NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

MARTIN L. HARRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Martin L. Harrell, Pro Se
Fed. Reg. No. 87948-020
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QUESTIONS PRESENTED FOR REVIEW

I. Whether Evidence Not Presented as the Result of Prosecutorial Misconduct Should Be Considered New Evidence under *McQuiggin*?

II. Whether a District Court May Summarily Deny for Lack of Diligence a Motion to Reopen Based on New Evidence, Where There Are Disputes of Material Fact as to Diligence?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *United States v. Martin L. Harrell,* Case No. 1:07-CR-45-01(HL), U.S. District Court for the Middle District of Georgia. Judgment entered August 29, 2006.

- *United States v. Martin L. Harrell,* No. 06-14686, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered June 6, 2007.

- *Martin L. Harrell v. United States,* Case No. 1:08-cv-90021(HL), U.S. District Court for the Middle District of Georgia. §2255 Judgment entered September 21, 2012.

- *Martin L. Harrell v. United States,* No. 12-15968, U.S. Court of Appeals for the Eleventh Circuit. Judgment denying COA on §2255 motion entered July 25, 2013.

- *Martin L. Harrell v. United States,* Case No. 1:08-cv-90021(HL), U.S. District Court for the Middle District of Georgia. Rule 60(b) Judgment entered February 21, 2020.

- *Martin L. Harrell v. United States,* No. 20-11212, U.S. Court of Appeals for the Eleventh Circuit. Judgment denying COA on Rule 60(b)motion entered June 2, 2020.

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The Order of the United States District Court for the Middle District of Georgia denying Petitioner's motion for relief from judgment and denying him a certificate of appealability is unpublished and may be found at USDC Case No. 1:07-cr-45 (February 21, 2020) (Appendix - A4).

The Order of the United States Court of Appeals for the Eleventh Circuit denying reconsideration of the denial of Petitioner's motion for certificate of appealability is unpublished and may be found at USCA Case No. 20-11212; *United States of America v. Martin L. Harrell* (September 9, 2020) (Appendix - A6).

JURISDICTION

The order denying the motion for reconsideration was issued on September 9, 2020. The order denying Petitioner's motion for certificate of appealability, signed by a judge of the Eleventh Circuit, was issued on June 2, 2020. This petition is timely filed pursuant to Sup. Ct. R. 13 and this Court's Order dated March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment, in light of the ongoing public health concerns relating to COVID-19. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall be [] be deprived of life, liberty, or property, without due process of law.

Federal Rule of Civil Procedure 60 provides, in pertinent part:

> (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (6) any other reason that justifies relief.
>
> (c) Timing and Effect of the Motion.
>
> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

STATEMENT OF THE CASE

1. The Trial & Plea Proceedings

In 2005, Martin Harrell ("Harrell" or "Mr. Harrell"), with Dexter Harrison and Charles L. Harrell ("Charles"), was indicted in a 13-count superseding indictment. In the indictment, Harrell and Charles were jointly charged with conspiring to interfere with interstate commerce by threats, intimidation, and extortion, in violation of 18 U.S.C. § 1951(a)(1) (Count 1), and interfering with interstate commerce by threats, intimidation, and extortion, in violation of 18 U.S.C. § 1951(a)(1) (Count 2). Mr. Harrell was separately charged with interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952(a) (Count 3). Mr. Harrell and Harrison were jointly charged with: (1) conspiring to commit arson and mail fraud, in violation of 18 U.S.C. § 371, 18 U.S.C. § 844(i), and 18 U.S.C. § 1341 (Count 5); (2) mail fraud, in violation of 18 U.S.C. § 1341 (Count 6); and (3) arson, in violation of 18 U.S.C. § 844(I), and 2 (Count 7). Petitioner Harrell was also separately charged in the indictment with: (1) three counts of witness tampering, in violation of 18

U.S.C. § 1512(b)(1) (Counts 8, 9, and 10); (2) an additional count of interference with interstate commerce by threats, intimidation, and extortion, in violation of 18 U.S.C. § 1951(a) (Count 11); and (3) making misleading statements, in violation of 18 U.S.C. § 1512(b)(3) (Count 12). Finally, the indictment also separately charged Charles with witness tampering, in violation of 18 U.S.C. § 1512(b)(3) (Count 4), and charged Harrison with making misleading statements, in violation of 18 U.S.C. § 1512(b)(3) (Count 13).

Thereafter, the court severed the counts in the indictment into three separate trials according to their relevance to each other. Specifically, the court ordered that Counts 4-10 and 12-13 would be tried first, and that later, separate trials would be held on Counts 1 -3, and on Count 11.

At the first trial, Harrell was convicted under Counts 5, 7, 10, and 12, but was acquitted of Counts 6, 8, and 9. Subsequently, before any additional trial was held, Mr. Harrell pled guilty to Count 1 in exchange for the dismissal of Counts 2, 3, and 11.

2. *Brady* Violations Related to the GBI File[1]

Early on, none of the Defendants were suspected of being involved in the arson, and primary suspicion was on a family of grifters who were members of the "English Travelers" operating out of the towns of Ackworth, Dallas, and Hiram, Georgia.[2] The Mullen Family was identified as members of the "English Travelers" and Harry and Tanya Mullen were residing in the motel at the time of the arson.[3] Endorsements in the file indicate that it, along with tapes, photographs, and physical evidence, was transmitted in its entirety to the United States Attorney's Office prior to trial and at some unknown time returned to the GBI minus some exhibits or evidence.[4]

The *Brady* violations stem from the government not turning over to any

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[1] During the investigation the individual investigative reports were maintained by the Georgia Bureau of Investigation (GBI) in a file which has come to be called (unofficially) "the GBI file."

[2] *DE #712-1, p. 1,* Memorialization of conversation between SAP Murphy and South Carolina SLED Senior Agent Joe Livingston, contained in GBI File and titled Exhibit #65 in that file.

[3] *See DE #712-1, pp. 2-4,* Pages 1-3 of Exhibit #2 from the GBI File.

[4] *See DE #712-1, p. 5,* GBI Face Sheet from GBI File.

defendant individual documents contained in the file which were either exculpatory for Defendants or inculpatory for the Mullen Family. Toward the later days of the trial, Mr. Harrell figured out that the file must exist and began looking for the file. He caused a Freedom of Information Act request to be filed, but he was told the file was lost.[5]

Much later, Mr. Harrell's co-defendant learned of the file from Petitioner, and employed a nationally recognized private detective, who, after the trial and all appeals of all defendants, found the file. A partial copy (with many of the exhibits in the index missing) was given to Petitioner by the co-defendant's attorney.

Although the GBI File was replete with evidence which the prosecution was required to provide, it is sufficient to note the evidence indicating that Mr. Harrell was unjustly exposed to conviction and a mandatory minimum sentence based on a falsehood, which was KNOWN to the prosecution at the time they argued for and successfully orchestrated this miscarriage of justice.

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[5] *See DE #623-1(sealed); DE #712-1, pp. 6-10, Affidavit of Alicia Shirah, with attached request.*

Specifically, the GBI file establishes that the prosecution knowingly solicited perjured testimony from Harry Mullen during trial:

> Q. And then, after you left them with your father, you went to the hospital; is that correct?
>
> A. Yes, ma'am.
>
> Q. What hospital did you go to?
>
> A. The one in Donalsonville. I don't know the name of it.
>
> Q. Yes, sir. Why did you go to the hospital?
>
> A. I was real short of breath, and it was like a pressure on my chest. I didn't know if I was having a heart attack or what, you know, but, I mean, ended up it was smoke inhalation is what it was.
>
> Q. And from that smoke inhalation, do you still suffer today?
>
> [DE #418, p. 17].

The prosecution was aware that this testimony was false. The GBI File contained SAP Murphy's interview of Dr. Swearingain, wherein Swearingain described Mullen's examination on the night of the incident and the fact that

he was NOT suffering from smoke inhalation in any demonstrable or medically verifiable fashion.[6]

> On Thursday, January 17, 2002, at approximately 2:40 p.m., SAP MIKE MURPHY and State Fire Marshall Investigator RONNIE DOBBINS conducted an interview with MR. DAVID SWEARINGAIN, M.D. at his office in Donalsonville, Georgia. The interview was in reference to the physicians' examination of HARRY MULLEN at the hospital emergency room on the date in question.
>
> DR. SWEARINGAIN stated MULLEN had checked into the emergency room with complaints of smoke inhalation. He advised that MULLEN stated he had driven his kids to his mother's house and began experiencing tingling in his arm, as well as chest pain.
>
> ***DR. SWEARINGAIN advised that MULLEN's EKG was normal with no hypertension noted. He stated that MULLEN was experiencing anxiety and fast breathing. DR. SWEARINGAIN indicated that MULLEN was not wheezing and his chest x-ray did not indicate anything abnormal. He stated that MULLEN's lungs were free of any problems. He stated the blood gases were not remarkable other than MULLEN experiencing anxiety and breathing***

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[6] The prosecution also possessed the statement of Joy McLaughlin, the Collections Manager of the Donalsonville Hospital who stated that Harry Mullen's behavior on the night of the incident was consistent with the behavior of one who anticipates a possible law suit. *See DE #712-1, p. 13,* Exhibit #51 from the GBI file.

fast.

> DR. SWEARINGAIN advised that he admitted MULLEN to the hospital overnight as a precautionary measure. This concluded the interview with DR. SWEARINGAIN.

See DE #712-1, p. 11-12, Exhibit #53 from GBI File.

This reality did not stop the prosecution from obtaining Mr. Harrell's conviction and the imposition of a 7-year mandatory minimum sentence based on Mullen's perjury.[7]

3. *Brady* Violations Related to the BATF File

During AUSA Crane's opening statement he introduced the prosecution's theory of the case, a central pillar of which was that the fuel used by the Ramada arsonist was not widely available, but Mr. Harrell had access to that fuel and indeed "every type of item recovered at the Ramada was also found at Marty Harrell's house or barn.[8]" Crane coupled this

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[7] *See DE #503, p. 16, n.3* ("No one was killed, but one guest, Harry Mullen, suffered smoke inhalation."[referring to footnote 3 which reads]"The injury to Mullen caused the mandatory minimum seven year provision to apply, 18 U.S.C. § 844(I).").

[8] *DE #417, p. 47.*

statement with what we now know to be an outright falsehood, that despite Mr. Harrell giving consent for law enforcement to collect samples from his diesel fuel tanks,"the case cannot be resolved by comparing diesel samples. Diesel is too similar, and based on the conditions, you can't match it up with DNA or blood typing. That will not resolve the issue.[9]"

During the trial of this matter, the prosecution offered the expert testimony of BATF chemist Allah Najam.[10] According to Najam, while it may be technically possible to compare red diesel fuel from different sources, this is not a test which is done at his lab, and in this case, because the diesel was mixed with gasoline, no such testing was possible.[11] On re-direct AUSA Crane drove this point home.

> Q. Turning your attention back to the issue of what happens when you mix gasoline and diesel from a chemical composition point of view --
>
> A. And you have a mixture of two ignitable liquids.

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9 *Id., p. 48.*

10 *DE #137; #420, pp. 13-42.*

11 *DE #420, pp. 27-29; 32-33; 35-36; 41-42.*

> Q. All right. And does its chemical composition change when the two are mixed together?
>
> A. Yes, sir. Because the chemical composition of gasoline is different than the chemical composition of diesel, so when you're mixing it together, you're changing the composition.
>
> Q. All right. Is there a machine or a device or a test that if we pour red dye diesel and gasoline together in a bucket, mix them up, that can then separate them out?
>
> *DE #420, pp. 41-42.*

This left the jury with the false impression that it was impossible to exclude Mr. Harrell's diesel fuel tanks as the source for the fuel used by the Ramada arsonist. To the contrary, after numerous FOIA requests and ultimately a FOIA suit against the BATF resulted in the release of Najam's test results,[12] it appears that Mr. Harrell's tanks could be excluded as the source

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[12] *See Plaintiff's Consent to Dismissal, Docket Entry #7 in Rudisill v. U.S. Dep't of Justice, BATF*, Case #1:17-cv-1364-KBJ (D.D.C.)("In October 2017, roughly a year and a half after making a proper written request for records under FOIA/PA, Mr. Rudisill finally received the records to which he was statutorily entitled. Although the delay in disclosure, and necessity of bringing this suit to compel production consistent with the FOIA's mandate are troubling, there appears to be nothing further to be gained through this litigation. – [footnote 1] – Mr. Rudisill filed this action without the benefit or expense of counsel, so recovery of costs – potentially arguable as the suit appears to

of the fuel used by the Ramada arsonist.[13] Specifically, review of the BATF testing results and Najam's testimony resulted in the preparation of a Rule 26 expert report by Douglas Byron, which concludes that Mr. Harrell's diesel tanks can be excluded as the source of the fuel used by the Ramada arsonist.[14]

> 5. Facts Considered:
>
> Thirteen items submitted in the case, items 1-5 and items 7-14, were reported as containing a mixture of gasoline and a heavy petroleum distillate. Two of the samples, items 20 and 21, collected from Mr. Harrell's farm did not contain either gasoline or a heavy petroleum distillate and could not have been the source of the profiles seen in the fire debris data. This information was discussed at trial. The ATF chemist testified that the data generated in the case did not allow for the exclusion of any source locations, however, there was no mention of a comparison of item 6 to items 25a and 25b. Item 6 was a fire debris sample recovered from the hotel and items 25a and 25b originated from the Harrell farm.

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have served as the catalyst for disclosure – would be limited to the filing fee and other negligible expenses.– Mr. Rudisill therefore consents to dismissal of this case and does not seek costs.").

[13] *DE #712-1, pp. 14-21, Rule 26 Expert Report of Douglas Byron, dated 6/11/2018; DE #712-1, pp. 22-89, Excerpt of BATF Testing Results.*

[14] *Id.*

* * *

Items 6, 25a and 25b are all classified as heavy petroleum distillates and were reported correctly. Item 6, however, is missing naphthalene, a chemical found in products refined from crude oil and seen in both gasoline and traditional heavy petroleum distillates such as diesel fuels. When analyzed using a mass spectrometer this chemical produces a dominant 128 ion. While missing in item 6, naphthalene is present in samples 25a and 25b originating from the Harrell farm. ***This is important to this case because it indicates the diesel fuel from the Harrell farm may be excluded as the source of diesel or heavy petroleum distillate identified in debris recovered from the hotel. The absence of this ion was noted by the ATF chemist during the original analysis, however, Mr. Najam was not asked during testimony about his notes or the missing 128 ion.*** There is no known post manufacturing process scientifically proven to account for the missing ion. ***This indicates the lack of the 128 ion from item 6 is due to a manufacturing process different than the process used to manufacture the diesel samples recovered from the Harrell farm.***

6. Conclusions:

Considering the facts and observations made available, it is my professional opinion that the diesel fuel (heavy petroleum distillate) present in sample 6 is not from the same source as the samples obtained from the Harrell farm (items 25a and 25b).

DE #712-1, pp. 15-16.

4. Sentencing & Direct Appeal

Mr. Harrell was sentenced to a total of 240 months on both the arson and Hobbs Act convictions and was ordered to pay restitution in the amount of $319,145.10.[15] On August 29, 2006, Mr. Harrell filed an appeal, raising as error the order for restitution,[16] which was upheld by the Eleventh Circuit in an Order filed July 10, 2007.[17]

5. Proceedings Under 28 U.S.C. §2255

On August 11, 2008, Mr. Harrell filed a *pro se* motion to vacate under §2255, with supporting brief in this court.[18] Mr. Harrell's motion to vacate sought relief on the grounds that he had been deprived of the effective assistance of counsel in the trial court and on direct appeal. The proceedings on Mr. Harrell's motion to vacate were expansive and contentious, involving

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15 *DE #358.*

16 *DE #366.*

17 *DE #444.*

18 *DE #465.*

the representation of Mr. Harrell by multiple attorneys, some of whom were uncomfortable representing a petitioner with such strident views on how his case should be litigated.

As relevant to this request for COA, the issues raised in the underlying Rule 60 motion, and the specific defects in the proceeding addressed in both, Mr. Harrell filed a *pro se* motion to amend on August 18, 2011.[19] That motion described "*Brady* violations (GBI evidence), suborned perjury of witnesses and agents during the . . . trial . . . [and] Henry Mullen and the hidden GBI evidence.[20]" Mr. Harrell sought permission to amend his pending motion to vacate to include:

> Even though Petitioner at the 2009 hearing brought up the hidden GBI evidence, Petitioner did not have any absolute proof that such evidence existed. The government in fact has admitted Petitioner also brought up the GBI evidence back on April 12, 2006, on page 2 in Government's Objections To Petitioner's Answer To The Courts April 14, 2011 Order.
>
> Petitioner now has irrefutable GBI documentation

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19 *DE #562.*

20 *Id., pp. 2-3.*

that shows this evidence in fact existed and was not turned over intentionally. This evidence will show Dennis Weaver (governments main witness) made clandestine tapes of Marty and Julie Harrell and lied about it during the trial. It is important to note GBI Agent Mike Murphy was at the prosecution table during the trial.

* * *

Contained also in the hidden GBI evidence are pages of evidence showing Harry Mullen and his families involvement in fraudulent activities. Mr. Mullen was a suspect in the arson who had motive, opportunity and was at the motel the night of the fire. Mr. Mullen behaved suspiciously before and after the fire and as such, became a suspect. This evidence would have been very important at trial for the defense to offer an alternate theory. In fact, there is much more circumstantial evidence against Mr. Mullen than Petitioner. The evidence was withheld to keep the defense from being able to use it. Agent Walshingham or Agent Murphy could once again authenticate this evidence. This evidence would take minimal time to offer and the probative value is high.

DE #562, pp. 3-4

On October 7, 2011, the Honorable Thomas Q. Langstaff, United States Magistrate Judge found that "[t]o the extent that the Petitioner seeks to add

new claims to his §2255 petition, the Court finds that these claims are untimely.[21]" This was based on the Magistrate Judge's findings that Mr. Harrell had failed to establish that the proposed amended claims either related back to the timely submitted claims or were independently timely.[22]

On March 30, 2012, Mr. Harrell's counsel filed a motion to amend with supporting memorandum.[23] As relevant to this application for COA, in that memorandum, Mr. Harrell sought permission to amend his pending motion to vacate to include a claim that:

> The United States, in violation of the principles established in *Brady v. Maryland*, 373 US 83 (1963) failed to deliver exculpatory material, falsely denied the existence of material specifically requested by Petitioner, and failed and refused to deliver material requested by Petitioner, to Petitioner's detriment at trial and appeal. Petitioner seeks to add this claim on the basis of 28 USC § 2255(f)(2), 28 USC § 2255(f)(4), and equitable tolling.
>
> *DE # #609, p. 2.*

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21 *DE #578, p.1.*

22 *Id., pp. 1-2.*

23 *DE #609.*

On September 21, 2012, the Honorable Hugh Lawson, Senior United States District Judge refused to consider Mr. Harrell's *pro se* motion to amend and denied his counseled motion to amend on grounds that the motion was untimely.[24] Subsequently, Mr. Harrell sought COA which was denied.[25]

6. The Instant Rule 60(b) Proceedings in the District Court

On August 23, 2018, Mr. Harrell filed the *pro se* motion for relief from the Judgment denying his motion under 28 U.S.C. §2255, pursuant to Federal Rule of Civil Procedure 60(b)(6), with supporting exhibits, which is the subject of this petition. [DE# 712; #712-1]. Mr. Harrell's Rule 60 motion sought relief based on the district court's failure to consider Mr. Harrell's amended §2255 claims of prosecutorial misconduct – based on then newly discovered evidence that the prosecution had failed to turn over substantial exculpatory evidence which they alone enjoyed access to – timely, based on his actual

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[24] *DE #655, pp. 3-5 & n.1.*

[25] *DE #667 & #672.*

innocence, despite precedent – *United States v. Montano*[26] – indicating that actual innocence can overcome the habeas statute of limitations. Instead, the district court denied Mr Harrell's *pro se* motion to amend[27] and his subsequent counseled motion to amend,[28] both on grounds of untimeliness.[29] Mr. Harrell argued that these procedural errors constituted the type of defect in the integrity of the §2255 proceeding which rises to the level of an "extraordinary circumstance" under Rule 60(b)(6). *See Gonzalez v. Crosby*, 545 U.S. 524, 532 nn. 4-5, 125 S. Ct. 2641 (2005).

Mr. Harrell further argued that the district court's erroneous untimeliness ruling, in tandem with the equities mandating relief, including the manifest miscarriage of justice Mr. Harrell is currently suffering – as he

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[26] 398 F.3d 1276, 1284 (11th Cir. 2005) ("Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by Appellant's failure timely to file his § 2255 motion."); *See also McQuiggin v. Perkins*, 569 U.S. 383 (2013) (holding that actual innocence can overcome the habeas statute of limitations).

[27] *DE #562 & #578.*

[28] *DE #609.*

[29] *DE #578 & #655.*

presents a strong showing of actual innocence, and indeed that prosecutorial misconduct appears to have led to the conviction of an innocent – and Mr. Harrell's reasonable diligence in seeking the withheld exculpatory evidence, only to be consistently misled by the prosecution and delayed by the actions of the law enforcement community, fundamental fairness and justice required that the judgment denying Mr. Harrell's §2255 motion be set aside. [DE #712]. Additionally, Mr. Harrell noted that the lack of prejudice to the United States also militated in favor of a grant of relief from the judgment denying Mr. Harrell's §2255 motion and for reopening the proceedings upon the same. *Id.*

On May 8, 2019, the magistrate judge issued his Order & Recommendation ("O & R"), that Mr. Harrell's Rule 60(b) motion be denied because "[t]he Court cannot find Petitioner's nearly six-year delay reasonable under Rule 60(b). Petitioner provides no justification for his delay, and does not raise any new facts that would require the Court to alter its earlier denial of his motions to amend." [DE #716, p. 6]. Mr. Harrell filed timely objections to the O & R, including:

Mr. Harrell respectfully objects to the O & R's reliance on its finding that he "provides no justification for his delay, and does not raise any new facts that would require the Court to alter its earlier denial of his motions to amend," – [DE #716, p. 6] – as a basis to conclude that the "Court cannot find Petitioner's nearly six-year delay reasonable under Rule 60(b)." *Id.* Courts agree that "[w]hat constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties." *Lemoge v. United States*, 587 F.3d 1188, 1196 (9th Cir. 2009).

This objection is based on the reality that Mr. Harrell: 1) provided a more than adequate explanation for the delay – including the need to have the BATF sued for evidence to support the underlying Napue and Brady claims, and then have those records examined by a renowned expert who concluded that Mr. Harrell's diesel tanks can be excluded as the source of the fuel used in the Ramada arson, raising a creditable claim of actual innocence [DE # 712, p. 13, nn. 16-17, pp. 25-31; #712-1, pp. 14-89] –; and 2) showed that he was suffering a substantial injustice, that the equities favored granting relief, and that the relief sought would not prejudice the prosecution. [DE #712, pp. 32]. Additionally, Mr. Harrell objects on grounds that the conclusion is contrary to the public interest in: 1) correcting unjust convictions; 2) vindicating colorable showings that actually innocent individuals have

> been convicted as a result of prosecutorial misconduct, including knowing Brady and Napue violations, by prosecutors who remain in office and appear to be engaged in an ongoing course of conduct intended to cover up such misconduct, and learning the truth of the offense for which Mr. Harrell was wrongly convicted.
>
> This portion of the O & R should be rejected, the judgment denying Mr. Harrell's §2255 motion should be set aside and proceedings upon the same reopened with an evidentiary hearing promptly scheduled.
>
> *DE #718, pp. 3-5.*

On February 21, 2020, the district court filed its Order [DE #727], denying in all respects Mr. Harrell's then pending Motion for Relief from the Judgment denying his motion under 28 U.S.C. §2255, under Federal Rule of Civil Procedure 60(b)(6). This order also denied Mr. Harrell a certificate of appealability. *Id.*

On March 27, 2020, Mr. Harrell timely filed his notice of appeal. [DE #728].

7. The Application for COA to the Eleventh Circuit and Motion for Reconsideration from the Denial Thereof

Mr. Harrell sought COA from the Eleventh Circuit on the following question:

> Did the lower court err or alternatively abuse its discretion by adopting, over Mr. Harrell's objection, the R & R's finding that he "provides no justification for his delay, and does not raise any new facts that would require the Court to alter its earlier denial of his motions to amend," – [DE #716, p. 6] – as a basis to conclude that the "Court cannot find Petitioner's nearly six-year delay reasonable under Rule 60(b)," where: A) courts agree that "[w]hat constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties." Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009); B) the record demonstrated that Mr. Harrell: 1) provided a more than adequate explanation for the delay – including the need to have the BATF sued for evidence to support the underlying Napue and Brady claims, and then have those records examined by a renowned expert who concluded that Mr. Harrell's diesel tanks can be excluded as the source of the fuel used in the Ramada arson, raising a creditable claim of actual innocence [DE # 712, p. 13, nn. 16-17, pp. 25-31; #712-1, pp. 14-89] –; and 2) showed that he was

> suffering a substantial injustice, that the equities favored granting relief, and that the relief sought would not prejudice the prosecution. [DE #712, pp. 32]; and C) the ruling is contrary to the public interest in: 1) correcting unjust convictions; and 2) vindicating colorable showings that actually innocent individuals have been convicted as a result of prosecutorial misconduct, including knowing Brady and Napue violations, by prosecutors who remain in office and appear to be engaged in an ongoing course of conduct intended to cover up such misconduct, and learning the truth of the offense for which Mr. Harrell was wrongly convicted?

In his application for COA, Mr. Harrell explained that his Rule 60(b) motion challenged the district court's failure to consider his amended §2255 claims of prosecutorial misconduct – based on then newly discovered evidence that the prosecution had failed to turn over substantial exculpatory evidence which they alone enjoyed access to – timely, based on his actual innocence, despite precedent – *United States v. Montano*[30] – indicating that actual innocence can overcome the habeas statute of limitations. Instead, Harrell

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[30] 398 F.3d 1276, 1284 (11th Cir. 2005) ("Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by Appellant's failure timely to file his § 2255 motion."); *See also McQuiggin v. Perkins*, 569 U.S. 383 (2013) (holding that actual innocence can overcome the habeas statute of limitations).

explained ,the district court denied his *pro se* motion to amend[31] and his subsequent counseled motion to amend,[32] both on grounds of untimeliness.[33] Mr. Harrell argued that these procedural errors constituted the type of defect in the integrity of the §2255 proceeding which rose to the level of an "extraordinary circumstance" under Rule 60(b)(6). *See Gonzalez v. Crosby*, 545 U.S. 524, 532 nn. 4-5, 125 S. Ct. 2641 (2005).

Mr. Harrell further argued that the district court's erroneous untimeliness ruling, in tandem with the equities mandating relief, including the manifest miscarriage of justice Mr. Harrell is currently suffering – as he presents a strong showing of actual innocence, and indeed that prosecutorial misconduct appears to have led to the conviction of an innocent – and Mr. Harrell's reasonable diligence in seeking the withheld exculpatory evidence, only to be consistently misled by the prosecution and delayed by the actions of the law enforcement community, fundamental fairness and justice require

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31 *DE #562 & #578.*

32 *DE #609.*

33 *DE #578 & #655.*

that the judgment denying Mr. Harrell's §2255 motion be set aside. [DE #712]. Additionally, Mr. Harrell noted that the lack of prejudice to the United States also militated in favor of a grant of relief from the judgment denying Mr. Harrell's §2255 motion and for reopening the proceedings upon the same. *Id.*

Mr. Harrell further explained that the district court's denial adopted the magistrate judge's recommendation that his Rule 60(b) motion be denied because "the court cannot find Petitioner's nearly six-year delay reasonable under Rule 60(b)." [DE #716, p. 6; DE # 727]. Mr. Harrell argued that this decision is at least debatable as courts agree that "[w]hat constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties,"[34] and the record established that Mr. Harrell: 1) provided a more than adequate explanation for the delay – including the need to have the BATF sued for evidence to support the underlying *Napue* and *Brady* claims,

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[34] *Lemoge v. United States*, 587 F.3d 1188, 1196 (9th Cir. 2009).

and then have those records examined by a renowned expert who concluded that Mr. Harrell's diesel tanks can be excluded as the source of the fuel used in the Ramada arson, raising a creditable claim of actual innocence *[DE # 712, p. 13, nn. 16-17, pp. 25-31; #712-1, pp. 14-89]* –; and 2) showed that he was suffering a substantial injustice, that the equities favored granting relief, and that the relief sought would not prejudice the prosecution. *[DE #712, pp. 32].* Additionally, Mr. Harrell argued that the conclusion was contrary to the public interest in: 1) correcting unjust convictions; 2) vindicating colorable showings that actually innocent individuals have been convicted as a result of prosecutorial misconduct, including knowing *Brady* and *Napue* violations, by prosecutors who remain in office and appear to be engaged in an ongoing course of conduct intended to cover up such misconduct, and learning the truth of the offenses for which Mr. Harrell was wrongly convicted. Finally, Mr. Harrell argued that this issue obtains the required constitutional dimension by reference to the issues raised and attempted to be raised in Mr. Harrell's amended §2255 motion, as summarized in *§I.D.5, supra.*

The Eleventh Circuit denied Mr. Harrell's application for COA, stating in pertinent part:

> Harrell filed his Rule 60(b)(6) motion almost six years after the district court entered the judgment denying his § 2255 motion, and he did not present any reason for this delay. *Id.* Moreover, Harrell's Rule 60(b)(6) motion did not present "exceptional circumstances" that would justify relief from the district court's earlier judgment, but instead sought to relitigate his earlier motion to amend his § 2255 motion, which the district court had denied as untimely. *Griffin*, 722 F.2d at 680. Accordingly, Harrell's motion for a COA is DENIED because he has not made the requisite showing, and his IFP motion is DENIED AS MOOT.
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> *App. A-3.*

Mr. Harrell filed a timely motion for reconsideration arguing that the language of the order demonstrated that the Circuit Judge who issued the order had misapprehended that factual record and Mr. Harrell's showing of "exceptional circumstances" and had apparently adopted the district court's misconstruction of the record and that showing. Mr. Harrell argued that he had established that prosecutorial misconduct – in suppressing the exculpatory scientific evidence which demonstrated that, contrary to the

testimony offered by the prosecution at Mr. Harrell's trial, Mr. Harrell's diesel fuel tanks could not have been the source of the fuel used in the arson which Mr. Harrell was convicted of committing, See DE #712, p. 13, nn. 16-17, pp. 25-31; #712-1, pp. 14-89 – was the reason for his six year delay in submitting the motion for relief from judgment. He further argued that the erroneous nature of the lower court's initial refusal to hear Mr. Harrell's amended claim, his truly compelling showing of actual innocence, and the reality that he is clearly suffering a monumental miscarriage of justice, as established by Mr. Harrell in his Rule 60(b) motion and supporting papers represent "exceptional circumstances" warranting the relief requested, and the Eleventh Circuit Judge's misapprehension of these realities warranted reconsideration.

On September 9, 2020, a two-judge panel denied reconsideration.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER EVIDENCE NOT PRESENTED AS THE RESULT OF PROSECUTORIAL MISCONDUCT SHOULD BE CONSIDERED NEW EVIDENCE UNDER McQUIGGIN.

The lower courts here asserted that Mr. Harrell failed to "raise any new facts that would require the Court to alter its earlier denial of his motions to amend."[35] This is simply irreconcilable with this Court's holdings in *Schlup* and *McQuiggin,* in light of the quantity and quality of the exculpatory scientific evidence which Mr. Harrell submitted in support of his motion for relief from judgment. The only basis for the lower courts' cursory dismissal of the new scientific evidence presented by Mr. Harrell is their mistaken view that evidence which could have been presented earlier, but was withheld due to prosecutorial misconduct, does not constitute "new evidence" under *McQuiggin*. When the Eleventh Circuit adopted the district court's analysis that Mr. Harrell had not presented any new evidence that ruling deepened and hardened an existing circuit split.

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[35] DE #716, p. 6; adopted by DE #727; App. A-2.

In *Reeves v. Fayette, SCI*, 897 F.3d 154 (3d Cir. 2018), the Third Circuit recognized that evidence which may have been technically available at the time of trial, but was not presented due to a constitutional violation (in that case ineffective assistance of counsel – in this case prosecutorial misconduct) is "new evidence" under *McQuiggin*. Their rationale is consistent with this Court's holdings, aligned with the best interests of society, acts to vindicate fundamental fairness, and is instructive:

> The approach we adopt is consistent with *Schlup* and the rulings of many of our sister circuits. Moreover, it recognizes that "the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup*, 513 U.S. at 325, 115 S.Ct. 851. Indeed, "the conviction of an innocent person [is] perhaps the most grievous mistake our judicial system can commit," and thus, the contours of the actual innocence gateway must be determined with consideration for correcting "such an affront to liberty." *Satterfield v. Dist. Att'y Phila.*, 872 F.3d 152, 154 (3d Cir. 2017).
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> *Reeves v. Fayette, SCI*, 897 F.3d 154, 164 (3d Cir. 2018), as amended (July 25, 2018), cert. denied sub nom. *State Corr. Inst. at Fayette v. Reeves*, 139 S. Ct. 2713, 204 L. Ed. 2d 1123 (2019).

The decision below is irreconcilable with *Reeves*. But the split did not begin when the Eleventh Circuit issued its order denying Mr. Harrell COA. Rather, it has deepened and hardened ever since the lower courts began considering innocence claims under *Schlup* and *McQuiggin*. *See generally Reeves*, 897 F.3d at 161-62 & n.6. The following courts of appeals agree with the Third Circuit that facts not developed due to constitutional violations count as new: *Gomez v. Jaimet*, 350 F.3d 673, 689-90 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003). The Eighth Circuit agrees with the Eleventh Circuit that evidence counts as "new" only if it was "not available at trial." *Amrine v. Bowersox*, 238 F.3d 1023, 1018 (8th Cir. 2001). Three courts of appeals have suggested that newly presented evidence can count as new. *See Riva v. Ficco*, 803 F.3d 77, 84 (1st Cir. 2015); *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012); *Rivas v. Fischer*, 687 F.3d 514, 543, 546-47 (2d Cir. 2012). The Fifth Circuit has not taken a clear position, *see Fratta v. Davis*, 889 F.3d 225, 232 (5th Cir. 2018), but has suggested that evidence is not "new" if it could have been discovered by professionally reasonable counsel. *Id.* at 232

n.21.

Thus, there is a live, well-developed conflict among the circuits on this important and recurring question, one that is appropriate for this Court's certiorari review. Sup. Ct. R. 10(a). This Court should grant certiorari to resolve the conflict.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A DISTRICT COURT MAY SUMMARILY DENY FOR LACK OF DILIGENCE A MOTION TO REOPEN BASED ON NEW EVIDENCE, WHERE THERE ARE DISPUTES OF MATERIAL FACT AS TO DILIGENCE.

Here, there were disputed issues of material fact as to whether Mr. Harrell had been diligent in obtaining the exculpatory scientific evidence at the heart of his motion to reopen. Despite the existence of conflicting evidence, the district court and the Eleventh Circuit decided the issue adversely to Mr. Harrell on a cold record without holding a hearing, taking evidence, or observing the demeanor of the witnesses. This Court should grant certiorari to resolve whether, when confronted by a claim of innocence, a lower court may summarily resolve such factual disputes without taking

evidence.

When a habeas judgment is rendered on procedural grounds, the petitioner may seek to reopen the judgment on a showing of extraordinary circumstances. *Fed. R. Civ. P. 60(b)(6); Buck*, 137 S. Ct. at 778; *Gonzalez*, 545 U.S. at 535. New, reliable evidence of innocence can present such extraordinary circumstances, *Satterfield v. Dist. Att'y Philadelphia*, 872 F.3d 152, 162-63 (3d Cir. 2017), and also serves to support equitable tolling of any statute of limitations. *McQuiggin*, 569 U.S. at 386. Under *McQuiggin*, any lack of diligence on the petitioner's part is considered "as a factor in determining whether actual innocence has been reliably shown." *Id.* at 387.

Diligence is a familiar concept in habeas proceedings. See, e.g., 28 U.S.C. § 2244(d)(1)(d); 28 U.S.C. § 2255(f)(4). This Court and the lower federal courts have made clear that diligence means "reasonable diligence," not "maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citations and quotation marks omitted). Diligence, like the other extraordinary circumstances that can justify reopening a judgment and equitable tolling, is

an "'equitable, often fact intensive' inquiry." *Id.* at 654 (quoting *Gonzalez*, 545 U.S. at 540 (Stevens, J., dissenting)). Accordingly, lower courts have previously held that when a petitioner has "alleged facts regarding his diligence that would entitle him to relief," *Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002), the district court abuses its discretion if it fails to hold an evidentiary hearing. *Id.; accord Aragon-Llanos v. United States*, 556 F. App'x 826, 829-30 (11th Cir. 2014) (unpublished).

Here, however, the lower courts never paused to consider the facts in any careful and considered fashion, much less hold a hearing with respect to diligence. Instead, they reviewed what was essentially a cold record. They found a lack of diligence without allowing for any development of the record. This was a serious error. The lower courts did not engage in a "fact-intensive inquiry," but in a rush to judgment, asserting that Mr. Harrell provide no reason for his six year delay in submitting the motion to reopen. Inasmuch as Mr. Harrell alleges that prosecutorial misconduct was the reason for the delay, he should not be made to bear the consequences of the success of the

prosecution's perfidy. *See Reeves v. Fayette SCI*, 897 F.3d 154, 164 (3d Cir. 2018) (where a constitutional violation delays the discovery or presentation "to the fact-finder [of] the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence for purposes of the *Schlup* actual innocence gateway.").

The record below presents dramatically conflicting allegations, and inadequately founded assumptions, of material fact respecting diligence, which the lower courts could not properly resolve without a hearing. To the extent that there are legitimate doubts about the reliability of Mr. Harrell's exculpatory scientific evidence, evidentiary development should be ordered, including discovery and further expert review, so that Mr. Harrell's new evidence can be corroborated or disproved.

McQuiggin makes clear that diligence is a relevant consideration when a petitioner seeks to reopen judgment on a time-barred claim. *Holland* makes clear that the inquiry into diligence is an equitable, fact-intensive inquiry. But this Court has not addressed whether or in what circumstances factual

development of an innocence gateway claim is required. This Court should grant certiorari to decide that issue.

CONCLUSION

This Honorable Court should grant the petition for writ of certiorari.

Respectfully submitted this 23rd day of September, 2020.

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