No. _____

IN THE

Supreme Court of the United States

PAUL ROSS EVANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL ROSS EVANS
#83230-180
Pro Se
FCI SCHUYLKILL
PO BOX 759
MINERSVILLE, PA 17954-0759

QUESTION PRESENTED

1. When a motion under Fed. R. Civ. Proc. 60(b) is granted with respect to a prisoner's *first* application under 28 U.S.C. 2255, whether a subsequent amendment to that *same* proceeding under section 2255 may potentially be questioned in view of 28 U.S.C. 2244(b)(3)(A) as being a second or successive application?

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OPINIONS BELOW

All opinions below are unpublished.

The opinion of the United States court of appeals for the Fifth Circuit appears at Appendix A to the petition. The opinion of the Fifth Circuit denying reconsideration appears at Appendix B. The opinion of the United States district court for the Western district of Texas appears at Appendix C. The opinion of the district court denying reconsideration appears at Appendix D.

JURISDICTION

The Fifth Circuit entered its opinion on July 24, 2019. App. A. A timely petition for reconsideration was denied on September 26, 2019. App. B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is set forth as follows:

28 U.S.C. 2244(b)(3)(A)

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

STATEMENT OF THE CASE

Reasoning it was a second or successive application under 28 U.S.C. 2244(b)(3)(A), the district court

denied Evans' timely motion under Fed. R. Civ. Proc. 60(b) to set aside the final judgment in his first (and only) motion under 28 U.S.C. 2255.

On appeal, the Fifth Circuit found this debatable (App. A, pp. 2a-3a):

> Evans's amended § 2255 motion was voluntarily dismissed without prejudice prior to an adjudication on the merits. He now claims that his defense counsel fraudulently induced him to dismiss this motion. To the extent that Evans "attacks 'some defect in the integrity of the federal habeas proceedings,' rather than the resolution on the merits," reasonable jurists would debate the district court's dismissal of his Rule 60(b) motion as a second or successive petition. *In re Edwards*, 865 F.3d 197, 204 (5th Cir. 2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)); *see also Slack*, 529 U.S. at 489 (holding that "a habeas petition filed after an initial petition was dismissed" for failure to exhaust state remedies "without an adjudication on the merits is not a 'second or successive' petition").

The Fifth Circuit, however, ultimately denied Evans' motion for a certificate of appealability (COA) on the ground that "Evans has not made has not made the required showing of a debatable constitutional claim." App. A, p. 3a, ¶2.

The district court, however, had appointed counsel with instructions to add the claim in question by amendment to Evans' original claims filed *pro se*. It would thus appear to be a foregone conclusion that reasonable jurists can debate whether the added claim is at least "valid" under the threshold inquiry

standard of *Slack v. McDaniel*, 529 U.S. 473, 481, 484 (2000), given that it was the district court itself which ordered it to be added in the first place. *See also Miller-El v. Cockrell*, 537 U.S. 322, 323 (2003).

As the district court explains itself in a footnote (ROA.126, p. 1, n. 1):

> The Federal Public Defender was appointed to represent Evans to pursue a claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Federal Public Defender filed an amended § 2255 motion [#48] on behalf of Evans on June 23, 2016. This case was stayed pending the outcome of *Beckles v. United States*, No. 15-8544. On May 23, 2017, Evans voluntarily dismissed the amended motion. Evans's original § 2255 motion is currently before the Court.

In denying the motion for a COA, the Fifth Circuit reasoned that Evans seeks to raise a new claim "not raised in his amended § 2255 petition, and reasonable jurists would not debate the district court's dismissal of this new claim as second or successive." App. A, p. 3a, ¶ 3. In a nutshell, the Fifth Circuit surmised that amendment would be needed for Evans to succeed on the merits, but that any new claims would be second or successive.

REASONS FOR GRANTING THE WRIT

If the effect of granting a motion under Rule 60(b) is to return a case to the state it was in before final judgment, then future amendments to the case cannot institute *second or successive* proceedings so long as the *first* proceeding remains in effect.

The Court should grant review to clarify this matter for the lower courts. The supervisory power of this Court is invoked for the obvious reason that the Fifth Circuit has shown itself unable to distinguish first from second, as is required for an appreciation of the rules of order.

In *Gonzales v. Crosby*, 545 U.S. 524, 532 (2005), the Court introduced confusion concerning the situation in which "a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." For clearly the purpose in attacking some defect in the integrity of the federal habeas proceedings is not merely to address such a defect on academic grounds, but rather to remove the defect in hopes of obtaining a more favorable result than provided by the federal court's prior resolution of the habeas claims.

In the instant case, there is no telling in what direction the habeas proceedings might have gone in, had appointed counsel not fraudulently induced Evans to dismiss his claim added by counsel. For example, had counsel continued to pursue the case, new claims might have added by amendment, or existing claims might have been modified. This presumption is especially logical, given that the habeas proceedings were dismissed at the pleading stages.

Hence, the Court should address this confusion by clarifying that so long as the *basis* of the Rule 60(b) motion attacks some defect in the integrity of the federal habeas proceedings, then the habeas proceedings should be allowed to take whatever course they would have taken in absence of the defect, including with any possible amendment of the claims.

According to *Slack*, 529 U.S., at 484, to obtain a COA when, as here, the district court dismissed the motion on a procedural ground without reaching the merits, the movant must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." However, as this instant case makes clear, satisfaction of the second prong should suffice to obtain a COA to appeal the denial of a Rule 60(b) motion.

This follows since, at this point, the courts are no position to divine the ultimate course the habeas proceedings will take in absence of the defect in integrity. The question of whether a valid constitutional claim is presented must therefore be left for another day, after the integrity of the proceedings is restored. Hence, given that the Fifth Circuit agreed that Evans satisfied the second prong of *Slack*, his motion for a COA should have been granted.

This exception to the "valid claim" prong of *Slack* is analogous in principle to the exception to application of the prejudice prong of the Strickland test for ineffective assistance when presented with "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658-659, and n. 29 (1984). "[S]uch circumstances involve impairments ... that are easy to identify and ... easy for the government to prevent." *Strickland v. Washington*, 466 U.S. 668, 669 (1984).

Moreover, it would clearly go beyond a "threshold inquiry into the underlying merit of [the] claims" for the Court of Appeals to attempt to divine the validity of a claim under such circumstances. *Miller-El*, 537

U.S., at 323. *See also, e.g., Slack*, 529 U.S., at 481. Accordingly, an exception to application of the "valid claim" prong of Slack makes practical sense in cases where the district court's procedural ruling in denying a Rule 60(b) motion is at least debatable by jurists of reason.

The suggested exception is similarly analogous to the exception to application of *Strickland's* prejudice prong in cases of conflicted counsel. *Cuyler v. Sullivan*, 446 U. S. 335, 345-350 (1980). "In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland,* 466 U.S., at 669. There is little question that appointed counsel's loyalties were not with Evans; and, it is similarly difficult to measure the precise effect on the habeas proceedings of representation corrupted by conflicting interests.

A few notes are in order.

As the Rule 60(b)(3) motion was filed within the one-year period provided by Rule 60(c)(1), there is no question of judicial economy, only one of the judicial quality which Rule 60(b) is meant to address.

In denying reconsideration, the district court states (App. D, p. 8a, ¶ 2):

> Evans previously challenged his conviction in a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. ... The Federal Public Defender filed an additional § 2255 motion on behalf of Evans on June 23, 2016, raising a claim under *Johnson v. United States*, 135 S. Ct. 2551(2015).

On the contrary, the record shows that appointed counsel filed not an "additional" section 2255 motion, but rather an amended motion which was supplemental to the original motion filed pro se. *See* ROA.101, at 109, #14 ("This motion supplements Evans' pro se filing, document 41, in this cause number.") Moreover, the original motion under section 2255 (ROA.65) and the order dismissing the amended motion (ROA.125) both have the same cause number. There can be no ambiguity that the original and amended section 2255 motion are part of the same habeas proceeding.

Likewise, the Fifth Circuit has also treated the claim filed by counsel under *Johnson v. United States*, 135 S. Ct. 2551(2015), as if presented in a habeas proceeding which is somehow separate from the one in which four claims were raised by Evans pro se. For example, the Fifth Circuit states in its opinion (App. A, p. 3a, ¶ 3):

> In his COA motion, Evans also seeks to challenge his plea agreement. This claim was not raised in his amended § 2255 petition, and reasonable jurists would not debate the district court's dismissal of this new claim as second or successive. *See Edwards*, 865 F.3d at 203–04.

On the contrary, as the Fifth Circuit stated in denying a COA on appeal from the dismissal of the first four claims filed in this proceeding (*United States v. Evans*, No. 17-50656, Order filed 10/03/2018):

> Paul Ross Evans, federal prisoner # 83230-180, seeks a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2255 mo-

tion challenging his guilty plea conviction and 480-month sentence for weapons offenses.

Hence, there can be no question that a challenge of Evans' guilty plea is fairly included among the *five* claims raised in his amended section 2255 motion, and which amended motion consists of the four original claims filed pro se and the one *Johnson* claim filed by counsel as a supplement. In contrast, allowing the courts, as if by sleight of hand, to treat the one habeas proceeding as if two separate proceedings gives rise to a false appearance of a second or successive proceeding.

It would appear by circumstances that the Federal Public Defender was conflicted by loyalty to the district court's effort to appoint counsel only "to pursue a claim under *Johnson*" rather than to represent Evans with respect to the entirety of his habeas proceeding. ROA.126, p. 1, n. 1. Another conflict is evident in that appointed counsel did not disclose that he was working all the while under the supervision of the same attorney who was the subject of Evans' claim of ineffective assistance.

Hence, there can be no question that an integrity defect exists such as merits the granting of the Rule 60(b) motion. It remains to be seen what course the habeas proceedings will take in absence of such a defect. Since the proceedings were dismissed at the pleading stages, the Court should clarify that amendment to the section 2255 motion is possible, that all claims for relief must revisited in absence of the defect, and that no amendment can constitute a second or successive application, given that the present proceedings remain the first.

CONCLUSION

The petition should be granted.
Respectfully submitted,

PAUL ROSS EVANS
#83230-180
Pro Se
FCI SCHUYLKILL
PO BOX 759
MINERSVILLE, PA 17954-0759

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