

No. 19-5499

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IN THE  
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.  
FILED

JUN 03 2019

OFFICE OF THE CLERK

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MARVEL THOMPSON,

Petitioner,

v.

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 Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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PETITIONER / PRO SE

## QUESTIONS PRESENTED

1. Whether The District Court And Seventh Circuit Court Of Appeals Erred When They Denied The Petitioner A Certificate Of Appealability Where The Petitioner Established Both That Jurists Of Reason Could Debate The Correctness Of The District Court's Denial Of Rule 60(b)(6) Relief And The Denial Of A Valid Constitutional Right?
2. Whether The Seventh Circuit, When Denying The Petitioner A Certificate Of Appealability, Applied An Overly Burdensome COA Standard In Direct Contravention Of This Court's Precedents Setting Forth The Standards Of Review Governing The Issuance Of A COA Pursuant To 28 U.S.C. § 2253(c)(2)?
3. Whether Jurists Of Reason Could Conclude Or Debate Whether The Petitioner's Rule 60(b)(6) Motion Was Timely And Not An Unauthorized Second Or Successive 28 U.S.C. § 2255 Petition?

## LIST OF PARTIES INVOLVED

All the parties to this action appear in the caption of the cover page.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Marvel Thompson, pro se, hereby petitions the Court for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The Seventh Circuit's unpublished Order denying the Petitioner's petition for rehearing and rehearing en banc dated 04 March 2019 is provided herewith as Appendix A.

The Seventh Circuit's unpublished Order denying the Petitioner's

request for a certificate of appealability ("COA") is provided herewith as Appendix B.

The District Court's unpublished Order denying relief pursuant to Civil Rule of Procedure 60(b)(6) is provided herewith as Appendix C.

The District Court's unpublished Order denying the Petitioner's request for a COA is provided herewith as Appendix D.

### JURISDICTION

The Seventh Circuit Court of Appeals issued its last Order (Appendix A) on 04 March 2019 when it denied the Petitioner's timely-filed petition for rehearing and rehearing en banc. The Petition is therefore timely-filed and this Court has jurisdiction over the instant petition pursuant to 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an application for a certificate of appealability under 28 U.S.C. § 2253(c), which states:

"(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(B) the final order in a proceeding under [28 U.S.C.] section 2255."

This case involves the application of Federal Rule of Civil Procedure 60(b)(6), which reads:

"(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:

(6) any other reason that justifies relief."

This case also involves the application of Federal Rule of Civil Procedure 60(c), which reads:

"(c) Timing And Effect Of 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 judgment or order or date of the proceeding."

#### **STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

##### **A. Relevant Proceedings**

The Petitioner plead guilty in the United States District Court for the Northern District of Illinois, Eastern Division, to one Count in violation of 21 U.S.C. §§ 841 and 846.

In exchange for the Petitioner's plea of guilty, the Government agreed, inter alia, that he would be eligible for a full three level acceptance of responsibility ("AOR") reduction. The Government accepted the factual basis for the Petitioner's plea and agreed to the AOR reduction even after, as the Government claims, the Petitioner obstructed justice by falsely denying relevant conduct.

After securing the Petitioner's plea of guilty, the Government, at the time of sentencing, argued that while it had agreed the Petitioner was entitled to the AOR reduction as part of his plea agreement with the Government, the Court should not only deny him the AOR reduction, but that

the Court should also increase his Guideline level by two levels for obstruction of justice.

The Petitioner was represented by Counsel on direct appeal to the Seventh Circuit Court of Appeals, which affirmed his conviction and sentence.

The Petitioner filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence pro se. Therein the Petitioner raised a claim that the Government had breached his plea agreement by failing to comply with the terms of his plea agreement in several discrete ways -including the claim that plea, sentencing, and appellate counsel were ineffective in failing to compel specific performance of the Government's agreement to agree to the AOR reduction and for failing to argue the breach of the plea in that regard.

After the Petitioner filed his pro se § 2255 motion, he retained counsel and was then granted leave of the Court to "amend" the § 2255 motion and claims.

Counsel then submitted the amended § 2255 motion, but then incorporated as if fully set forth verbatim the Petitioner's pro se § 2255 motion and claims.

The District Court Ordered a response to both pleadings and claims set forth therein.

The Government answered the Petitioner's AOR/breach claim by stating that, because the Petitioner's factual basis for his plea constituted a false denial of relevant conduct and obstruction of justice, the Petitioner himself voided the agreement and the Government was no longer, therefore, bound by its agreement to agree to the AOR reduction.

§ 2255 Counsel did not, but could have, cited the Seventh Circuit's holding in United States v. Grimm, 170 F.3d 760 (7th Cir. 1999), as a defense to the Government's claims -a defense that would have established that the

Government could NOT assert its agreement for the AOR reduction was voided when the Petitioner "falsely denied relevant conduct" and "obstructed justice" where the Government accepted the AOR agreement even after it was aware of the alleged "falsities" contained in the factual basis the Petitioner gave for his plea of guilty. Id.

Consequently, because § 2255 counsel failed to raise the Grimm defense, the Petitioner's AOR/breach claims failed on the merits and were defaulted by § 2255 counsel in both the District Court and the subsequent appeal to the Seventh Circuit.

Relying on the Seventh Circuit's decision in Ramirez v. United States, 799 F.3d 845 (7th Cir. 2015), and this Court's holding in Martinez v. Ryan, 566 U.S. 1 (2012), the Petitioner sought relief under Federal Rule of Civil Procedure 60(b)(6) claiming that his § 2255 Counsel was ineffective and that Counsel's ineffectiveness constituted a defect in the underlying § 2255 proceeding where, but for Counsel's unprofessional errors and omissions (i.e., failing to assert the Grimm defense), the outcome of the § 2255 proceeding would have been different and his claims would have not been defaulted.

The Government answered that the Rule 60(b)(6) motion was untimely and, if not untimely, it was an unauthorized second and successive § 2255 motion the district Court lacked jurisdiction to hear.

The Petitioner responded by pointing out that the time limits applicable to Rule 60(b)(6) (see Rule 60(c)) merely required him to bring such a motion within a "reasonable time" and that he brought his motion soon after the Seventh Circuit first created the procedural opportunity to bring such a claim via Rule 60(b)(6) as prior precedent had previously foreclosed his claims until the Seventh Circuit's ruling in Ramirez, a caveat that rendered his motion timely and brought within a reasonable time.

The Petitioner also pointed out that, under existing precedents, the Rule 60(b)(6) motion was NOT a disguised and unauthorized second or successive § 2255 motion as the Petitioner was NOT asserting any "new" claims, but was merely asserting a defect in the failure of § 2255 Counsel to assert the Grimm defense in relation to an earlier claim that was not, therefore, heard on its ultimate merits because it was defaulted.

The District Court denied the Rule 60(b)(6) motion on the grounds that it was "untimely" and, even if not, it was an unauthorized second or successive § 2255 motion. The District Court also denied the issuance of a COA.

The Petitioner appealed to the Seventh Circuit Court of Appeals and was denied a COA.

The Petitioner then sought a rehearing and rehearing en banc, which was denied by the court.

The instant petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit follows.

#### **REASONS FOR GRANTING THE WRIT**

I. Certiorari Should Be Granted Because Reasonable Jurists Could Unquestionably Debate Whether The Petitioner's Rule 60(b)(6) Motion Was Timely And NOT An Unauthorized Second Or Successive Attack On His Conviction And Sentence

(a) The Motion Was Timely-Brought Within A Reasonable Time Of The Seventh Circuit Issuing Its Decision In Ramirez That Removed The Obstacle Of Case Law Categorically Barring Him From Making The Species Of Rule 60(b)(6) Claims Advanced In The District Court

Prior to the Seventh Circuit's Decision in Ramirez (applying this Court's decision in Martinez to § 2255 proceedings), prior binding precedent

categorically barred the Petitioner from claiming that his § 2255 Counsel was "ineffective" and that such a "defect" in his underlying § 2255 proceeding warranted a "reopening" of the proceedings to permit him to overcome such defects under Rule 60(b). Ramirez, 799 F.3d at 845-51.

Thus, ipso facto, where the Petitioner brought his motion only after he first could have under existing precedents, reasonable jurists could conclude or debate whether the Petitioner's Rule 60(b)(6) motion was brought within a "reasonable time" following the decision in Ramirez -a decision that created the "FIRST" procedural opportunity for the Petitioner to bring his species of claims. Cf. Federal Rule of Civil Procedure 60(c).

The District Court and Seventh Circuit alike, therefore, erred when it denied the Petitioner a COA on the question of "timeliness."

- (b) The Rule 60(b)(6) Motion Did NOT Seek To Raise Any New Substantive Claims For Relief And, Therefore, The Motion Was Neither A Second Or Successive § 2255 Motion

As noted supra, the Petitioner's Rule 60(b)(6) motion did NOT seek to reopen his § 2255 proceedings for the purpose of inserting any new claims for relief.

Rather, in accordance with Ramirez and Martinez, the Rule 60(b)(6) motion merely sought to cure defects in the earlier underlying § 2255 proceeding (the ineffectiveness of § 2255 counsel leading to a default of claims) with respect to otherwise viable claims that were not heard on their ultimate merits due a defaulting of claims by § 2255 counsel.

That is, the Petitioner's Rule 60(b) motion merely sought to remove § 2255 Counsel's ineffectiveness and resulting prejudice from the underlying 28 U.S.C. § 2255 proceeding that kept the Petitioner's breach/AOR claims

(which were advanced in the § 2255 motion) from being ultimately decided on their merits according to Grimm, 170 F.3d 760 (7th Cir. 1999), simply because § 2255 Counsel defaulted any reliance upon Grimm at a critical stage of the underlying § 2255 proceeding.

Thus, in light of the facts and circumstances of this case, and in light of the holdings of this Court in Martinez v. Ryan, 566 U.S. 1 (2012), and Gonzalez v. Crosby, 545 U.S. 524 (2005), and the Seventh Circuit's holdings in Ramirez and Grimm, jurists of reason could conclude or debate whether the Petitioner's Rule 60(b)(6) motion was NOT, in reality, an unauthorized second or successive 28 U.S.C. § 2255 motion.

Accordingly, it was error for the District Court and the Seventh Circuit to (a) hold that the Petitioner had not made a substantial showing of the denial of a constitutional right, (b) conclude that the Petitioner's Rule 60(b)(6) motion was an unauthorized second or successive § 2255 motion, and (c) conclude the Petitioner was not entitled to a COA under this Court's precedents governing the standards for the issuance of a COA under 28 U.S.C. § 2253(c)(1)(B) and 2253(c)(2).

II. The District Court And Seventh Circuit Applied An Overly Burdensome COA Standard In Direct Conflict With This Court's COA Precedents And, Therefore, This Court Should Grant Certiorari To Secure And Maintain The Uniform Application Of This Court's COA Precedents

This Court's precedents are clear: a COA involves only a threshold analysis and preserves full appellate review of "potentially" meritorious claims. Thus, "a prisoner seeking a COA need only demonstrate a 'substantial showing' that the district court erred in denying relief." See Miller-El v. Cockrell, 537 U.S. 322 (2003)(quoting Slack v. McDaniel, 529 U.S. 473 (2000),

and 28 U.S.C. § 2253(c)(2)). This "threshold inquiry" is satisfied so long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." Id. at 327, 336. A COA is NOT contingent upon proof "that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable [and a COA issuance warranted] even though every jurist of reason might agree, after a COA has been granted and the case has received full consideration, that the petitioner will not prevail." Id. at 338 (modified for context).

In sum, the touchstone for the issuance of a COA under this Court's precedents is "the debatability of the underlying constitutional claim, not the [ultimate] resolution of that debate." Id. at 342; See also id. at 348 (Scalia, J., concurring)(recognizing that a COA is required when the district court's denial of relief is not "undebatable").

Applying these standards for the issuance of a COA, this Court reversed the failure to issue a COA in a case explaining that a COA should be issued where there is "any evidence" supporting the habeas claims. Id. at 340.

Applying these standards in the case at bar, and given the relative merit of the Petitioner's claims addressed above, it is clear that the Petitioner was entitled to the issuance of a COA under this Court's precedents governing the standards for issuing a COA under 28 U.S.C. §§ 2253(c)(1)(B) and 2253(c)(2).

Thus, ipso facto, the district court and the Seventh Circuit in this case contravened this Court's holdings in Miller-El and its progeny.

Accordingly this Court should grant the instant petition for a Writ of Certiorari to secure and maintain the uniform application of its precedents governing the issuance of a COA and to prevent the Seventh Circuit

Court of Appeals from applying an overly burdensome COA standard that unfairly deprives habeas litigants appellate review of habeas claims that otherwise pass muster under this Court's COA precedents.

CONCLUSION

Wherefore, the Petitioner respectfully requests his petition be granted on this 11 day of August, 2019.



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