No. 20-6266

IN THE

SUPREME COURT OF THE UNITED STATES

---ORIGINAL

MARIO SALAS - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARIO SALAS REG No. 49988-053
MOSHANNON VALLEY CORRECTIONAL FACILITY
Unit D-5 / 28L
555 GEO DRIVE PHILIPSBURG, PA 16866
TELEPHONE : N/A

QUESTION(S) PRESENTED

1. Question in reviewing the merits of Rule 60(b)(6). Motion is whether the unique fact of Petitioner's case reveal extraordinary circumstances justifying relief from the Habeas Judgment. The answer to this question is "Yes"

2. Why if Appeal Courts have an inherent power to correct earlier error, if it becomes apparent and avoid injustice.

3. In this instant case, does Buck, Tharpe and Apprendi, Haymond require this Court to Remand with instruction to allow the Rule 60(b) as timely filed.

LIST OF PARTIES

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

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 23, 2020.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 21, 2020, and a copy of the order denying rehearing appears at Appendix _____.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including COVID-19 (date) on March 19, 2020 (date) in Application No. 589 A US.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was N/A. A copy of that decision appears at Appendix N/A.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1- U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the sameoffence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property to be taken for public use, without just compensastion.

2- U.S. Constitutional Amendment VI

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.

3- Title 21 U.S.C. § 841

4- Title 21 U.S.C. § 841(a)

5- Title 21 U.S.C. § 841(b)(1)(A)

6- Title 21 U.S.C. § 841(b)(1)(C)

7- Title 21 U.S.C. § 841(b)(1)(b)

8- Title 28 U.S.C. § 2255

9- Title 28 U.S.C. § 2253(c)(2)(2000)

STATEMENT OF THE CASE

CRIMINAL PROCEEDING: In June 1998, a Grand Jury indicted petitioner for conspiracy to distribute heroin. The indictment did not specify the quantity of heroin allegedly distributed. The case went to trial and a jury convicted the Petitioner. The Jury returned a general verdict; it made no finding on the quantity of heroin involved.

At sentencing the Petitioner's attorney objected to the drug quantity used to determine the Petitioner's sentence as an unconstitutional due process violation.

The District Court made a finding as to drug quantity and, based on the associated Sentencing Guidelines, sentenced the Petitioner to life in prison.

Direct Appeal - The Petitioner's attorney timely noted an appeal. On April 17, 2000, the Fourth Circuit affirmed the Petitioner's conviction. United States v. Salas, 211 F.3d 1266 (4th Cir Apr. 17, 2000) (unpublished). The Fourth Circuit issued judgment the same day.

On June 26, 2000, the Supreme Court decided Apprend v. New Jersey, 530 U.S. 466 (2000). Apprendi help that any fact that increase the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.

On July 17, 2000 the Petitioner's time expired for filing a petition for Certiorari contesting the Fourth Circuit's affirmation of his conviction. See Supreme Court Rule 13, 30. No petition for Certiorari wes filed. Lack of communication from attorney. After his sentencing the petitioner had trouble getting information from his attorney, who abandoned him.

Petitoner writ to District Court, even on the question of whether his attorney filed an appeal.

On April 17, 2000, the same day the Fourth Circuit affirmed his conviction, the District Court granted petitioner's pro se motion to compel communication from his attorney and direct the petitoner's attorney to communicate with him about the appeal.

In July 2000, acting on another pro se motion, the District Court directed petitioner's attorney to file a letter detailing how he had complied with the April order. The District Court has no record of a filing in response to this directive.

In a later proceeding in which petitoner raise this last of communication, petitoner's attorney stated on record that he "considered his representation of petitioner to have been completed at the conclusion of his appeal to the [Fourth Circuit]. In addition, the petitioner's attorney stated that he "has no independent recollection of petitioner requesting that this case be appealed to the U.S. Supreme Court, either verbally or in writing, (although counsel concedes he does not recall advising petitioner, in writing, of his right to file a writ with U.S. Supreme Court.)

Habeas Proceeding - District Court. In January 2001, Petitioner filed a habeas petition alleging that his sentence is unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). In his habeas petition, Petitioner highlighted that his attorney had not petitioned for Certiorari, and had made this decision without petitioner's consent. Petitioner had 90 days in which to file a writ of Certiorari with the United States Supreme Court, but his counsel (albeit without petitioner's consent) opted not to

file the writ.

In its response, the United States argued in part that the Apprendi claim was "barred on collateral review because Apprendi was not a 'watershed' decision as the Supreme Court has defined that term. The petitioner replied pro se, arguing that the traditional retroactivity analysis did not apply because his conviction was not final when the Supreme Court decided Apprendi: "[T]he government completely ignored the fact that petitioner's conviction had not become final prior to the decision of Apprendi"

The petitioner reiterated this argument in a supplemental filing: "As to retroactivity of Apprendi, the date show that petitioner's conviction became final only after the Apprendi ruling came down. Therefore, retroactivity plays no part here:

In January 2002, the District dismissed the Apprendi claim based on then - existing Fourth Circuit precedent on when a conviction becomes final (the "Habeas Judgment")

> Apprendi "does not apply retroactively to cases on collateral review" See United States v. Sanders, 247 F.3d 139, 146 (4th Cir. 2001). Consequently, Mr. Salas cannot make a valid argument under Apprendi if the judgment against him became final prior to the Supreme Court's June 26, 2000 holding in that case. The Fourth Circuit has adopted the position that, when a defendant appeals to the Fourth Circuit but does not file a petition for a writ of Certiorari with the United States Supreme Court, his or her conviction become final on the date of the conviction is affirmed by the Fourth Circuit. See United States v. Torres 211 F.3d 836, 838-39 (4th Cir. 2000)

Petitioner moved for reconsideration and argued that his conviction became final when the time for petitioning for Certiorari elapsed - not when the Fourth Circuit affirmed his conviction:

> The question is: When did petitioner's conviction become final. The Supreme Court has succinctly held that for retroactivity purposes, [b]y 'final' we mean a case in which a judgment of conviction has been rendered, the availability of appeal for certiorari elapsed or a petition for certiorari finally denied" See Griffith v. Kentucky, 479 U.S. 314 [1987].

The Petitioner again reiterated the relevant dates to his case: because Apprendi v. New Jersey 120 S.Ct 2348 (2000) was decided on June 26, 2000, and petitioner's case became final per Griffith on July 17, 2000. It should be retroactively applied in petitioner's case". The District Court denied the motion for reconsideration without analysis.

Habeas Proceeding - Fourth Circuit: Petitioner appealed the Habeas Judgment. He again argued on appeal that his conviction became final after the Supreme court decided Apprendi "Apprendi was decided on June 26, 2000, and appellant's case became final on July 17, 2000." The government did not file a brief on appeal.

In March 2003, while petitioner's appeal was pending, the Supreme Court decided Clay v. United States, 537 U.S. 522 (2003) Clay held that, for a federal prisoner, "a judgment of conviction become final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." Id at 525. In support of its holding, the Supreme Court cited its precedent on finality, including case relied on by the petitioner:

> [In the context of postconviction relief,] finality has a long-recognized, clear meaning: Finality attaches when this court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires See e.g..,.. Griffith, 479 U.S. 314, 321 N.6 (1987 ...

Id. at 527. Clay resolved a circuit split, and explicitly reversed the position taken by the Fourth Circuit in Torres. Clay, 537 U.S. at 526 (citing Torres and rejecting its holding).

Four Months after the Supreme Court decided Clay, the Fourth Circuit dismissed petitioner's appeal without analysis - ignoring the Clay decision. United States v. Salas, 68 F. App's 484 (4th Cir. 2003) (unpublished).

Petitioner timely petitioned for rehearing and rehearing on banc. The petitioner - pro se - clearly explained the Supreme Court's decision in Clay and its conflict with the panel decision:

> Since the filing of the §2255 at the district level and in this court, a change in the law occured, which was overlooked by the panel. Further, this court decision or opinion is in direct conflict with the Supreme Court's later decision considering the time when a conviction becomes "final" see Clay v. U.S. No 01-1500 (3/4/03). When the Supreme Court resolved the dilem[M]a among the circuit as to when the conviction become final for purpose of direct review and 28 U.S.C. §2255.
>
> In Clay, supra, the Supreme Court overruled this circuit precedent, which established the doctrine of, "when a defendant's appeals to the Fourth Circuit but does not file a petition for a writ of certiorari, with the Unites States Supreme Court, said conviction become[s] final on the date the conviction is affirmed by the Fourth Circuit." U.S. v Torres 211 F.3d 836-39 (4th cir, 2000)

Ignoring the clear error in the Habeas Judgment and the panel decision, the Fourth Circuit denied the petition for rehearing on Spetember 2, 2003.

Petitioner filed a motion seeking relief from the Habeas Judgment under Rule 60(b). The petitioner argued that the decision in Clay justified from the Habeas Judgment:

> In denying the §2255, on January 29, 2002, this Court stated, relying on U.S. v [Torres], 211 F.3d 836 (4th Cir. 2000), that because petitioner did not file a petition for certiorari to the Supreme Court, the conviction became final on April 17, 2000, the date the Fourth Circuit [a]ffirmed the sentence and conviction ... However, Torres, supra, on March 4, 2003, was overruled by the Supreme Court's decision in Clay v. United States ... Therefore, on virtue of the Supreme Court decision on Clay, which expressly overruled Torres, supra, and the fact that Apprendi was decided before petitioner['s] 90 day to petition for certiorari expired, and the Clay ruling clealy clarified the Fourth Circuit erroneous interpretation in Torres, this court should vacate its order dismissing petitioner's §2255, in order to cure this grave miscarriage of justice ...

The district court dismissedthe motion in November 2004. The district court seemed to acknowledge the error from the habeas proceeding footnoting that "[t]he Supreme Court held in Clay that the one-year limitation periods for filing a §2255 motion started to run when the time for seeking a writ of certiorari in the Supreme Court on direct review expired."

Nevertheless, the district wrongly applied Fourth Circuit precedent to classify the motion as a successive habeas petition. The district court constrived the motion as petitioner "continu(ing) his attack on his conviction based on precedencial evolution." But petitioner did not seek to attack his conviction through this Rule 60(b) motion, he sought to challange a defec in the integrity of the habeas proceeding. Even so, the district court dismissed the motion.

In June 2005, Petitioner focused on his attorney's lack of communication during a period critical to the petitioner's case. The window within which to petition for certiorari on his direct

appeal:

> In the case at bar, movant was deprived of an apportunity at a crucial time, because representation by appointed counsel was merely ineffective, but enterely absent ...
> His counsel[s] inaction on direct appeal and apparent failure to communicate with movant, coupled with the lack of Notice to movant personally of the right to of certiorary prevented movant proceeding pro se.

Movant argued that his attorney "knew or reasonably should have known that if the Supreme court previously has granted certiorari in another case to review an issue similar to one in movant's case [(i.e., Apprendi)], the Certworthiness' of the issue already is established." Last than a month later the district court dismissed the motion as a successive habeas petition.

Petitioner timely moved to alter or amend the judgment under Rule 59. Four days later, the district court denied the motion. Petitioner appealed. The Fourth Circuit dismissed the appeal, and denied rehearing See United States v. Salas No 05-7207 (4th Cir). Petitioner petitioned for certiorari, which the Supreme Court denied. Id.

In 2006, Petitioner filed a notice with the district court seeking to preserve a claim under United States v. Booker 543 U.S. 220 (2005). A Supreme Court decision on the constitionality of the Sentencing Guidelines that stemned from Apprendi. The district construed this filing as a motion and denied it.

From 2007 through 2009, petitioner continued to persue relief, filing one motion unrelated to his Apprendi claim and the Habeas Judgment.

In 2010, petitioner moved from the Fourth Circuit to recall

the Mandate issued in his direct appeal. In this motion, petitioner recounted the lack of communication from his attorney about the appeal and about the timeline to file for certiorari. He asked for the opportunity to file a writ of certiorari out of time. The Fourth Circuit directed petitioner's attorney to respond.

In response, the petitioner's attorney stated that he "considered his representation of the petitioner to have been completed at the conclusion of his appeal to [the Fourth Circuit]". The Petitioner's attorney also "concede[d] he does not recall advising petitioner, in writing, of his right to file a writ with the U.S Supreme court."

The Fourt Circuit denied the motion to recall mandate. From 2011 through 2016, a new attorney appeared for the petitioner for limited purpose of seeking a sentence reduction under Amendment 782 to the Sentencing Guidelines. The district court reduced the petitioner's sentence to 30 years imprisonment in March 2017. The attorney then moved to withdraw as attorney of record for the petitioner, which the district court granted.

Rule 60(b) motion - In March 2018, petitioner filed the Rule 60 (b) motion at issue in this appeal. The petitioner appearing pro se - styled the Rule 60(b) motion as a one made under Rule 60 (b)(4) seeking relief from a void judgment.

Petitioner also included an argument that relief from judgment was warranted because of the extraordinary circumstances in his case, including the Supreme Court's decision in Clay v United States. The government did not file a response to the Rule 60(b) motion.

In May 2018, the district court denied the Rule 60(b) motion as untimely, and failure to establish extraordinary circumstance.

In its opinion, the district court appears to have construed the Rule 60(b) motion as seeking relief under both Rule 60(b)(4) and (b)(6).

As to relief under Rule 60(b)(4), the district court held that "Salas fail to offer any persuasive argument as to why this court should find that his Rule 60(b)(4) [motion] was filed within a reasonable time."

As to Rule 60(b)(6), the district court focused on timeliness and lack of extraordinary circumstance:

> [T]he Court construes Salas to also argue in his Rule 60(b) motion that the Supreme Court's decision in Clay is an extraordinary circumstance that warrents vacating the dismissal of his §2255 motion. However, this argument fail for two reasons. First, the fourth circuit has made clear that extraordinary circumstances do not exist where there is only a change in decisional law. Second, the fourth circuit instructs that even if extraordinary circumstances exist, a movant must still meet Rule 60(b)'s requirement of timeliness. Because Salas waited over sixteen years after the dismissal of his §2255 motion and fifteen years after the Supreme Court's decision in Clay to bring his Rule 60(b) motion, his motion is untimely. (internal citation omitted).

On May 28, 2019, petitioner timely appealed. The Fourth Circuit appointed undersigned counsel to represent the petitioner on appeal. That same day, the Fourth Circuit granted a certificate of appealability. Petitioner's claim that the district court committed error in dismissing his §2255 on the ground that it was untimely.

On December 10, 2020 case's argued by 4th circuit appeals court. March 23, 2020 decided affirmed by the 4th circuit panel. Affirmed by unpublished opinion judge Cogbur wrote the opinion, in

which Judge Diaz and Judge Quattlebaum joined.

On May 21, 2020 the Court of Appeal denies motion for extension of time to file a brief supporting the petition for rehearing and rehearing en banc previously filed on April 20, 2020. The Court denied the petition for rehearing and rehearing en banc on May 19, 2020.

Petitioner has not filed brief. He is representing as pro se. He is currently under locked down status due to the COVID-19 pendamic.

REASON FOR GRANTING THE PETITION

The district Court denied relief on two reasons for denying petitioner's motion - untimeliness and failure to show "extraordinary circumstances."

A change in decision (law alone is not "extraordinary" enough to justify reopening a case "long since final", and that a lack of diligence by the movant render the circumstance "all the less extraordinary." On both points, the lack of extraordinary circumstances in Gonzalez highlights the extraordinary circumstance here.

First, in Gonzalez, the Federal Habeas judgment became final, then the relevant change in dicisional law occured, and then the movant sought relief under Rule 60(b)(6) 545 U.S. at 527. Base on this timeline, the Supreme Court relief in part on the fact that the judgment was "long since final" when change in law occured. Id at 536. Similarly, the Fourth Circuit ease cited by the government focus on changes in law after final judgment:

> Indeed, even before Gonzalez was decided, Fourth Circuit held "a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." Moses, 815 F.3d at 168-69 (quoting Dowell v. State Farm Fire & Cas. Auto. Ins Co., 993 F.2d 46, 48 (4th Cir 1993: See also Hall v. Warden, Md Penitentiary, 364 F. 2d 495, 496 (4th Cir 1996) (en banc) [stating that "judgments which had become final long before [an intervining Supreme Court case] was decided should not be reopened merely upon a showing of inconsistency with that decision")
> (emphasis added)

In contrast here, the relevant change in decisional law occured before the Habeas judgment became final. The Supreme Court decided Clay in March 2003; the Habeas Judgment did not become final until after the Fourth Circuit denied rehearing in September 2003 and after the

Supreme Court denied certiorari in February 2004. That the Supreme Court decided Clay before the Habeas Judgment became final thus renders the circumstances of petitioner's case extraordinary.

Second, unlike the movant in Gonzalez, Petitioner diligently pursued review of the issue despite recognizing this portion of the Gonzalez decision. But, the fact of petitioner's case reveal extraordinary circumstances justifying relief from the Habeas Judgment. The determination of "extraordinary cicumstances" under Rule 60(b)(6) is a highly fact-specific determination that must be made case-by-case. "In determining whether extraordinary circumstances are present, a court may consider a wide range of factors" Buck v. Davis 137 S.Ct. 759, 778 (2017). As the Supreme Court has long acknowledged and recently reaffirmed, such factors may include "'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process'" Id. (citing Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 487, 863-74 (1988); See also Satterfield v. District Attorney Philadelphia 872 F.3d 152, 155 (3rd Cir. 2017) (" A district court addressing a Rule 60(b)(6) motion premised on a change in decisional law must examine the full penalty of equitable circumstances in the particular case before rendering a decision.") Taking the Supreme Court, "must continuously bear in mind that to perform (their) high function in the best way justice must satisfy

> In addition to timelyness, the Fourth Circuit took to two other threshold requirements for motions under Rule 60(b) - a meritorious defense and a lack of unfair prejudice to the opposing party. See United States v. Welsh, 879 F. 3d 530, 533 (4th cir. 2018). As discussed, petitioner has a meritorious claim for relief from the Habeas judgment. And in t he context of §2255 motion, the United States as the opposing

party will not be prejudiced by Petitioner relief. the appearance of justice." Lileberg, 486 U.S. at 864 (citing - in re Murchison, 349 U.S. 133, 136 (1955)); See also United States v. Welsh, 879 F.3d 530,536 (4th Cir. 2018) ("In determining whether to grant relief from judgment under 60(b), a district court must delicately balance the sanctity of final judgments ... and the incessant command of the Court's conscience that justice be done in light of all t he fact.")

On the original and timely, even assuming that movant's second Rule 60(b) motion was timely, petitioner's third such motion filed over a decade later - is not. It is clear a fundamental miscarriage of justice is taking place.

A notice of appeal that name the final judgment is sufficient to support review of the all earlier order that merge in the final judgment under general rule that appeal from a final judgment support review of all earlier interlocutory orders: United States v. Bosewell 2019 U.S. LEXIS 31855, Feb 28, 2019.

When a court of appeals properly applies the certificate of appealability (COA) standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. that a prisoner's f ailed to make the multimate showing that this claim is meritorious does not logically mean he failed to make a prelimanary showing that the claim was debatable. Thus, when a reviewing court inverts the statutory order of operations and first decides the merits of an appeal, then justifies its denial of a COA based on its adjudication of the actual merits, it has placed too heavy a burden on the prisoner at the charge. Judicial precedent

flatly prohibit such a departure presribed by 28 U.S.C. §2253. See Buck v. Davis 137 S.Ct. 759, 781 (2017); and Tharpe v. Seller 138 S.Ct. 545: January 8, 2018. Buck's conviction and sentence were affirmed on direct appeal. Buck v. States No 72,810 1999 Tax Crim. App. unpub.LE:2<Tex. Crim. App., Apr 28, 1999>. His case then entered a labyrinth of state and federal collateral review, where it has wandered for the better part of two decades.

This appeal centers on whether the district court erred by denying petitioner's Rule 60(b) motion as untimely. The government give little attention to timeliness, instead focusing on the merit of the underlying Apprendi claim. The government also muddles the appropriate framework for review of a motion for Rule 60(b) relief, invoking inapplicable doctrines and precendent.

> Rule 60(b)(6) provides relief from a final judgment when extraordinary circumstances exist. A party must also meet the threshold requirements: (i) reasonable timeliness, (ii) a potentially meritorious claim, and (iii) lack of unfair prejudice to the opposing party. An appeal from the denial of rule 60(b) relief does not bring up the underlying judgment for review.

Petitioner filed the Rule 60(b)(6) motion within a reasonable time when considering the extraordinary circumstances of petitioner case. A ruling that would again preclude petitioner from having his Apprendi claim heard risks continued injustice. It is not clear what more a pro-se prisoner could do to establish that petitioner acted with sufficient diligence to preserve a meritorious argument than what petitioner did here.

The district court abused its discretion by denying the Rule 60(b)(6) motion. To obtain relief from judgment under Rule 60(b), "a moving party must first show (1) that the motion is timely, (2)

that petitioner has a meritorious claim or defense, and (3) that the opposing party will not suffer unfair prejudice if the Court grants petitioner relief under Rule 60(b), and motion was filed within a reasonable time when considering the full facts of petitioner's case. The primary issue in this appeal is whether the district Court erred in denying the Rule 60(b) motion as untimely. In defending the holding, however, the government makes only one argument on timeless.

The parties agree that motions under Rule 60(b) must be made "within a reasonable time" But the government than makes the same mistake as the district court. It concentrates on one fact - when the Supreme Court decided Clay v. United States, 537 U.S. 522(2003). The government, like the district court, then compared the time since Clay to the limits on a "reasonable time" in other case. See Buck v. Davis, 137 S.Ct. 759, 781 (2017); Tharpe v. Sellers 138 S.Ct 545:1/8/18.

The district court abused its discretion by denying the motion under Rule (b)(6) without considering the extraordinary circumstance of petitioner's case. Although petitioner styled the motion, as one under Rule 60(b)(4), the district court correctly looked to the substance of the motion in construing it as also seeking relief under Rule 60(b)(6). As courts have found, the substance of a motion governs over the title. See e.g., Gonzalez, 545 U.S. at 527 n.1 (considering a motion filed by a pro-se prisoner by its substance rather than its title). This is especially true for motion filed by pro-se litigants, which court "held to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972); see Erickson v. Pardus 551 U.S. 89, 94 (2007)

In the Rule 60(b) motion, Petitioner argued that the Habeas Judgment is void, and also highlighted that the decision in Clay v. United States were extraordinary circumstances justifying relief from the Habeas Judgment. While the district court did not mention Rule 60(b)(6) by name, it "construe[d] petitioner to also argue in his Rule 60(b) motion- that the Supreme Courts decision in Clay is an extraordinary circumstance that warrants vacating the dismissal of his §2255 motion "Extraordinary circumstance" applies only to motion seeking relief under Rule 60(b)(6). See Gonzalez 545 U.S. at 535, see also United States v. Mc Rae, 793, 400 N.8 (4th Cir. 2015), and Buck v. Davis, 137 S Ct. 759, 781 (2017). Because Rule 60(6) requires a showing of "extraordinary circumstances." It necessarily entails a review of the full circumstan ce of the specific case. For example, in Buck v. Davis, the Supreme Court looked at "the circumstance of the case" in reversing the lower court for mentioning relevant evidence in its analysis. 137 S.Ct. 759, 778 (2017). Similarly, in Gonzalez v. Crosby, the Supreme Court looked not only at the ground for relief offered by the movant under Rule 60(b)(6), but also petitioner's lack of diligence in pursuin that relief. 545 U.S. at 536-37.

Indeed, this court has recognized the fact specific nature of this determination, reiterating the need to delicately balance the sancity of final judgment... and the incessant command of the court's conscience that justice be done in light of all t he fact." Welsh, 879 F.3d at 536 (emphasis added). By seeking to narrow the analysis on t he Rule 60(b)(6) motion to the Clay decision, the government ignores the other circumstance present in Petitioner's case. These circumstances include the procedural posture of petitioner;s case when the Supreme Court decided Clay, the well documented lack of

communication and abandon from petitioner's attorney at a critical moment, and the deligence of petitioner in pursuing relief.

The district court sentence petitioner to life in prison in June 1999. Eight months later, having not received information from petitioner attorney about the direct appeal. Petitioner moved the district court to compel his counsel to communicate. In April 2000, the district court granted the motion, directing petitioner's attorney "to communicate with [Petitioner] and tell him whether or not an appeal was filed." Base on another motion filed by petitioner in July 2000, presumably stating that petitioner had still not heard from petitioner attorney, the district court then ordered petitioner's attorney to file a letter detailing how he had complied with the prior order by August 4, 2000.

On August 4, 2000 - after petitioner's time to petition for certiorari on direct appeal expired - Petitioner's attorney finally sent petitioner some communication. The record of this case thus reveals a lack of communication from petitioner's attorney at critical moment. Indeed, petitioner's attorney conceded that "he does not recall advising petitioner in writing, of his right to file a writ with the U.S. Supreme Court.

The government blame petitioner for not having more fact on record about the lack of attorney communication. ("Precisely because the defendant did not raise a claim of ineffective appeal advice in petitioner first hebeas petition, the district court never convened an evidentiary hearing on that issue. As a result, the record has gone stale.") But responsibility for the lack of record on any communications between petitioner and his attorney can equally be placed on his attorney.

The petitioner's attorney ostensibly ignored the district court's directive to file with the court a letter detailing his communications. If such a letter had been filed, more would be known about "mannner in which [petitioner's attorney] has complied with the court's April 17, 2000 order that direct [him] to both provide [petitioner] with a copy of the trial transcript and any pleadings filed with the Fourth Circuit, and to communicate with [petitioner] regarding the status of the appeal. Given these facts,placing the responsiblity on petitioner a pro se litigant, for the record in this Rule 60(b) proceeding does not "satisfy the appearance of justice." Liljerberg v. Health Serv. Acquisition Corp.,486 U.S. 847, 864 (1988)

Extraordinary circumstances exist here, and the district court abused its discretion in ignoring them. The district court violated petitioner's right to trial by Jury under the Fifth and sixth Amendments. Apprendi v. New Jersey 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed 2d 435), also United States v. Haymond 139 S.Ct. 2369; 204 Ld. 2d 897; 2019. Petitioner has a meritorious underlying claim. Two of the district court's four major arguments to deny focuses on the merits of petitioner's Apprendi claim (arguing that petitioner procedurally defaulted his Apprendi claim); Part II (arguing that the Apprendi claim fails on plain error review). But "an appeal from denial of Rule 609b) relief does not bring up the underlying judgment for review." Browder v. Dir. Dep't of Corr of Illinois, 434 U.S. 257,263 N.7 (1978); see also In re Burnley, 988 F.2d 1, 3 (4th Cir) 1993) ("In ruling on an appeal from a denial of a Rule 60(b) motion this court may not review the merits of the underlying order; it may only review the denial of the motion with respect to the grounds set

forth in Rule 60(b)"). District Court's arguments are thus more suitable if petitioner wins this appeal and obtains relief from the Habeas judgment - not on appeal of petition Rule 60(b) motion.

That said, within the confines of a Rule (b) appeal, the movant show that the petitioner has a meritorious claim. Welsh, 879 F.3d a 533. This requirement entails a proffer of evidence that would permit a finding for the movant. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp, 843 F.2d 808, 812 (4th Cir. 1988): See United States v. Moradi 673 F.2d 725, 727 (4th Cir. 1982). The movant need not show "an ironclad claim or defense which will guarantee success at trial," but simply "a potentially meritorious claim or defense which, if proven will bring success in its wake" United States v. Kayser-Roth Corp., 272 F.3d 89,95 (1st Cir. 2001). And at later case Supreme Court Case Buck v. Davis 137, S.Ct. 759, 781, Tharpe v. Seller 138 S.Ct. 545:: January 8, 2018.

Petitioner did not procedurally default his Apprendi claim because petitioner's attorney raised the relevant constitional issue at sentencing. The district court say, the jury in this case would easily have concluded that the conspiracy involved one Kilogram or more of heroin. But ignores a key fact. When during quantity has not been alleged in the indictment and found beyond reasonable doubt by a jury, Apprendi precludes imposition of a sentence in excess of the maximum prescribed by 21 U.S.C. §841 (b)(1)(c). 30 years maximum sentence under §841 (b)(1)(b) when defendant has prior felony drug conviction. See Tharpe v. Sellers:: 138 S.Ct. 545:: January 8, 2018, at late Supreme Court decision Haymond v. United States 139 S.Ct. 2369; 204 L.Ed. 2d, 897; 2019. Quoting: Consistent with these understandings,

juries in our consitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish. A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct. In early Republic, if an indictment or "accusation...lack[ed] any particular fact which the laws ma[d]e essentail to the punishment," it was treated as "no accusation" at all. 1 Bishop §87, at 55; see also 2 M. Hale, Pleas of the Crown *170(1736); Archbold *106. And the "truth of every accusation" that was brought against person had to "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." 4 Blackstone 343. Because the Constitution's guarantees cannot mean less today then they did the day they were adopted, it remains the case today that a jury must fund beyond a reasonable doubt every fact'"which the law makes essential to [a] punishment'" that a judge might later seek to impose. Blakely, 542 U.S., at 304, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (quoting 1 Bishop §87, at 55).

Together with the right to vote, those who wrote our constitution considered the right to trial by jury "the heart and lungs of the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977). Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury sought to preserve the people's authority over its judicial functions. J. Adams Diary Entry (Feb. 12, 1771), in 2 Diary and Autobiography [204 L.Ed. 2d 903] of John Adams 3 (L. Butterfield ed. 1961); see also 2 J. Story, Commentaries on the Constitution §1779,

pp. 540-541 (4th ed. 1873).

[139 S.Ct. 2376] Toward that end, the Framers adopted the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy trial, by an impartial jury." In the Fifth Amendment, they added that no one many be deprived [2019 U.S. LEXIS 12] of libert without "due process of law." Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has "extend[ed] down centuries." Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000). But when does a "criminal prosecution" arise implicating the right to trial by jruy beyond a reasonable doubt? At the founding, a "prosecution" of an individual simply referred to "the manner of [his] formal accusation." 4 W. Blackstone, Commentaries on the Laws of England 298 (1769) (Blackstone); see also N. Webster, An American Dictionary of the English Language (1st ed. 1828) (defining "prosecution" as "the process of exhibitng forma charges against an offender before legal tribunal"). And the concept of a "crime" was a broad one linked to punishment, amounting to those "acts to which the law affixes ... punishment," or, stated differently, those "element[s] in the wrong upon which the punishment is based." 1 Bishop, Criminal Procedure §§80, 84, pp. 51-53 (2d ed. 1872) (Bishop); see also J. Archbold, Pleading and Evidence in Criminal Cases *106 (5th Am. ed. 1846) (Archbold) (discussing a crime as including any fact that "annexes a higher degree punishment") ; [2019 U.S. LEXIS 13] Blakely v. Washington, 542 U.S. 296, 309, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi, 530 U.S., at 481, 120 S. Ct. 2348, 147 L.Ed 2d 435.

The government then argues the evidence against peitioner was "overwhelming," so the error should not corrected. That is incorrect.

The record permits a finding that the evidence petitioner was not overwhelming. To start, this case involves a conspiracy, it does not involve possession or distribution by petitioner. The government brought forward no evidence of searches of petitioner's house, restaurant, or night club that revealved any drug or money, nor did the government offer evidence that petitioner was arrested with any drug or money.

Instad, as the government explained at trial, the conspiracy was a"puzzle", to which each of the 13 testifying witness contributed a piece. In sum, the evidence cited by the government about petitioner involvment in this conspiracy is not overwhelming. At minimum, enough uncertainty exists surrounding the evidence that the government relies on to justify petitioner having the Apprendi claim heard by the district court, leaving to the district court the task of reviewing the 300 page trial transcript. The transcript show the jury instruction clear the district court to violated petitioner's right by Jury under Fifth and Sixth Amendment. When they said. Meaning that the $1 million in drug money sought as foreiture in the indictment was equivalent to around eight kilogram.

A finding that the district court abused its discretion in denying the Rule 60(b) motion based on the unique facts of petitioner's case thus should not produce a"tidal wave" of claims. See e.g., Buck v. Davis 137 S.Ct. 759, 781 (2017) (Thomas, J., dissenting)(noting that a decisio nentitling a prisoner to relief under Rule 60(b)(6) "has few ramifications, if any, beyond the highly unusual facts presented here")

The district court erred in denying as untimely the motion under Rule 60(b)(4) for relief judgment. Seperate the error in denying the motion under Rule 60(b)(6) the district court wrongly subjected the motion to a timeliness requirement when it addressed the claim for relief under (b)(4).

A void judgment is a legal nullity, United States Student Aid Funds, Inc v. Espinoza 559 vs. 260, 270 (2010), and "no passage of time can transmute a nullity into a binding, United States v. One Toshiba Color Television, 213 F.3d 147, 157 (3d Cir. 2000) stated another way "the reasonable time criterion of the Rule 60(b) as it relates to void judgment, means no time limit, because a void judgment is no judgment at all." Rodd v. Region Const. Co. 783 F. 2d 89,91 (7th Cir. 1986) (citation omit ted); see also Hertz Corp v. Alamo Rent-A-Car, Inc. 16 F.3d 1126, 1130 (11th Cir. 1994) (T)he time within which a Rule 60(b)(4) motion may be brought is not constrained by reasonableness.)

Indeed, the United States has conceded the point in other cases, acknowledging in briefs that Rule 609b)(4) "place no time limit on an attack upon a void judgment" See, e.g. United States v. Philip Morris USA Inc., brief for the United States of America, 2016 WL 1069314 (D.C. Cir., Mar. 17, 2016); see also Stoecklin v. United States, brief of the Appellee, 2001 Wl 34142816 (11th Cir) Sept 2001. ("Absent exceptional circumstances, a Rule 60(b) (4) motion may be made at any time.")

Here, the district court wrongly denied relief under Rule 60(b)(4) as untimely, finding that "petitioner fail to offer any persuasive argument as to why this court should find that the petitioner Rule (b)(4) was filed within a reasonable time."

But the Rule 60(b)(4) motion"is not subject to the reasonable time limitations imposed in the other provisions of Rule 609b)." In re Heckert, 272 F.3d at 256-57

On May 28, 2019, the United States Court of Appeals for the Fourth Circuit grant a Certificate of Appealability on petitioner's claim that the district court committed error in dismissing his §2255 motion on the ground that it was untimely. However, despite the fact specific. Similarly, in Gonzalez v. Crosby the Supreme Court looked not only at the ground for relief offered by the movant under Rule 60(b)(6) or in Buck v. Davis, the Supreme Court looked at the circumstances of this case.

On March 23, 2020. On virtue of the Fourth Circuit arbitrary and adversed decisoin against the petitioner. Affirmed District Court Judgement.

On May 19, 2020, the Court denied the petition for rehearing and rehearing en banc. The petitioner could not file brief due to COVID-19 pandemic prison lock down status.

CONCLUSION

For these reasons, the Court should reverse the district court and either remand with instruction to grant the Rule 60(b) motion or remand for further proceedings.

10/7/2020

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