No. 21-6096

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE:

BYRON THOMAS MCCOLLUM,

Petitioner.

On Petition For A Writ Of Mandamus To
The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF MANDAMUS

Byron Thomas McCollum
Petitioner, pro se

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals can refuse to consider and rule upon a duly filed Motion to Recall Mandate, the basis of said motion alleges that the Eleventh Circuit, in denying a Certificate of Appealability (COA), denied that COA based upon a merits determination of facts supporting the constitutional claim presented, a decision and judgment made without jurisdiction and in direct violation of 28 U.S.C. § 2253(c)(1)?

2. Whether the Eleventh Circuit Court of Appeals' decision and judgment to deny a COA on the constitutional claim presented based on a merits determination of the underlying facts supporting that claim, a decision and judgment made without jurisdiction, and in direct violation of 28 U.S.C. § 2253(c)(1), are, as a matter of law, absolutely void?

3. Whether a pro se prisoner litigant has a procedural due process right, pursuant to Eleventh Circuit Rule 41-1(b), which authorizes the Eleventh Circuit to recall a mandate already issued to prevent "injustice," to file a request the mandate be recalled, a request alleging the Eleventh Circuit acted without jurisdiction in its decision and judgment denying a COA, because that decision and judgment was a merits based decision, in direct violation of 28 U.S.C. § 2253(c)(1)?

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PETITION FOR A WRIT OF MANDAMUS

Byron Thomas McCollum respectfully petitions for a Writ of Mandamus to compel a review and determination of a Motion to Recall Mandate from the U.S. Court of Appeals for the Eleventh Circuit.

OPINION BELOW

Letters from the court of appeals, App. A & B, dated July 12, 2021, and July 23, 2021, informing Petitioner that the Motion to Recall Mandate had been received by the appellate court, and that no action would be taken on that motion.

JURISDICTION

Pursuant to 28 U.S.C. § 1651(a), All Writs Act, the Court has the authority to issue a Writ of Mandamus to compel the Court of Appeals for the Eleventh Circuit to consider and make a determination on a Motion to Recall Mandate filed under Circuit Rule 41-1. Stay or Recall of Mandate.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Sixth Amendment:

Right to Counsel Clause

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

Fifth Amendment:

Due Process Clause

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

Title 28 U.S.C. § 2253 provides that:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> > (B) the final order in a proceeding under 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Eleventh Circuit Court of Appeals Rules

> Cir.R. 41-1. Stay or Recall of Mandate
>
> (b) A mandate once issued shall not be recalled except to prevent injustice.

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

My name is Byron Thomas McCollum. I am 73 years old. I an the Petitioner, a pro se litigant, and I will herein refer to myself using first-person pronouns.

On August 8, 2015, I was indicted in Columbus, Georgia, on one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a)&(b), and one count of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). (App.C).

I pled not guilty and demanded a jury trial. On or about January 27, 2016, I informed my appointed defense counsel, Ms. Jennifer Curry, in writing, of my need and desire to testify in my own defense. (App. D, pgs. 7-8). My attorney did not meet with me until approximately 36 hours before my trial was to begin, which was February 29, 2016. During that brief 11th hour meeting, counsel informed me that, should I testify, the trial judge would admit all my prior convictions, dating back to the 1960's, and most significantly prior bank robbery convictions I had incurred in 1985 and 1997. (Id. pg. 8-10). I questioned counsel extensively about the admission of those prior bank robbery convictions, and she assured me the trial judge would admit those convictions. (Id.). Based solely on counsel's legal advice concerning the trial court's admission of those prior bank robbery convictions, I waived my right to testify. (Id.).

The Government's case against me was based on circumstantial evidence. Because I was prevented from testifying, the Government was allowed to twist otherwise innocuous facts and circumstances into pretzel logic, and omit evidence that was probative of my innocence. (Id.).

During my jail incarceration, prior to and after I was ultimately convicted, I had no access to any legal reference materials; therefore, I had no way then to determine whether counsel's advice regarding the admission of my prior bank robbery convictions as impeachment evidence was correct. However, at my July 6, 2016, sentencing hearing, I acknowledged the fact that I had wanted to testify, but that I did not because of counsel's advice about the trial court's intention to admit those bank robbery convictions.

The trial judge responded:

> And there were plenty of good reasons for you not to testify because...had you testified, it is clear those felony convictions would have been admitted, and the jury would have heard at trial that you were a **SERIAL BANK ROBBER** before you committed this offense. So at trial it made complete sense for you to make the decision on your own not to testify. And the record, I think, will be clear on that. (emphasis added).

(App. E, pg. 23, line 9-19).

Thus, the trial judge verified explicitly what my trial counsel told me regarding the admission of multiple prior bank robbery convictions as impeachment evidence. The trial judge gave no consideration at all to the unfair prejudice I would

suffer from the admission of those convictions. Moreover, since my counsel did not file a motion in limine to determine which, if any, of my prior convictions would have been admissible under Federal Rule of Evidence (FRE) 609, it appears obvious that counsel had some communication with the trial judge, prior to advising me before trial, about the judge's intention to admit those multiple prior bank robbery convictions.

On or about October 10, 2018, I filed an Amended 28 U.S.C. § 2255 motion, setting forth nine separate claims of ineffective assistance of cousnel (IAC). (App. D). However, only Ground I of that motion is relative to the determination of this Petition.

Ground I of that § 2255 motion alleged that I waived my right to testify based on the erroneous legal advice of my trial counsel. (Id. pg. 3).

In 1985, I pled guilty, pursuant to Federal Rule of Criminal Procedure 20, to nine(9) bank robberies in the district court in Columbus, Georgia. I received nine(9) concurrent twenty-year sentences. I argued in my § 2255 motion that those bank robbery convictions were inadmissible under FRE 609(b) because 1) I had not been given any written notice of the Government's intention to use those convictions as impeachment evidence, 2) that those convictions were too old and lacked any probative value as impeachment evidence, and 3) any prior bank robbery conviction, let alone multiple bank robbery convictions, was too prejudicial because I was on trial for bank robbery. (App. , pg. 3-15).

In 1997, I pled guilty to bank robbery in state court in Tampa, Florida. I received a fifteen-year prison sentence. I also pled guilty to a grand theft charge, and I received a concurrent five-year sentence. I was released from state prison in 2009; therefore, I acknowledged that both those 1997 convictions would have been potentially admissible under FRE 609(a)(1). (Id. pg. 23-15). I also acknowledged that, had I testified, the Government would have been entitled to impeachment evidence, if same was available. However, I argued that my 1997 grand theft conviction would have satisfied the government's need for impeachment evidence, and that the 1997 bank robbery conviction, which would have been cumulative impeachment evidence to the grand theft conviction, was too prejudicial because I was on trial for the same offense. Because it was the same exact offense, the potential was just too great that the jury would misuse that prior bank robbery conviction as substantive evidence of my guilt on the current offense. (Id.).

In denying this ground, the district court stated:

> Moreover, even if it is possible that the Court would not have permitted the Government to impeach Petitioner with the 1985 conviction[s], the Court likely would have admitted the 1997 convictions for bank robbery and grand theft motor vehicle under Rule 609(a)(1)(B). Rule 609(a)(1)(B) requires that a felony conviction be "admitted in a criminal case in which the witness is a defendant, "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Here, Petitioner argues that his testimony was critical to his defense because the Government's case against him was based on

> circumstantial facts. Thus, Petitioner's testimony would have negated each of the circumstantial facts. Thus, Petitioner's credibility would have been vital, and the Government would have a substantial need for impeachment. The Court likely would have admitted both the 1997 convictions, and Petitioner's counsel was not ineffective for telling her client so. (emphasis added).

(App. F, pg. 4-5).

Clearly, the trial judge retreated from his stated position at my sentencing hearing, that he would have admitted multiple bank robbery convictions to depict me as a "serial bank robber." However, without addressing in any way the "probative value versus prejudicial effect" of the prior bank robbery conviction, a requirement of FRE 609, the judge stated that he would have likely admitted both my prior 1997 convictions, which included a prior bank robbery conviction. And by stating an intention to admit that prior bank robbery conviction, which was indeed cumulative impeachment evidence to the grand theft conviction, the trial judge was able to absolve my trial counsel from being ineffective. And, of course, the trial judge denied a Certificate of Appealability (COA). (Id.).

After filing a timely Notice of Appeal (App. C), I filed a motion for a COA in the Eleventh Circuit. (App. G). In that motion I requested a COA on Grounds I, II, III and VI, each of which alleged an IAC claim.

On March 30, 2021, the Eleventh Circuit entered a one-page order denying a COA, an order stating only that I "failed to make

a substantial showing of a denial of a constitutional right." (App. H).

With no analysis of any of my IAC issues, I chose to seek reconsideration of only Ground I, an IAC issue I was confident showed a denial of my Sixth Amendment right to effective assistance of counsel. (App. I).

On May 19, 2021, the Eleventh Circuit entered an order denying reconsideration, an order stating only that I "had offered no new evidence or arguments of merit to warrant relief." (App. J).

On or about June 30, 2021, I filed a Motion to Recall the Mandate, pursuant to Eleventh Circuit Rule 41-1(b). The basis of that motion alleged that the appellate court's denial of a COA was a merits decision, which exceeded the jurisdictional authority provided by 28 U.S.C. 2253(c), a fact that rendered the appellate court's decision null and void. (App. K).

The appellate court sent me a letter dated July 12, 2021, stating: "The Court has received your motion to recall mandate. No action will be taken. No further relief is available from this Court." (emphasis added). (App. A).

On July 15, 2021, I wrote a letter to the court of appeals asking for consideration and a merits determination of my motion to recall mandate. (App. L).

The appellate court sent me another letter dated July 23, 2021, again stating in pertinent part: "No further action will take place in this case." (App. B).

On July 29, 2021, I again wrote a letter to the court of appeals, wherein I made it very plain that my motion to recall the mandate was grounded in the fact that the court acted without jurisdiction by reaching the "merits" of my IAC issue in ruling on my COA request. (App. M).

On August 17, 2021, I filed a Motion Requesting a Decision from the Court on the previously submitted Motion to Recall Mandate. (App. N). To date, the court of appeals has taken no action on my request to recall the mandate.

Because a motion to recall the mandate does not toll the time to file for certiorari in this Court, a Petition for a Writ of Certiorari was filed in this Court on August 16, 2021, and on September 8, 2021, it was placed on the Court's docket as No. 21-5613. Naturally, the issues in the motion to recall the mandate and the pending petition for certiorari are related.

SUMMARY OF THE LEGAL ANALYSIS OF GROUND I

For a long time, trial courts and courts of appeal, both state and federal , have struggled with the problem of unfair prejudice a testifying criminal defendant can suffer from revealing to the jury his/her prior criminal convictions as impeachment evidence.

Some eight years prior to the enactment of FRE 609, Circuit Judge Warren Burger, who would later become Chief Justice of this

Court, wrote in Gordon v. United States, 383 F.2d 936, 940 (DC Cir. 1967) that:

> A special and even more difficult problem arises when the prior conviction [to be admitted as impeachment evidence] is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." (emphasis added).

See also United States v. Issac, 449 F.2d 1040, 1042 (DC Cir. 1971) ("What Gordon teaches is this: Where defendant's testimony is needed he is not to be impeached with a conviction for a similar crime if another conviction is available for impeachment.").

FRE 609 was enacted in 1975, and states that evidence of prior convictions, when a criminal defendant testifies, are to be used only to evaluate a witness's "character for truthfulness." Id. Subsection (a)(1)(B) states that a prior conviction must be admitted when a defendant testifies "if the probative value of the evidence outweighs its prejudicial effect to the defendant." Id.

In United States v. Young, 574 Fed. Appx. 896, 903, the Eleventh Circuit held that "when considering prejudice under a Rule 609 analysis, the more similar a prior conviction is to the present offense, the more prejudicial it is, militating against admissibility."

In presenting my request for a COA on Ground I, I relied heavily on two Eleventh Circuit cases: United States v.

Pritchard, 973 F.3d 905 (11th Cir. 1992), and United States v. Lisbon, 2018 U.S. App. LEXIS 35559 (11th Cir. 2018).

In Pritchard, the defendant was on trial for bank robbery. The defendant testified and he was impeached with a prior burglary conviction. On direct appeal, the court held that the defendant was not unduly prejudiced; "[W]e believe that the prior burglary conviction was not so similar to the charged robbery that it created an unacceptable risk that the jury would improperly consider the burglary as evidence that Pritchard committed the robbery." (emphasis added) 973 F.3d at 909. The court also held that because the defendant's credibility was pitted against the testimony of a cooperating co-defendant, who was impeached with a prior felony conviction, the Government's need for impeachment evidence was substantial, and that because the defendant had no other prior conviction available for impeachment, "the burglary conviction was not merely cumulative of other impeachment evidence." (emphasis) Id. Consequently, the trial court did not abuse its discretion by admitting the burglary conviction for impeachment. Id.

In Lisbon, the defendant was on trial for a drug offense, and he waived his right to testify. In a post-conviction motion, the defendant alleged that his trial counsel was ineffective because counsel erroneously advised him that the trial court would admit a similar prior drug conviction as impeachment evidence, causing him to waive his right to testify. Id. 2018 LEXIS 2. The district court denied the motion, and defendant

appealed. The Eleventh Circuit granted a COA, to wit:

> Was Mr. Lisbon's trial counsel ineffective in counseling him not to testify in his own defense at trial?

Id. 2018 LEXIS 3.

The Eleventh Circuit held that Lisbon's allegations of ineffective assistance, based on counsel's advice not to testify based on the admission of a similar prior drug conviction for impeachment, stated a cognizable claim of counsel interfering with defendant's right to testify. Id 2018 LEXIS 5.

As in Pritchard, the Lisbon panel acknowledged that the defendant's testimony would have been pitted against a co-operating co-defendant who was impeached with a prior felony conviction; therefore, the Government's need for impeachment evidence was substantial. Also, like Pritchard, the defendant had no other prior conviction available for impeachment. Thus, the "fairly similar" prior drug conviction would not be "merely cumulative to other impeachment evidence." Id. 2018 LEXIS 8.

Using "similarity" between the impeachment conviction and the current offense as a benchmark, the appellate court stated:

> Lisbon's 1996 conviction was fairly similar to the charges against him in the prosecution underlying this case. But we are not convinced that Lisbon's prior conviction **was not so similar to the new charges against him that admitting Lisbon's prior conviction would have created an UNACCEPTABLE RISK that the jury would improperly consider his prior conviction as evidence that Lisbon was guilty of the new charge**. (emphasis added).

Id.

Consequently, because the Lisbon court found that it would have been "possible," under the specific facts of the case, for the trial court to have admitted the "fairly similar" prior drug conviction for impeachment under FRE 609 without incurring an "abuse of discretion," Lisbon's counsel was not ineffective. Id.

As shown above, the FRE 609 issue in Pritchard was raised as a direct appeal issue, and the FRE 609 issue in Lisbon was raised under an ineffective assistance of counsel claim. However, the resolution of the FRE 609 issue in both cases was a determination by appellate panels whether, under the specific facts of each case, the district courts' decisions to admit the "somewhat similar" conviction is Pritchard, and the "fairly similar" conviction in Lisbon, were,or could have been, admitted without incurring an abuse of discretion. See United States v. Tisdale, 817 F.2d 1552, 1555 (11th Cir.), cert. denied 484 U.S. 868 (1981) (District court decision to admit prior convictions under FRE 609 is reviewed under the "abuse of discretion" standard.).

There were the same three major points of consideration in both Pritchard and Lisbon: 1) similarity between prior conviction and current offense; 2) defendants had no other conviction available for impeachment purposes; and 3) defendants' testimony were pitted against testimony of cooperating co-defendants who were each impeached with prior felony convictions.

The IAC issue I presented in Ground I of my § 2255 motion was essentially the same issue presented in Lisbon. Therefore, I argued in my original request for a COA and in a motion for reconsideration, the issue on appeal would be whether, under the specific facts and circumstances of my case, the trial court could have admitted my 1997 bank robbery conviction as cumulative impeachment evidence to my 1997 grand theft conviction, without incurring an abuse of discretion. (App. G, pg. 2-20, and App. I, pg. 1-15).

Using "similarity" between the current offense and prior conviction used for impeachment, I argued that using that similarity benchmark, no prior offense could be more similar than the exact same offense--bank robbery when I was on trial for bank robbery. Thus, using the same offense as the current offense for impeachment under FRE 609 would have to trigger an "unacceptable risk" the jury would misuse that prior conviction as substantive evidence of my guilt on the bank robbery charge. If using the exact same offense for impeachment as the current offense would not trigger that "unacceptable risk," then no offense could. Id.

Unlike the defendants in Pritchard and Lisbon, I did have another prior conviction available as impeachment evidence...a 1997 grand theft conviction. When other impeachment evidence is available, the probative value of a cumulative prior conviction decreases accordingly. United States v. Cathey, 591 F.2d 268, 276-77 (5th Cir. 1979). Moreover, a trial court should

exclude use of a prior conviction for impeachment if evidence of such a conviction "negates credibility only slightly but creates a substantial chance of unfair prejudice." United States v. Palumbo, 401 F.2d 270, 273 (2d Cir. 1968) cert. denied 394 U.S. 847 (1969). (App. G, pg. 2-20, and App. I, pg. 1-15).

As to the third factor, my trial testimony would not have been pitted against a cooperating co-defendant. In fact, the Government's case against me was based almost entirely on circumstantial evidence. Had I testified, I would have certainly denied all involvement in the alleged bank robbery. However, the vast majority of my testimony would have been about substantive facts that could be corroborated by official documents and other records. As such, it would also have been a consideration on appeal whether the Government's need for impeachment evidence would have been lessened as compared to Pritchard and Lisbon. Id.

Consequently, based on the specific facts and circumstances of my case, I argued that there were sufficient reasons for an appellate panel to determine that the trial judge would have abused his discretion by admitting my 1997 bank robbery conviction as cumulative impeachment evidence to my 1997 grand theft conviction. Id.

THE DENIAL OF A COA IN THIS CASE WAS A MERITS BASED DECISION

As shown above, the trial court denied this IAC claim "on the merits" by stating that it was likely the court would have admitted both of my 1997 convictions, grand theft and bank robbery, as impeachment evidence had I testified at trial. Of course, the likely admittance of that bank robbery conviction was/is the key factor. By stating the court likely would have admitted the bank robbery conviction as impeachment evidence, the court was able to absolve trial counsel from being ineffective. (App.F , 4-5).

This Court has made it abundantly clear as to how the courts of appeals must proceed under 28 U.S.C. § 2253(c) when considering whether to grant of deny a COA:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits...This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. (emphasis added).

Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2005).

In this case, in denying a COA, the Eleventh Circuit gave no analysis whatsoever of the IAC issue presented, but instead offered only the barest boiler-plate statement that no substantial showing of the denial of constitutional right had

been made. With no specific articulated basis set forth for the denial of a COA, at first blush it might appear the Eleventh Circuit's decision is insulated from the sort of review it would take to determine whether the appellate court's decision amounted to a merits based decision on the IAC issue presented.

However, I respectfully submit that that is not the case at all, because the Eleventh Circuit's denial of a COA is in fact nothing more, or less, than a decision affirming the district court's denial of this IAC issue, to wit:

> The Court likely would have admitted both the 1997 convictions [as impeachment evidence] and Petitioner's counsel was not ineffective for telling her client so.

(App. F pg,. 4-5).

And by affirming the district court's decision on this IAC issue, the appellate court held that the district court's decision to admit the 1997 bank robbery conviction as cumulative impeachment evidence to the 1997 grand theft conviction would not have been an "abuse of discretion." Moreover, the appellate court also rejected the distinguishing underlying facts-- similarity between the impeachment evidence and the current offense; similar conviction merely cumulative to other impeachment evidence; and the Government's lessened need for impeachment evidence--dismissing these underlying facts as having no merit in determining whether the district court abused its discretion in admitting the prior bank robbery conviction.

Taking into consideration that the Eleventh Circuit issued a COA in Lisbon on the same IAC issue, and considering the

underlying facts, facts that are potentially supportive of an appellate decision in my favor, the Eleventh Circuit considered the merits of my IAC issue, and then denied a COA based on that merits consideration.

JURISDICTION AND AUTHORITY UNDER 28 U.S.C. § 2253(c)

In Slack v. McDaniel, 529 U.S. 473 (2000), Miller-El v. Cockrell, 537 U.S. 322 (2003), and Buck v. Davis, 197 L. Ed. 2d 1 2017), this Court has made it abundantly clear that an appellate court making a COA determination may not decide the constitutional claim presented "on the merits" and then deny a COA on that merits consideration.

> When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction, (enphasis added).

Miller-El, 537 U.S. at 336-37.

Title 28 U.S.C. § 2253(c), as amended by the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), governs appeals in habeas corpus proceedings under §§ 2254 and 2255. Section 2253(a) is a general grant of jurisdiction. Gonzalez v. Thaler, 181 L. Ed. 2d 619, 631 (2012). Section 2253(c)(1) states:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals... (emphasis added).

Thus § 2253(c)(1) is the statute that specifically limits the jurisdiction of the courts of appeals to making a merits determination of the constitutional claim presented only after a COA has been granted. Gonzalez,181 L. Ed. 2d at 631.

"Jurisdiction" is the most fundamental element of a court's authority in ruling upon any matter. This Honorable Court, the highest court in this country, and potentially the most powerful court in the world, cannot act on any matter without having first been vested with the proper jurisdiction.

In Roman Catholic Archdiocese of San Juan v. Feliciano, 206 L. Ed. 2d 1, 5 (2020), citing Kern v. Huidekoper, 103 U.S. 485 (1881) this Court held that when a court acts "without jurisdiction, its subsequent proceeding and judgment [are] not...merely erroneous, but absolutely void." (emphasis added).

Therefore, as shown above, the Eleventh Circuit's "judgment" denying a COA in this case, a decision that was clearly a "merits based" decision made without jurisdiction, must be, and is, "absolutely void."

MOTION TO RECALL MANDATE

Although this Court has made it abundantly clear that a court of appeals may not rule on the merits of a claim presented for a COA, in this case the Eleventh Circuit, for whatever reason or reasons, ignored the instructions of this Court and denied a COA based on a merits determination.

Normally, after a prisoner has been denied a COA, and after requesting the appellate court to reconsider its decision denying a COA, the prisoner is out of options in the appellate court. However, in unusual and exceptional circumstances a prisoner may request the appellate court to recall the mandate.

Pursuant to Eleventh Circuit Rule 41-1(b) "[a] mandate once issued shall not be recalled except to prevent injustice." (emphasis added). Consequently, because the Eleventh Circuit's denial of a COA in this case was based on a merits determination of the IAC issue presented, a determination the appellate court did not have the jurisdiction to make, a denial of a COA on an illegal basis creates a manifest injustice. Therefore, a motion to recall the mandate in this case is not only appropriate, it was/is the only option left open to me in correcting the injustice done to me in the Eleventh Circuit. And appellate courts can recall a mandate only in "extraordinary circumstances," as it is a measure of "last resort to be held in reserve grave, unforeseen contingencies." Calderron v. Thompson, 523 U.S. 550 (1998). Again, what could possibly be a more "grave contingency" than letting a "judgment" made without jurisdiction continue to stand, when that illegal judgment is by law "absolutely void."

In United States v. Ball, 2021 U.S. App. LEXIS (11th Cir. 2021), the Eleventh Circuit elected to recall the mandate in that case to allow a prisoner to file a motion for rehearing.

While I do not in any way disagree with the Eleventh Circuit's decision in Ball to recall the mandate, allowing the prisoner to file a motion for rehearing he otherwise would not have been able to submit, that reason pales in comparison to the circumstances presented in this case.

Thus, on June 30, 2021, I submitted a "Motion to Recall the Mandate" to the Eleventh Circuit. In that motion as a jurisdictional basis under Rule 41-1(b) I stated:

> By rendering a merits decision without jurisdiction, the Court, acting outside its authority, has unjustly denied me my due process right to fully brief my IAC issue, submit that issue to a three-judge appellate panel, and have that panel determine the merits of this IAC issue.

(App. K, pg. 2).

I have set forth above the highlights of my case as it pertains to the claim presented in Ground I, and how based on the facts and circumstances of this case, the denial of a COA on this IAC issue was a merits based decision. However, in the motion to recall the mandate, I painstakingly set forth in minute detail how the denial of a COA on this IAC issue was an unlawful merits based decision. That motion does, of course, speak for itself. (App. K, pg. 1-39).

Thereafter, I received a letter from the Eleventh Circuit stating:

> The Court has received your motion to recall mandate. No action will be taken. No further relief is available from this Court.

(App. A)

On July 15, 2021, I sent a letter to the Eleventh Circuit requesting that the motion to recall mandate be submitted to the judges involved so that a merits determination could be made. (App. L).

In a subsequent letter dated July 23, 2021, the appellate court stated:

> In response to yourletter inquiry, the court is in receipt of your document "Motion to Recall Mandate." The order denying a motion for certificate of appealability was issued on 3/302021 and a motion for reconsideration was already filed and ruled on as to the denial of a certificate of appealability in this case on 5/21/2021. No further action will take place in this case.
>
> **11th Cir. R. 27-3 Successive Motions for Reconsideration Not Permitted.** A party may file only one motion for reconsideration with respect to the same order. Likewise, a party may not request reconsideration of an order disposing of a motion for reconsideration previously filed by that party. (emphasis original).

(App. B).

Thus, without saying so directly, the Eleventh Circuit appeared to be construing my motion to recall the mandate as a successive motion to reconsider. So on July 29, 2021, I sent another letter to the Eleventh Circuit atating:

> Over and over, the Supreme Court has made it crystal clear that in granting or denying a Certificate of Appealability, "a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Miller El, 154 L. Ed 2d at

> 931. In my motion to recall the mandate, I have painstakingly detailed how this Court, in denying a COA, did precisely what the Supreme Court said it could not do by going to the merits of my ineffective assistance issue to deny a COA. Thus, although the denial of a COA is coexistent with the argument presented, in fact it must be, the central and only issue that justifies recalling the mandate is this Court exceeded its jurisdiction under § 2253(c)(1) as defined by the Supreme Court.
>
> I am attempting to solve a problem created by this Court's illegal actions--I do not know what else to call the Court's exceeding its jurisdiction other than illegal--and a new problem emerges when my motion to recall the mandate is misconstrued as a successive motion for reconsideration.
>
> Therefore, I respectfully request that my motion to recall mandate be submitted to the appropriate judges so that they can rule upon the issue presented. (emphasis added).

(App. M).

When no reply came from the above referenced letter, on August 17, 2021, I submitted a "Motion Requesting a Decision from the Court on the Previously Submitted Motion to Recall Mandate." (App. N). To date, the Eleventh Circuit has not acknowledged receipt of that motion, nor has that court taken any action on the Motion to Recall the Mandate. Thus, based on the Eleventh Circuit's previously stated position, I do not believe there is anything I can do to facilitate any action on that motion from the Eleventh Circuit. Thus, I believe I should be absolved of all due diligence requirements to effect action from the appellate court on the motion in question.

REASONS WHY THE COURT SHOULD GRANT THE PETITION

1. Granting of the writ of mandamus to compel the Eleventh Circuit to consider and render a decision on a Motion to Recall the Mandate will help enforce this Court's decisions in Slack, Miller-El, and Buck that firmly established an appellate court's jurisdictional limitations under 28 U.S.C. § 2253(c)(1) when making a COA determination.

Over and over again, this Court has instructed the courts of appeals that making a merits based determination at the COA stage "is in essence deciding an appeal without jurisdiction." (emphasis added). Miller-El, 537 U.S. at 337. However, when factoring in this Court's decision in Gonzalez v. Thaler, 181 L. Ed. 2d 619 (2012), where this Court held that § 2253(c)(1) is jurisdictional, depriving appellate courts of the jurisdiction to render a merits determination until after a COA has been issued, an appellate court that makes such a merits determination at the COA stage **IS** deciding an appeal without jurisdiction. There really can be no equivocation on that central point.

As I have shown above, the Eleventh Circuit's denial of a COA was a merits based decision. The appellate court affirmed the district court's "merits decision," and completely disregarded the facts and circumstances unique to this case that show a likely favorable outcome on my behalf on appeal. Consequently, because the Eleventh Circuit lacked jurisdiction under § 2253(c)(1) to make a merits determination at the COA stage, the appellate court's judgement in that matter should be, and is, "absolutely void."

In the majority of published cases denying COA's in the Eleventh Circuit, the court offers some analysis of the claim(s)

presented, and then, based on that analysis, shows how a claim does not meet the requirements for a COA. In this case, no such analysis was offered, and, I submit, for good reason, because any analysis of the IAC issue presented would have required the Eleventh Circuit to grant a COA, just as the appellate court did on the same IAC issue presented in United States v. Lisbon, 2018 U.S. App. LEXIS 35559 (11th Cir. 2018).

In the Motion to Recall the Mandate, I stated clearly and plainly that the basis for that motion rested firmly in the appellate court's lack of jurisdiction, under § 2253(c)(1), to make a merits decision in denying a COA in this case. Frankly, I cannot think of anything more manifestly unjust than a court making a judgment in a case without the jurisdiction to render that judgment. That is especially true in this case, where such a judgment works to effectively end the litigation of a viable constitutional claim of ineffective assistance of counsel, leaving me with extremely limited options for further litigation of that claim.

Of course, I have submitted a Petition for the Writ of Certiorari to this Court, and same has been docketed in this Court as case No. 21-5613. However, and I mean absolutely no disrespect in what I am about to say, seeking certiorari in this Court is like buying a ticket in the "litigation lottery." Putting that in Biblical prospective: "straight is the gate and narrow is the way" and "many are called but few are chosen." Matthew, 20:16, & 7:13.

But the fact remains that the litigation process in the Eleventh Circuit should not be at an end. The Motion to Recall the Mandate under Eleventh Circuit Rule 41-1(b) is not frivolous and sets forth very serious allegations that the appellate court's judgment, a judgment made without jurisdiction, is "absolutely void."

Of course, the Eleventh Circuit's written denials, the denial a COA (App. H) and the denial of reconsideration (App. J), are couched in the correct boiler-plate language, but do not give any analysis of why the IAC claim was denied a COA. But, if the Eleventh Circuit's denial of a COA was not a merits determination, a contemporaneous analysis of that issue, setting forth the reason(s) that IAC issue did not deserve a COA would effectively deal with the mandate recall motion. However, the appellate court just does not want to touch that motion--it is as if I put Kryptonite in Superman's lunch box!

Therefore, for the above reasons, I respectfully submit the Court should issue the writ of mandamus to compel the Eleventh Circuit to consider and render a decision of the Motion to Recall the Mandate.

2. Although not precisely germane to a decision by this Court to grant a writ of mandamus, there are facts, very disturbing facts, that should also deserve to be considered.

A full month prior to the commencement of my trial, I informed my counsel of my need and desire to testify at trial. (App. D. pg. 3-15). However, I did not hear from my counsel

until some 36 hours before my trial was to begin. At that 11th hour meeting, my attorney said that, if I testified, the trial judge would admit all my prior bank robbery convictions as impeachment evidence. Id. Based solely on counsel's advice about the admission of those bank robbery convictions, I waived my right to testify.

My attorney did not file a motion in limine to determine which, if any, of my prior convictions could have been admissible under FRE 609, nor did counsel inform me of the requirements of FRE 609, or the numerous caselaw decisions, in the Eleventh Circuit and in other federal circuits, that militated against the admission of impeachment evidence of an offense similar or the same as the current offense, much less the admission of multiple prior convictions for the exact same offense as the current offense. However, my attorney assured me that there would be no way to prevent the trial judge from admitting those multiple bank robbery convictions if I testified.

It is reasonable to assume that my trial counsel was licensed to practice law in the state of Georgia, and also admitted to practice criminal law in federal courts. Thus, it is also reasonable to assume that my attorney was herself aware of the requirements of FRE 609, and she was aware of the numerous caselaw decisions militating against the admission of impeachment evidence of prior convictions similar to or the same as the trial offense. Finally, it is also reasonable to assume that counsel

knew, or she certainly should have known, that the district court would not be able to legally admit multiple bank robbery convictions as impeachment evidence when I was on trial for that same offense, bank robbery. Therefore, the question that naturally poses itself is: why would my attorney tell me that the trial judge would do just that?

That question was answered when, at my sentencing hearing, I broached the subject of not testifying based on the admission of multiple bank robbery convictions as impeachment evidence. As reflected by the trial judge's comments, he was quite displeased that I would question my attorney's effectiveness:

> THE COURT: All right. Before I pronounce sentence, let me make just a couple of observations regarding the trial of this case and some of the comments that Mr. McCollum made regarding trial.
>
> Or course, Mr. McCollum, you will have the opportunity under our system to file your motions and seek a new trial and appeal the verdict. And you'll have plenty of time to do that because you'll have plenty of time on your hands after I pronounce sentence today. But what I want to make a couple of observations about a couple of things that were said.
>
> First of all, it was clear to me from my observations during the trial that you received effective counsel during your case. It is clear to me that you made the independent decision during trial not to testify on your own behalf, that the Court explored that with you and you determined that it was in your best interest at that time not to testify in your own behalf. **And there were plenty of good reasons for you not to testify because...had you testified, it is clear that those felony convictions would have been admitted, and the jury would have heard at trial that you were a SERIAL BANK ROBBER before you committed this**

> **offense**. So at trial it made complete sense for you to make the decision on your own not to testify. And the record, I think, will be clear on that. (emphasis added).

(App. E, pg. 22, line 18 through pg. 23, line 19).

To be clear on one point, the trial judge did ask me during trial about my decision not to testify. However, during that brief colloquy, I was asked only whether I had discussed testifying with my attorney, to which I responded that I had. But at no time did the trial judge say one word about impeachment evidence, and certainly no indication that he planned to admit all my prior bank robbery convictions should I testify. That information came pretrial only from my attorney. And she emphatically stated that the trial judge would admit all my prior bank robbery convictions as impeachment evidence. (App. D., pg. 4-4). Therefore, when I waived my right to testify at trial, I had no verbal or written notice from the trial court regarding the admission of prior convictions for impeachment purposes.

Of course the conformation of what my attorney told me relative to the admission of those multiple bank robbery convictions came when the trial judge explicitly acknowledged exactly what my attorney told me pretrial. That, had I testified, the trial judge would admit all my prior bank robbery convictions, depicting to the jury, in his own words, as a "serial bank robber."

Returning to the question posed above: how could my attorney have been so sure about the convictions the trial judge would admit as impeachment evidence? It is obvious that the trial

judge and my attorney had some pretrial discussion regarding my testimony at trial, and that the trial judge told my attorney about his intentions to admit the multiple bank robbery convictions as impeachment evidence in the event I testified. And, apparently, my attorney, without raising any objections regarding the potential admissions of those bank robbery convictions, merely relayed the judge's message to me, without telling me that she had discussed the matter with the judge.

Under FRE 609, when a defendant testifies, impeachment evidence is admitted only for one purpose, to allow the jury to have information to potentially evaluate the testifying defendant's "character for truthfulness." Id. And FRE 609 impeachment evidence cannot be used by a jury as substantive evidence of the defendant's guilt vis a vis the trial offense. And common sense indicates that the more similar a prior conviction may be to the current offense, the more likely the jury will misuse that impeachment evidence. "[W]hen considering prejudice under a Rule 609 analysis, the more similar a prior conviction is to the present offense, the more prejudicial it is, militating against admissibility." United States v. Young, 574 Fed. Appx. 896, 903 (11th Cir. 2014).

But in this case it is obvious that the trial judge's threat, and that is precisely what it was, a threat, a threat conveyed to me by my own attorney, to admit all my prior bank robbery convictions, was designed and intended for only one purpose, and that was to prevent me from testifying. Wielding

that threat of admitting those bank robbery convictions like a metaphorical cudgel, the trial judge relied on the unfair prejudice I would suffer, unfair prejudice he, as trial judge, was suppose to see that I did not suffer, from the admission of those bank robbery convictions, depicting me as a "serial bank robber," to make sure that I could not testify at trial.

My attorney's complicity in this plan to prevent me from testifying is readily apparent for those with eyes who wish to see. My attorney knew that I could not present any meaningful defense unless I testified. But my attorney, my only advocate, apparently worked hand in glove with the trial judge, placing me in the untenable position that, if I chose to testify, I would more likely than not be convicted because the jury would misuse those multiple bank robbery convictions as evidence of my guilt on the trial offense. Accordingly, not only is there evidence of ineffective assistance from my attorney, there is evidence that she acted deliberately against my interests, working with the trial judge to make it impossible for me to testify in my own behalf.

That my trial testimony would have made a difference in the outcome of my trial is, I submit, readily apparent. In my § 2255 motion, I set forth in a 40-page affidavit what my trial testimony would have been, and then I argued in my motion how my testimony would have negated the nefarious spin the Government was allowed to put on the circumstantial evidence presented. (App. D, pg. 16-51, & Exhibit A).

It is also important to note that throughout the litigation of the instant IAC issue, neither the Government nor the trial court has ever attempted to address in any way the argument relative to the unfair prejudice of admitting one, much less multiple bank robbery convictions, as impeachment evidence, when I was on trial for bank robbery.

Of course, in the order denying this IAC claim, the trial court retreated from the court's sentencing hearing position to depict me as a "serial bank robber." Instead, the district court limited the admission of potential impeachment evidence to two 1997 prior convictions: grand theft and bank robbery, stating he would have "likely" admitted both those 1997 convictions. However, the district court gave no FRE 609 analysis, an analysis that is required in this situation, regarding the probative value versus the prejudicial effect of admitting a prior bank robbery conviction as cumulative impeachment evidence, when the trial offense was also bank robbery. See United States v. Bailey, 761 Fed. Appx. 698 (11th Cir. 2018) and United States v. Preston, 608 F.2d 626 (5th Cir. 1979) cert. denied 440 U.S. 940 (1980). Moreover, by stating that he would have "likely" admitted the bank robbery conviction and the grand theft conviction, again without any FRE 609 analysis, the trial judge then conveniently was able to absolve trial counsel from being ineffective. (App. F, pg. 4-5).

I cannot offer any reason(s) why the trial judge would want to prevent me from testifying, or why my attorney would willingly

act against my interests in going along with that plan. The only thing I can do is report the facts as they appear in the record, and then draw the logical conclusions those facts tend to produce.

Neither can I say with any degree of certitude that the district court's actions to prevent me from testifying, or my attorney's complicity in that plan, played any part in the Eleventh Circuit's merits based decision in denying a COA on the instant IAC claim. However, those facts are there in the record, and it is my hope that when this case is ultimately reversed, either by a resolution of the Motion to Recall the Mandate, or by the Petition for Writ of Certiorari now pending in this Court, that these facts can be more fully briefed, explored, and considered by an appellate panel deciding the IAC claim presented.

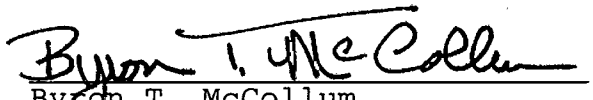
I respectfully submit that I have convincingly shown that the Eleventh Circuit's denial of COA on the instant IAC issue was in fact a merits based decision, resulting in a judgment made without jurisdiction and in direct violation of § 2253(c)(1). Therefore, that judgment is, as a matter of law, absolutely void.

It is for the reasons and authority established in the above paragraph that formed the basis of the Motion to Recall the Mandate in the Eleventh Circuit. Thus, because that judgment is absolutely void, having been rendered without jurisdiction, and because such an invalid judgment cannot stand and creates a manifest injustice in this case, it is due to be corrected by recalling the mandate pursuant to Eleventh Circuit Rule 41-1(b).

CONCLUSION

WHEREFORE, for all the foregoing reasons, and for good cause shown, I respectfully request the Court to grant the Writ of Mandamus to compel the Eleventh Circuit Court of Appeals to consider and render a decision on the pending Motion to Recall the Mandate, App. K, along with any further or general relief this Court may been right and proper.

Respectfully submitted,



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