CLD-005 October 1, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-2072**

UNITED STATES OF AMERICA

VS.

KIRK A. SIMMONS, Appellant

(D. Del. Crim. No. 1-13-cr-00097-001)

Present: RESTREPO, MATEY and SCIRICA, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c); Buck v. Davis, 137 S. Ct. 759, 777 (2017); Morris v. Horn, 187 F.3d 333, 339–41 (3d Cir. 1999). To the extent that Appellant's motion under Federal Rule of Civil Procedure 60(b) sought to raise new claims or to attack the District Court's denial of claims in his 28 U.S.C. § 2255 motion on the merits, jurists of reason would agree, without debate, that the Rule 60(b) motion constituted an unauthorized second or successive § 2255 motion that the District Court lacked jurisdiction to consider. See 28 U.S.C. §§ 2253(c)(2), 2244(b)(3)(A); Gonzalez v. Crosby, 545 U.S. 524, 530–32 (2005); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000). To the extent that Appellant's motion raised "true" Rule 60(b) claims, see Gonzalez, 545 U.S. at 531, by challenging the District Court's denial of his requests for evidence and dismissal of claims in his § 2255 motion as procedurally barred, jurists of reason would agree, without debate, 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." Cox v. Horn, 757 F.3d 113, 120 (3d Cir. 2014) (citation omitted); see also Gonzalez, 545 U.S. at 535.

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: October 13, 2020
Lmr/cc: Graham L. Robinson
Kirk A. Simmons

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

KIRK A. SIMMONS,	:	
	:	
Movant/Defendant,	:	
	:	
v.	:	Civ. Act. No. 15-549-LPS
	:	Cr. Act. No. 13-97-LPS
UNITED STATES OF AMERICA,	:	
	:	
Respondent/Plaintiff.	:	

MEMORANDUM

I. INTRODUCTION

Movant Kirk A. Simmons ("Movant") has filed a Motion for a Bill of Particulars (D.I. 104) and a Rule 60(b) Motion to Reopen/Reconsider his § 2255 Proceeding (D.I. 107) ("Rule 60(b) Motion"). For the reasons discussed, the Court will deny both Motions.

II. BACKGROUND

On February 3, 2017, the Court denied in its entirety Movant's § 2255 Motion challenging his 2014 convictions for attempted coercion and enticement of a minor (18 U.S.C. § 2422(b)). (D.I. 28; D.I. 58) Movant appealed that decision and, on April 28, 2017, the Third Circuit Court of Appeals terminated Movant's appeal after denying his request for a certificate of appealability. (D.I. 100)

On June 25, 2018, Movant filed in this Court a Motion for a Bill of Particulars, asking the Court to order the Government to provide a Bill of Particulars that "itemizes and lists those evidences [sic] transferred to defense counsel during discovery in the above captioned criminal case." (D.I. 104) Movant asserts he needs this evidence to demonstrate that the Government did

not provide him with Exhibit 4[1] during discovery in his criminal proceedings. He also contends that the Government's failure to provide Exhibit 4 supports an argument he wishes to raise in a Rule 60(b) motion, namely, that his rights were violated under *Brady v. Maryland*, 373 U.S. 83 (1963). (D.I. 104) The Government responds that the Court should deny the Motion for a Bill of Particular for two reasons. (D.I. 105) First, the Government notes that the request was not filed within a reasonable time, since it was filed almost four years after Movant was sentenced and more than a full year after his § 2255 Motion was denied. (D.I. 105 at 2) Second, the Government asserts that Movant incorrectly alleges that he never received the requested information, which the Government insists it provided Movant "during the normal course of discovery on October 11, 2013." (D.I. 105 at 2-3)

On August 29, 2018, Movant filed in the Court of Appeals for the Third Circuit an Application for Leave to File a Second or Successive § 2255 Motion ("Application for Second/Successive Motion Authorization"), on the ground that new evidence (including Exhibit 4) came to light during his § 2255 proceeding. *See In re Simmons*, No. 18-2904, Application (3rd Cir. Aug. 29, 2018). Movant contended that this new evidence supports the claims he raised in his original § 2255 Motion, and also that the new evidence demonstrates his decision to plead guilty was not fully informed, due to the Government's *Brady* violation. *Id.* at 60. The Third Circuit denied the Application for Second/Successive Motion Authorization on September 13, 2018. *See In re Simmons*, No. 18-2904, Order (3rd Cir. Sept. 13, 2018).

[1]Exhibit 4 "contains incriminating conversations between [Movant] and an undercover detective in which [Movant] discusses his clear intent to violate 18 U.S.C. § 2422(b)." (D.I. 105 at 1) The Government provided Exhibit 4 to the Court and Movant during Movant's § 2255 proceeding.

On October 26, 2018, Movant filed in this Court a Motion for Reconsideration pursuant to Federal Rule of Civil Procedure 60(b)(2), (3) and (6), asking the Court to reconsider its denial of his § 2255 Motion because the Government did not provide him with Exhibit 4 in his criminal proceeding during the pre-plea period. (D.I. 107 at 9-10) According to Movant, the Government has falsely stated that it provided Exhibit 4 to Movant during discovery. He also contends that the Government intentionally presented a falsified version of the facts during the pre-plea period in order to "substantially interfere" with Movant's ability to "fully and fairly articulate an entrapment defense and proceed to trial." (D.I. 107 at 10)

IV. LEGAL STANDARDS

A motion filed pursuant to Federal Rule of Civil Procedure 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Pursuant to Rule 60(b)(2), a "court may relieve a party or its legal representative from a final judgment, order, or proceeding" "for [] newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Pursuant to Rule 60(b)(3), a "court may relieve a party or its legal representative from a final judgment, order, or proceeding" "for fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Finally, pursuant to the catch-all provision of Rule 60(b)(6), a "court may relieve a party or its legal representative from a final judgment, order, or proceeding" "for any other reason that justifies relief." A court may grant a Rule 60(b) motion only in extraordinary circumstances,[1] and in such a motion it is not appropriate to reargue issues that the

[1]*Moolenaar v. Gov't of Virgin Islands*, 822 F.2d 1342, 1346 (3d Cir. 1987).

court has already considered and decided. *See Brambles USA Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990).

Additionally, when, as here, a district court is presented with a Rule 60(b) motion for reconsideration after it has denied a movant's § 2255 motion, the Court must first determine if the motion constitutes a second or successive application under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). As articulated by the Third Circuit,

> in those instances in which the factual predicate of a petitioner's Rule 60(b) motion attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction, the Rule 60(b) motion may be adjudicated on the merits. However, when the Rule 60(b) motion seeks to collaterally attack the petitioner's underlying conviction, the motion should be treated as a successive habeas petition.

Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004). Under AEDPA, a prisoner cannot file a second or successive habeas application without first obtaining approval from the Court of Appeals; absent such authorization, a district court cannot consider the merits of a subsequent application. *See* 28 U.S.C. §§ 2244(a) and 2255(h); Rule 9 of the Rules Governing Section 2255 Cases in the United States District Court, 28 U.S.C. foll. § 2255; *Robinson v. Johnson*, 313 F.3d 128, 139-40 (3d Cir. 2002).

IV. DISCUSSION

A. Rule 60(b) Motion for Reconsideration

Movant asserted the Court should reopen earlier habeas corpus proceedings.

In his Motion for Reconsideration, Movant asserts that the Court should vacate his conviction because the Government did not provide him with Exhibit 4 during his criminal proceeding. More specifically, Movant contends that Exhibit 4 constitutes newly-discovered evidence for the purposes of Rule 60(b)(2), and that the Exhibit supports the claims for relief he presented in his original § 2255 Motion. (D.I. 107 at 6-8) Relatedly, Movant contends that the Court should also grant relief under Rule 60(b)(3), because the Government committed "widespread

and deliberate" fraud during his criminal proceedings in order to "substantially interfere" with his ability to "fully and fairly articulate an entrapment defense and proceed to trial." (D.I. 107 at 10)

The arguments in Movant's Rule 60(b) Motion attack his underlying conviction and not the manner in which the Court's denial of his § 2255 Motion was procured. Consequently, the Court must treat the Motion as a second or successive § 2255 Motion. It appears that Movant presented these same arguments to the Third Circuit in his September 2018 Application for Second/Successive Motion Authorization, and the Third Circuit denied that request. There is no indication that Movant has obtained authorization to file a second or successive § 2255 motion from the Third Circuit since its 2018 denial. Therefore, the Court will dismiss the instant Rule 60(b) Motion for lack of jurisdiction.[2] *See* Rule 9, 28 U.S.C. foll. § 2254; 28 U.S.C. § 2244(b)(1).

B. Motion for a Bill of Particulars

In his Motion for a Bill of Particulars, Movant asks the Court to order the Government to itemize the evidence it provided to defense counsel during discovery in his underlying criminal proceeding. Movant asserts that this information would demonstrate that the Government did not provide him with Exhibit 4 during his criminal proceeding, and also that the information supports the arguments in his Rule 60(b) motion.

Having already determined that it lacks jurisdiction over Movant's Rule 60(b) Motion, the Court will dismiss as moot the instant Motion for a Bill of Particulars. Alternatively, even if the Motion were not moot, the Court would deny the Motion as factually baseless because the

[2]The Court concludes that it would not be in the interest of justice to transfer the instant Motion to the Court of Appeals for the Third Circuit, because nothing in the Motion comes close to satisfying the substantive requirements for a second or successive petition under 28 U.S.C. § 2244(b)(2).

Government provided the information contained in Exhibit 4 to Movant during the discovery phase of his criminal proceeding. (*See* D.I. 105 at 2-3)

C. Motion for Status Report or Hearing

In October 2019, Movant filed a Motion for a Status Report and/or Hearing for his Rule 60(b) Motion. (D.I. 111) Having decided that it must deny the Rule 60(b) Motion for lack of jurisdiction, the Court will dismiss as moot the Motion for Status Report and/or Hearing.

V. CONCLUSION

For the aforementioned reasons, the Court concludes that the instant Rule 60(b) Motion constitutes an unauthorized second or successive § 2255 Motion under 28 U.S.C. § 2244 and § 2255(h). Therefore, the Court will dismiss the Rule 60(b) Motion for lack of jurisdiction. Relatedly, the Court will also decline to issue a certificate of appealability, because Movant has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997); 3d Cir. LAR 22.2 (2011). Finally, the Court will dismiss as moot Movant's Motions for a Bill of Particulars and a Status Report/Hearing. A separate Order will be entered.

May 7, 2020
Wilmington, Delaware

HONORABLE LEONARD P. STARK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

KIRK A. SIMMONS,	:	
	:	
Movant/Defendant,	:	
	:	
v.	:	Civ. Act. No. 15-549-LPS
	:	Cr. Act. No. 13-97-LPS
UNITED STATES OF AMERICA,	:	
	:	
Respondent/Plaintiff.	:	

ORDER

At Wilmington this 7th day of May, 2020, for the reasons set forth in the Memorandum issued this date;

IT IS HEREBY ORDERED that:

1. Movant's Motion for Reconsideration Pursuant to Federal Rule of Civil Procedure 60(b) is **DENIED** for lack of jurisdiction because it constitutes an unauthorized second or successive § 2255 motion. (D.I. 107)

2. Movant's Motion for a Bill of Particulars is **DISMISSED** as moot. (D.I. 104)

3. Movant's Motion for Status Report/Hearing is **DISMISSED** as moot. (D.I. 111)

4. The Court declines to issue a certificate of appealability.

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. **20-2072**

UNITED STATES OF AMERICA

v.

KIRK A. SIMMONS,
Appellant

D.C. No. 1-13-cr-00097-001

SUR PETITION FOR REHEARING

Before: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and SCIRICA,* *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ L. Felipe Restrepo
Circuit Judge

Dated: December 23, 2020
Lmr/cc: Graham L. Robinson
Kirk A. Simmons

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* Judge Scirica's vote is limited to panel rehearing only.

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may

APPENDIX E

appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [28 USCS § 2255].

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

APPENDIX F

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Rule 11. Pleas

(a) **Entering a Plea.**

(1) *In general.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) **Considering and Accepting a Guilty or Nolo Contendere Plea.**

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel-and if necessary have the court appoint counsel-at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the

Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) **Plea Agreement Procedure.**

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the

defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) **Withdrawing a Guilty or Nolo Contendere Plea.** A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) **Finality of a Guilty or Nolo Contendere Plea.** After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) **Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) **Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) **Harmless Error.** A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KIRK A. SIMMONS — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, Kirk A. Simmons, do swear or declare that on this date, February 16, 2021, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Soliciter General of the US
Department of Justice, Room 5616, 950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 16, 2021

Amended Brief mailed Feb 22, 2021
Kirk A. Simmons

Kirk A. Simmons
(Signature)