NO. 19-7283

IN THE

SUPREME COURT OF THE

UNITED STATES

ORIGINAL

FAIRLY W. EARLS,

PETITIONER-APPELLANT,

V.

SUSAN NOVAK,

RESPONDENT-APPELLEE.

On Petition For Writ Of Certiorari To The

United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Date: 01-02-2020

Fairly W. Earls
Columbia Correctional
P.O. Box 900
Portage, WI. 53901

QUESTION PRESENTED

Fairly Earls case raises a pressing issue of National Importance: Whether and to what extent did the United States Court of Appeals for the Seventh Circuit impose an improper and unduly burdensome Certificate of Appealability standard. That decision contravenes this Court's precedent and deepens the Circuit splits when it denied Mr. Earls a Certificate of Appealability (COA) on his motion to reopen the judgment and obtain merits review of his claim of Newly Discovered Evidence presented in a Federal Rules of Civil Procedure Rule 60(b) Motion that provides suffient evidence that his Sentence under a State Statute Violates the Double Jeopardy Clause of the United States Constitution Fifth Amendment.

(Copy of a Case on point is attached as Appendix J.)

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITY

OPINIONS BELOW

The November 19, 2019 opinion of the Court of Appeals Order Denying Earls Motion to Recall Mandate is attached as Appendix A. The October 23, 2019 opinion of the Court of Appeals Denying Rehearing is attached as Appendix D. The October 7, 2019 opinion of the Court of Appeals Denying Earls Certificate of Appealability on Newly Discovered Evidence pursuant to Federal Rules of Civil Procedure 60(b) Motion on a Double Jeopardy Violation is attached as Appendix F. The March 7, 2019 opinion of the Court of Appeals requiring the $505.00 fees to appeal is attached as Appendix I.

JURISDICTION

The Court of Appeals entered it's Judgment on October 23, 2019. This Court has Jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a State Criminal Defendants Constitutional Rights under the Fifth, Sixth, and Fourteenth Amendments. The Fifth Amendment provides in relevant part:

> "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

The Sixth Amendment provides in relevant part:

> "in all criminal prosecutions, the accused shall enjoy the right to... have assistance of counsel for his defense."

The Fourteenth Amendment provides in relevant part:

> "nor shall any state...deny to any person within its jurisdiction the equal protection of the laws".

This case also involves the application of 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--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court;

(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. INTRODUCTION

By any measure, Fairly Earls Sentence is extraordinary. At Sentencing, the State Court sentenced Mr. Earls to 60 (sixty) years punishment for violating his condition of bail, commonly known as Wisconsin Bail Jumping Statute § 946.49. (30 years imprisonment and 30 years supervised release). Three Years after Mr. Earls was sentenced the United States Court of Appeals for the Seventh Circuit acknowledged in another case that such a sentence under Wis. Stat. § 946.49 is unconstitutional and undermines not only the integrity of Mr. Earls sentence but also the integrity of this Court's Historical Rulings on the Fifth Amendment double jeopardy clause. See Boyd v. Boughton, 798 F.3d 490 (7th Cir. 8-14-2015) cert. denied 01-19-2016 and attached as Appendix J. The Seventh Circuit Court in Boyd, left no doubt that Wisconsin Statute § 946.49 violated the Fifth Amendment Clause of the United States Constitution when sentenced cumulative in a single prosecution. If this plainly extraordinary circumstances when viewed in combination with the Historical precedent from this Court of Blockburger v. United States, 284 U.S. 299 (1932) and a fair and honest review,

-if it does not Justify relief under Rule 60(b)(5) or (6), then that Rule has no meaning.

Yet when presented with theses extraordinary facts and that Courts own decision with the case on exact point, the Seventh Circuit panel declared Mr. Earls--made no substantial showing of the denial of a Constitutional Right, that decision is attached as Appendix F. That conclusion as the Two substitute judges panel decided in its Orders, Appendix F and D, the Denial of Rehearing, is wrong under any Standard of Review; the circumstances of Newly Discovered Evidence, Double Jeopardy Violation and Federal Rules of Civil Procedure Rule 60(b) Motion identified by Mr. Earls in [Appendix E, eight page petition for Rehearing], [Appendix C, nine page petition for Rehearing En Banc], and [Appendix H, nineteen page Motion requesting Certificate of Appealability-that is Part of the Record the Panel said they Reviewed] "describes a situation that is at least debatably Extraordinary".

B. STATE HABEAS PROCEEDINGS,

In October 2012 Earls was Sentenced in the State of Wisconsin on Ten counts of Bail Jumping to Sixty Years imprisonment pursuant to Wisconsin Statute § 946.49. All ten counts were ran consecutive to each other in a Single Prosecution, the counts when bifuricated is 30 years in and 30 years supervision.

The Bail Bond issued to Mr. Earls by the circuit court had no Terms of Condition on it for Mr. Earls to violate as the state alleges in the Conviction. The trial court said it was an error by the clerk of the court to not have bail/bond conditions on it, but the clerk might of been having trouble with the copy process.

The case is a State of Wisconsin 28 U.S.C. § 2254 Writ of Habeas Corpus that has Fully proceeded thru the State Courts on several issues seeking relief on Violations of Constitutional Rights. The last Court in Wisconsin was the

State Supreme Court and that Court denied review on 03-16-2015. Earls filed a Writ of Habeas Corpus in the United States District Court for the Eastern District of Wisconsin. The District Judge decided to not hear from the state Attorney General and took on the role as counsel for the state and argued against Earls claims, dismissing the Habeas Petition on 07-10-2015. The District Court decided that there was not a substantial showing of the denial of a Constitutional Right in any issues, altho she debated them, and dismissed the Certificate of Appealability.

On 07-24-2015 Earls timely filed his Notice of Appeal with the Seventh Circuit Court of Appeals and a Motion for Certificate of Appealability. The Seventh Circuit Court reviewed the Final Order as the district court taking on the role as the state and based on the Order the Court of Appeals on 04-26-2016 decided out of all the claims raised by Mr. Earls they found no substantial showing of the denial of a Constitutional Right, which was a joke. Apparently the panel was not aware of the recent decision by it's own Court in Boyd v. Boughton, 798 F.3d 490 (7th Cir. 2015) cert. denied U.S. 136 S.Ct. 899 (Jan. 19, 2016). That case in the Seventh Circuit decided the exact same claim as Mr. Earls Double Jeopardy was violated and thus it is a substantial showing of the Denial of a Constitutional Right. Earls filed for a Rehearing and a rehearing En Banc on 05-05-2016 and both Motions were Denied by the Clerk of that Court on 05-28-2016. Earls filed a Writ with this Court on 09-14-2016 and review denied on 06-23-2017.

Earls in this current Motion on Appeal had to exhaust all remedies with the prior petition before pursuing this Motion with the district Court.

On 10-25-2017 Mr. Earls filed a Motion asking the District Court to Review his claim on the Substantive change in Law and Modify it's prior order based on the change that warrants him relief. Earls was only seeking review of the

prior District Court Order and challenging that Order. On 12-11-2017 the District Court denied Earls Motion as a Second Petition and said in no uncertain terms that the case Law Earls presented was not Valid because Mr. Earls did not file a Federal Rule of Civil Procedure Rule 60(b) motion.

On 02-12-2018 Mr. Earls filed his Federal Rule of Civil Procedure Rule 60(b) Motion with the District Court, because the Court said if had filed one they could then see his Constitutional Violation and the case Law that he had presented in his other Motion would now be valid. Mr. Earls Rule 60(b) Motion claimed that his Wisconsin Statute § 946.49 multiple punishment in a single prosecution violated the 5th Amendment double jeopardy clause under the Newly Discovered Two-Step analysis decided by the Seventh Circuit Case Boyd and the prior District Court Order should be Modified to reflect the change in Law.

The District Court clerk did not give this New Motion under Federal Rule Civil Procedure Rule 60(b) a New case number, but instead docket it on the closed case 15-cv-637 and gave it a docket number 20. It was filed on 02-12-2019 also Mr. Earls filed a Motion on a Amended Certificate of Appealability showing the Substantial Showing of the Denial of a Constitutional Right because of the Newly Discovered Facts and Constitutional Violations. This Motion was filed pursuant to Federal Rule of Civil Procedure 15(c)(1)(A) & (B).

On 03-07-2019 the District Court denied Mr. Earls Federal Rule of Civil Procedure Rule 60(b)(5) & (6) Motion as being in Conflict with AEDPA and declaring that Rule 60(b) Motion are to be considered as second and successive petitions contravenes this Court precedent and the Seventh Circuit . Pursuant to Altman v. Benik, 337 F.3d 764,766 (7th Cir. 2005) (it cannot be successive, its a New Claim of Newly Discovered Evidence Motion for relief from Judgment under Federal Rule of Civil Procedure 60(b). On 03-12-2019 Mr. Earls filed his Notice of Appeal and required documents in the Seventh Circuit.

Mr. Earls filed a Motion for Certificate of Appealability on 03-17-2019 and is attached as Appendix H with the Court of Appeals. On October 7, 2019 the Seventh Circuit Court of Appeals denied Mr. Earls Certificate of Appealability after reviewing the Record and his motion for appointment of counsel is denied, attached as Appendix F. On October 23, 2019 the Court of Appeals denied Mr. Earls motion for Rehearing. Altho a timely En Banc Petition was filed the Clerk of the Court issued a Mandate and then denied yet another timely filed motion to recall the mandate on November 19, 2019.

C. FEDERAL HABEAS CORPUS

In a Federal Habeas Corpus case under 28 U.S.C. § 2254, a State prisoner, invoking Rule 60(b) of the Federal Rules of Civil Procedure for Relief from a Judgment is not to be treated as a second or successive Federal Habeas Corpus Petition--which would be subject to the restrictions on such petitions in 28 U.S.C. § 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)-- if the Motion does not assert, or reassert, claims of error in the Movant's State Conviction, as for such purposes:

(1) The policy consideration of Finality, standing alone, is unpersuasive in the interpretation of Rule 60(b), whose whole purpose is to make an exception to Finality.

(2) When no "claim" is presented within the meaning of § 2244(b), there is no basis for contending that a Rule 60(b) Motion should be treated like a Habeas Corpus Application.

(3) If neither a Rule 60(b) Motion, nor the Federal Judgment from which the motion seeks relief, substantively addresses federal grounds for setting aside the movant's state conviction, then allowing the motion to proceed as denominated creates NO INCONSISTENCY WITH THE FEDERAL HABEAS CORPUS STATUTE OR RULES.

(4) Rule 60(b) has a valid role to play in Federal Habeas Corpus Cases.

(5) Several characteristics of Rule 60(b) motion limit the friction between Rule 60(b) and the successive--petition probhibitions of AEDPA, and thus the harmonization of Rule 60(b) and AEDPA will not expose federal courts to an avalanche of frivolous post judgment motions. Supreme Court Judges citing this purpose, (Scalia,J., joined by Rehnquist, Ch.J., and O"Connor, Kennedy, Thomas, Ginsburg, and Breyer, JJ.).

In 2018 and 2019 the Seventh Circuit Court of Appeals has held that Newly Discovered Evidence is Extraordinary Reason for a Rule 60(b) Motion, see Gleason v. Jansen, 888 F.3d 847, 851-52 (7th Cir. 2018); Lajim,LLC v. GE, 917 F.3d 933 (7th Cir. 2019).

Mr. Earls has justified the relief that he has requested, therefore the "Extraordinary Remedy" of Rule 60(b)(5) & (6) should be granted because it is newly discovered evidence and it is a Fifth Amendment Constitutional Right that has been violated.

The Federal Rules of Civil Procedure Rule 60(b) authorizes relief for a prisoner from a final judgment, order or proceeding on many grounds, including mistake, misconduct or (6) any other reason that justifies relief, see Matter of Canopy Financial Inc., 708 F.3d 934 (7th Cir. 2013); Bakery Mach. & Fabrication Inc. v. Trad. Baking Inc., 570 F.3d 845, 848 (7th Cir. 2009).

The decision by the Seventh Circuit Court on Wisconsin Statute § 946.49 bail jumping in a Single proceeding was a substantive Change in Law, see Boyd v. Boughton, 797 F.3d 490 (7th Cir. 2015) cert. denied U.S. 136 S.CT. 899 (Jan. 19, 2016) attached as Appendix J, that warrants Modification of the Seventh Circuit and District Court Orders denying relief.

This Court has allowed Rule 60(b) motions for reopening case when the movant shows any reason that justifies relief, Gonzalez v. Crosby, 545 U.S. 524 (2005).

The district court issued it's decision on denying Mr. Earls Habeas Corpus in July 2015 and the Seventh Circuit issued it's decision on Wisconsin Statute § 946.49 in Boyd in August of 2015 cert. denied 2016. Mr. Earls had to finish the litigation appeal before timely pursuing the change in Substantive Law in the now appealed Rule 60(b) motion.

This Court decided that Federal Rule of Civil Procedure Rule 60(b) permits a party to obtain relief from a judgment or order if, among other things, applying the judgment or order prospectively is no longer equitable. Rule 60(b)(5) provides a means by which a party can ask a Court to modify or vacate a judgment or order if "a significant change in either factual conditions or in Law" renders continued enforcement detrimental to the public interest, see Horne v. Flores, 557 U.S. 433, 447 (2009); Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992).

The New Rule of Law as a "must" decided in Boyd v. Boughton, 798 F.3d 490 (7th Cir. 2015) cert. denied U.S. 136 S.CT. 899 (01-19-2016), is a Substantive Law and according to this Court the New Law applies retroactively to Mr. Earls Double Jeopardy claim on Wisconsin Statute § 946.49 bail jumping in a single prosecution. Whorton v. Bockting, 549 U.S. 406, 416 (2007). also see United States v. Stork, 2015 U.S. Dist. Lexis 162777 (2015) ("a rule is substantive rather than procedural if it alters the range of conduct or the class of person's that the law punishes"), Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

Mr. Earls relied on this Court's precedent that addressed the circumstances under which a Habeas petitioner's Motion under Federal Rule of Civil Procedure Rule 60(b) does not qualify as a section 28 U.S.C. § 2244 second or successive application for Habeas relief, and the lower Courts both went against that ruling, Tharpe v. Sellers, 138 S.CT. 545 (2018), quoting Gonzalez v. Crosby, 545 U.S. 524 (2005).

Mr. Earls bears the Burden of establishing that changed circumstances warrant relief, and Mr. Earls has met that burden by the change in the Law by the Seventh Circuit Court decision on Wisconsin Statute § 946.49 that violates the double jeopardy clause in a single proceeding, (Boyd, supra). Once a party carries the burden, a Court abuses its discretion "when it refuses to modify an injunction or consent decree in light of such changes". Agostini v. Felton, 521 U.S. 203, 215 (1997); B.H., 2018 U.S. Dist. Lexis 101276 (7th Cir. 2018) ("a court errs when it refuses to modify an injunction or consent decree in light of such change").

Mr. Earls filed his Rule 60(b) Motion challenging only the District Court's failure to reach the merits with the two-step analysis of his double jeopardy claim in a single prosecution as decided by the Seventh Circuit Court in Boyd, "a Must analysis", see Boyd, 798 F.3d at 498.

According to this Court the Rule 60(b) Motion by Mr. Earls does not warrant the treatment of a Second or Successive petition, and can be ruled upon by the district court without precertification by the Court of Appeals and the restrictions of 28 U.S.C. § 2244(b)(3). see Tharpe v. Sellers, 138 S.CT. 545 (2018) (citing Gonzalez, 545 U.S. 538, hn23). The district court decided that Mr. Earls Rule 60(b) motion was in conflict with AEDPA because Mr. Earls did not get precertification which is inconsistent with this Court's precedent.

Mr. Earls Rule 60(b) Motion was not asking the District Court to set aside his State Conviction, but rather to modify the Federal Judgment by that Court dismissing the Federal Habeas Petition in that Court and apply the Change in substantive Law on the State Statute § 946.49 in a single proceeding, see Dunlap v. Litscher, 301 F.3d 873, 876 (7th Cir. 2002). The Seventh Circuit change in substantive Law did contradict the prior District Court Order. If the District Court were to apply the change in law on Wisconsin Statute § 946.49 as decided by the Seventh Circuit Court it would not change Mr. Earls Conviction but

rather it would allow the District Court to advise the State Court to Run Mr. Earls Statute § 946.49 counts concurrently to avoid violating the Double Jeopardy Clause of the Fifth Amendment, see Boyd, 798 F.3d 494.

There is no Conflict as the district court said on procedural limitations of AEDPA or to seek leave to file a motion. This Court precedent and the requirements of law by Congress allows Mr. Earls to File his Rule 60(b) Motion challenging the District Court prior Order and it is the Correct procedural Mechanism.

It is well within the District Court discretion to Modify a Consent Order on the filling of a Federal Rule of Civil Procedure Rule 60(b) Motion, see Lee v. Village of River Forest, 936 F.2d 976, 979 (7th Cir. 1991). Mr. Earls has carried his burden establishing that his relief is Warranted.

D. CERTIFICATE OF APPEALABILITY

Mr. Earls filed an application Motion for a Certificate of Appealability on March 18, 2019 with the Seventh Circuit Court with respect to Boyd v. Boughton, 798 F.3d 490 (7th Cir. 2015). The COA was part of the record reviewed by the panel. In the COA Mr. Earls showed that he was sentenced in violation of the Double Jeopardy Clause with Wisconsin Statute § 946.49 as throughly explained in Appendix J, (15 page decision by the Seventh Circuit on Boyd v. Boughton, 798 F.3d 494-498). Also COA was Granted in Boyd, 798 F.3d 492

More importantly at [*498] the plain language of the Court "in order to determine whether multiple punishments in a single proceeding violate the double jeopardy clause, a Court Must engage in a two-step analysis".

The Seventh Circuit denied Mr. Earls a COA [Appendix F], without engaging in a TWO_STEP analysis to determine if Double Jeopardy was Violated. The Courts own two-step analysis in Boyd establishes the Substanial showing of the denial of a Constitutional Right. Mr. Earls should be entitled to the same Rights, and Mr. Earls had no underlying charges in his State Conviction.

No Federal Court, not the District Court and not the Seventh Circuit Court has afforded Mr. Earls a Must Two-Step analysis on his claim and if they had it would of been absolute proof that Mr. Earls Fifth Amendment was Violated in a Single proceeding.

REASON FOR GRANTING THE WRIT

The panel's decision contravened this Court's precedent in a case raising an issue of National significance: Whether the criminal justice system will tolerate a Sentence that is imposed in Violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

This Court has repeatedly stressed that when a Habeas petitioner makes a threshold showing that his Constitutional Rights were violated, a COA should issue. see Jordan v. Fisher, 135 S.CT. 2647, 2652 (2015); Buck v. Davis, 137 S.CT. 759 (2017).

This threshold question should be decided without a full consideration of the factual or legal bases adduced in support of the claims. The panel's decision that no reasonable jurist could debate that the double jeopardy clause applies to Mr. Earls case when they were presented with there own Courts precedent in Boyd v. Boughton, 798 F.3d 490 (7th Cir. 2015) establishing that Mr. Earls is correct on his Constitutional Right being Violated. The panel's decision is a slap in the face to the Honorable and Reasonable Jurist of this Court who have Historically held that Courts must apply the Blockburger Test. (Blockburger v. United States, 284 U.S. 299 (1932).

The panel's review of the Record, [which is the district court's decision and Mr. Earls Motion for COA and Counsel] attached as Appendix G and H, is in fact a adjudication of the Actual Merits and then denying Mr. Earls a COA, it is in essence an appeal without jurisdiction. see 123 S.CT. 1029 at 336-337.

This Court has emphasized, the COA inquiry, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "Jurist of Reason could disagree with the District Court's resolution of his Constitutional claims or that Jurist could conclude the issues presented are adequate to deserve encouragement to proceed further". Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

The Statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then -if it is- an appeal is the normal course. A "Court of Appeals should not limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of the claims", and ask "only if the district court's decision was debatable", Id. at 318, 123 S.CT. 1029, 154 L.Ed 2d 931.

Thus when a reviewing Court inverts the statutory order of operations and first decides the merits of an appeal, then justifies its denial of a COA based on its adjudication of the merits, it has placed too heavy a burden on Mr. Earls at the COA stage. Judicial precedent flatly prohibits such a departure from the procedure prescribed by 28 U.S.C . § 2253.

For all these reasons, and those discussed more fully herein Certiorari should be Granted.

E. Certiorari should be Granted Because Reasonable Jurist Could unquestionably Debate The Extraordinariness of The Circumstances Identified by Mr. Earls.

This Court's precedent is 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. Miller-El, 537 U.S. at 327 (quoting Slack v. McDaniel, 529 U.S. at 473, 484 (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 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". Id at 338.

In sum, the touchstone is "the debatability of the underlying constitutional claim [or procedural issue], not the 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").

The panel's contrary conclusion is a direct product of its failure to adhere to this Court's precedent. Instead of engaging in the comprehensive, equitable analysis required by Rule 60(b), the panel disregarded critical aspects of Mr. Earls case; and instead of acknowledging the unique harm of the Sentencing, the panel ignored it. Certiorari is warranted.

F. The Panel Improperly Sidestepped the COA Process by Denying Relief

In reviewing the facts and circumstances of Mr. Earls case, the Seventh Circuit panel "paid lipservice to the principles guiding issuance of a COA," Tennard v. Dretke, 542 U.S. 274, 283 (2004), but actually held Mr. Earls to a far more onerous standard. Specifically, the panel '"sidestepped the threshold COA process by first deciding the merits of Mr. Earls appeal on record, and then justifying its denial of a COA based on its adjudication of the actual merits", thereby "in essence deciding an appeal without jurisdiction". Miller El 537 U.S. at 336-37.

As this Court stressed in Miller-El, the threshold nature of the COA inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or for that matter, three judges, that he or she would prevail." Miller-El, 537 U.S. at 337. Yet that is precisely what the panel did here.

Rather than consider whether reasonable jurists could disagree with the district court and conclude that Mr. Earls allegations "set up an extraordinary situation", Ackermann v. United States, 340 U.S. 193, 199 (1950). At the end of this flawed analysis on Earls claims, the panel conclusorily declared, jurists of reason would not debate that Earls has failed to show extraordinary circumstances justifying relief. In Harrington v. Richter, 562 U.S. 86, 101 (2011) (noting the court of appeals failed to apply the proper AEDPA standard when it "conducted a de novo review".

The panel impermissibly sidestepped the COA inquiry in this manner by denying relief. The panel's (profoundly wrong) assessment of Mr. Earls Rule 60(b) motion and complete departure from the proper COA analysis. The panel's sole inquiry should have been whether a reasonable jurist could conclude that Mr. Earls double jeopardy claim is remarkable, or that Wisconsin Statute § 946.49 violates the double jeopardy clause as explained in Boyd v. Boughton, 798 F.3d 490 (7th Cir. 2015) cert. denied 01-19-2016. attached here as Appendix J.

The Seventh Circuit's failure to apply the proper COA standard in this case is not an isolated error. This Court has corrected other Circuit's unduly restrictive approach to granting COAs.

G. The Panel Failed to Undertake the Equitable Rule 60(b) Inquiry Mandated by this Court's Precedent.

The panel also disregarded this Court's precedent establishing that Rule

60(b) is an equitable remedy, which "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice". Liljeberg v. Health Serv. Acquistion Corp., 486 U.S. 847, 863-64 (1988) (quoting Klapprott v. United States, 335 U.S. 601, 614-15 (1949). As with any equitable standard where the touchstone is accomplishing justice, a court must "examine all of the circumstances" to determine whether "collectively they establish extraordinary circumstances for purposes of Rule 60(b)(6). Ramirez v. United States, 799 F.3d 845, 851 (7th Cir. 2015); see Klapprott, 335 U.S. at 615 (analyzing circumstances collectively in concluding that reopening the judgment was appropriate under Rule 60(b)).

Instead of following this equitable, holistic approach, the Seventh Circuit panel in this case, improperly "diluted the full weight" of the circumstances identified by Mr. Earls, App. H. By discounting these circumstances, the Seventh Circuit failed to undertake the equitable, case-specific analysis mandated by this Court's precedent. As a preliminary matter, a "prisoner's inability to present a claim of trial error for merits review is of particular concern when the claim is one of ineffective assistance of counsel, because the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system". Martinez, 132 S.CT. 1317. Yet the Seventh Circuit panel failed to consider the extraordinary circumstances identified by Mr. Earls and improperly treated Mr. Earls case solely on its conclusion rooted in the State Court Facts.

The Seventh Circuit's analysis is not only inconsistent with this Court's precedent, it also deepens a circuit split concerning the proper application of Rule 60 (b) motions. By contrast, the Third and Seventh Circuits have held that a change in decisional Law is relevant and must be considered along with all of the equitable factors identified by the petitioner to determine whether Rule 60(b) relief is warranted.

The panel's decision to break from this Court's precedent and it's own precedent on Double Jeopardy, Certificate of Appealability and Rule 60(b) relief undermines the integrity of the Criminal Justice System. The panel's error's on these points is a fundamental one, which requires this Court's Review.

CONCLUSION

For all of the foregoing reasons, Mr. Earls case is extraordinary. At a minimum, reasonable jurists could so conclude, which means a COA must issue. This Court's review is warranted not only to resolve the circuit split, but to maintain public confidence that Courts will not permit in essence a Life Sentence based on a Statute that violates the double jeopardy clause of the Fifth Amendment when applied wrongly as in this case.

Dated: 01-02-2020

Respectfully Submitted,

Fairly W. Earls

Fairly W. Earls
Columbia Correctional
P.O. Box 900
Portage, WI. 53901