No. 20-7494

IN THE

SUPREME COURT OF THE UNITED STATES

KIRK A. SIMMONS — PETITIONER
(Your Name)

ORIGINAL

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KIRK A. SIMMONS
(Your Name)

FEDERAL MEDICAL CENTER P.O.BOX 1600
(Address)

BUTNER, NC 27509
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

1. Did the District Court abuse its discretion when it dismissed petitioner's Rule 60 motion, which asserted evidence falsification and Fraud on the Court, for lack of jurisdiction by recharacterizing the motion as a unauthorized second habeas corpus petition?

2. Did the U.S. Court of Appeals exceed the scope of the analysis required for a Certificate of Appealability when it stated "Appellant was not entitled to relief under Rule 60(b) because he failed to show that there were 'extraordinary circumstances' where, without [Rule 60(b)] relief, an extreme and unexpected hardship would occur"?

3. Would a split appellate decision denying a rehearing enbanc request for a Certificate of Appealability actually evidence that jurists of reason do find the District Court's resolution of the claims debatable or wrong?

4. Does the continuous denial of a habeas corpus hearing to a petitioner - who can establish his legal innocence on the existing record, but could not have done so at an earlier time due to egregious misconduct by the government and ineffective assistance from his defense counsel - give rise to a serious Constitutional issue? If so, what are the avenues available to address those Constitutional issues?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v Simmons, No. 13-cr-97, U.S. District Court for the District of Delaware. Judgment entered Aug. 15, 2014.

In re Simmons, No. 16-3884, U.S. Court of Appeals for the Third Circuit. Judgment entered Jan. 25, 2017

Simmons v United States, No. 15-cv-459, U.S. District Court for the District of Delaware. Judgment entered Feb. 3, 2017.

United States v Simmons, No. 17-1414, U.S. Court of Appeals for the Third Circuit. Judgment entered Apr. 28, 2017 Rehearing enbanc denied Jun. 9, 2017.

Simmons v United States, No. 17-6185, Supreme Court of the United States. Writ declined Oct. 30, 2017. Reconsideration denied Jan. 16, 2018.

In re Simmons, No. 17-2147, U.S. Court of Appeals for the Third Circuit. Judgment entered Jul. 7, 2017.

Simmons v United States, No. 18-2904, U.S. Court of Appeals for the Third Circuit. Judgment entered Sep. 13, 2018.

In re Simmons, No. 20-1050, U.S. Court of Appeals for the Third Circuit. Judgment entered Apr. 27, 2020.

United States v Simmons, No. 20-2072, U.S. Court of Appeals for the Third Circuit. Judgment entered Oct. 13, 2020. Rehearing enbanc denied Dec. 23, 2020.

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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 _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[X] reported at Simmons v US, 2020 US Dist. LEXIS 80630 (D.Del, May 7, 2020); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

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

The opinion of the _____ court appears at Appendix _____ to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was October 13, 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: December 23, 2020, and a copy of the order denying rehearing appears at Appendix C.

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

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 _____. A copy of that decision appears at Appendix _____.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's case involves the following statutes:

1) 28 U.S.C. §2255 - Text, in full, located at Appendix E

2) 28 U.S.C. §2244 - Text, in full, located at Appendix F

3) Fed. R. Civil Proc. Rule 60 - Text, in full, at Appendix D

4) Fed. R. Crim. Proc. Rule 11 - Text, in full, at Appendix G

STATEMENT OF THE CASE

Comes Now, Kirk A. Simmons, the petitioner acting pro-se and without benefit of counsel who respectfully moves this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit inorder to review that court's and the U.S. District Court's handling of petitioner's motion pursuant to Fed. R. Civ. Proc. Rule 60(b) and 60(d) asserting Fraud on the Court and his legal innocence as a basis to reopen the earlier habeas corpus proceeding which was denied and petitioner's claims dismissed as procedurally barred.

CASE HISTORY

1) On July 18, 2013 petitioner was arrested by Delaware state police following their online reverse police sting orchestrated by Detective Kevin McKay of the Child Protection Task Force.

2) Sometime between July 18 and August 27 the state of Delaware dropped their case when forensic analysis of confiscated electronic devices revealed petitioner was, in fact, innocent of the Task Force's targeted criminal conduct-illegal pornography.

3) On August 27, 2013 HSI Special Agent Patrick McCall filed a criminal complaint in the U.S. District Court alleging petitioner violated 18 U.S.C. § 2422(b) - attempted enticement of a minor (DI 2).

4) On August 28, 2013 Agent McCall arrested petitioner in petitioner's home.

5) On September 24, 2013 a federal Grand Jury returned a two count indictment charging petitioner with alleged violation of 18 U.S.C. § 2422(b) and 18 U.S.C. § 2251(a) & (e) (DI 11).

6) On February 25, 2014 petitioner entered into a plea agreement pleading guilty to violation of 18 U.S.C. § 2422(b) (DI 28).

7) On August 7, 2014 the government filed its sentencing memorandum (DI 38).

8) On August 12, 2014 petitioner was sentenced to 120 months imprisonment and the Court's judgment issued August 15, 2014 (DI 41).

9) On June 4, 2015 petitioner timely filed a motion to vacate under 28 U.S.C. § 2255 raising four grounds - Miranda violations, Illegal detention, Prosecutorial misconduct thru evidence manipulation, concealment and delayed presentation, and Ineffective Assistance of counsel (DI 56).

10) On October 1, 2015 the Court directed the government to respond to petitioner's § 2255 motion to vacate (DI 63).

11) On November 16, 2015 petitioner requested, via letter to the court, access to the transcript of the Grand Jury proceedings and copies of the federal criminal complaint and arrest warrant (DI 65).

12) On November 17, 2015 the Court ordered the government to respond to petitioner's Grand Jury request (DI 68) and they responded on November 18, 2015 (DI 69).

13) On November 19, 2015 the Court denied petitioner's request for Grand Jury transcript (DI 70).

14) On December 1, 2015 the government filed its objection to petitioner's motion to vacate and included evidence - 'Govn Exhibit 4' - that petitioner had never seen during the criminal prosecution (DI 71).

15) Petitioner conducted side-by-side comparisons of 'Govn Exhibit 4' to Agent McCall's oath-sworn affidavit supporting his criminal complaint and arrest warrant.

16) Petitioner's analysis revealed in a 'clear and convincing' manner that Agent McCall had deleted 75% of the state's evidence - interactive messages - from 'Govn Exhibit 4' to produce his oath-sworn affidavit.

17) Furthermore, the deleted evidence was exculpatory evidence that provided proof of inducement of petitioner by state police to engage in the police's proffered criminal conduct.

18) Further analysis showed that the plea agreement statement of facts and the PSI report were solely and exclusively sourced from Agent McCall's fraudulent affidavit.

19) The government's case-in-chief and all supporting documents presented to the Court, defense counsel and petitioner during the criminal proceedings were knowingly falsified by the intentional omission of material exculpatory evidence.

20) On December 10, 2015 petitioner renewed his request for disclosure of the Grand Jury transcript in light of his analysis described in points 15-19, citing evidence manipulation and fraud as the basis for this request (DI 73).

21) On December 11, 2015 the Court ordered the government to respond to petitioner's renewed request for Grand Jury transcript (DI 74).

22) On December 14, 2015 the government responded opposing that request (DI 75).

23) On December 15, 2015 AUSA Edward McAndrew was terminated (DI 76).

24) On December 22, 2015 petitioner filed motion to compel disclosure of forensic evidence derived from analysis of confiscated electronic devices (DI77).

25) On December 28, 2015 petitioner replied to the government's objection to his motion to vacate and attempted to add a fifth ground - entrapment - in light of new evidence, Govn Exhibt 4 (DI 78).

26) On January 13, 2016 the Court denied petitioner's request for Grand Jury transcript (DI 79).

27) On January 13, 2016 the Court ordered the government to respond to petitioner's request for forensic evidence from electronic devices (DI 80).

28) On January 20, 2016 government objected to petitioner's request for forensic evidence stating the government's case did not need any forensic evidence but relied solely on the evidence collected during the state's sting (DI 82).

29) On February 12, 2016 petitioner responded to government's objection to petitioner's request for disclosure of forensic evidence by asserting the government's case made use of a falsified version of the state's evidence (DI 83).

30) On May 16, 2016 petitioner filed a motion to supplement his original §2255 motion introducing the results of his analysis (15-19) to inform the court of evidence fabrication and manipulation by officers of the court (DI 86).

31) On September 6, 2016 petitioner filed a Memorandum of Law in Support of § 2255 motion, still pending before the Court, outlining the Court's authority regarding Brady violations impact on the validity of pleas of guilt (DI 89).

32) On October 12, 2016 petitioner filed a petition for a writ of mandamus regarding petitions DI 77 (forensics), DI 86 (Motion to Supplement) and DI 89 (Memorandum of Law) - In re: Simmons, No 16-3884, U.S. Court of Appeals for the Third Circuit. Judgment - denied without prejudice to refiling if District Court does not rule promptly.

33) On October 26, 2016 the district court denied petitioner's request for forensic evidence, granted the motion to supplement stating "the court will only consider the assertions in the motion to the extent they actually supplement and/or amplify the claims in movant's original §2255 motion and will not consider the assertions to the extent they may constitute new claims", and completely ignored the Memorandum of Law (DI 90).

34) Two days later, on October 28, 2016, AUSA Edmond Falgowski was terminated (DI 91).

35) On January 18, 2017 petitioner filed a motion for In-camera Review of the Grand Jury proceedings (DI 95).

36) On February 3, 2017 the District Court dismissed the motion to vacate, claims procedurally defaulted, denied relief, denied In-camera review as moot and never addressed the Memorandum of Law (DI 97).

37) On March 11, 2017 petitioner requested a Certificate of Appealability - United States v Simmons, No 17-1414, U.S. Court of Appeals for the Third Circuit. Judgment entered Apr 28, 2017 denying CoA.

38) On May 11, 2017 petitioner requested rehearing enbanc which was denied Jun 9, 2017.

39) On June 22, 2017 petitioner renewed his request for writ of mandamus regarding the Memorandum of Law - In re: Simmons, No 17-2147, U.S. Court of Appeals

for the Third Circuit. Judgment entered Jul 7, 2017 denied stating "..Simmons has no right to the relief he requests...he raised the issue of his Memorandum of Law in his request for a CoA".

40) August 29, 2017 petitioner timely filed a petition for writ of certiorari - Simmons v United States, No 17-6185, Supreme Court of the United States. Request denied on Oct 30, 2017.

41) Request for reconsideration/rehearing, filed on Nov 20, 2017 was declined on Jan 16, 2018.

This summary of the habeas corpus proceeding that was afforded petitioner's motion to vacate his conviction demonstrates the diligent effort by petitioner to overcome the prejudice due to concealed evidence and his decision to plea, when new evidence suddenly appears nearly two years after his conviction. It is impossible to reconcile 'clear and convincing' evidence that revealed evidence manipulation, concealment and fabrication by officers of the court and their use of that fradulent result as their case-in-chief with the District Court's 1) refusal to order an evidenciary hearing, 2) refusal to allow discovery regarding forensic evidence, 3) refusal to access the Grand Jury proceeding, especially In-camera review, 4) refusal to allow amendment of opening brief to add a claim of entrapment, and 5) granting prosecutor's request for procedural default of petitioner's claims, especially the prosecutorial misconduct claim in light of Fraud on the Court.

The District Court possessed ample authority to address these on-going issues. In Townsend v Sain, 372 U.S. 293 (1963) it was held that "evidenciary hearings required in habeas proceedings where there is a substantial allegation of newly discovered evidence". With regards to overcoming procedural defaults, in Amadeo v Zhant, 486 U.S. 214 (1988) it was held that "concealment of evidence on the part of the prosecutor is ample 'cause' to overcome procedural default". Regarding

petitioner's request to add a fifth ground of entrapment in his reply brief as a direct result of newly discovered evidence, in United States v Barrett, 178 F.3d 34 (1st Cir 1999) the appellate court asserted "The liberal amendment policy applicable to habeas petitions may make new claims available to a petitioner during a habeas action, even when the claim would not have been available at the inception of that action". Finally, regarding peering behind the curtain of the Grand Jury proceeding - which commenced nearly a month after the state's evidence had been falsified/manipulated by Agent McCall - in Webb v United States, 789 F.3d 647 (6th Cir 2015) the appellate court stated "the finding of an indictment, fair upon its face, by a properly constituted Grand Jury, conclusively determines the existance of probable cause. An exception to this rule applies when prosecutor knowingly or recklessly presents false testimony to the Grand Jury to obtain the indictment". In Ferrara v United States, 456 F.3d 278 (1st Cir 2006) the appellate court vacated the conviction of a defendant because the government withheld exculpatory evidence from the accused prior to his plea of guilt. In fact, most Circuits recognize that either nondisclosure or delayed disclosure of material exculpatory or impeachment evidence invalidates a plea of guilt. And the extensive case law supporting this was presented to the District Court in petitioner's Memorandum of Law Supporting §2255 Motion (DI 89) - which was out right ignored throughout the habeas proceedings and never adjudicated. And in a recent case Orie v Sec'y Pa Dep't of Corr, 940 F.3d 845 (3rd Cir 2019) the Third Circuit held that "introduction of fabricated evidence was Fraud on the Court" and the prejudice caused by that act can be corrected by declaration of a mistrial to reset the legal proceedings to a state prior to the introduction of that fabricated evidence.

Clearly the District Court possessed more than enough authority by which to address the miriad of legal issues that permeated the petitioner's habeas proceeding. Did the District Court abuse its discretion? Petitioner believes it did.

On June 25, 2018 petitioner filed a motion asking the Court to order the government to provide proof that 'Govn Exhibit 4' had been provided to defense counsel during discovery (DI 104).

On July 18, 2018 the government responded sua sponte baldly asserting 'Govn Exhibit 4' was provided to defense counsel in discovery but provided no proof (DI 105).

On July 30, 2018 petitioner replied to government's response (DI 106).

On August 23, 2018 petitioner filed a petition seeking authorization to file a second habeas corpus petition, citing newly discovered evidence, not previously available due to fraud, and his legal innocence. In re: Simmons, No 18-2904, U.S. Court of Appeals for the Third Circuit. Judgment entered Sep 13, 2018 denying request for not satisfying the requirements of §2244.

On October 26, 2018 petitioner filed the motion to reopen his procedurally defaulted habeas corpus proceeding pursuant to Fed. R. Civ. Proc. Rule 60(b)(2), 60(b)(3), 60(b)(6) and 60(d)(3) (DI 107).

Five months after its filing, on March 4, 2019, petitioner inquired of the Court regarding the status of his Rule 60 motion (DI 108).

One year after its filing, on October 28, 2019, petitioner filed a motion for a status report or evidentiary hearing on his Rule 60 motion (DI 111).

On January 2, 2020, after 15 months of inaction by District Court regarding petitioner's Rule 60 motion, petitioner requested a writ of mandamus - In re: Simmons, No 20-1050, U.S. Court of Appeals for the Third Circuit. Judgment entered Apr 27, 2020 denying request without prejudice to refiling.

On May 7, 2020, after 20 months of complete inaction, the District Court denied petitioner's Rule 60 motion for lack of jurisdiction after recharacterizing it as a second § 2255 petition (DI 117/118).

Petitioner's Rule 60 motion sought to reopen the earlier dismissed, procedurally defaulted habeas corpus proceeding by asserting a Rule 60(b)(2) claim

that Govn Exhibit 4 was new evidence, as defined by 60(b)(2), that supported the habeas claim of prosecutorial misconduct, a Rule 60(b)(3) claim of misrepresentation of the government's case-in-chief through evidence manipulation and concealment, a violation of Brady, a Rule 60(d)(3) claim of Fraud on the Court based on the prosecutor's intentional introduction into and use of knowingly falsified evidence throughout the criminal and habeas proceedings, and a Rule 60(b)(6) claim based upon the factual reality of petitioner's legal innocence of the charged conduct in the federal indictment.

The relief petitioner actually sought was for the District Court to: 1) reopen the prior habeas corpus proceeding, 2) allow petitioner to freely amend/supplement the originally filed habeas petition to include any claim whose factual predicate is based, in part or in whole, upon the previously concealed evidence, Govn Exhibit 4, 3) grant that petitioner has demonstrated more than ample 'cause' to overcome imposed procedural defaults, 4) order a prompt evidenciary hearing, 5) appoint professional defense counsel to assist/represent petitioner. The Rule 60(b) & 60(d) petition was solely directed at attacking the integrity of the earlier habeas proceeding due to the judge's decisions which precluded or blocked reaching the merits of petitioner's habeas claims - namely refusal to allow all requested discovery (forensics, Grand Jury), denial of any evidenciary hearing, denial of adding a claim based on newly discovered evidence, failure to reach the merits by allowing procedural default even in the face of proof of evidence manipulation and the use of fraud by the prosecutor(s) to ensure these decisions. Thus petitioner's Rule 60(b) & 60(d) motion was a legitimate Rule 60 motion.

STATEMENT OF FACTS

In the underlying Rule 60 motion petitioner established the following facts by 'clear and convincing' evidence, facts which the U.S. Attorney has never disputed:

1) Detective McKay proposed all criminal conduct during the state of Delaware's

online reverse police sting (Rule 60 motion, p 21-26).

2) Detective McKay engaged in actions and behaviors that jurists of reason would conclude induced petitioner to engage in McKay's proffered criminal conduct (Rule 60 motion, p 21-26).

3) Formerly concealed evidence, Govn. Exhibit 4, demonstrates petitioner's reluctance to engage in that criminal conduct (Rule 60 motion, p 21-26).

4) The State of Delaware dropped their criminal case against petitioner.

5) HSI Agent Patrick McCall deleted 75% of the state's evidence - interactive messaging collected by McKay during his online reverse police sting - to prepare and present has oath-sworn affidavit to initiate charging and arresting petitioner (Rule 60 motion, p 7,11-15).

6) The deleted evidence consisted exclusively of McKay's actions to induce and petitioner's reluctance to engage in criminal conduct (Rule 60 motion, p 21-26).

7) Agent McCall's fraudulent affidavit was presented under oath to magistrate judge to complain of and to justify federal arrest warrant for petitioner (Rule 60 motion, p 10-11 & Exhibit A).

8) McCall's fraudulent affidavit was used by AUSA McAndrew as the sole source of 'facts' presented to defense counsel, petitioner and the Court as their case-in-chief (Rule 60 motion, p 13-15).

9) The 'statement of facts' in the plea agreement and presentence report are exclusively derived from McCall's affidavit. In the Rule 60 motion, petitioner mapped each paragraph in the documents to a corresponding paragraph in McCall's fraudulent affidavit (Rule 60 motion, p 13-15).

10) The state's evidence - Govn Exhibit 4 - collected by McKay during his online reverse police sting was NEVER presented to petitioner throughout his prosecution.

11) The state's evidence - Govn Exhibit 4 - first surfaced on December 1, 2015

nearly two years after petitioner's conviction, as an attachment to the government's opposition brief to petitioner's §2255 motion to vacate conviction.

12) AUSA McAndrew asserted procedural default to block District Court from reaching the merits of petitioner's claims during the original 2255 habeas proceedings.

13) On February 25, 2014 AUSA admitted in open court during the plea hearing that the government has no evidence of predisposition of petitioner toward any of the criminal charges in the federal indictment (Rule 60 motion, p 26-27).

14) Govn Exhibit 4 presents substantial evidence of inducement by Det. McKay that fits the inducement framework in United States v Mayfield, 771 F.3d 417 (7th Cir 2013)(en banc) (Rule 60 motion, p 21-25).

15) Facts 13 & 14 form a complete affirmative defense of entrapment and, as such, is an assertion of petitioner's legal innocence of the charges in the indictment (Rule 60 motion, p 26-27).

16) At no time during the Rule 60 proceedings has the government denied or rebutted any of these facts, thus they stand entirely undisputed.

17) The government's sentencing memorandum served on the Court and defense counsel on August 7, 2014, nearly six months after the plea hearing of Feb 25, 2014 contained an attachment (Govn Exhibit 1), which was a reformatted version of Govn Exhibit 4 (DI 38, Exhibit 1).

18) Edson Bostic, defense counsel, fully aware of fact 13, possessed evidence on Aug 7, 2014, one week prior to sentencing, that his client was legally innocent of the charged conduct (Facts 13, 14 & 17).

19) Legal innocence is a valid basis on which to withdraw a plea of guilt.

20) Edson Bostic failed to alert petitioner of a valid basis to withdraw the Feb 25, 2014 plea pursuant to Fed. R. Crim. Proc. Rule 11.

21) Defense counsel, an officer of the court, failed to alert the District Court or his client of the fraud.

22) Edson Bostic, defense counsel, thus failed to preserve two substantial issues for possible appeal.

23) Petitioner's Rule 60 motion received no action by the District Court for nearly 20 months.

24) Following the District Court's denial of his Rule 60 motion, petitioner requested a Certificate of Appealability - United States v Simmons, No 20-2072, U.S. Court of Appeals for the Third Circuit. Judgment entered Oct 13, 2020 denying motion. Rehearing en banc denied Dec 23, 2020 stating "A majority of the judges of the circuit in regular service not having voted for rehearing".

25) Petitioner requested by letter to the Circuit Court clerk on January 7, 2021 a breakdown of the yes/no votes for rehearing since the Court order denying rehearing en banc is ambiguous, as logic would suggest two possible vote outcomes could be reconciled with 'a majority of judges ...not having voted for', 1) a unanimous rejection by all judges voting 'no' or 2) fewer judges voting 'yes' than those voting 'no' - a divided decision.

26) On February 3, 2021, after the clerk refused to provide the vote breakdown, the petitioner filed a formal motion with the Chief Judge of the Third Circuit requesting the release of the 'yes'/'no' vote count.

Would not a divided decision actually evidence that jurists of reason do, in fact, find the district court's assessment of petitioner's constitutional claims debatable or wrong? Petitioner believes that it would.

SUMMARY OF THE ISSUES

First, the District Court's recharacterization of petitioner's Rule 60 motion as a second habeas corpus petition and the appellate court's decision to essentially affirm, thru denial of a CoA, is contrary to the decision in, and abuses the proscribed framework of analysis described in Gonzalez v Crosby, 545 U.S. 524 (2005).

Second, the appellate court exceeded the scope of analysis that is required

in deciding whether to grant a Certificate of Appealability by simultaneously engaging in an analysis of the merits of some of the claims (Rule 60(b)(6)) in contradiction of the scope of analysis described in Buck v Davis, 137 S.Ct. 759 (2016).

Third, the lower courts, by recharacterization, have abrogated their jurisdiction, and thus have effectively denied petitioner a fulsome and meaningful habeas review of the constitutionality of his incarceration. This failure to permit a remedy, or perhaps an attempt to avoid a remedy - in the face of his legal innocence, heretofore unable to be asserted due to both Fraud on the Court by the prosecutor and by ineffective assistance of defense counsel - would "raise serious Constitutional questions".

ARGUMENTS

I. Gonzalez v Crosby, 545 U.S. 524 (2005).

Gonzalez v Crosby is the seminal U.S. Supreme Court case that directly addresses Rule 60 motions. The case reads like a tutorial intended for the inferior courts and clarifies the meaning of a Rule 60 'claim' in light of §2244(b) and clearly specified when such assertions would or would not amount to a habeas claim. The Gonzalez Court stated:

A Rule 60 assertion advances a habeas claim when it:

1) seeks to add a new ground
2) asserts 'excusable neglect', 60(b)(1), to add a claim
3) seeks relief to present newly discovered evidence, 60(b)(2), in support of a claim previously denied on the merits
4) cites 'subsequent change in substantive law' as a basis for Rule 60(b)(6) relief

A Rule 60 assertion does NOT advance a habeas claim when the motion attacks, not the substance of a federal court's prior resolution of a claim "on the merits", but:

1) a previous ruling which precluded a merits determination (for example - a denial due to failure to exhaust, procedural default, statute-of-limitations), or
2) some defect in the integrity of the federal habeas corpus proceeding, such as fraud on the federal habeas corpus court

First, petitioner's Rule 60 motion introduced to the court record via Rule 60(b)(2), newly discovered evidence (Govn Exhibit 4) and side-by-side comparisons of Govn Exhibit 4 to documents that represented the government's case-in-chief, in order to establish in a 'clear and convincing' manner evidence manipulation and Fraud Upon the Court. (Rule 60 motion p 14-19) These government documents (McCall's oath-sworn affidavit, plea agreement statement of facts, and PSI) were referenced and cited throughout the habeas corpus proceedings in motions filed by AUSAs McAndrew and Falgowski so as to deceive Judge Stark and resulted in Stark's denial of all of petitioner's multiple requests. 'Govn Exhibit 4' was evidence from the state's online reverse police sting, and facts therein were required to establish petitioner's complete affirmative defense of entrapment and thus his legal innocence to the charges in the federal indictment. These findings - evidence manipulation, use of false evidence in a legal proceeding, evidence concealment and the AUSA's knowledge that the petitioner was legally innocent - would support petitioner's claim of prosecutorial misconduct raised in his opening §2255 habeas petition, but that would NOT advance a 2nd or successive habeas petition in the spirit of §2244(b) because Judge Stark invoked procedural default, at AUSA McAndrew's request. Thus, the prosecutorial misconduct claim, as well as others, were NEVER addressed on their merits. "The Court denied in its entirity Movant's 2255 motion challenging his 2014 conviction" - Judge Stark.

Second, petitioner's Rule 60 motion alleged fraud, misrepresentation or misconduct by an opposing party - Rule 60(b)(3) and Fraud Upon the Court - Rule

60(d)(3). (Rule 60 motion p 10-19) These assertions are at the heart of petitioner's motion because fabrication and use of fabricated evidence in any legal proceeding is highly offensive and always constitutes egregious misconduct. Theokary v Shay (In re: Theokary), 592 Fed. App'x 102 (3rd Cir 2014)("The submission of fabricated evidence, regardless of the merits or validity of the underlying claim, always constitutes egregious misconduct"). And this conduct prejudiced petitioner throughout the legal proceedings. Prejudice that petitioner could not overcome due to the Court's denial of every attempt to address and mitigate that prejudice throughout the habeas proceedings. Prejudice arising through use of fabricated evidence in a criminal proceeding has resulted in a Superior Court's invocation of its inherent power under Hazel-Atlas (ie Rule 60(d)(3)) - and the Third Circuit's expressed approval of that invocation - to right the obvious wrong and reset the proceeding so as to eliminate that prejudice. Orie v Sec'y Pa Dep't of Corr, 940 F.3d 845 (3rd Cir 2019)(held: introduction of fabricated evidence was fraud on the court and the prejudice caused by that act can be corrected by declaration of a mistrial to reset the legal proceedings to a state prior to the introduction of that fabricated evidence).

The Gonzalez Court did not outline any situation in which assertions under Rule 60(b)(3) or Rule 60(d)(3) would give rise to a habeas claim under §2244(b). Thus petitioner's allegations asserting wrong against the petitioner under Rule 60(b)(3) and wrong against the Court under Rule 60(d)(3) could not possibly give rise to a 2nd or successive habeas claim since the Gonzalez court specifically stated fraud against the habeas court is NOT a habeas claim under §2244(b). Fraud against the petitioner and the District Court - starting from the inception of the federal case by the U.S. Attorney's office in Delaware did NOT cease as the case moved from criminal to a civil action. That would have required a full confession by AUSAs McAndrew and Falgowski to their fraudulent/criminal conduct, such confession simply did not happen. In reality the fabricated

evidence at the heart of the government's case-in-chief continued to be cited, referenced and quoted by AUSAs McAndrew and Falgowski throughout the habeas proceedings, and this garbage was even quoted by Judge Stark in his order denying the habeas petition. McAndrew and Falgowski were masterful in their deception of the District Court and Judge Stark, however both were ultimately terminated (McAndrew - 12/15/2015; Falgowski - 10/28/2016). And petitioner has yet to receive any relief whatsoever, no consideration of his habeas claims, only incessant, baseless denials at every step and in every way by the Court, who neither addressed the habeas claims on their merits, nor called for an evidenciary hearing at any time during the habeas proceedings or the Rule 60 proceedings, as required by Townsend v Sain.

Third, petitioner's Rule 60 motion asserted relief under Rule 60(b)(6) as this allows for the discretion of the court to come into play. The Supreme Court has opined that courts may consider a wide range of factors, including the risk of injustice to the parties and the risk of undermining public confidence in the judicial process. Liljeberg v Health Srvc Acq Corp, 486 U.S. 847, 863-864 (1988). The U.S. Supreme Court went on to state that a court making such determinations, must continuously bear in mind that, in order to perform its function in the best way, justice must satisfy the appearance of justice.

Petitioner established in the Rule 60 motion his legal innocence to the charges in the federal indictment by establishing a complete affirmative defense which necessarily required introducing new evidence under Rule 60(b)(2). (Rule 60 Motion, p 20-27) 'Govn Exhibit 4' - hidden from petitioner for nearly two years - provided ample evidence of inducement by Detective McKay during his online reverse police sting targeting petitioner. Petitioner had already secured the government's affirmative admission in earlier court hearings that no evidence exists that would show petitioner predisposed toward the conducts charged in his indictment. (Rule 60 Motion, p 26-27). It would seem to petitioner and jurists

of reason that imprisonment of an individual legally innocent of the charges would certainly constitute 'extraordinary circumstances' that would permit relief under Rule 60(b)(6). McClesky v Zant, 499 U.S. 467 (1991)("fundamental miscarriage of justice" - an extraordinary instance when a constitutional violation probably has caused the conviction of one innocent of the crime"). And a Court's utter failure to at least meaningfully address that situation would be amazingly potent at undermining public confidence in our Courts, and would allow a manifest miscarriage of justice to stand uncorrected.

Clearly petitioner's assertion of Rule 60(b)(6) relief could not give rise to a habeas claim under §2244(b) because the Gonzalez Court specified that could happen only if the requested relief cited 'subsequent change in substantive law' as the basis for Rule 60(b)(6) relief. Petitioner merely asserted his legal innocence by establishing a complete affirmative defense of entrapment, heretofore impossible because the U.S. Attorney's concealment of the facts in 'Govn Exhibit 4', the state's evidence, by deleting 75% of that evidence in the federal case and committing Fraud on the Court.

II. Buck v Davis, 137 S. Ct. 759 (2016).

Buck v Davis is another recent U.S. Supreme Court case with which the lower courts decision and analysis conflicts. In Buck's Rule 60(b)(6) and 60(d)(3) petition, Buck directly attacked the integrity of his criminal proceeding due to a juror who Buck alleged was racially biased. His district court denied Buck's Rule 60 motion as a 2nd or successive habeas petition. On Buck's request for a CoA, his appellate court denied the request stating a) the petition was a second/ successive habeas petition and b) Buck had "failed to establish extraordinary circumstances" to warrant relief under Rule 60(b)(6). Just like the present case history. The U.S. Supreme Court granted a writ of certiorari and ruled that the district court 'abused its discretion by denying the Rule 60 motion' and the appellate court 'exceeded the scope of the CoA analysis' by engaging

in an assessment of the merits or lack thereof in his Rule 60(b)(6) claim. On remand, Buck was ultimately granted a writ of habeas corpus by the appellate court.

Likewise, Judge Stark has abused his discretion by denying petitioner relief under Rule 60 through conveniently construing petitioner's valid Rule 60 motion as a 2nd or successive habeas petition - in direct contradiction to the expressed specifications in Gonzalez v Crosby. Likewise, the ruling of the appellate court merely repeated Stark's assessment, ignoring all of the requests for relief (Rule 60(b)(2), 60(b)(3), 60(b)(6) and 60(d)(3)) that a Gonzalez analysis would show constituted legitimate claims under Rule 60. Furthermore, the ruling of the appellate court stated that "Appellant was not entitled to relief under Rule 60(b) because he failed to show that there were 'extraordinary circumstances where, without [Rule 60(b)] relief, an extreme and unexpected hardship would occur' ", thus exceeding the scope of analysis at the CoA stage in the same way as described in Buck v Davis. Because issuance of a CoA is required for jurisdiction before any Court can address the merits of any petitioner's Rule 60 claims, how can the appellate court assert "Appellate was not entitled...", when, in fact, by their denial of the CoA, the court lacks jurisdiction? The Circuit's final ruling reads like a generic boilerplate order designed to automatically reject all Rule 60 motions, as the court did not once reference any fact in petitioner's Rule 60 motion to justify their rejection.

The appellate court's ruling is profoundly disturbing when they assert that no 'extraordinary circumstances' have occurred. The essence of this case is that evidence falsification and concealment has been used to secure a conviction of one whom the AUSA knew was not predisposed to the charged conduct from the start of the federal prosecution.

III. Strict Rendering of AEDPA Creates Serious Constitutional Question

The lower courts, by recharacterization of petitioner's Rule 60 motion,

which asserted Fraud on the Court and legal innocence, as a second habeas corpus petition have abrogated their jurisdiction and, by so doing, have effectively denied petitioner a fulsome and meaningful habeas review of the constitutionality of his continued incarceration. The appellate court refused his earlier formal request to file a second habeas petition based on assertions of evidence manipulation, Fraud on the Court and his legal innocence based on newly discovered evidence, heretofore unavailable to petitioner due to egregious conduct on the part of the prosecutor and ineffective assistance of counsel. The district court, faced with these same facts, declared the Rule 60 motion as a second habeas petition and when a Certificate of Appealability was requested from the appellate court they denied the CoA, asserting the Rule 60 motion was a second habeas petition.

With the 1996 passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress amended the way habeas corpus proceedings can be used to address constitutional challenges to a conviction or sentence, specifically, henceforth petitioners are allowed only one habeas corpus proceeding for a collateral attack, unless petitioner relies on new evidence that is suggestive of innocence. 28 U.S.C. § 2255(h). Courts quickly recognized the potential danger of this restriction by Congress in that a very narrow interpretation could create a barrier to habeas relief that in itself, under the right circumstances, could raise or create serious Constitutional questions.

Does the lower Courts' strict rendering of AEDPA's intent - in light of petitioner's having established his legal innocence to the charges in his indictment - risk allowing Legislative authority of overstepping and interfering with the Court's power to adjudicate or its inherent power to address due process violations by the Executive Branch of government? Several Circuits have devised tests to clarify when the savings clause of § 2255 would permit a remedy.

In Triestman v United States, 124 F.3d 361 (2nd Cir. 1997) the Second Circuit

has stated "We conclude that serious constitutional questions would arise if a person can prove his actual innocence on the existing record - and who could not have effectively raised his claim of innocence at an earlier time - has no access to judicial review".

In In re Dorsainvil, 119 F.3d 245 (3rd Cir. 1997) the Third Circuit court of appeals stated "If no other avenues of judicial review were available for a party who claimed that he was factually or legally innocent as a result of a previously unavailable statutory interpretation, the Court would be faced with a thorny constitutional issue".

In Prost v Anderson, 636 F.3d 578 (10th Cir. 2011) the Tenth Circuit court of appeals stated "whether the savings clause may be used in the fashion the 2nd and 3rd circuits have suggested to avoid serious constitutional questions arising from application of §2255(h) is an important question. So are the questions whether, when and how application of §2255(h)'s limits on 2nd or successive motions might raise a serious constitutional question".

In essence petitioner's current situation is factually similar to both Triestman and In re Dorsainvil and yet subtly different. Like Triestman, petitioner can now establish his innocence on the existing record, yet could not have done so earlier. Not due to his own negligence but solely due to egregious misconduct on the part of the prosecutor, coupled with ineffective assistance from his defense counsel. And like In re Dorsainvil his claim is that of legal innocence which could not have been asserted earlier. Not due to a benign situation such as previously unavailable statutory interpretation, but due entirely to malicious conduct by police and prosecutor alike in falsifying the state's evidence to specifically impede his ability to assert his legal innocence via a complete affirmative defense of entrapment and, thus, forced to plea guilty to charges from the Grand Jury secured by that falsified evidence. And finally, like both cases, petitioner has yet to be afforded a fulsome,

robust and meaningful habeas review of the constitutionality of his incarceration.

Clearly, the District Court had both jurisdiction and authority and power to address petitioner's claims of Fraud on the Court in his legitimate Rule 60 motion. United States v Beggerly, 524 U.S. 38 (1998)("Rule 60(d) permits a court to entertain an independent action to relieve a party from judgment in order to 'prevent a grave miscarriage of justice' "); United States v Wright, 913 F.3d 364 (3rd Cir 2018)("Prejudice sufficient for a district court to intervene in a proper prosecution based upon its inherent authority occurs when the government engages in actions that place defendant at a disadvantage in addressing the charges"); Reyes-Mata v Lynch, 192 L.Ed.2d 225 (2015) the majority stated:

> "When a federal court has jurisdiction, it also has virtually unflagging obligation to exercise that authority... Courts sometimes construe one kind of filing as another. If a litigant misbrands a motion, but could get relief under a different label, a court will often make the requisite change. But that established practice does not entail sidestepping the judicial obligation to exercise jurisdiction. And it results in identifying a route to relief, not in rendering relief impossible... What a federal circuit court may not do is to wrap a merits discussion in jurisdictional garb so that the U.S. Supreme Court cannot address a possible division between that court and every other".

Justice Thomas went on to state that "recharacterization occurs when a court treats an unambiguous filing as something that it is not. That practice is an unusual one, and should be used, if at all, with caution".

The Circuit court should have granted the Certificate of Appealability, or if they insist the Rule 60 motion was a second or successive habeas petition, should have authorized its adjudication by the district court given the obvious miscarriage of justice that has occurred through the well evidenced egregious misconduct of the government through special agent and AUSA alike. Yet, the Circuit court chose to sit silent in the face of the factual reality of petitioner's case, not even acknowledging that claims under Rule 60(b)(3) and Rule 60(d)(3) were raised. Thus, jurisdiction abrogated has taken priority over addressing clear due process violations against the petitioner. Does such a

a strict and narrow interpretation of § 2255(h) by the District Court, given the legal innocence of the petitioner and the egregious misconduct of the prosecutor, actually create a serious Constitutional issue? Petitioner believes that it does.

REASONS FOR GRANTING THE PETITION

The U.S. Supreme Court has defined a 'fundamental miscarriage of justice' as "an extraordinary instance when a Constitutional violation probably has caused the conviction of one innocent of the crime". McClesky v Zhant, 499 U.S. 467 (1991).

Petitioner has demonstrated his legal innocence through a complete affirmative defense of entrapment by adducing both a lack of predisposition, through the federal prosecutor's own admission of such, and ample evidence of his inducement by state detectives during their online reverse police sting. The State of Delaware dropped their criminal case against petitioner when their forensic analyses revealed petitioner was, in fact, innocent of their targeted criminal conduct, illegal pornography. The federal government accepted the case from the State of Delaware, promptly created a falsified version of the state's evidence by deleting all evidence of inducement of petitioner by police to impair the petitioner's ability to mount a defense of entrapment and proceed to trial. Matthew v United States, 485 U.S. 58 (1988)("Defendant entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment"). Interestingly, whenever the federal prosecutor spoke of the state's sting operation he always used the pronoun 'we', revealing an active, on-going collaboration between the feds and the state. Thus, the state detectives during their sting operations are emboldened to induce individuals, even non-predisposed individuals, to participate in their criminal schemes, knowing that the state will be protected by the federal prosecutor's willingness to conceal their inducement activities through evidence falsification and Fraud on the Court.

Petitioner has shown that a falsified version of the state's evidence was used as the affidavit to support charging and arresting petitioner. Furthermore,

this fraudulent evidence was likely used to deceive a federal Grand Jury into returning a two count indictment. Now with his ability to mount a defense and proceed to trial impaired, facing two federal charges, and having a public defender who was, at best ineffective, or worse complicit in the fraud, the petitioner had little choice but to plead guilty to the lesser charge. At the plea hearing, and in direct response to petitioner's assertion of his lack of predisposition to the criminal conduct charged in the indictment, the government, through Assistant US Attorney McAndrew, admitted that no evidence exists to suggest petitioner's predisposition toward any of the charged criminal conduct. Furthermore, one week prior to federal sentencing, prosecution's sentencing memorandum was served on the District Court and the public defender, Edson Bostic. That memorandum (DI 38) contained an attachment of the state's actual evidence (unfalsified) (DI 38, attachment 1). All the necessary components to assert entrapment as a defense are now available to the defense counsel, yet that counsel NEVER advised his client that the evidence needed to complete the assertion of the affirmative defense of entrapment - i.e. his legal innocence - was now in hand. Nor did that defense counsel advise petitioner of this valid basis to withdraw his earlier uninformed guilty plea. Fed. R. Crim. Proc. Rule 11(d); United States v James, 928 F.3d 247 (3rd Cir 2019)("Several courts of appeal have treated a well-founded entrapment defense as a sufficient claim of innocence"; "Legal innocence alone can support withdrawal of a guilty plea").

The federal government thus acheived a conviction through falsification of evidence, Fraud - aided by ineffective defense counsel - that it could not have acheived, as a matter of law, at trial. Jacobson v United States, 503 U.S. 540 (1992)("Government must adduce evidence to show defendant, who pleads entrapment, was predisposed, prior to and independant of the acts of the government, beyond a reasonable doubt, else government fails 'as a matter of law' "); United States v Jannotti, 501 F.Supp 1182 (3rd Cir 1980)("Under no circumstances is it permis-

sible to convict of crime a non-predisposed defendant who is induced by law enforcement agents to commit the crime charged").

All courts agree that claims of actual factual innocence have been recognized in constitutional and habeas jurisprudence as among the "most compelling cases for habeas review". Prost v Anderson, 636 F.3d 578 (10th Cir 2011). Does legal innocence - that could not have been asserted earlier solely due to evidence falsification, Fraud on the Court, and ineffective assistance of defense counsel - compel such habeas review? Petitioner believes such a miscarriage of justice has occurred and does demand such habeas review.

The Jacobson Court stated "When the government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the Courts should intervene". The petitioner prays that they do.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Keith A. Simmons

Date: February 12, 2021