

IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 20-7000

FELIX O. BROWN JR.

Petitioner, Pro se

vs.

KEITH FOLEY, Warden

Respondent.

: PETITIONER'S MOTION FOR
RECONSIDERATION OF ORDER
: DENYING LEAVE TO PROCEED
IN FORMA PAUPERIS OR FOR LEAVE
: *TO PROCEED AS A VETERAN*

Now comes Petitioner, Felix O. Brown Jr. (hereinafter Brown), proceeding under indigent pro se prisoner status to respectfully move this Court to reconsider the 03/22/2021 order denying Brown to proceed under in forma pauperis status¹; or *to now* permit Brown leave to proceed as a veteran: for the following well-grounded reasons.

For cause:

Respectfully, one of Brown's questions is worthy of reconsideration, whereas it raises a substantial question involving a conflict between federal circuit courts: if left unresolved by this Court shall continue to stand as binding precedent for *all habeas petitioners* under the jurisdiction of the *First, Third, and Sixth Circuits*: as opposed to *petitioners within the jurisdiction of all remaining circuits*; in direct regard to a vitally important post-habeas procedural vehicle.

¹ See Appendix A - received by Brown from correctional officer, Sgt. Scott, on 04/02/2021.

To wit:

“1. In the context of a Habeas proceeding, does the United States Supreme Court require a showing of actual innocence in order to pursue an independent action in equity under Fed. Civ. Proc. R. 60(d)(1)?”

The *First, Third, and Sixth Circuits*, require that in addition to the requisite procedural requirements of Federal Procedure Rule 60(d)(1)²: all habeas petitioners make *a substantial showing of actual innocence*³ before the procedural deficiency claim(s) raised within a post-habeas Rule 60(d)(1) will be reviewed: as opposed habeas petitioners under the jurisdiction of all the remaining federal circuit courts.

To wit:

“[M]oreover, relief under Rule 60(d) is ‘available only to prevent a grave miscarriage of justice,’ which has been construed in the habeas context as requiring a ‘strong showing of actual innocence.’ *Id.* at 595-96 (quoting United States v. Beggerly, 524 U.S. 38, 47, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998); Calderon v. Thompson, 523 U.S. 538, 557, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998)). Although Brown asserts that he has shown cause excusing the procedural default of his jury-instruction claim because the prison failed to mail his Rule 26(b) application in a timely fashion, Brown has failed to offer any evidence of actual innocence⁴. Accordingly, reasonable jurists would not debate the denial of Brown’s Rule 60(d) motion.”

Id. Brown v. Foley, 2020 U.S. App. LEXIS 23753,[*3]-[*4](6th Cir.)

² To prevail on a motion made under Rule 60(d)(1), the movant must show “(1) That the judgment in favor the defendant ‘ought not, in equity and good conscience,’ be enforced; (2) that he has a ‘good’ claim; (3) that ‘fraud, accident, or mistake,’ prevented him from obtaining the benefit of his claim; (4) ‘the absence of fault or negligence’ on his part; and (5) ‘the absence of any adequate remedy of law.’” *Id.*

³ See, e.g., *Brown v. Braman*, 2020 U.S. App. LEXIS 40141,(6th Cir. 12/22/2020 Filed)(“ Relief under Rule 60(d)(1) is ‘available only to prevent a grave miscarriage of justice,’ which has been construed in the habeas context as requiring a ‘strong showing of actual innocence.’”)

⁴ In fact, the United States Court of Appeals, for the Sixth Circuit, has enacted and enforced this “strong showing of actual innocence” Civ. R. Proc. 60(d)(1) prerequisite for the past 10 years. See, *Mitchell v. Rees*, 651 F.3d 593.

Conclusion

Brown respectfully submits that he has presented a question of importance which is in the public interest to have decided by this Court of last resort.

Moreover, please be aware that Brown is far from a vexatious litigator. In fact, *each and every one* of his post-habeas motions *exclusively* challenged the integrity of the district court's procedural ruling on Brown's Ground Two for relief, in light of the presentation of cause and prejudice as contained within Brown's Traverse Brief exclusively to excuse said procedural default bar, which *to date* has denied Brown the benefit of his defense.

Whereas, an evaluation of such – in accordance of law – would have warranted an evaluation of the constitutional merit claims raised under Ground Two for relief.

This Court can easily ascertain the truth of this by a simple review of the following.

To wit:

"Brown *double* demonstration of cause and prejudice (submitted in accordance with *Edwards v. Carpenter*⁵) consisted of the following to excuse his default for Ground Two's constitutional claims:

1. Appellate counsel was ineffective for failure to raise the following dead-bang winner on direct appeal.
 - a. Trial court's refusal to give a theory of defense instruction- i.e. accident instruction.
 - b. Trial counsels' failure to object to the trial court's refusal to give the jury a requested accident instruction.

⁵ 529 U.S.446, 450 ("A procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the 'cause and prejudice' standard with respect to the ineffective-assistance claim itself.").

2. The objective factors external to the defense – prison officials.

- a. Lack of access to a Notary, so as to comply with App.R.26(B)(2)(d) prevented Brown from mailing his App.R.26(B) application on the day that he intended: 06/28/2000. In fact, after waiting for a total of two days -- beginning the afternoon of the 28th to the end of business on the 29th -- for a notary and still not being granted access to one: Brown had no other choice but to relinquish control of his R. 26(B) application over to prison authorities for mailing mail on the morning 06/30/2000 absence the required sworn statement (affidavit).⁶
- b. The delayed mailing of Brown's 26(B) by prison personnel, on 06/30/2000. Brown argued and proved that *in the normal course of events: all former* sent and received mail to, and from, the Trumbull County Clerk of Courts Office, required only one business day.⁷

Id. EFC #16, pgs. 40-51.

Sincerely submitted,


Felix O. Brown Jr. # 312-676
Grafton Corr. Inst.
2500 South Avon-Belden Rd.
Grafton, Ohio, 44044

CERTIFICATE OF SERVICE

I, Felix I. Brown Jr, do herein certify that a true copy of this application for a has been served, via U.S. Mail, upon the Respondent's legal representative, Atty. Gen. of Ohio, David Youst at 150 East Gay Street, 16th Fl., Columbus, Ohio, 43215, on this 11th day of April, 2021.


Felix O. Brown Jr. #312-676

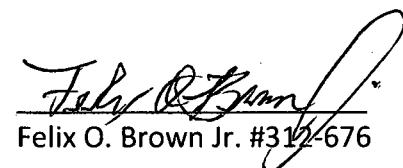
⁶ This was/is clearly documented within State's Exhibit 50: an exhibit which Brown referenced no less than four (4) time within his Traverse. *Id.* EFC 16, pages 46, 48. The contents of said exhibit are (1) an affidavit from the responsible Notary Public attesting to the fact that Brown was made to wait from 06/28/2000 to 07/05/2000 for a notary; and (2) a zerox copy of cash mail out slip – to mail out Brown's 26(B) via certified mail - that was dated 06/28/2000 and endorsed by two prison officials (per prison policy).

⁷ This was/is clearly documented within numerous documents contained within State's Exhibit 53; an exhibit which Brown referenced twice within his Traverse. *Id.* (EFC#16, page 47.)

DECLARATION

I, Felix O. Brown Jr., do herein declare in accordance with 28 U.S.C. §1746 and 18 U.S.C. § 1621 under the penalty of perjury that all facts contained herein this Motion for Reconsideration are true and correct.

I further declare under perjury that I surrendered the original and an additional cover page over to prison authorities to mail, via certified mail, to the United States Supreme Court, on this 11th day of April, 2021.



Felix O. Brown Jr. #312-676

APPENDIX A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 22, 2021

Mr. Felix Brown, Jr.
Prisoner ID #312-676
Grafton Correctional Institution
2075 S. Avon-Belden Road
Grafton, OH 44044

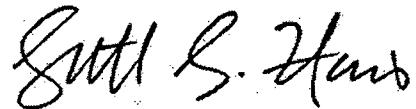
Re: Felix Brown
v. Keith Foley, Warden
No. 20-7000

Dear Mr. Brown:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

Sincerely,



Scott S. Harris, Clerk