ORIGINAL

No. 19-8585

IN THE
SUPREME COURT OF THE UNITED STATES

VAN JACKSON,	) Appeal From the Seventh Circuit Court of Appeals
Petitioner,	) Case No. 18-2060
vs.	) From denial of Rule 60(b)(5)-(6) In the District Court of the
UNITED STATES OF AMERICA,	) Southern district of Indiana Case No. 1:05-cv-307-DFH-VSS
Respondent,	)

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Supreme Court. From the Seventh Circuit Court of Appeals.

Petitioner Van Jackson is proceeding before this Honorable court in a Inpropia Persona manner, and is Unskilled, and Unsophisticated in the ways of law and pleadings. Thus pursuant to **Haines v. Kerner**, 404 U.S. 519 (1972), invokes the liberal pleading doctrine.

Petitioner Jackson respectfully request this Honorable Court's indulgence in this regard.

Van Jackson # 05676-028
U.S.P. Leavenworth
P.O.Box 1000
Leavenworth KS, 66048

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a federal Prisoner has a Right to Present a argument based on a Change in Procedural law on his first motion under Title 28 U.S.C.§ 2255 ?

(2) Whether the district court was correct on it's procedural ruling, of the initial § 2255 proceedings.?

(3) Whether Jackson's Federal Rule 60(b)(6) Petition is a bona fide 60(b) in light of **Gonzalez v. Crosby**, 545 U.S. 524 (2005).?

(4) Whether a bona fide 60(b) can be appealed without permisson required under Title 28 U.S.C.§ 2253's stringent criteria governing federal Post-Conviction remedies ?

(5) Whether the District and Appeals Court erred in treating Jackson's Rule 60(b) Petition as a Successive Petition, in light of **Gonzalez** id. ?

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OPINION/ORDERS

The order of the district court denying Petitioner's § 2255 appears at appendix page 13-16

The order of the district court denying Petitioner's Rule 60(b)(6) appears at appendix page 17-18

The opinion of the Seventh Circuit court affirming the district court's decision denying Rule 60(b)(6) motion appears at appendix page 19

The Ruling of the Seventh Circuit court denying hearing or re-hearing en banc, appears at appendix page 20

STATUTORY PROVISIONS INVOLVED

JURISDICTION

The United District Court for the Southern district of Indiana (Indianapolis) had jurisdiction, pursuant to Title 18 U.S.C.§-3231. Which provides exclusive jurisdiction of offenses against the United States.

The Seventh Circuit Court of Appeals had Appellate jurisdiction pursuant to 28 U.S.C.§ 1291, Which vests United States Circuit Courts with jurisdiction to hear appeals from final decisions of United States district courts.

On April 18,2018, Petitioner Jackson filed a Federal Rule Civil Procedure, rule 60(b)(5)-(6) motion in the district court, and the court construed the motion as a Second or Successive petition under Title 28 U.S.C.§ 2255. order on April 26,2018.

On June 29,2018, Jackson filed a motion to proceed on appeal to the Seventh Circuit Court of Appeals in forma pauperis.

On July 29,2019, a Two panel judge(s) affirmed the district court order, construing Jackson's motion to proceed in forma pauperis as a request for a Certificate of appealability, and found no showing of a substantial right. pursuant to 28 U.S.C. § 2253(c)(2) denied Jackson motion.

On August 12, 2019 Jackson filed a petition for a hearing or rehearing en banc. And that request was denied on August 27, 2019.

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On July 14, 1999, the Petitioner Van Jackson was charged with other individuals in a federal indictment handed down by the Grand Jury sitting in the Southern District of Indiana. Jackson was charged in counts 1,13,22 and 29 of the Indictment. Count 1 alleged that Jackson participated in a conspiracy to possess with intent to distribute and/or distribute one or more of a mixture or substance containing a detectable amount of heroin, in violation of 21 U.S.C.§ 841(a)(1) and 846. Counts 13,22 and 29 charged him with distributing heroin on three separate occasions, in violation of 21 U.S.C.§ 841(a)(1) and 18 U.S.C.§ 2(a).

On February 9,2001, after a trial by jury, Jackson was found guilty of all four counts charged to him.

On May 11,2001, a sentencing hearing was conducted and the court determined his criminal history level to be IV. For one kilogram of heroin the (2000) edition of the United States guidelines called for a base offense level of 32. (U.S.S.G.§ 2d1.1(c)(4). At a level 32 and criminal history IV, Jackson's presumptive sentencing range was 168 to 210 months in prison.

During sentencing the Probation Officer recommended that Jackson's base offense level start at 34, believing that he was responsible for 3 to 9.9 kilograms of heroin. The Probation also recommended a Eight (8) level enhancement pursuant to the then-mandatory guidelines for sentencing enhancements. Based on the following:

A 2-level increase believing a weapon was used in the offenne, Pursuant to (U.S.S.G.§ 2d1.1(B)(1)).

A 4-level increase believing he played a leadership role, Pursuant to (U.S.S.G.§ 3b1.1(a)).

A 2-level increase believing a Juvenial was used in the offense. (U.S.S.G.§ 3b1.4).

Jackson objected to the factors that would increase his sentence, based on **Apprendi v. Newjersey**, 530 U.S. 466 (2000).('other than the fact of a prior conviction, any fact that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt. **id**, at 490.

The Sentencing court rejected Jackson's (Apprendi) argument, and based on the preponderance of evidence that the conspiracy involved 3 to 9.9 kilograms, starting the base offense level at 34. And also used the mandatory guidelines to increase the offense level by (8) levels, allowing Jackson's total offense level to be 42. Yielding a sentencing range of 360 months to life in prison. The court then sentenced Jackson to 360 months.

Jackson appealed his sentence to the Seventh Circuit court of Appeals, inwhich his court appointed attorney filed a brief pursuant to **Anders v. California**, 386 U.S. 738 (1967). Counsel examined whether he could pursue a (Apprendi) claim, since Jackson's guideline range was premised on aggravating factors never presented to the jury, or proven beyond a reasonable doubt. The Seventh Circuit court found the argument to be frivolous, and dismissed the appeal. **United States v. Jackson**, 41 fed.Appx. 848 (7th Cir.2002).

Relying on **United States v. Westmoreland,** 240 f.3d 618 (7th Cir.2001) (holding sentencing court's need only determine enhancement factor's by a preponderance of the evidence, so long as the sentence does not exceed the statute of conviction pursuant to 21 U.S.C.§ 841(b)(1)(a)-(i), determining Jackson could have received a life sentence. he only received 360 months. **id.**

Jackson filed a Petition for Writ of Certiorari to the Supreme Court inwhich this court denied review on March 1,2004. **Jackson v. United States,** 540 U.S. 1226 (2004). Shortyly thereafter this Supreme Court intervened and decided **Blakely v. Washington,** 542 U.S.-296, 159 L.Ed.2d 403, 124 S.Ct 2531 (2004). where the court had explained the 'Apprendi' decision, that then"prescribed statutory maximum" was the maximum sentence a judge could impose by the defendant. Not (as commonly understood) the maximum statutory sentence prescribed by the legislature for the offense, like 21 U.S.C.§ 841(b)(1)(a)(i). **id,** at 124 S.Ct 2531.

The Supreme court ultimately confirmed that (Blakely) applies to the federal guidelines, and that application of the guidelines as written was unconstitutional because of their mandatory nature. **United States v. Booker,** 543 U.S. 220, 160 L.Ed.2d 621, 125 S.Ct 738 (2005).

On February 28,(2005) Jackson filed his initial motion to Vacate, or Correct his sentence pursuant to Title 28 U.S.C.§ 2255, on a variety of grounds. But the first and principle argument advanced was in light of both intervening changes in law by the Supreme court in (Blakely) and (Booker), Jackson's sentence became invalid.

Because it's length was determined in part by adverse factual findings by a judge based on preponderance of evidence, rather than beyond a reasonable doubt by jury. And that the federal sentencing guidelines under the mandatory system was found to be unconstitutional.

In deciding the change in law claim, the district court precluded a merit determination based on 'Blakely' and 'Booker', instead, the court denied the argument for a technical reason, i.e., because Jackson raised a Sixth Amendment claim based on 'Apprendi' on his direct appeal to the Seventh Circuit court and was unsuccessful.

Jackson believes that the merit of his change in law argument based on 'Blakely' and 'Booker' should have been considered in reaching a resolution in the § 2255 habeas proceedings. See, **Dunn v. United States**, 442 U.S. 100, 60 L.Ed.2d 734, 99 S.Ct 2190 (1979).

On April 18,2018, Petitioner Jackson filed a Motion pursuant to Federal Rule Civil Procedure 60(b)(5)-(6) in the district court, relying on **Gonzalez v. Crosby**, 545 U.S. 524, 162 L.Ed.2d 480(2005). Where Jackson challenged, not the sunstance of the decision denying his § 2255, but the defect in the integrity of the habeas proceedings, were the court precluded a determination based on the merit of his change in law argument established in the § 2255 brief.

The district court denied Jackson's rule 60(b)(5)-(6) motion, construing it as a Second or Successive motion under § 2255. And the Seventh Circuit court affirmed, finding no substantial showing of the denial of a constitutional right. pursuant to 28 U.S.C.§-2253(c) it was required to dismissed.

REASON FOR GRANTING THE WRIT

Petitioner Jackson filed a Federal Rule 60(b)(6) motion in the district court seeking to set aside the district court's judgment denying his argument on his initial habeas petition under § 2255.

Jackson's argument in his § 2255 was based on a change in law, that was established by the Supreme court in **Blakely** id, and **Booker** id. However, the district court refused to reach the merit of the issue based on procedural grounds, i.e, because Jackson raised a Sixth Amendment **Apprendi** id, argument on direct appeal to the Seventh Circuit court and was unsuccessful.

At the time of Jackson's direct appeal (Apprendi) was unsettled, Circuit court precedent dictated that Sentencing court's need only determine enhancement factor's by a preponderance of the evidence, so long as the sentence does not exceed the Statute of Conviction. **United States v. Westmoreland**, 240 f.3d 618 (7th Cir.2001).

In denying Jackson's direct appeal the Seventh Circuit held that the jury found beyond a reasonable doubt that Jackson conspired to distribute atleast One kilogram of heroin, and under Title 21 - U.S.C. 841(b)(1)(a)(i) he could have been sentenced to life, he only recieved 360 months, **Apprendi** id, required nothing more. **Jackson**, id, 41 fed. Appx. at 853.

Petitioner Jackson filed a Writ of Certiorari to the Supreme court inwhich the court denied review. **Jackson**, id, 540 U.S. 1226 (2004). But, shortly thereafter and prior to filing his initial § 2255, the Supreme court intervened and decided (Blakely) and (Booker).

In **Blakely**, the Supreme Court clarified the 'Statutory Maximum' for 'Apprendi' purpose is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury's verdict. Not, (as - commonly understood) the maximum statutory sentence prescribed by the legislature for a particular offense. **Blakely**, 124 S.Ct at 2531.

The Blakely court held that 'Apprendi' precluded the judge from making further findings to enhance the sentence, even if it fell within the statutory range of Title 21 U.S.C.§ 841(b)(1)(a)(i). **Blakely**, 542 U.S. at 303-304.

In **Booker**, the Supreme Court confirmed that 'Blakely' applies to the federal sentencing guideline systems, and held (other than Criminal history) only facts proven to a jury beyond a reasonable doubt or admitted by the defendant could be used to calculate a sentence under the guidelines. And that application of the guidelines as written is unconstitutional because of their mandatory nature. **Booker**, 543 U.S. at 226-227,233.

Jackson's initial § 2255 raised a **Blakely** and **Booker** claim, because the length of his sentence was determined in part by adverse factual findings that went beyond the standard range established by the then sentencing guideline range of 168 to 210 months. But, well within the permissible range by Statute of 841(b)(1)(a)(i) of life.

The Government responded to the initial § 2255, arguing that Blakely or Booker effects Jackson's sentence because his applicable guideline range was 360 to life. And Blakely did not apply to the guidelines. citing **Booker**, 124 S.Ct at 2538 n.9.

The Government further noted that Booker didn't apply retroactively to Criminal cases that became final prior to it's release January 17, 2005. Citing **McReynolds v. United States**, 397 f.3d 479,481 (7th Cir - 2005).

In deciding Jackson's § 2255, the district court rejected his 'Blakely' and 'Booker' argument for a technical reason, i.e., because Jackson had raised a Sixth Amendment **Apprendi** claim on direct appeal and was unsuccessful.

Petitioner Jackson believes that at the time of his initial § 2255 **Westmoreland** id, was no longer good law, based on the Supreme court's intervening decisions in 'Blakely' and 'Booker'. And the district court had jurisdiction to entertain a hearing based on a change in law. **Dunn v. United States**, 442 U.S. 100 (1979).

Instead, Jackson was effectively shut-out of his initial § 2255 habeas proceedings without any adjudication of the merit of his change in law argument. The dismissal of a first habeas petition is a particular serious matter, for that dismissal denies the Petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty. **Lonchar v. Thomas**, 517 U.S. 314 (1996); **Slack v. McDaniel**, 529 U.S. 473 (2000).

The Supreme Court has held, inter alia, that even though the legal issue raised in a § 2255 motion "was determined against a [applicant] on the merits of a prior application" "applicant may [never the less] be entitled to a new hearing upon showing an intervening change in law." **Sanders v. United States**, 373 U.S. 1, 10 L.Ed.2d 148, 83 S.Ct 1068 (1963).

The same rule applies when the prior determination was made on appeal from the applicant's Conviction, instead of an earlier § 2255 proceedings, If new law has been made... since the trial and appeal. **Kaufman v. United States**, 394 U.S. 217,230, 22 L.Ed.2d 227, 89 S.Ct 1068 (1969).

The failure to reach the substance of the change in law argument based on 'Blakely' and 'Booker' created a defect in the integrity of the § 2255 habeas proceedings. Thus, the proper means to bring such a challenge is through Rule 60(b)(6), as explained by the Supreme court in **Gonzalez v. Crosby**, 545 U.S. 524 (2005). Where the court stated that if the alleged Rule 60(b) assert's some "defect in the integrity of the federal habeas proceedings" it is a legitimate Rule 60(b). id, 545 U.S. at 530,532 & n.5.

The district court treated Jackson's Rule 60(b)(6) motion as a Second or Successive petition under § 2255, holding that his argument is a challenge to the substance of the court's ruling and therefore must be treated as a Successive § 2255 motion.

Jackson assert's that his Rule 60(b)(6) should not have been treated as a Successive § 2255, because he only challenged the procedural ruling of the habeas court. And did not lead inextricably to a merit-base attack on the disposition of the prior habeas proceedings. See, **Spitznas v. Boone**, 464 f.3d 1213 (10th Cir.2006). Conversly, it is a true 60(b) motion if it challenge only a procedural ruling of the habeas court, which precluded a merit determination of the habeas application. **Spitnas**, 464 f.3d at 1215-16.

Petitioner Jackson filed a motion to appeal the denial of his 60(b) motion, and to proceed in forma pauperis in the district court. And the court denied his request to proceed in forma pauperis.

Jackson filed a motion to proceed in forma pauperis in the Seventh Circuit court, where the court construed his petition as a certificate of appealability and found no showing of a substantial right, under 28 U.S.C.§ 2253(c)(2) denied Jackson's appeal.

The standard for appealability under § 2253(c)(2) is somewhat different depending upon whether the district court has rejected the issue sought to be appealed on it's merits or on procedural grounds. With respect to constitutional claims rejected on their merits, the Supreme court has applied the Certificate of Appealability standard for granting Certificate of probable cause set forth in **Barefoot v. Estelle,** 463 U.S. 880 (1983) and followed in the **AEDPA.** See also, **Slack v. McDaniel.** id. Under this standard, the appellant must make a showing that each issue he or she seeks to appeal is at least debatable among jurist of reasons, that the court could resolve the issue [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. **Barefoot,** 463 U.S. at 893 n.4. The "substantial showing" standard does not compel a Petitioner to demonstrate that he or she would prevail on the merit. id.

As to claims denied on Procedural grounds, (that is, where the district court has not reached the merit) the court in **Slack** clarified that (COA) standard is somewhat different and easier to meet;

(1) " whether jurist's of reason would find it debatable whether the Petitioner states a valid claim of the denial of a constitutional right" (in other word's, does the Petitioner at least allege a valid claim, even though it hasn't been proven yet). and (2) Whether "jurist of reason would find it debatable, whether the district court was correct in it's procedural ruling. **Slack**, 529 U.S. at 478.

Petitioner Jackson believes that he has presented a valid claim of the denial of constitutional right established by **Blakely** and **Booker**. And it is debatable among jurist of reason because Jackson has preserved a Sixth Amendment challenge to the federal sentencing guideiines under **Apprendi** id. therefore, review is under plenary. See, **United States v. Schlifer**, 403 f.3d 849 (7th Cir.2005), the approach developed after the mandate of Booker.(holding that 'Apprendi' objections preserved an argument under 'Booker'. See, **United States, - v. Burke** 424 f.3d 400 (7th Cir.2005).

Other Circuit Courts have spoken on the issue and have adopted the standard for determining when a defendant has preserved his challenge to Mandatory application of the guidelines to his case. The first, Second, Eighth, and Eleventh Circuit each have recognized that a defendant's argument that (Apprendi) undermine the federal guidelines, or that he was entitled to have a jury determine the sentencing factors in his case, preserved his claim of non-constitutional 'Booker' error. **United States v. Antonakopoulos**, 399 f.3d 68,76 (1st Cir.2005); **United States v. Lake**, 419 f.3d 11,12 (2nd Cir.2005); **United States - v. Fleck**, 413 f.3d 883,896 (8th Cir.2005); **United States v. Mathenia**, 409 f.3d 1289,1290-91 (11th Cir.2005).

CONCLUSION

Given the substance of Jackson's Rule 60(b)(6) motion, it is a bona fide 60(b),therefore the correct procedures requires that the merit's of the motion be addressed in the first instance by the district court. **Abdur'Rahman v. Ricky Bell**, 537 U.S. 88 (2000), without pre-certification govern by 28 U.S.C.§ 2253(c)(2).

Jackson ask this Supreme Court for a **remand**, with instruction's for the district court to take into account the procedural change in law since Jackson's direct appeal, consistent with **Blakely** and **Booker**. Along with his due diligence, the opposing party's reliance interest in the finality of the judgment, and other equitable considerations. **11 C Wright, A Miller & M. Kane, Federal Practice and Procedure § 2857** (2d.Ed. 1995 and Supp. 2004). And give him the one fair shot at habeas review that Congress intended that he have.

As the Supreme Court has recognized that Rule 60(b)(6) "provides court's with authority 'adequate to enable them to vacate judgment whenever such action is appropriate to accomplish justice." See, **Lileberg v. Health Service Acquisition Corp.,** 486 U.S. 847 (1988).