60(b) relief?

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PETITION FOR A WRIT OF CERTIORARI

Elester Middlebrook respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in United States v. Middlebrook, No. 18-12230-J.

OPINIONS BELOW

The summary opinion of the Court of Appeals is unreported, but has been reproduced in full in Appendix "A".

The opinion of the district court denying the Rule 60 motion appears in Appendix "B".

JURISDICTION

The Court of Appeals denied Petitioner's application for a certificate of appealability on December 24, 2018. (Appendix "A").

Justice Thomas agreed to extend the time for petitioning a certiorari until May 23, 2019. (Appendix "F").

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2113(a)

- (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—Shall be fined under this title or imprisoned not more than twenty years, or both.

21 U.S.C. § 2113(d)

- (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

Fed. R. Civ. P. Rule 60(b)(4) and (6)

- (b) **Grounds for Relief from a Final Judgment, Order or Proceeding.** 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 reasons:

(4) the judgment is void;

(6) any other reason that justifies relief.

Fed. R. Civ. P. Rule 60(c)

- (c) **Timing and Effect of the Motion.**

(1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) **Effect on Finality.** The motion does not affect the judgment's finality or suspend its operation.

STATEMENT OF THE CASE

Mr. Middlebrook begins with a recitation of the two decades of litigation, then discusses the general factual background that supports granting of the writ.

Course of Proceedings

In August 2003, the United States charged Elester Middlebrook in a three count superseding indictment with robbing the Wachovia Money Center, in violation of 18 U.S.C. § 2113(a) and (d); possession of a firearm during a bank robbery, in violation of 18 U.S.C. § 924(c); and Hobbs Act conspiracy, in violation of 18 U.S.C. § 1951.

On March 31, 2004, the jury found him guilty of all counts, and the district court sentenced him to 319 months in prison. On appeal, the Eleventh Circuit Court of Appeals affirmed the conviction but remanded for resentencing in light of **United States v. Booker**, 543 U.S. 220 (2005). The crux of the government's case was that the Money Center was federally insured as alleged in the indictment by presenting testimony of the bank manager who stated that FDIC insurance was in effect on the day of the robbery.

On April 3, 2006, on remand from the court of appeals, the district court imposed the same 319 months and the Eleventh Circuit affirmed.

On May 22, 2007, Mr. Middlebrook filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255.

On December 13, 2007 the district court adopted the magistrate's report and recommendation and denied Mr. Middlebrook's § 2255 motion.

Ten years later, Mr. Middlebrook obtained evidence that at the time of the alleged robbery Wachovia Money Center was not insured. (App. "G"). Then, Mr. Middlebrook sought to reopen his § 2255 proceeding under Federal Rules of Civil Procedure 60(b)(4) and (6).

On March 22, 2018, the district court denied Mr. Middlebrook's motion to reopen his § 2255 proceedings. The district court expressed its reason for denying the motion was that "the defendant's motion is untimely." (App. "B").

On December 24, 2018, the Eleventh Circuit Court of Appeals denied Mr. Middlebrook's application for a certificate of appealability. (App. "A").

This petition ensued.

Factual Background

In 2003, the district court convicted Mr. Middlebrook of a crime he did not commit. The district court found him guilty of robbing a federally insured bank, the Wachovia Money Center in Atlanta, Georgia. Wachovia Money Center, however, is not federally insured (App. "G"), thus 28 U.S.C. § 2113 did not prohibit Mr. Middlebrook's conduct. The United States indicted and the jury convicted Mr. Middlebrook for conduct that did not constitute a federal crime. To be sure the Eleventh Circuit Court of Appeals affirmed the conviction, but did so on the basis of the wrong facts (App. "D", "E"). Nevertheless, the district court relied upon the appeals court's inaccurate inferences to bolster its denial of relief; "[a]s an initial matter, the Eleventh Circuit concluded that...the Money Center was federally insured." (App. "C") (quoting App. "D" at, pp. 5-6). As we now know, that factual finding was not true, and in the absence of that untruth there could be no conviction, and there would have been relief in § 2255.

At trial and continuously thereafter, Mr. Middlebrook contended that Wachovia Money Center did not qualify as a financial institution, since Wachovia Money Center was not insured by the Federal Deposit Insurance Corporation. Therefrom two fundamental errors arose: (1) the district court lacked subject-matter jurisdiction since neither the indictment, nor Mr. Middlebrook's conduct violated the laws of the United States; and (2) Mr. Middlebrook was actually innocent of his crime of conviction.

Mr. Middlebrook appealed both his conviction and his 319 month prison sentence. The Eleventh Circuit affirmed both. In 2007 Mr. Middlebrook filed a 28 U.S.C. § 2255 motion.

The district court's first impression was that Mr. Middlebrook's § 2255 claim should be reconstrued as "the Government knowingly used false evidence..., or....knowingly developed and presented false evidence...." (App. "C" at 6, n.1). Of course, as the district court eventually recognized, that recharacterization, like the original claim presented, rendered the claim impotent. The impotency stemmed from an inconclusive record.

At that point, although the record included some evidence that the "federally insured" finding was wrong, the record did not show that either the government or the witnesses had lied. Significantly, the expanded § 2255 record, however, did support the inference that the witnesses, jury, and court were wrong. Put differently, on a properly framed § 2255 claim, Mr. Middlebrook did not have to prove that the witness lied, instead he only needed to prove that the witness(es) were wrong.

Although inartfully presented as prosecutorial misconduct, the crux of Mr. Middlebrook's § 2255 challenges were that he is factually innocent of robbing a federally-insured institution (App. "C", "G"). Following that path, the district court should have liberally construed Mr. Middlebrook's pro se § 2255 motion as a gateway claim of actual innocence to show that "counsel was ineffective for not obtaining the evidence, and that under any circumstances, the evidence shows that the district court lacked power to enter a guilty verdict. The district court disregarded the presumption that Mr. Middlebrook's allegations were true, and construed the claim as an "actual-innouce claim based on newly discovered evidence." (App. "C" at pp. 5-6).

Over the ensuing decade Mr. Middlebrook sought to obtain proof that at the time of the incident, Wachovia Money Center was not FDIC insured. In April 2017, he obtained the proof (App."G"), which prompted him to file the Rule 60(b) motion giving rise to this petition.

In the Rule 60(b) motion, Mr. Middlebrook claimed that the district court improperly recharacterized his § 2255 claims, thus did not answer the grounds presented. This due-process failure, in conjunction with his bona fide claim of actual innocence, serves as an extraordinary circumstance that allows the Rule 60(b) ground to be heard, and serves to make his filing timely under Rule 60(b)(4).

Ultimately, the district court should have recharacterized the original § 2255 claims in order to effectively address Mr. Middlebrook's claims that inadequate counsel and unreliable evidence caused an unjust conviction.

REASONS FOR GRANTING THE WRIT

1. In the post-conviction context, this Court holds that factual innocence generates an equitable exception to both procedural default and the statute of limitations. That is factual innocence is an extraordinary circumstance which permits exceptional remedies. The Eleventh Circuit ignored the doctrine when it refused the COA, found the Rule 60(b) motion was not filed within a reasonable time, and did not identify an extraordinary circumstance. How the miscarriage of justice doctrine applies to Rule 60(b) is a question of substantial importance this Court should resolve.

This Court identified that Rule 60(b) plays an important role in habeas corpus proceedings. **Gonzalez v. Crosby**, 545 U.S. 524, 535 (2005). This Court did, however, conclude that certain preconditions must exist for a person to receive the benefit of certain Rule 60(b) subsections. The Rule 60(b)(6) movant must first show that "extraordinary circumstances justify [] the reopening of a final judgment." **Gonzalez**, 545 U.S. at 535, and then must show that the movant filed the motion within an undefined, reasonable time. *Id.*, See **Fed. R. Civ. P. 60(c)**.

By necessary implication, the Eleventh Circuit found that Mr. Middlebrook did not prove one or the other, or both of the conditions. Yet this Court identifies the conviction of an actually innocent person as a complete miscarriage of justice. Further, it provides that a complete miscarriage of justice constitutes an extraordinary circumstance, which generates an equitable exception that overrides procedural defects and statutes of limitation. **McQuiggin v. Perkins**, 133 S.Ct. 1924 (2013). The Eleventh Circuit Court of Appeals, implicitly, does not recognize that a bona fide claim of actual innocence constitutes an extraordinary circumstance permitting Rule 60(b)(6) relief.

In Argument 1, Mr. Middlebrook shows that under this Court's precedent, his factual innocence claim constitutes an extraordinary circumstance justifying Rule 60(b)(6) relief. In other words, when the \$ 2255 court did not rule on a claim that—if proven—would have established actual innocence, the district court's oversight generated an extraordinary circumstance such that the current Rule 60(b) ground should be granted regardless of diligence or delay. Quite simply, the Constitution and American society cannot tolerate the imprisonment of an actually innocent person.

Alternatively, the district court's failure to adjudicate Mr. Middlebrook's actual-innocence-related claims permits relief under Rule 60(b)(4). In order to invoke Rule 60(b)(4), a movant must show that a district court violated due process by making a procedural error that foreclosed the movant from having notice of an issue or opportunity to argue a claim. In other words, when a district court improperly denies a person due process (notice and opportunity to be heard) the judgment or decree of that court is void and may be challenged under Rule 60(b)(4). **United Student Aid Funds, Inc. v. Espinosa**, 130 S. Ct. 1367 (2010) ("Rule 60(b)(4) applies only in the rare instance where a judgment is

premised on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard."). The § 2255 court liberally construed the pro se filing in a manner that left the merits of the actual-innocence claims adjudicated. The § 2255 court violated due process, effectively nullifying its judgment.

We explicate each concept in turn.

1A. In the post-conviction context, a bona fide claim of actual innocence constitutes an extraordinary circumstance that entitles a party to Rule 60(b)(6).

The Supreme Court uniformly finds that the conviction of a factually innocent person constitutes a miscarriage of justice, which in turn creates an extraordinary circumstance that generates an equitable exception to override any procedural impediment or statute of limitations. "The principles of...finality that informed the concepts of cause and prejudice must yield to the imperative of correcting a fundamental unjust incarceration." See, e.g., **McQuiggin**, 133 S.Ct. at 1924 (statute of limitation); **House v. Bell**, 547 U.S. 518 (2006); **Coleman v. Thompson**, 501 U.S. 722, 750 (1991)(miscarriage of justice claim permits abuse of the writ, i.e., asserting in a second petition a claim that could have been, but was not, raised in an earlier petition); **Murray v. Carrier**, 477 U.S. 487, 496 (1986)("where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence in a showing of cause for procedural default"); **Kuhlman v. Wilson**, 477 U.S. 436, 454 (1986)(actual innocence allows for asserting claims that the habeas court previously rejected in a successive petition). In sum, the Supreme Court finds that neither abuse of the available legal procedures or a statutory deadline will stand as a barrier to a full and fair adjudication of a claim of actual innocence. Succinctly, a federal court

with jurisdiction must always determine whether a state or federal government continues to wrongfully deprive an innocent individual of his liberty.

American Tradition

The Supreme Court miscarriage of justice doctrine reflects American tradition from before the founding of the republic. "Society views the conviction of an innocent person as perhaps the most grievous mistake our judicial system can commit. Reflecting the gravity of such an affront to liberty, the 'fundamental-miscarriage of justice' exception has evolved to allow habeas petitioner to litigate - their" otherwise procedurally foreclosed constitutional claims. *Satterfield v. Dist. Atty. Phil., et. al.*, 872 F.3d 152, 154 (3d Cir. 2017).

The upshot of the Supreme Court's explications, actual innocence constitutes an extraordinary circumstance that cannot be shackled or barred by procedure or time. Correspondingly, the presence of actual innocence alone pushes the Rule 60(b) motion past the threshold inquiries of reasonable time and extraordinary circumstances necessary for a Rule 60(b).

American society and equitable precedent favor granting the Rule 60(b)(6) motion in order that Mr. Middlebrook's unanswered actual-innocence-related claims may be answered.

1B. Factual innocence generates an equitable exception that overrides a habeas corpus limitation period. In the context of § 2255, the time limitation on Rule 60(b) motions functionally is a habeas corpus limitation period that does not apply to claims sounding in factual innocence.

The district court overlooked that the miscarriage of justice doctrine applied to Mr. Middlebrook's Rule 60(b)(6) motion, thus the motion cannot be untimely. The "untimeliness" to the extent it exists at all goes to the credibility of the new evidence, rather than to the validity of the motion. See

McQuiggin, 133 S.Ct. at 1932 ("We have explained that untimeliness, although not an unyielding ground for dismissal of a petition, does bear on the credibility of evidence preferred to show actual innocence."); see also **Christeson v. Roper**, 135 S.Ct. 891, 895-896 (2015)(petitioner was entitled to demonstrate Rule 60(b) motion's timeliness and extraordinary circumstances justifying reopening of final judgment); **Satterfield**, 872 F.3d at 161 (petitioner who makes a credible showing of actual innocence is allowed to pursue constitutional claims despite statute of limitations).

Simply, if Mr. Middlebrook's corroborated allegations are true, then Mr. Middlebrook is factually innocent, that is, he did not commit the bank robbery or any of the related convictions. Accordingly, the magistrate should have permitted Mr. Middlebrook the opportunity to correct the § 2255 record by adducing evidence that proved the § 2255 proceedings had material defects.

2. This Court provides that a district court's procedural error, which prevents a merits adjudication constitutes a defect in the integrity of a habeas proceeding. When a district court incorrectly applies the liberal construction doctrine, the district court effectively prevents a merits adjudication, thereby denying Mr. Middlebrook a fair opportunity to be heard. In essence, a judicial action inconsistent with due process of law. An error that renders the original judgment void and permits a Rule 60(b) challenge at any time.

The Antiterrorism Effective Death Penalty Act prohibition on second or successive habeas petitions places substantial restrictions on the use of Rule 60(b) to seek relief from or to reopen a § 2255 proceeding. **Gonzalez**, 545 U.S. at 534-35. This Court, however, held that a Rule 60(b) motion may not be used to attack a court's previous merits determination. **Id.** at 535-36. Rule 60(b) may be used to challenge a defect in the integrity of the federal habeas proceeding. **Id.** at 532.

This Court identified one such defect as when "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 type of defect amounts to a judicial action that denies due process of law (opportunity to be heard), and renders the habeas judgment void. See *Espinosa*, 130 S.Ct. at 1376.

As the Eleventh Circuit recognizes that Constitution and fundamental fairness require each person to receive a complete and comprehensive habeas corpus proceeding. See generally *Clisby v. Jones*, 960 F.2d 925, 935 (11th Cir. 1992)(en banc). Thus, when a district court's procedural error deprives a § 2255 movant (i.e., habeas petitioner) of fair "notice" or a meaningful "opportunity to be heard," then the district court—substantively—acts in "a manner inconsistent with due process of law." *Espinosa*, 130 S.Ct. at 1377.

When a district court acts in a manner inconsistent with due process of law, its judgment is a nullity, *Id.* at 1377. In the Rule 60(b) context, the presence of a void judgment has particular significance. A threshold Rule 60(b) inquiry is the reasonable time requirement contained in Rule 60(c). But a Rule 60(b)(4)(void judgment) challenge "is not constrained by any time limit." See *Oldfield v. Pueblo De Bahia Lora, S. A.* 558 F.3d 1210, 1215 n.13 (11th Cir. 2009); *Burke v. Smith*, 252 F.3d 1260, 1263 (11th Cir. 2001); *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1130 (11th Cir. 1994)(noting First, Fifth, Seventh, Tenth, and D.C. Circuits have expressly held that a Rule 60(b)(4) motion is not subject to the Rule 60(c) time limit or more precisely that in the context of void judgment almost any length of time is reasonable). Hence, contrary to the district court's finding that fifteen years is too long, there is no too long. And jurists of reason would disagree with the district court's using timeliness as a basis for denying the motion.

A Liberal Construction Error May Violate Due Process

If we assume the district court and the Court of Appeals neither ignored binding precedent nor overlooked so settled a rule (as what is cognizable under Rule 60(b), then these courts must have misapprehended the nature of Mr. Middlebrook's claims, the labels of his motion, and the basis for his prayer for relief, i.e., Rule 60(b)(4).

Most likely, the Eleventh Circuit failed to recognize that a procedural error, which forecloses an opportunity for a merits adjudication, equates to a court acting in a manner inconsistent with due process. This misconception of a due process violation, puts the Eleventh Circuit in conflict with this Court and its sibling circuits.

Here, the original § 2255 court, a decade before Mr. Middlebrook's 2017 Rule 60(b) motion, misapplied the liberal construction doctrine and construed Mr. Middlebrook's claims in a manner adverse to Mr. Middlebrook (App. "C"). If the district court had chosen to construe Mr. Middlebrook's grounds as (1) an actual innocence claim that excuses procedural default and (2) an ineffective assistance of counsel claim for failing to obtain the generally available evidence of both his innocence and the criminal court's lack of subject-matter jurisdiction (i.e. non-federal crime set forth in the indictment), then Mr. Middlebrook likely would not have been required to wait ten years for the government to produce the exonerating evidence that Wachovia Money Center was not a federally-insured institution.

The liberal construction mistake caused the district court to never permit discovery and never reach the merits of Mr. Middlebrook's claims.

A proper use of Rule 60(b), that is, unconstrained by time, is to allow a movant to revive a long-lost—even a forsaken—claim that was presented, but never decided.

This Court should grant the writ, define the defect identified in **Gonzalez** as a fundamental due process error, then vacate the Court of Appeals judgment and remand it to the Eleventh Circuit with directions to grant a certificate of appealability, as a means of summarily vacating and remanding the cause to the district court for a merits adjudication.

3. **The Constitution guarantees to every citizen: due process of law, equal protection of the law, and the right to petition for redress of grievance. The Eleventh Circuit's unilluminating boilerplate order denying Mr. Middlebrook's certificate of appealability eviscerates those rights. The Eleventh Circuit should follow this Court's general guidance and articulate the factual predicates and legal premises that support its judgments.**

This Court has instructed federal courts that meaningful review—if not due process of law and fundamental fairness principles—require a court to explain the reasoning behind its decrees, judgments, and orders. Cf., e.g., **Carter v. Stanton**, 405 U.S. 669, 771 (1972).

The Eleventh Circuit denied Mr. Middlebrook's application for a certificate of appealability in a one paragraph boilerplate order. (App. "A"). The order was devoid of any factual predicates and references legal premises only at the highest level of generality, such as quoting the holding of **Slack v. McDaniel**, 579 U.S. 473 (2000). The Eleventh Circuit's unilluminating, opaque, boilerplate order tells this Court, the parties, and the public nothing about why the appellate or district court does not believe that a claim sounding in actual innocence did not demonstrate that a constitutional right had been denied, or why jurists of reason would not disagree with the district court's refusal to address the Rule 60(b)(6) motion's merits.

Or more precisely, the appellate court opinion does not explain why jurists of reason would not debate a summary denial of a motion that sounds

in actual innocence, articulates a judicial denial of due process, and describes a fundamental flaw in the integrity of a habeas proceeding—a habeas court not addressing the merits of valid and cognizable claims.

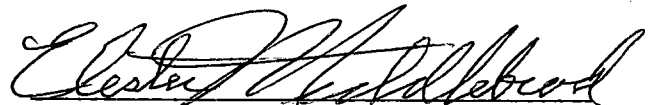
This Court should grant the writ and exercise its supervisory powers to direct the Eleventh Circuit to provide a reasoned opinion for its denial of a certificate of appealability.

CONCLUSION

The Eleventh Circuit departed from this Court's directions on the meaning of 28 U.S.C. § 2253(c)(2), the applicability of the miscarriage-of-justice doctrine, and the consequences of a district court illiberally construing a § 2255 motion; as a result, Mr. Middlebrook remains in prison for a crime that never occurred.

This Court should grant the writ, the appellate court's opinion, remand the cause within instructions to the Eleventh Circuit to grant a COA on whether factual innocence constitutes an extraordinary circumstance justifying Rule 60(b) relief. And whether any time is unreasonable when factual innocence is in controversy.

Respectfully prepared by Frank L. Amodeo and submitted by Elester Middlebrook. on this 22nd day of April 2019:



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VERIFICATION

Under penalty of law as authorized in 28 U.S.C. § 1746, I declare the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.

