ORIGINAL

20-5194

CASE NO: _____

IN THE UNITED STATES SUPREME COURT

Supreme Court, U.S.
FILED
JUN 17 2020
OFFICE OF THE CLERK

IN RE: Kevin Dewayne Moore
MOVANT

PETITION FOR THE ISSUANCE OF
AN ORIGINAL HABEAS CORPUS

QUESTIONS PRESENTED

1) DOES THE FACT THAT MOVANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL - BASED ON NEWLY DISCOVERED EVIDENCE THAT COUNSEL FAILED TO PRESENT THE GOVERNMENT'S FORMAL PLEA BARGAIN OFFER AND FACTUAL RESUME TO HIM, IS NOT COGNIZABLE UNDER: A) 28 USC § 2244(b)(2); B) 28 USC § 2255(h), AUTHORIZE MOVANT TO INVOKE THE SAVINGS CLAUSE IN 28 USC § 2255(e) AND PRESENT THIS SERIOUS SIXTH AMENDMENT VIOLATION CLAIM IN AN ORIGINAL HABEAS CORPUS, ISSUED BY THIS COURT, PURSUANT TO THIS COURT'S ORIGINAL JURISDICTION?

2) DID MOVANT'S COURT APPOINTED LAWYER PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR WAS HIS PERFORMANCE DEFICIENT - BASED ON NEWLY DISCOVERED EVIDENCE THAT SHOWS HE FAILED TO PRESENT THE GOVERNMENT'S FORMAL PLEA BARGAIN OFFER AND FACTUAL RESUME TO MOVANT? AND DOES THIS SERIOUS SIXTH AMENDMENT VIOLATION REQUIRE THAT MOVANT'S CASE BE: A) REMANDED

BACK TO THE PRETRIAL/PLEA BARGAIN PHASE OF THIS CASE; OR B) DISMISSED WITH PREJUDICE?

3) DOES MOVANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM - BASED ON NEWLY DISCOVERED EVIDENCE THAT COUNSEL FAILED TO PRESENT THE GOVERNMENT'S FORMAL PLEA BARGAIN OFFER AND FACTUAL RESUME TO HIM, QUALIFY AS A NON-SUCCESSIVE § 2255 CLAIM, DUE TO THE FACT THAT THESE FACTS AND EVIDENCE WERE DISCOVERED YEARS AFTER THE COMPLETION OF HIS ORIGINAL § 2255 PROCESS? AND DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT RECHARACTERIZED HIS Fed. R. OF CIV. P. RULES VIOLATIONS CLAIM AS A SUCCESSIVE § 2255, AND IF DOING SO, VIOLATED WELL ESTABLISHED FIFTH CIRCUIT AND/OR U.S. SUPREME COURT PRECEDENT?

PARTIES TO THE PROCEEDINGS

Kevin Dewayne Moore - Movant

UNITED STATES OF AMERICA - Respondent

K. ZOOK - Warden, FCI Seagoville,
Respondent- if habeas corpus issued

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PETITION FOR THE ISSUANCE OF AN ORIGINAL HABEAS CORPUS

MOVANT, Kevin Moore (Mr Moore), AVERS THAT HE IS NOT CHALLENGING THE "VALIDITY" OF HIS CONVICTION OR SENTENCE. MR MOORE AVERS THAT THIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR OF COUNSEL'S DEFICIENT PERFORMANCE - BASED ON NEWLY DISCOVERED EVIDENCE THAT COUNSEL FAILED TO PRESENT THE GOVERNMENT'S FORMAL PLEA BARGAIN OFFER AND FACTUAL RESUME TO HIM, IS NOT COGNIZABLE UNDER 28 USC § 2244 (b)(2) OR 28 USC § 2255(h), ~~AND~~ RENDERING THE § 2255 INADEQUATE OR INEFFECTIVE. NOR IS THIS CLAIM COGNIZABLE UNDER 28 USC § 2241, UNLESS THIS COURT USES ITS ORIGINAL JURISDICTION AND ISSUES THIS HABEAS CORPUS, OTHERWISE, THIS SERIOUS CONSTITUTIONAL VIOLATION WILL GO UNCORRECTED, AS THE COURTS STATE THAT THE § 2241 IS TO BE USED TO CHALLENGE THE EXECUTION OF THE SENTENCE, ACTUAL INNOCENCE OR PRISON CONDITIONS. AS IT STANDS NOW, MR MOORE'S CONSTITUTIONAL VIOLATION CLAIM IS NOT COGNIZABLE UNDER THESE.

Mr Moore avers that he has attempted to present this claim of ineffective assistance of counsel claim in his Fed. R. Civ. P. (FRCvP) Rules violation(s) claim/motion to the United States District Court (USDC), pursuant to FRCvP Rule 15, or 59(e), or 60(b)(2), or 60(b)(6).

However, the USDC recharacterized it as a second or successive §2255, Attachment B, dismissed it and transferred it to the United States Court of Appeals (USCA) for the Fifth Circuit, Attachment C, even though Mr Moore complied with the plain, concise and express language Congress used when it created/enacted these rules.

Mr Moore avers that this claim is not to be considered as a successive §2255 claim, because this claim was not ripe at the time his original §2255 process was completed, as this claim did not even exist until years after the completion of that process.

Mr Moore avers that this particular Constitutional [redacted] violation claim is not cognizable under the current

PROVISIONS IN 28 USC § 2244(b)(2), § 2255(h), OR § 2241 - AS DEFINED BY THE COURTS, AND FAILURE TO PERMIT THIS REMEDY RAISES SERIOUS CONSTITUTIONAL QUESTIONS/ISSUES.

OPINIONS PRESENTED

A) May 11, 2020. USCA's REFUSAL TO ACCEPT Mr MOORE's ~~Fed~~ Fed. R. APP. P. (FRAP) RULE 40. ATTACHMENT A.

B) APRIL 23, 2020. USCA's DENIAL OF Mr MOORE's PETITION FOR A LIMITED REMAND AS A NON-SUCCESSIVE § 2255, OR APPLICATION TO FILE A SUCCESSIVE § 2255. ATTACHMENT B.

C) JANUARY 31, 2020. USDC's JUDGMENT(S). DKT NOS: 78 AND 2. ATTACHMENT C.

D) JANUARY 31, 2020. USDC JUDGE's MEMORANDUM AND ORDER, DISMISSING Mr MOORE's FRCVP RULES VIOLATION CLAIM/MOTION AND TRANSFERRING IT TO THE USCA DKT 77. ATTACHMENT D.

E) DECEMBER 12, 2018 - RECEIVED DECEMBER 18, 2018. RESPONSE TO A FOIA REQUEST. LETTER FROM THE GOVERNMENT SHOWING THAT A FORMAL PLEA BARGAIN OFFER WAS GIVEN TO MR MOORE'S LAWYER. ATTACHMENT E.

F) SEPTEMBER 12, 2007. LETTER TO MR MOORE'S LAWYER, REQUESTING FACTUAL RESUMES. ATTACHMENT F.

G) JANUARY 4, 2019. LETTER TO PROSECUTOR, REQUESTING COPIES OF THE PLEA OFFER AND FACTUAL RESUME. ATTACHMENT G.

JURISDICTIONAL STATEMENT

THIS COURT'S ORIGINAL JURISDICTION TO ISSUE AN ORIGINAL HABEAS CORPUS, IS INVOKED PURSUANT TO 28 USC § 1251(a), 28 USC § 1651(a), ART III, CLS 1, 2.

REASONS FOR GRANTING THE ISSUANCE OF THE HABEAS CORPUS

Mr Moore avers that this particular constitutional violation claim is not cognizable under 28 USC § 2244(b)(2), § 2255(h), or even 28 USC § 2241 - the way the courts have decided what the § 2241 is to be used for.

That he properly presented this claim in his Rule(s) violation motion to the USDC. That the USDC abused its discretion or failed to follow well established Fifth Circuit review criteria and/or violated well established Fifth Circuit and/or US Supreme Court precedent, when it recharacterized his Rule motion/claim into a successive § 2255.

Therefore, Mr Moore is presenting his application/petition/request, for this Court to use its original jurisdiction to issue an original habeas corpus, as he has no other avenue available to him, in order to present this serious constitutional violation claim.

STATEMENT OF THE CASE

Mr Moore avers that he did not apply for a 28 USC § 2241, in the USDC, because this particular Constitutional violation claim is not cognizable under the Courts' current interpretation of how and when a § 2241 can be used: A) Actual Innocence; B) Prison Conditions; C) Execution of Sentence.

Mr Moore avers that the Courts have also held that if a claim is not cognizable under 28 USC § 2244(b)(2) or § 2255(h), it is not cognizable under § 2241.

Mr Moore avers that he presented this Sixth Amendment violation to the USDC on his Rule 15, on 59(e), on 60(b)(2), on 60(b)(6) motion. He fully complied with the plain, concise, and express language Congress used when they created/enacted these rules.

However, the USDC and the USCA for the Fifth Circuit, treated this motion as a successive § 2255, even after he provided facts and Fifth Circuit and Supreme Court precedent showing that it is not a successive § 2255.

THE USCA 5TH MAINTAINED THAT HIS MOTION WAS A SUCCESSIVE § 2255 AND DENIED HIS PETITION FOR A LIMITED REMAND TO THE USDC AS A NON-SUCCESSIVE § 2255.

MR MOORE AVERS THAT HIS CONSTITUTIONAL VIOLATION CLAIM IS NOT COGNIZABLE UNDER § 2244(b)(2), § 2255(h), OR § 2241- UNDER THE COURTS CURRENT INTERPRETATION, AND THAT IS WHY HE PRESENTED IT AS A FRCVP RULE 60(b) VIOLATION CLAIM. HOWEVER, THE LOWER COURTS WILL NOT PERMIT/ ALLOW HIM TO PRESENT THIS SERIOUS CONSTITUTIONAL VIOLATION CLAIM, WITHOUT THIS COURT'S ISSUANCE OF AN ORIGINAL HABEAS CORPUS.

ARGUMENT

I

ISSUANCE OF AN ORIGINAL HABEAS CORPUS

MR MOORE AVERS THAT HE IS NOT CHALLENGING THE "VALIDITY" OR THE "EXECUTION" OF HIS CONVICTION OR SENTENCE. HE IS PRESENTING A FACTUAL CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR OF COUNSEL'S DEFICIENT PERFORMANCE, DURING THE PRETRIAL / PLEA BARGAINING PHASE OF HIS CASE, THAT LED TO HIS DECISION TO GO TO TRIAL.

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Mr Moore is attempting to present a Sixth Amendment violations claim. This is an ineffective assistance of counsel claim-based on newly discovered evidence that his court appointed lawyer failed to present the government's formal plea bargain offer and factual resume to him, nor did his lawyer even mention the existance of these. Attachment E(3).

Mr Moore is petitioning this Court to exercise its original jurisdiction and issue an original habeas corpus, as he has no other avenue available to present this Constitutional violations claim. It is not cognizable under §2244(b)(2) or §2255(h), or §2241-as the courts current interpretation does not authorize it to be presented.

In order for Mr Moore's Sixth Amendment violations claim to be cognizable under §2244(b)(2) or §2255(h), it must be: i) new rule of constitutional law, made retroactive; ii) newly discovered evidence, that shows he is actually innocent of the crime charged. Thus, showing Mr Moore's claim is not cognizableunder these.

Because of this, his Constitutional claim is also not cognizable under §2241. Cf CHRISTOPHER v MILES, 342 F 3d 378, 385 (5th Cir 2003)(Because petitioner's challenge to his conviction and sentences does not fall within the savings clause of §2255(e), it is not cognizable in a §2241 petition).

In 1948 Congress enacted 28 USC §2255. See: US v HAYMAN, 342 US 202, 212-14 (1952); WOFFORD v SCOTT, 177 F 3d 1236, 1239 (11th Cir 1999). The language of §2255 suggests, and the Eleventh Circuit has expressly concluded, that this statute was intended to channel challenges to the legality of the conviction and imposition of sentence, while leaving §2241 available to chalenge the continuation or execution of an initially valid confinement. ANTONELLI v WARDEN, USP ATLANTA, 542 F 3d 1348, 1351-52 (11th Cir 2008); US v JORDAN, 915 F 2d 622, 629 (11th Cir 1990); BROUSSARD v LIPPMAN, 643 F 2d 1131, 1134 (5th Cir 1981)(Attacks on the underlying validity of a conviction must be brought under §2255, not §2241). Thus, §2241 provides an avenue for challenges to matters such as the administration of parole, prison disciplinary actions, prison transfers and certain types of detention. See: ANTONELLI, supra; THOMAS v CROSBY, 371 F 3d 782, 810 (11th Cir 2004); BISHOP v RENO, 210 F 3d 1295, 1304, n 14 (11th Cir 2000); McGHEE v HANBERRY, 604 F 2d 9, 10 (5th

Cir 1979); RUDZAVICE v ENGLISH, No 5:14CV8/MMP/EMT (11th Cir 2014) (Review under §2241 is unavailable because petitioner challenges the validity of his convictions and sentences, not the execution of his sentences).

Mr Moore avers that he is not and has not challenged the "validity" of his conviction or sentence, or the execution of his sentence. Therefore, his Sixth Amendment violation claim is not cognizable under §2244(b)(2), or §2255(h), or §2241-as defined by the courts.

However, since his claim is not cognizable under §2244(b)(2), or §2255(h), this shows that the §2255 is "inadequate or ineffective" for THIS PARTICULAR Constitutional violations claim. (28 USC§2255(e)). Therefore, either Mr Moore has shown that he is now authorized by the savings clause, §2255(e), to present this claim in a §2241, or this Court has original jurisdiction to issue an original habeas corpus, or can use its supervisory powers to compell the lower court(s) to accept his FRCvP claim/motion as filed and to adjudicate the merits of it.

Jurisdiction of the Supreme Court extends to rights protected by the Constitution, Treatiesor Laws of the United States, from whatever source these rights may spring. NEW ORLEANS v DeARMAS, 34 US 224 (1835).

In FELKER v TURNER, 518 US 651 (1996), this Court held:

"In an opinion by Rehnquist, Ch.J., expressing the view of the court, it was held that...the Act did not preclude the Supreme Court from entertaining a habeas corpus petition filed as an original matter in the Supreme Court."

Mr Moore is petitioning this Court for the issuance of a habeas corpus, because he has no other avenue available to present his Sixth Amendment violations claim. The exercise of jurisdiction by the Supreme Court to protect Constitutional rights cannot be declined when it is plain that fair result of decision is to deny rights. ROGERS v ALABAMA, 192 US 226 (1904).

In PROST v ANDERSON, 636 F 3d 578, 580 (CA10 2011), the court held:

"Congress has told us that federal prisoner's challenging the VALIDITY of their convictions or sentences may seek relief only under pathway prescribed in §2255. To this rule, Congress has

provided only one exception: a federal prisoner may resort to §2241 to contest his conviction if but only if the §2255 remedial mechanism is 'inadequate or ineffective to test the legality of his detention.' 28 USC §2255(e)." "2241 petitions...are generally reserved for complaints about the nature of a prisoner's confinement, not the fact of his confinement."

Mr Moore avers that he is NOT challenging the "validity" of his conviction or sentence, or the "nature" of his confinement. He is challenging the ineffective asssitance of counsel he received during the pretrial/plea bargain phase of this case. As this Court can plainly see, his claim is NOT cognizable under §2244(b)(2), or §2255(h), or §2241-as described above. Thereby, showing that the §2255 is "inadequate or ineffective" and he should be authorized to present a §2241, pursuant to §2255(e).

The court's have stated that the §2241 will be available to free a §2255 movant from AEDPA's restrictions on second or successive motion whenever failure to permit a remedy would "raise serious Constitutional questions." TREISTMAN v US, 124 F 3d 361, 377 (CA2 1977); WOFFORD v SCOTT, No 98-8297 (CA11 1999).

Mr Moore avers that as it is currently written in §2244(b)(2), §2255(h), or §2241, his claim is not cognizable. Therefore, they are currently "inadequate or ineffective" to correct his Sixth Amendment violation. Therefore, this Court has the authority, duty, and/or obligation to use its original jurisdiction and issue a habeas corpus.

Cf McCARTHAN v DIR OF GOODWILL INDUS-SUNCOAST, No 12-14989 (CA11 2017), which held:

"A motion to vacate is inadequate or ineffective to test the legality of a prisoner's detention only when it cannot remedy a particular kind of claim."

Mr Moore avers that this Court holds the future of this Sixth Amendment violations claim in its hands. As this Sixth Amendment claim of ineffective assistance of counsel-based on newly discovered evidence that counsel failed to present the government's formal plea to him, during the pretrial/plea bargain phase, is not cognizable under §2244(b)(2), or §2255(h), or §2241-as currently defined by the courts.

Mr Moore avers that this Court has the authority and/or original

jurisdiction to decide if he can file a §2241 under §2255(e), or for this Court to issue an original habeas corpus.

II

DID COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR WAS HIS PERFORMANCE DEFICIENT?

Mr Moore avers that his court appointed lawyer provided ineffective assistance of counsel and/or his performance was deficient-based on newly discovered evidence that counsel failed to present the government's formal plea bargain offer and factual resume to him. Attachment E(3).

Mr Moore avers that counsel is REQUIRED to present the government's formal plea bargain offer to him. However, that did not happen.

In a letter dated May 29, 2007, the government sent Mr Moore's lawyer-Mr carlton McLarty (McLarty) its formal plea bargain offer. Attachment E(3). McLarty NEVER presented this to Mr Moore, nor did he inform Mr Moore of its existance.

On September 12, 2007, Mr Moore sent a letter to McLarty, requesting to be provided with all factual resumes, in this case. This letter is in case no: 3:11-CV-2540-0, Dkt 1, ground one, exhibit A. It is presented to this Court as Attachment F. Mr Moore has NEVER received copies of any resumes, or even a reply to that request.

Mr Moore avers that had he been provided with the plea and resume, that the government gave McLarty,① then there would have been NO reason for tihs September 12, 2007 letter requesting copies of the resumes.

Mr Moore avers that throughout the pretrial portion of this case, McLarty REFUSED to enter into plea negotiations with the government, on his behalf. The ONLY thing McLarty ever brought to him, were threats of more charges and prison time, if he did not sign for the maximum of 10 years. this was ALL DONE VERBALLY, as nothing in writing was ever presented to Mr Moore. The record supports these facts and Mclarty has never denied any of them.

McLarty had an obligation to consult with Mr Moore on important decisions and to keep him informed of important developments in the course of prosecution. STRICKLAND v WASHINGTON, 466 US 668, 688 (1984); JOHNSON v DUCKWORTH, 793 F 2d 898, 902 (7th Cir 1986) (Client must be involved in decision to accept or reject plea offer,

① ON MAY 29, 2007,

and failure to inform client of offer constitutes ineffective assistance of counsel). Also see: MISSOURI v FRYE, 566 US 134 (2012).

Had McLarty presented this plea to Mr Moore, it could possibly have changed the entire course/outcome of this case, because at the time this plea was given to McLarty, Mr Moore's original indictment was in effect. He could have negotiated a plea for only 2, 3, 4, 5, or 6 years. This is substantially less harsh/severe than the 360 months (30 years) he is now serving.

Mr Moore avers that during the course of pretrial, he had asked Mclarty what would happen if he offered to sign a plea for 2-3 years? McLarty just laughed and stated that the prosecutor "wants the max and I will not present this to her." (Case no: 3:11-CV-2540-O, dkt 27, pg 45; dkt 47, pg 17).

Mr Moore avers that he has continually stated that McLarty refused to enter into any type of plea negotiations, because, according to McLarty, the prosecutor would not accept anything but the max of 10 years. The files and records support these facts, as well as Mclarty has never denied any of these facts. (3:11-CV-2540-O, dkt 1, grounds one and nineteen).

The Supreme Court has made clear that plea negotiations are a "critical stage" of a criminal proceeding, and Sixth Amendment right to counsel therefore applies. MISSOURI v FRYE, 566 US 134 (2012); LAFLER v COOPER, 566 US 156 (2012). "failure to inform client of offer [plea] constitutes ineffective assistance." JOHNSON v DUCKWORTH, 793 F 2d 898, 902 (7th Cir 1986).

Mr Moore avers that on January 4, 2019, he sent a letter to the prosecutor, at the U.S. Attorney's Office in Dallas, TX, requesting to be provided with a copy of the plea and resume. Attachment G. He has NEVER received a response/reply to that request.

"Attorneys are obligated to present plea offers to their clients and WILL BE FOUND LACKING if they fail to do so." '[t]he negotiation of a plea bargain is a critical phase of litigation of the Sixth Amendment right to effective assistance of counsel.' UNITED STATES v REEDY, 719 F 3d 369, at *2 (5th Cir 2013), quoting PADILLA v KENTUCKY, 559 US 356 (2010)." VALLADO v STEPHENS, SA-13-CA-196-XR (5th Cir 2013).

McLarty's failure to present or inform Mr Moore of this plea

constitutes ineffective assistance of counsel, as McLarty's performance was deficient and that deficient performance prejudiced Mr Moore's defense. STRICKLAND, supra. In MISSOURI v FRYE, 566 US 134 (2012), this Court held:

"Defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Also holding: "That defense counsel in that case was deficient in failing to communicate to the petitioner the prosecutor's formal plea offer before it expired, where petitioner [EXECTLY as Mr Moore has done] produced a letter from the prosecutor communicating the offer." Also see: BAKER v US, No 14-370(PGS) (3rd Cir 2019); GLOVER v US, 531 US 198 (2001); COMPEAN v US, No 12-0730 (WD KY 2013); LINT v PRELESNIK, No 09-10044 (ED MICH 2011); ROBINSON v US, 744 F Supp 2d 684 (ED MICH 2010); MAVASHEV v US, No 11-3724 (ED NY 2015).

Mr Moore avers that THIS Court found FRYE's lawyer to be ineffective, however, the USDC and the USCA for the Fifth Circuit are REFUSING to find Mr Moore's lawyer ineffective FOR THE EXACT SAME CONDUCT.

Mr Moore avers that McLarty has met or exceeded the definition of ineffective assistance of counsel and/or his performance was deficient, because of his failure to present the goverment's formal plea offer to him or to even inform him of its existance.

There are only two ((2) courses of action to take to correct this Sixth Amendment violation. They are: 1) remand to the USDC at the pretrial/plea bargain phase of this case; or 2) dismiss his criminal case with prejudice.

Mr Moore avers that he is NOT challenging the "validity" of his conviction or sentence. Thes are just the only 2 avenues available for relief to correct this Constitutional violation.

III
NOT A SECOND OR SUCCESSIVE §2255

Mr Moore avers that he presented his motion under FRCvP Rule 15, or 59(e), or 60(b)(2), or 60(b)(6), to the USDC, based on newly discovered evidence that his court appointed lawyer failed to present the government's formal plea bargain offer and factual resume to him, during the pretrial/plea bargain phase of this case.

Mr Moore did not discover this fact-Sixth Amendment violation, until YEARS AFTER his original §2255 process had been completed.

Because of this fact or time of discovery, his properly filed FRCvP Rule(s) violation claim/motion, cannot be recharacterized or construed as a successive §2255. Cf MAGWOOD v PATTERSON, 561 US 320, 332 (2010), in which this Court states that:

"The Supreme Court permits a petitioner to pursue another petition without prior authorization from a court of appeals in three situations." "A petitioner may proceed when he raises a claim which was not ripe at the time of his first application. See PANETTI v QUARTERMAN, 551 US 930, 947 (2007)." Also see: FIELDING v DAVIS, EP-19-CV-106-KC (5th Cir 2019).

Mr Moore avers that the only avenue available for him to appeal the recharacterization of his FRCvP rules motion into a successive §2255, was to apply for authorization to file a second or successive §2255 in the USCA. So he did.

At the beginning of that Application, Mr Moore specifically stated :

"Mr Moore did not discover this fact until years after his original §2255 had been filed and the process completed. Therefore, THIS claim was NOT available and did NOT even exist, at the time he filed his original §2255."

"This claim should not be considered as being a second or successive §2255 or claim, and should be remanded to the district court to be adjudicated on its merits, as a Fed.R.Civ.P. (FRCvP) Rule 15, or 59(e), or 60(b)(2), or 60(b)(6), BEFORE proceeding any further in this application process." Application Memorandum of Law, pg 2.

The USCA did not address any of these, when it denied Mr Moore's request for a remand before proceeding with the application process, and/or when it denied his application. The USCA cited US v HERNANDES, 708 F 3d 680, 681 (5th Cir 2013) and WILLIAMS v TAYLOR, 602 F 3d 291, 301-04 (5th Cir 2010), stating that Mr Moore is required to file for authorization.

However, the HERNANDES case was denied because he "attacked the district court's previous resolution of a claim on the merits." His "Rule 60(b) motion clearly went to the merits of his habeas claim...that he resurrected from his original §2255." Id at 681.

Mr Moore avers that he has NOT "attacked" the USDC's "previous resolution of a claim on the merits," as the facts and evidence presented NOW did NOT exist and the USDC's previous resolution has nothing to do with THIS claim. Therefore, HERNANDES cannot be applied to this situation or to these circumstances.

The WILLIAMS case states that:

"The scope of Rule 59(e) has been described as unrestricted, where Rule 60(b) relief can be invoked only for causes SPECIFICALLY STATED **IN** the Rule." HN9.

Since Mr Moore's 59(e) motion, as presented, complies with the language IN IT, it should be "unrestricted" as to the relief sought/ granted. However, it is not being done that way, by the courts.

"To prevail on a Rule 59(e) motion, the movant MUST SATISFY AT LEAST ONE of the following: 1) an intervening change in controlling law; 2) NEW EVIDENCE NOT PREVIOUSLY AVAILABLE; 3) the need to correct a clear manifest error of law or fact or to prevent manifest injustice. IN RE BENJAMIN MOORE & CO, 318 F 3d 626, 629 (5th Cir 2002); ROSENZWEIG v ARURIX CORP, 332 F 3d 854, 863-64 (5th Cir 2003)(quoting SIMON v UNITED STATES, 891 F 2d 1154, 1159 (5th Cir 1990))." US v MALTA, No 2:12-1020 (5th Cir 2017).

Mr Moore has met or exceeded the above requirement, in order to "prevail on" his 59(e) motion, filed in the USDC or to be granted a non-successive §2255.

He has met or exceeded or complied with the plain, concise, or express language in 60(b)(2), for newly discovered evidence.

"'Newly discovered evidence' IS AN **APPROVED** ground for reconsideration under 60(b)(2)." THOMAS v GREYHOUND LINE INC, No 4:11-CV-00659-0 (5th Cir 2019); LOFTEN v DAVIS, No 7:18-CV-00025-0 (5th Cir 2019).

Mr Moore avers that he has also met, exceeded, or complied with the plain, concise, or express language in 60(b)(6), for this newly discovered evidence, by presenting "extraordinary circumstances" to the USDC, as he has shown that he received newly discovered evidence of his lawyer's failure to present the government's formal plea bargain offer to him-providing ineffective assistance of counsel and/or deficient performance, YEARS AFTER his origianl §2255 process was completed.

"Although we have described Rule 60(b)(6) as a 'grand reservoir of equitable power to do justice in a particular case when relief is not warrented by the preceeding clauses.'" Id at 642 9qouting HARRELL v DCS LEASING CORP, 951 F 2d 1453, 1458 (5th Cir 1992)), we have noted that "[r]elief under this section is granted under this section only if extraordinary circumstances are present." Id. (Quoting AM TOTALISATOR CO v FAIR GROUNDS CORP, 3 F 3d 810, 815 (5th Cir 1993) WILLIAMS, at 331. Also see: ADAMS v THALER, 679 F 3d 312, 319 (5th Cir 2012); MOCHA v THALER, 619 F 3d 387, 400 (5th Cir 2010).

FRCvP Rule 15(a) requires leave to amend be granted freely "when justice so requires." 15(a)(2). That is, Rule 15(a) provides a "strong presumption in favor of granting leave to amend." FIN ACQUISITIONS PARTNERS LP v BLACKWELL, 440 F 3d 278, 291 (5th Cir 2006), and the court MUST DO SO "unless there is a substantial reason to deny leave to amend." DUSSOUY v GULF COAST INV CORP, 660 F 2d 594, 598 (5th Cir 1981). Thus, while leave to amend is not automatic,see JONES v ROBINSON PROP GRP, 427 F 3d 987, 994 (5th Cir 2005), the federal rules policy "is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine point of pleading." DUSSOUY, at 598.

FRCvP Rule 15 authorizes Mr Moore to relate this factual Constitutional violation back to his original §2255, 15(c)(1)(B), as it relates back to the same core event(s)-ineffective assistance of counsel. MAYLE v FELIX, 545 US 644, 657 (2005). Also see: CHARLTON v US, 389 F 3d 107, 115 (1st Cir 2019); US v SAENZ, 282 F 3d 354, 355-56 (5th Cir 2002); BLANTON v US, No 3:12-CV-5077-L-BH (5th Cir 2013).

Mr Moore avers that his properly filed FRCvP claim/motion is not a successive §2255, as his Constitutional violation claim was not ripe at the time his original §2255 process was completed, as this claim did not even exist at that time.

"'A second-in-time petition does not neccessarily equate to one which is successive within the meaning of §2255.' UNITED STATES v FULTON, 780 F 3d 683, 685 (5th Cir 2015)(citing IN RE CAIN, 137 F 3d 234, 235 (5th Cir 1998)). 'instead, "a later petition is successive WHEN IT: 1) raises a claim challenging the petitioner's conviction or sentence THAT WAS OR COULD HAVE BEEN RAISED in an earlier petition; or 2) otherwise constitutes an abuse of the writ,"' Id. (Quoting CAIN, 137 F 3d at 235)." US v HOOKKIN, No 14-168 SECTION I (5th Cir 2019). Also see: CRONE v COCKRELL, 324 F 3d 833, 836 (5th Cir 2003).

Mr Moore avers that his FRCvP claim/motion is not successive, because it did NOT "raise a claim that was or could have been raised in an earlier petition," nor is it "an abuse of the writ."

"To determine whether a petition is second or successive, the court MUST analyze whether the challenge presented in a second habeas petition occurred before the petitioner filed his first habeas petitiion. PEOPLES v QUARTERMAN, 573 F 3d 225, 229 (5th Cir 2009)." COMBS v DAVIS, No 3:18-CV-03289-L(BT) (5th Cir 2019).

Mr Moore's claim did NOT occur "before the petitioner filed his first habeas petition." Therefore, it is not a successive §2255 and should be allow/authorized to be presented as filed or as a non-successive §2255.

In LEAL GARCIA v QUARTERMAN, 573 F 3d 214 (5th Cir 2009), the Fifth Circuit held that:

"We may deem a later petition based on a newly available claim non-successive and outside the confines of §2244 if the defect that it attacks did not arise until after the prior habeas proceeding." Id at 223.

"As we explained, when considering whether a later petition is non-successive, WE CONSIDER THE DEFECT that the later petition attacks AND WHEN THAT DEFECT AROSE. Texas did not deny LEAL's claim based on AVENA and the Bush Declaration until March 2007, WELL AFTER the resolution of LEAL's first habeas petition. AS A RESULT, the AVENA/Bush declaration claim WAS NOT PREVIOUSLY AVAILABLE TO HIM making LEAL's petition non-successive." "As it was non-successive, LEAL's second habeas petition did not require authorization, so it follows that THE DISTRICT COURT DID HAVE JURISDICTION." Id at 224.

Mr Moore avers that neither the USDC or the USCA performed the above stated test/inquiry, or did not "consider the defect" that he presented, which clearly "arose" AFTER the conclusion of his original §2255 process, and was "not previously available to him." Thus, making this claim/motion non-successive and the USDC had/has the jurisdiction to accept it, as filed, and rule on its merits.

In US v OROZCO-RAMIREZ, 211 F 3d 862 (5th Cir 2000), the Fifth Circuit held that his out-of-time appeal claim may not be a successive §2255, because it "occurred AFTER his initial habeas motion was adjourned and COULD NOT have been raised in that motion."

"We conclude then that this claimis not 'second or successive' under AEDPA, because 'to hold otherwise...would bar prisoner from ever obtaining federal habeas review' on this ground. STEWART, 118 S Ct at 1622. Accordingly, we reverse the district court's dismissal of OROZCO-RAMIREZ' claim of ineffective assistance of counsel during the out-of-time appeal and remand that claim for consideration on its merits. " Id at 869.

OROZCO-RAMIREZ's and Mr Moore's circumstances are EXACTLY THE SAME. BOTH of their claims occurred AFTER their original §2255 processes were completed. However, the Fifth Circuit stated OROZCO-RAMIREZ's claim was non-successive and stated that Mr Moore's claim was successive, even though the circumstances were identical.

The USCA further abused its discretion by not permitting Mr Moore to file his petition for panel rehearing-Fed.R.App.P. (FRAP) Rule 40. Attachment A.

The USCA has the authority, duty or obligation to sua sponte order a rehearing, where there is a good faith dispute as to whether Mr Moore's claim/motion is actually a successive §2255 or not.

"A party seeking rehearing or reconsideration must specifically allege any point of law or fact that this court overlooked or misapprehended. See Fed.R.App.P. 40(a)(2). The petitioner has the burden of showing that he has no other avenue of relief and that his right to relief is clear and indisputable. See MALLARD v UNITED STATES DISTRICT COURT, 490 US 296, 309...(1989)." IN RE MORALES, No 19-13140-H (CA11 2020). Also see: THOMPSON v CALDRON, 157 F 3d 918, 922 (CA9 1998); TRIESTMAN v US, 124 F 3d 361, 367 (2nd Cir 1997) (This court has the authority to order a rehearing sua sponte. It is well-established that a court of appeals is entitled to both reconsider a prior decision sua sponte); US v MELENDEZ, 60 F 3d 41, 44 (2nd Cir 1995); KRIMMELL v HOPKINS, 56 F 3d 873, 874 (8th Cir 1995).

Mr Moore avers that he has met or exceeded the above requirement, in order for the USCA to sua sponte accept/order a rehearing. The USCA did not even permit him to file his FRAP Rule 40 petition for rehearing. Attachment A.

Mr Moore avers that he has proven, by the preponderance of the evidence, that he has properly presented his Sixth Amendment violation claim under FRCvP Rule 15, or 59(e), or 60(b)(2), or 60(b)(6), and that the USDC abused its discretion and/or violated Fifth Circuit precedent when it denied his FRCvP claim/motion and recharacterized it as a successive §2255, when it clearly is not.

That the USCA abused its discretion when it failed to follow its own criteria, violated it own Circuit precedent and/or the Supreme Court's well established precedent, when it denied Mr Moore's request for remand back to the USDC as a non-successive §2255, or in denying his request for a successive §2255, or failing to sua sponte recharacterizing it as a new §2255.

Mr Moore avers that he has presented specific, non-conclusory facts, with supporting evidence and case law/precedent, that if true would entitle him to relief. Therefore, the USDC and/or the USCA has abused its/their discretion, violated its own review criteria, and/or well established Fifth Circuit and/or Supreme Court precedent, by denying his claim/motion filed pursuant to Fed R Civ P Rule 15, or 59(e), or 60(b)(2), or 60(b)(6).

Mr Moore avers that each of these rules listed, has its own set of requirements. He has complied with and/or abided by those rules, when he presented his claim/motion pursuant to those rules. The specific, plain, concise, express language, of those rules, has been met/followed.

Mr Moore avers that the above further supports the need for this Honorable Court to exercise its original jurisdiction and issue any original Habeas Corpus, or use its supervisory powers to compel the

LOWER COURT(S) TO ENTERTAIN HIS FRCVP MOTION AS FILED AND TO ADJUDICATE THE MERITS OF HIS CONSTITUTIONAL VIOLATION CLAIM.

IV
RELIEF REQUESTED

HE MOVES TO RESPECTFULLY REQUEST THAT THIS HONORABLE COURT: 1) VIEW ITS ORIGINAL JURISDICTION AND ISSUE AN ORIGINAL ~~WRIT OF~~ HABEAS CORPUS; 2) FIND THAT THE § 2255 IS "INEFFECTIVE OR INADEQUATE," IN THIS PARTICULAR CASE, AND AUTHORIZE HIM TO FILE A HABEAS CORPUS; 3) FIND THAT HIS COURT APPOINTED COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR THAT HIS PERFORMANCE WAS DEFICIENT - WHICH PREJUDICED HIS DEFENSE, AND REMAND THIS CASE BACK TO THE USDC AT THE TRIAL/PLEA BARGAIN PHASE OF THIS CASE OR TO DISMISS HIS CRIMINAL CASE WITH PREJUDICE; 4) FIND THAT HIS PROPERLY

FRCP FRCVP CLAIM/MOTION IS NOT A SUCCESSIVE § 2255, VACATE THE LOWER COURT(S) DENIAL AND REMAND IT BACK TO THE USDC FOR IT TO ADJUDICATE THE MERITS OF THIS CONSTITUTIONAL VIOLATION CLAIM.

V

CONCLUSION

FOR ANY AND ALL OF THE FOREGOING, MR MOORE PRAYS THAT THIS HONORABLE COURT WILL GRANT THE RELIEF REQUESTED, AND FOR ANY AND ALL OTHER RELIEF THIS COURT DEEMS NEEDED OR NECESSARY.

RESPECTFULLY SUBMITTED

BY: /S/ Kevin Dewayne Moore UCC-1-308/3-415

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SEALOVILLE, TEXAS [77515]

ATTACHMENT A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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May 11, 2020

#36285-177
Mr. Kevin D. Moore
FCI Seagoville
P.O. Box 9000
Seagoville, TX 75159-9000

No. 20-10121 In re: Kevin Moore
USDC No. 3:20-CV-260
USDC No. 3:07-CR-125-1

Dear Mr. Moore,

We are in receipt of your petition for panel rehearing pursuant to Fed.R.App.P. Rule 40.

28 U.S.C. Section 2244(b)(3)(E) does not permit review of the denial of your request to file a successive petition. We are taking no action on this document.

Sincerely,

LYLE W. CAYCE, Clerk
Claudia N. Farrington

By: _____
Claudia N. Farrington, Deputy Clerk
504-310-7706

RECEIVED MAY 19, 2020