No. 21-7604

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO U. AKEL — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

ANTONIO U. AKEL Reg#06899-017
(Your Name)

U.S.P. BIG SANDY P.O.Box 2068
(Address)

INEZ, KY 41224
(City, State, Zip Code)

N/A
(Phone Number)

PRO SE STATEMENT AND REQUEST FOR LIBERAL REVIEW

With respect to the Honorable Supreme Court Justices and law clerks the petitioner humbly asks the Court for liberal review, an open mind and fundamental fairness, in that, as an incarcerated PRO SE litigant creating this pleading from his prison cell during a modified operations schedule due to the World wide pandemic of Covid-19, he found himself having to utilize creativity and ingenuity to perfect his petition for writ of certiorari, often using a method of cutting and pasting in an attempt to obtain meaningful review.

At the outset the petitioner apologizes for this non-traditional and inartfull petition and prays the merit of the content takes precedent over its looks. I thank you for your time and attention.

Sincerely,

ANTONIO U. AKEL

QUESTION(S) PRESENTED

(1). WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS APPROACH AND PRACTICE IN THE CERTIFICATE-OF-APPEALABILITY (COA) CONTEXT ARE SIGNIFICANTLY OUT OF STEP WITH BINDING SUPREME COURT LAW, RAISING DUE PROCESS AND ACCESS TO THE COURT CONCERNS, WHERE EMPIRACAL DATA AND RECENT STUDIES DEMONSTRATE THAT NON-CAPITAL PRISONERS IN OTHER CIRCUITS ARE 69% MORE LIKELY TO GET A CERTIFICATE OF APPEALABILITY THAN NON-CAPITAL PRISONERS IN THE ELEVENTH CIRCUIT ?

(2). WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS COMMITTED ERROR IN DENYING THE HABEAS/§ 2255 MOVANT A (COA) TO APPEAL THE DENIAL OF HIS FED. R. CIV. P 60 (b)(6) MOTION TO REOPEN WHERE:

A. The movants Constitutional claim alleging word for word:

> "Akel was Denied his Constitutional Right to Effective Assistance of Counsel when [Attorney] Failed to Properly Litigate Petitioners Fourth Amendment claim. His failure to cite Controlling Precedent, Incompetently Putting forth falsities from an Arrest Affidavit and not the affidavit for the Search warrant, Coupled with his failure to Rectify the mistake and present further Evidence By filing an Agreed upon FRANKS HEARING were in violation of His Sixth amendment Rights,"

States a Valid Claim for the denial of his Constitutional Rights in Accord with Kimmelman v. Morrison, 477 U.S. 365, 1065. ct 2574 (1986) Clearly Satisfying the Substantive Prong of Slack v. McDaniel, 529 U.S. 473, 484, 120 S. ct 1595 (2000) and,

B. The District Courts legal premise for Denying the movants Rule 60(b)(6) motion Stating word for word:

> "This motion is simply another attempt to relitigate issues that were or Should have already been presented to the State Court, this Court, and brought before the Eleventh Circuit Court of Appeals for resolution",

is in Direct disregard of Binding Supreme Court law Gonzalez v. Crosby, 545 U.S.

524,539,125 S.Ct 2641 (2005) and Buck v. Davis, 137 S.Ct 759, 779 (2017), clearly satisfying the second prong of Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct 1595 (2000) because Jurists of Reason Know that the Supreme Court stated explicitly that "The whole purpose of Rule 60(b) is to make an exception to finality"?

(3). WHETHER IT IS CONTRARY TO THE PLAIN STATUTORY TEXT OF 28 U.S.C § 2253(c) TO REQUIRE A CERTIFICATE OF APPEALABILITY (COA) TO APPEAL THE DENIAL OF A "TRUE" FED.R.CIV.P 60(b)(6) MOTION TO REOPEN THE PROCEDURAL DEFECT IN THE INTEGRITY OF THE FEDERAL HABEAS PROCEEDING?

(4). WHETHER THIS COURT SHOULD EXERCISE ITS APPELLATE JURISDICTION UPON THE PETITIONERS PROPERLY PRESERVED OBJECTION IN THE COURTS BELOW, PROVIDING: WHERE HIS TRUE FED.R.CIV.P 60(b)(6) MOTION DOES NOT ATTACK THE CONVICTION OR SENTENCE BUT RATHER A PROCEDURAL DEFECT IN THE HABEAS / 28 U.S.C § 2255 PROCEEDING FOR WHICH LED TO "THE FINAL ORDER", JURISTS OF REASON WOULD DEBATE THAT AS A TEXTUAL MATTER 28 U.S.C § 2253's COA REQUIREMENT DOES NOT APPLY IN THIS CASE?

LIST OF PARTIES

[✓] 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

ANTONIO U. AKEL v. UNITED STATES OF AMERICA, U.S. Sup. Ct Pet. # 16-6038 April 3, 2017

ANTONIO U. AKEL v. UNITED STATES OF AMERICA, 2018 U.S. App. Lexis 15666 (June 8, 2018 11th Cir)

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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,
[ ] 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

[ ] reported at _____; 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 7, 2021.

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

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: DECEMBER 7, 2021, 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

Amendment 4 Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

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

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

(1). The defendant timely filed a motion pursuant to 28U.S.C§2255 to vacate, set aside, or correct his sentence in the United States District Court for the Northern District of Florida, Case No. 3:07-cr-136-LC-EMT at (Doc.#156).

(2). Expanding the facts the defendant filed an Amended 28U.S.C§2255 pursuant to the Federal Rules of Civil procedure 15(c) at (Doc.#187) for which the district Court Granted to the extent it was allowed. See (Doc.#196)

(3). The defendants claim for the denial of his Constitutional Rights within his Amended §2255 motion explicitly cites and relies upon Supreme Court precedent Kimmelman v. Morrison, 477 U.S. 365, 106 S.ct 2574 (1986) and States Word for Word, as cut and pasted below:

> AKEL WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN RANDALL ETHERIDGE FAILED TO PROPERLY LITIGATE PETITIONER'S FORTH AMENDMENT CLAIM. HIS FAILURE TO CITE CONTROLLING PRECEDENT, INCOMPETENTLY PUTTING FORTH FALSITIES FROM AN ARREST AFFIDAVIT AND NOT THE AFFIDAVIT FOR THE SEARCH WARRANT, COUPLED WITH HIS FAILURE TO RECTIFY THE MISTAKE AND PRESENT FURTHER EVIDENCE BY FILING AN AGREED UPON FRANKS HEARING WERE IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS. See (Doc.#187 pg 5)

(4). The factual predicates of the claim, for which were not in the Direct Appeal record, was the fact that the Sole factual predicates for probable cause to issue a Search warrant for which is "DISPOSITIVE" to the Indictment were falsities, a Reckless Disregard for the truth in violation of the defendants Fourth Amendment Rights in accord with Franks v. Delaware 438 U.S. 154, 98 S.ct 2674 (1978), and despite the fact that the defendants trial attorney had the evidence to prove that the "Controlled Buy" factual predicates were law enforcement fabrications he failed to file for dismissal of the indictment or file for a FRANKS hearing Clearly denying the defendant of his Sixth Amendment Right to the effective Assistance of Counsel in accord with Strickland v. Washington, 466 U.S. 668, 104 S.ct 2052 (1984).

(5). The defendants constitutional issue, effectively called a "Kimmelman v. Morrison claim," is substantiated beyond a Proffer of Credible evidence consisting of Trial Counsels Sworn affidavit at (Doc.#164-1 pgs 2-3) and the Sworn testimony of Trial Counsel obtained during an evidentiary hearing held on JAN. 28, 2014 (Doc.#208) transcribed at (Doc.#220 pgs 51-52 and 55-56) revealing respectively:

See (Doc.#164-1 pgs 2-3) (Affidavit of Counsel) Stating:

GROUND ONE

1. I argued for suppression as indicated in the record. I did not cite or argue controlling precedent because I felt the issues were so clearly self-evident from the testimony of law enforcement that the trial court would rule on the merits and facts of the motion to suppress.

See also (Doc.# 220 pgs 51-52 & 55-56) (Sworn testimony of trial Counsel obtained Jan 28, 2014) Stating:

Another question for you: Do you agree that the case in question, two controlled buys in this incident is dispositive to the whole case, correct?

A. As I recall, yes.

Q. And I don't know if you can recall, but if you can recall, Count IV and Count V of the Indictment were those controlled buys.

A. I don't remember.

Q. You can't recall the counts, but you can recall that --

A. Generally speaking, yes, sir.

Q. Okay. And I was acquitted of the -- I'm stating for the record I was acquitted of those two controlled buys, they were Count IV and Count V of the Indictment.

A. That's correct.

Q. Why would you not, if you were not intimidated by this judge or pressured by this judge, why would you not immediately move for dismissal of the indictment or file for a Franks hearing immediately after an acquittal of those charges?

A. Didn't do it.

Q. And one more time for the record, sir, just to be sure, you said that there wasn't any particular reason that you didn't file for dismissal of the indictment or the Franks hearing once evidence was discovered that those controlled buys were false?

A. I didn't file anything.

Q. You didn't file anything?

A. No, sir.

(6). However the district court procedurally barred the movants claim for relief from seeing the light of day by adopting the magistrates Report and Recommendations legal premise for doing so. See (Doc.#321) adopting R&R at (Doc.#196 pg12)) stating:

> Because the motion to suppress was thoroughly argued before the trial court and on appeal, the Government argues that Defendant's challenge to counsel's performance in this respect is procedurally barred. Rozier, *supra;* Nyhuis, *supra.* The court agrees that two of the three arguments Defendant makes in this motion are procedurally barred. Defendant's first argument, that counsel should have argued "controlling precedent," is an attempt to re-argue the issue of the staleness of the information concerning the **controlled buys that supported the warrant**, and as such it is procedurally barred. Similarly, his argument that counsel failed to demonstrate that the affidavit was false is an attempt to re-litigate the district and appellate courts' prior determination about this issue, couched as an ineffective assistance of counsel claim.

[redacted]

I.

In this case law enforcement provided testimony, two seperate times, for which reveals that thier "controlled Buy" probable cause predicates for issuance of a Search warrant "Dispositive" to the Federal indictment were Flagrant lies, hence it is only due to the petitioners trial counsels Gross ineffectiveness that he remains wrongfully convicted and falsely imprisoned. See (Doc.#77 pg's 31-32) (law enforcement testifying at the Suppression hearing that they could not substantiate that any Controlled Buy occurred):

20 Q. At the time of the affidavit for the search warrant, you
21 personally couldn't prove that Mr. Akel had participated in any
22 drug transaction? Everything you talked about was based on
23 what the CI supposedly told you, right?
24 A. Are you talking about on -- both the controlled buys?
25 Q. Yeah. That's all you had, right?
1 A. Yes, sir.

See also (Doc.#133 pg119) (law enforcement testifying that they never Conducted any Controlled Buys from the defendant):

11 Q. Okay. So you had May 31st, and then you go a whole month
12 of June and then the 18th of July, a little over a
13 month-and-a-half before you do the second alleged controlled
14 buy, correct?
15 A. We attempted to do another one.
16 Q. Okay. But he never would cooperate, right, or it didn't go
17 down?
18 A. We were never able to actually purchase drugs from him,
19 correct.

(7). The defendant/movant for years upon years during the §2255 proceeding brought to the district Courts attention that procedurally Barring him from raising and receiving a merits review upon his Constitutional claim for ineffective assistance of Counsel is Contrary to, and, in Direct disregard of Binding Supreme Court precedent Massaro v. United States, 538 U.S. 500, 123 S.ct 1690 (2003) and Kimmelman v. Morrison Supra, and that Jurists of Reason disagree with its legal premise because it is Contrary to laws. See (Doc.#'s 201; 219; 224; 256; 257; 262; 267; 271; 279; 315; 318; 367) See also Judicial Complaint No. 11-16-90045 (11th cir) (Complaint that the District Courts ruling at (Doc.#196 pg 12) and its intransigence thereof in refusing to correct, gives the appearance of a Concerted effort between the Court and government to hide a flagrant violation of the defendants Fourth and Sixth amendment rights as expressed through Kimmelman v. Morrison)

(8). The defendants/movants diligence in his attempt to be heard on habeas/§2255 is also established further when he highlighted the "procedural Error" and the potential to deny him his right to Due process of law at an evidentiary hearing taking place during the month Feb. 19, 2014, Speaking directly to the District Court at (Doc.#218 pgs 44-45) Stating:

You know, so far I've met prevarication after prevarication, and I'm -- I don't know what to do. I'm just -- I want to secure my right to fair due process of law. And if I have nothing coming from fair due process of law without the prevarication, just with the straight facts in conjunction with the law, then I don't have anything coming. But so far to date, what has transpired is -- I mean, it's not commendable, to say the least. So that wasn't on Mr. Register. That was on the previous person in his seat. So nothing against him. He seems to be an honorable individual and standup gentleman.

So I just ask that the Court give me an opportunity to present the facts of my case, and that's dealing with the 2255 in conjunction with the law. There's already a ruling from the magistrate, where it's already sitting there already ripe to be swept -- to sweep my claim under the rug, saying I'm proceeding

to bar (phonetic) from you and your claim, and that's not true. It's totally against *Kimmelman v. Morrison* and brand new cases, I believe out of this Court or the Court in Tallahassee, you know, showing that she's wrong, and that's just -- you know, it's -- I just ask Your Honor for the opportunity to have the facts of my case be taken into conjunction with the law, as any person should want, you know.

(9). Subsequently on May 5, 2017 the Eleventh Circuit Court of Appeals "Instructively" Clarified that the very exact same Procedural Bar utilized in this defendants/petitioners 28 U.S.C § 2255 proceeding was clear error in BROWN v. UNITED STATES, 688 Fed. Appx. 644, 651-652 stating:

> As an initial matter, **we find it instructive to discuss** the district court's conclusion that Brown is **procedurally barred** from raising this claim because he presented the claim on direct appeal. Typically, a prisoner is **procedurally barred** from relitigating an issue on collateral review that he already raised in his direct appeal.{2017 U.S. App. LEXIS 16} *Stoufflet v. United States*, 757 F.3d 1236, 1242 (11th Cir. 2014). **Where, however, facts essential to a claim are not in the appellate record, the general rule in favor** {688 Fed. Appx. 652} **of a procedural bar does not apply and the issue may be raised on collateral review to permit further** factual development. *See Bousley v. United States*, 523 U.S. 614, 621-22, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (citing *Waley v. Johnston*, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302 (1942) (per curiam)). One example of a claim typically requiring further **factual development through a § 2255 proceeding is a claim based on ineffective assistance of counsel**. *Massaro v. United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003).
>
> On direct appeal, this Court likened Brown's due process claim to a claim **based on ineffective assistance of counsel** because the claim relied on facts not before the district court, including the affidavit from Brown's plea counsel. *Brown I*, 526 F.3d at 707-08. In so doing, this Court stated, "As with an ineffective assistance of counsel claim, Brown's [due process] claim is best resolved in a collateral proceeding under 28 U.S.C. § 2255, where the district court will have an opportunity to convene a hearing, entertain the relevant evidence, and make findings of fact." *Id.* at 708. Accordingly, this Court has already signaled that Brown's due process claim falls within the exception to the general procedural rule prohibiting a prisoner from relitigating an issue presented on direct appeal. Therefore, to the extent that the district court{2017 U.S. App. LEXIS 17} adopted the magistrate judge's conclusion that Brown was **procedurally barred** from raising his due process claim, the district court erred.9

(10). Armed with the Clarification of law in BROWN supra, and within Five (5) months of the Substantive litigation of the § 2255 ending when the Supreme Court denied the defendants petition for writ of certiorari on OCTOBER 13, 2020, the petitioner filed a "Motion To Reopen The Procedural Defect In The Integrity of The Federal Habeas Proceeding" pursuant to Federal Rules of Civil Procedure 60(b)(6) on March 1, 2021 at (DOC#430). See Appendix "D" (Copy of 60(b)(6) motion at issue)).

(11). The petitioners Rule 60(b)(6) motion at (Doc.#430) ensures to demonstrate to the Court, that,:

(A). A rule 60(b) motion attacking a procedural defect in the habeas proceeding is governed by clause [6], See Id at pg#1 and pg#13

(B). The movants rule 60(b) motion is timely filed evinced by him being the "Paragon of Diligence", See Id at pg#'s 3-5 and pg#13

(C). The "Extraordinary Circumstances Justifying Rule 60(b)(6) relief" is based upon an Instructive clarification of federal procedure by a Federal Appeals Court in BROWN supra, which has proven that the district courts prior understanding of the "procedural Bar" rules was incorrect and wrong thus arbitrarily denying the movant a "Full and Fair opportunity" to litigate his habeas claims. See Id at pg#'s 2-3 and pg#14

(D). The movants Amended §2255 clearly states a valid claim for the denial of Constitutional rights and the evidence in support makes a Prima Facie Showing that he is and continues to be Wrongfully convicted and falsely imprisoned. See Id at pg#'s 6-15

(E). The Supreme Court has held that "The Whole purpose of Rule 60(b) is to make an exception to finality". See Id at pg#5 and pg#15

(12). However the district Court, two(2) days later, issued the following denial at (Doc.#432):

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

VS CASE NO. 3:07cr136/LAC

ANTONIO U. AXEL

REFERRAL AND ORDER

Referred to Judge Lacey Collier on March 2, 2021
Motion/Pleadings: DEFENDANT'S MOTION TO REOPEN THE PROCEDURAL DEFECT IN THE INTEGRITY OF THE FEDERAL HABEAS PROCEEDING
Filed by Defendant on 3/1/21 Doc.# 430

RESPONSES:
_____ on _____ Doc.# _____
_____ on _____ Doc.# _____
_____ Stipulated _____ Joint Pldg.
_____ Unopposed _____ Consented

JESSICA J. LYUBLANOVITS, CLERK OF COURT

s/Keri Igney
Deputy Clerk: Keri Igney

ORDER

Upon consideration of the foregoing, it is ORDERED this 3rd day of March, 2021, that:
(a) The relief requested is DENIED.
(b) This motion is simply another attempt to relitigate issues that were or should have already been presented to the State Court, this Court, and brought before the Eleventh Circuit Court of Appeals for resolution.

s/L. A. Collier
LACEY A. COLLIER
Senior United States District Judge

(13). Undeterred the defendant/movant filed three motions: A motion to correct the manifest error in law and fact pursuant to Fed.R.civ.p 59(e) at (Doc.#437); A motion to correct the courts mistake in the application of the laws pursuant to Rule 60(b)(1) at (Doc.#438) and; A motion to take judicial notice at (Doc#439), all for which inform the district court that its legal premise to have denied the movant Rule 60(b)(6) relief was in Direct disregard of, and, Squarely foreclosed by Supreme Court Binding precedents Gonzalez v. Crosby, 545 U.S. 524, 529, 125 S.ct 2641 (2005) and Buck v. Davis, 137 S.ct 759, 779 (2017).

(14). However despite the fact that both Gonzalez, supra and Buck supra demonstrate unequivocally that the district courts legal premise for denial was clearly wrong in that judgment finality does not Supersede Rule 60(b) relief, one day later, on April 7, 2021 the district court issued one word denials as to all motions, see (Doc.#'s 440; 441 and 442) providing no reason or particularities for which could allow the appellate court to determine rather than speculate that the law was applied correctly.

(15). Still having faith and litigating from his prison cell the defendant/petitioner sought a certificate of appealability in both the district court and the Eleventh Circuit ensuring to demarcate and satisfy both prongs of Slack v. McDaniel, 529 U.S. 473, 484, 120 S.ct 1595, 1604 (2000) as well as raising an objection in being required to obtain a (COA) to appeal the denial of his "TRUE RULE 60(b)" motion SEE Appendix "D" when nothing in the plain Text 28 U.S.C § 2253 supports this requirement and that it appears that the federal circuits made this mandatory by approaching the Statutory Construction of 28 U.S.C § 2253 Solely influenced by the Supposition that it is highly unlikely that Congress intended a given result.

(16). Both the district and appellate court Summarily Denied the Petitioner a (COA) providing no substantive explanation of the facts nor the two prong test of Slack supra stating only that:

> "Antonio AKel's motion for a certificate of Appealability is DENIED because he has failed to make a Substantial Showing of the denial of a Constitutional right."

Completely failing to apply the Rule of law in Slack, such that where a petitioner, such as AKel, must make a "Substantial Showing" without the benefit of a merits determination by an earlier court he must demonstrate that "Jurists of reason would find it debatable whether

the petition STATES a valid claim of the denial of a Constitutional Right, See Id 529 U.S. at 484, and completely failed to acknowledge that the Eleventh Circuit Court itself on June 8, 2018 in Appeal No. 17-14707 has already enunciated all that Akel needs to satisfy the Substantive prong of Slack, See:

ANTONIO U. AKEL, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2018 U.S. App. LEXIS 15666
No. 17-14707-AA
June 8, 2018, Decided

Editorial Information: Subsequent History

Reconsideration denied by, Motion denied by United States v. Akel, 2018 U.S. App. LEXIS 23037 (11th Cir. Fla., Aug. 17, 2018)

Editorial Information: Prior History

{2018 U.S. App. LEXIS 1}Appeal from the United States District Court for the Northern District of Florida.United States v. Akel, 337 Fed. Appx. 843, 2009 U.S. App. LEXIS 16952 (11th Cir. Fla., July 24, 2009)

Counsel For United States of America, Plaintiff - Appellee: Robert G. Davies, Alicia Forbes, U.S. Attorney Service - Northern District of Florida, U.S. Attorney's Office, Pensacola, FL.

Antonio U. Akel, Defendant - Appellant, Pro se, Estill, SC.

Judges: Before: TJOFLAT, MARCUS and JORDAN, Circuit Judges.

Opinion

BY THE COURT:

Antonio Akel is a federal prisoner serving a total 480-month, Armed Career Criminal Act ("ACCA") enhanced sentence, after a jury convicted him of conspiracy to possess various drugs with intent to distribute (Count 1); possession of marijuana with intent to distribute, (Count 2); and possession of a firearm by a convicted felon (Count 7). After this Court affirmed his convictions and sentence, Akel filed a *pro se* 28 U.S.C. § 2255 motion to vacate sentence, arguing that: (1) he no longer qualified as an armed career criminal; and (2) his counsel was ineffective.

The district court denied Akel's motion, concluding that he had three prior convictions for burglary of a dwelling, an enumerated offense under the ACCA, and therefore, the ACCA enhancement was proper. **Additionally, as to Akel's claim that his counsel was ineffective{2018 U.S. App. LEXIS 2} in failing to raise a Fourth Amendment issue**, the court concluded that the majority of Akel's arguments were procedurally barred because they sought to relitigate issues decided on direct appeal, couched in terms of ineffective assistance. The district court denied a certificate of appealability ("COA"). Akel then moved to alter or amend the judgment, under Fed. R. Civ. P. 59(e), arguing in part that the district court's decision was contrary to ***Kimmelman v. Morrison***, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). The district court denied the Rule 59(e) motion, and Akel appealed.

REASONS FOR GRANTING THE PETITION

(1). The FACT the Eleventh Circuit is Significantly out of step with other Courts and Binding Supreme Court law in its Certificate of Appealability analysis and determinations has been the focus of Study and debate by Jurists of Reason. See TONY MAURO & MARCIA COYLE, HAVE CIRCUIT COURTS 'CLOSED THE GATE' ON SOME INMATE APPEALS? NAT'L LAW JOURNAL, FEB. 5, 2020 available at https://www.lisa-legalinfo.com/wp-content/uploads/2020/02/NATLawJournal200205.pdf ("what does it mean for due process and access to the courts if non-capital prisoners in the First Circuit, according to one recent study, were 69% more likely to get a certificate of appealability than non capital prisoners in the Eleventh Circuit?"), See also St. Hubert v. United States, 140 S.Ct 1727, 1730 (2020)(statement of Sotomayor, J., respecting denial of certiorari):

> In the certificate-of-appealability (COA) context, where an inmate must make a threshold ``substantial showing of the denial of a constitutional right," § 2253(c)(2), this Court has cautioned that the threshold inquiry is ``not coextensive with a merits analysis" and that any court that `` 'justif[ies] its denial of a COA based on its adjudication of the actual merits . . . is in essence deciding an appeal without jurisdiction,' " Buck v. Davis, 580 U.S. ___, ___, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017) (quoting Miller-El v. Cockrell, 537 U.S. 322, 336-337, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)). This principle provides yet another reason, apart from the due process issues that petitioners focus on, to doubt the Eleventh Circuit's practices.

(2). The fact habeas/§2255 petitioners in other Circuits are 69% more likely to be Granted a COA than those in the Eleventh Circuit undermines public confidence that the law is being applied correctly and with an evenhand, and, where the writ of habeas corpus is of such fundamental importance to this nation's legal system that it is known as the Great writ, the tool meant to be available to any person who finds himself in jail when he ought not be there, this Court should step in and exercise its supervisory authority. CF Bounds v. Smith, 430 U.S. 817, 828, 97 S.Ct 1491, 52 L.Ed.2d 72 (1977)("The State and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus") and clarify the Rule of law to the lower Courts.

(3). In this case it is clear, and, indeed Jurists of reason would debate, that if the petitioner had applied for a COA in a Sister Circuit he would have been Granted the opportunity to appeal under the Governing Rule of law found in Slack v. McDaniel, 529 U.S. at 484 because:

(A). Jurists of Reason from the Eleventh Circuit itself in the 28 U.S.C §2255 appeal #17-14707 have already framed the fact that the petitioner alleged the Denial of a valid Constitutional Right, clearly satisfying the Substantive Prong of Slack Supra. See Antonio U. Akel v. United

States, 2018 U.S. App. Lexis 15666 (11th Cir.) (TJoflat, Marcus, and Jordan, Circuit Judges) stating:

BY THE COURT:

Antonio Akel is a federal prisoner serving a total 480-month, Armed Career Criminal Act ("ACCA") enhanced sentence, after a jury convicted him of conspiracy to possess various drugs with intent to distribute (Count 1); possession of marijuana with intent to distribute, (Count 2); and possession of a firearm by a convicted felon (Count 7). After this Court affirmed his convictions and sentence, Akel filed a *pro se* 28 U.S.C. § 2255 motion to vacate sentence, arguing that: (1) he no longer qualified as an armed career criminal; and (2) his counsel was ineffective.

The district court denied Akel's motion, concluding that he had three prior convictions for burglary of a dwelling, an enumerated offense under the ACCA, and therefore, the ACCA enhancement was proper. **Additionally, as to Akel's claim that his counsel was ineffective** {2018 U.S. App. LEXIS 2} **in failing to raise a Fourth Amendment issue**, the court concluded that the majority of Akel's arguments were procedurally barred because they sought to relitigate issues decided on direct appeal, couched in terms of ineffective assistance. The district court denied a certificate of appealability ("COA"). Akel then moved to alter or amend the judgment, under Fed. R. Civ. P. 59(e), arguing in part that the district court's decision was contrary to ***Kimmelman v. Morrison***, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). The district court denied the Rule 59(e) motion, and Akel appealed.

(B). Jurists of Reason would debate the "Correctness" of the District Courts legal premise to have Denied Rule 60(b)(6) relief, stating:

ORDER

Upon consideration of the foregoing, it is ORDERED this 3rd day of March, 2021, that:

(a) The relief requested is ***DENIED.***

(b) This motion is simply another attempt to relitigate issues that were or should have already been presented to the State Court, this Court, and brought before the Eleventh Circuit Court of Appeals for resolution.

s/L.A. Collier
LACEY A. COLLIER
Senior United States District Judge

Simply because it is Squarely foreclosed by Clearly established Supreme Court law Gonzalez v. Crosby supra and Buck v. Davis supra. See Bynoe v. Baca, 966 F.3d 972, 986 (9th Cir 2020) stating:

"But **the 'whole purpose' of** Rule **60(b)** 'is to make an exception to finality.'" *Buck*, 137 S. Ct. at 779 (quoting *Gonzalez*, 545 U.S. at 529). When a habeas petition is dismissed on **flawed procedural grounds**, "[t]here are no 'past effects' of the judgment that would be disturbed" if the habeas proceeding were reopened for further consideration, *Phelps*, 569 F.3d at 1138, and the state's interest in finality "deserves little weight," *Buck*, 137 S. Ct. at 779. Bynoe never had the opportunity to litigate his underlying claims on the merits in a federal habeas proceeding, and the state never expended resources disputing them. *See Miller*, 879 F.3d at 701. He remains incarcerated, and "the parties would simply pick up where they left off." *Phelps*, 569 F.3d at 1138.

(C). Jurists of Reason would find that the petitioners Rule 60(b)(6) motion is a "TRUE" and Quintessential application/example of the procedure in the habeas context, where the motion does nothing beyond proving that the District courts understanding of the federal procedural Bar Rules was incorrect and wrong thus arbitrarily denying him-

Contrary to Congressional intent-of his valuable right to be heard on one full round of federal habeas review. See(Doc.196 pg12)(Courts legal premise for procedural Bar) stating:

> Because the motion to suppress was thoroughly argued before the trial court and on appeal, the Government argues that Defendant's challenge to counsel's performance in this respect is procedurally barred. Rozier, *supra;* Nyhuis, *supra.* The court agrees that two of the three arguments Defendant makes in this motion are procedurally barred. Defendant's first argument, that counsel should have argued "controlling precedent," is an attempt to re-argue the issue of the staleness of the information concerning the controlled buys that supported the warrant, and as such it is procedurally barred. Similarly, his argument that counsel failed to demonstrate that the affidavit was false is an attempt to **re-litigate** the district and **appellate courts' prior determination** about this issue, couched as an **ineffective assistance of counsel** claim.

But see BROWN v. UNITED STATES, 688 Fed.Appx. 644, 651-652 (11th Cir 2017) and WARE v. UNITED STATES, 2018 U.S. Dist. Lexis 122839 (S.D.GA) Stating respectively:

> As an initial matter, we find it instructive to discuss the district court's conclusion that Brown is procedurally barred from raising this claim because he presented the claim on direct appeal. Typically, a prisoner is procedurally barred from relitigating an issue on collateral review that he already raised in his direct appeal.{2017 U.S. App. LEXIS 16} *Stoufflet v. United States*, 757 F.3d 1236, 1242 (11th Cir. 2014). Where, however, facts essential to a claim are not in the appellate record, the general rule in favor {688 Fed. Appx. 652} of a procedural bar does not apply and the issue may be raised on collateral review to permit further factual development. *See Bousley v. United States*, 523 U.S. 614, 621-22, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (citing *Waley v. Johnston*, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302 (1942) (per curiam)). One example of a claim typically requiring further factual development through a § 2255 proceeding is a claim based on ineffective assistance of counsel. *Massaro v. United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003).
>
> ••••
>
> Respondent argues Petitioner's claim is procedurally barred because the Eleventh Circuit rejected Petitioner's sufficiency of the factual basis claim on direct appeal. (Id. at 24.) When a § 2255 petitioner raises a claim on direct appeal, he may not relitigate the claim in collateral proceedings under a different legal theory. United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000) ("A rejected claim does not merit rehearing on a different, but previously available, legal theory.") However, where a petitioner collaterally attacks his conviction based on a claim of ineffective assistance of counsel where the petitioner has previously challenged the underlying deficiency, the petitioner has not merely repackaged the claim and the procedural bar does not apply. See Perry v. United States, Nos. CV 610-074, CR 606-026, 2011 U.S. Dist. LEXIS 41538, 2011 WL 1479081, at *4 (S.D. Ga. March 31, 2011) ("[T]he Court of Appeals{2018 U.S. Dist. LEXIS 45} rejected the claim on the merits, while here it is raised on ineffectiveness grounds. Ineffective assistance of counsel was not an available theory on direct review, so . . . the Court rejects the government's contention that this claim is barred."); Willis v. United States, Nos. CV 608-116, CR 606-026, 2009 U.S. Dist. LEXIS 52554, 2009 WL 1765771, at *4 (S.D. Ga. June 22, 2009) ("[T]he circuit court analyzed [petitioner's] claim for *judicial* error in the application of the sentencing guidelines. [Petitioner], in contrast, argues *attorney* error. . . . Hence, unlike the movant in Nyhuis, he is not merely 'repackaging' his claim of judicial error as a claim of ineffective assistance of counsel.") Accordingly, Petitioner is not merely repackaging his claim here, since he challenges Mr. Hawk's performance as ineffective.

Compare Gonzalez v. Crosby, 545 U.S. 524, 541 stating:

Unfortunately, the Court underestimates the significance of the fact that petitioner was effectively shut out of federal court-without any adjudication of the merits of his claims-because of a procedural ruling that was later shown to be flatly mistaken. As we have stressed, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." Lonchar v. Thomas, 517 U.S. 314, 324, 134 L. Ed. 2d 440, 116 S. Ct. 1293 (1996); see also Slack v. McDaniel, 529 U.S. 473, 483, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000) ("The writ of habeas corpus plays a vital role in protecting constitutional rights"). When a habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment. Indeed, the State has experienced a windfall, while the state prisoner has been deprived-contrary to congressional <*pg. 499> intent-of his valuable right to one full round of federal habeas review.

(4). In this case the errors committed in the Courts below are specially and flagrantly pronounced, where "Akel's underlying Constitutional claim that his counsel was ineffective in failing to raise a Fourth Amendment claim" and the evidence in Support makes a PRIMA FACIE SHOWING just off of a THRESHOLD look that he is ACTUALLY INNOCENT and WRONGFULLY CONVICTED. See (Doc# 220 pg's 51-52 & 55-56)(Jan 28, 2014 testimony from the defendants trial attorney in relation to the underlying Constitutional claim for 28 U.S.C. § 2255 relief) TESTIFYING AS FOLLOWS:

Another question for you: Do you agree that the case in question, two controlled buys in this incident is dispositive to the whole case, correct?

A. As I recall, yes.

Q. And I don't know if you can recall, but if you can recall, Count IV and Count V of the Indictment were those controlled buys.

A. I don't remember.

Q. You can't recall the counts, but you can recall that --

A. Generally speaking, yes, sir.

Q. Okay. And I was acquitted of the -- I'm stating for the record I was acquitted of those two controlled buys, they were Count IV and Count V of the Indictment.

A. That's correct.

Q. Why would you not, if you were not intimidated by this judge or pressured by this judge, why would you not immediately move for dismissal of the indictment or file for a Franks hearing immediately after an acquittal of those charges?

A. Didn't do it.

Q. And one more time for the record, sir, just to be sure, you said that there wasn't any particular reason that you didn't file for dismissal of the indictment or the Franks hearing once evidence was discovered that those controlled buys were false?

A. I didn't file anything.

Q. You didn't file anything?

A. No, sir."

(5). Additionally because the petitioner timely objected in both the district court and Court of Appeals, as to the requirement that a COA must be obtained to appeal the denial of a "TRUE Rule 60(b) motion", on the basis that it is contrary to the plain text of 28 U.S.C § 2253, this Honorable Court has an additional Reason to GRANT the petition and thereby resolve the Circuit split it noted in both Gonzalez v. Crosby supra and Buck v. Davis supra.

(6). It is the petitioners contention that the Federal Circuit Courts made the requirement that a COA must issue in order to appeal the denial of a "TRUE" Rule 60(b) motion solely influenced by the supposition that it is highly unlikely that Congress intended a given result, however this Court has repeatedly held that:

"The Best evidence of [Congress's] purpose is the Statutory Text adopted by both houses of Congress"

See (West Virginia Univ. Hospitals, Inc v. Casey, 499 U.S. 83, 98, 111 S.ct 1138 (1991) and as such he adopts the argument put forth by Judge TJoflat in his dissent within Gonzalez v. Sec'y For the Dept. of Corr., 366 F.3d 1253, 1299-1301 (11th cir 2004) Stating:

> Courts of appeals have jurisdiction "of appeals from all final decisions of the district courts . . . ." 28 U.S.C. § 1291. A litigant faced with an unfavorable district court judgment may make a timely appeal of that judgment and may also file a Rule 60(b) motion for relief with the district court either before or after filing his appeal. See Stone v. INS, 514 U.S. 386, 401, 115 S. Ct. 1537, 1547, 131 L. Ed. 2d 465 (1995). "The denial of the [Rule 60(b)] motion is appealable as a separate final order . . . ." Id. Thus, an order adjudicating a Rule 60(b) motion, in addition to a final judgment adjudicating the case as a whole, is an appealable, final decision.
>
> Although our appellate jurisdiction extends to all final decisions, § 2253's COA requirement does not. As a textual matter, § 2253 requires a COA to appeal only one final order in a habeas corpus proceeding, not all orders. See 28 U.S.C. § 2253(c)(1) (providing that the COA requirement {2004 U.S. App. LEXIS 138} applies to "the final order" in proceedings attacking state or federal convictions or sentences (emphasis added)).
>
> In habeas cases involving more than one appealable order, such as orders disposing of Rule 60(b) motions or other postjudgment motions, § 2253's requirement of a COA as to the appeal of just one final order clearly extends to the petitioner's efforts, if any, to appeal the court's final judgment denying him habeas relief. The district court's judgment on the habeas petition is seemingly the only "final decision" that could deny the petitioner's constitutional challenge to his conviction or sentence. Therefore, that judgment is the only decision that § 2253(c)(2) seems to address; it is the only final order that could serve as the basis for the petitioner's "substantial showing of the denial of a constitutional right[,]" the showing he must make to obtain the COA. In contrast to judgments denying habeas relief, final orders denying a Rule 60(b) motion do not adjudicate a constitutional challenge to the movant's conviction or sentence. They simply state that the district court will not exercise its discretion to set aside the final judgment it entered. 23

23
This point is discussed at length in Part IV, infra. 108
{2004 U.S. App. LEXIS 139} I agree with the majority's statement that the word "the" can sometimes be read in the plural. In certain circumstances, singular terms can be construed in the plural. See 1 U.S.C. § 1 ("Unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things . . . ."). "But obviously this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute." First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 657, 44 S. Ct. 213, 215, 68 L. Ed. 486 (1924) (interpreting the predecessor rule that "words importing the singular number may extend and be applied to several persons or things"); see also Toy Mfrs. of America, Inc. v. Consumer **{366 F.3d 1300}** Prods. Safety Comm'n, 630 F.2d 70, 74 (2nd Cir. 1980) (holding that 1 U.S.C. § 1 does not apply "except where it is necessary to carry out the evident intent of the statute"). AEDPA evinces no legislative intent to apply the COA requirement to more than one order. Nor does it evince legislative intent to apply the § 2253(c)(2) requirement of a "substantial showing" to an order **{2004 U.S. App. LEXIS 140}** that does not determine whether the petitioner has suffered the denial of a constitutional right. While AEDPA clearly limits appeals of the denial of habeas relief, there is nothing in the text of the Act that narrows the reach of Rule 60(b) or the independent collateral attacks the Rule authorizes. Thus, interpreting "the" in the plural would be improper in this context, and § 2253 must apply to one final order: the district court's final judgment on the habeas petition.
B.
I respectfully decline to join in the majority's reliance on the decisions of our sister circuits for the proposition that the COA requirement of § 2253 extends to appeals of the denial of Rule 60(b) relief. By and large, the courts, in reaching these decisions, simply assumed that § 2253 applies in the Rule 60(b) context. Moreover, most of these cases involve obvious misuses of the Rule and are therefore inapposite to circumstances involving true Rule 60(b) motions. See Rutledge v. United States, 230 F.3d 1041, 1052-53 (7th Cir. 2000) (considering an appeal from the denial of a Rule 60(b) motion based on an ineffective assistance of counsel claim that the petitioner "should have raised . **{2004 U.S. App. LEXIS 141}** . . in his § 2255 motion"); Morris v. Horn, 187 F.3d 333, 343 (3d Cir. 1999) ("What [the habeas petitioner] is attempting to raise as a Rule 60(b) motion is in fact what he should have brought as an appeal" from the district court's dismissal of his habeas petition for failure to exhaust state remedies.); Zeitvogel v. Bowersox, 103 F.3d 56, 57 (8th Cir. 1996) (refusing to grant a COA to review the denial of the petitioner's purported Rule 60(b) motion because the motion merely presented a constitutional claim, ineffective assistance of counsel, that the petitioner had previously raised in a motion for leave to file an SSHP). 24 I suggest that a fair reading of the opinions in these cases indicates that none of the motions at issue was a true Rule 60(b) motion.
24
The majority also relies on Kellogg v. Strack, 269 F.3d 100 (per curiam) (2d Cir. 2001). The grounds for the petitioner's Rule 60(b) motion in that case are unclear from the court's opinion.
{2004 U.S. App. LEXIS 142} Langford v. Day, 134 F.3d 1381, 1382 (9th Cir. 1998), also relied on by the majority, remains as a possible outlier. In that case, the petitioner, Langford, was convicted of capital murder by a Montana court and sentenced to death. At the time sentence was imposed, Montana law prescribed hanging or lethal injection as the means of execution. The trial court allowed the petitioner to choose the means of execution, and he chose hanging. In challenging his sentence on direct appeal and on federal habeas corpus, the petitioner unsuccessfully claimed that hanging violated the Eighth Amendment. Prior to the date set for his execution, "the Montana legislature abolished hanging, leaving only lethal injection as a means of execution." Id. at 1382. The petitioner thereafter filed a Rule 60(b) motion in the district court, alleging that this change in Montana law authorized the court to revisit its judgment denying his petition for habeas corpus relief. The court denied his motion, and the petitioner filed a notice of appeal.
The court of appeals interpreted its pre-AEDPA precedent, Lynch v. Blodgett, 999 F.2d 401, 402-03 (9th Cir. 1993), **{2004 U.S. App. LEXIS 143}** to preclude it from entertaining a petitioner's **{366 F.3d 1301}** appeal absent a certificate of probable cause (the COA's pre-AEDPA analog). In the court's view, AEDPA required a COA in all circumstances in which a certificate of probable cause was previously required. Because the petitioner could obtain neither a COA nor a certificate of probable cause, the court did not decide whether AEDPA or pre-AEDPA law applied. 25 In other words, the denial of a meritorious constitutional claim was required in either case, and petitioner failed to show this. Langford, 134 F.3d at 1382.

25
While Langford is not entirely clear on this issue, I assume that AEDPA's effective date fell after the petitioner filed his motion but before he filed his notice of appeal. The Supreme Court had not settled the question whether AEDPA's COA requirement applied in this circumstance until after 1998, the year of the Langford decision. See Slack v. McDaniel, 529 U.S. 473, 481, 120 S. Ct. 1595, 1602, 146 L. Ed. 2d 542 (2000) (holding that " § 2253 applies to appellate proceedings initiated post-AEDPA[,]" even when the underlying habeas proceeding was initiated a district court pre-AEDPA). **{2004 U.S. App. LEXIS 144}** The Ninth Circuit's decision in Lynch, the basis for Langford's result, relied on this circuit's decision in Lindsey v. Thigpen, 875 F.2d 1509, 1512 (11th Cir. 1989) (per curiam). Lindsey, however, is inapposite to Langford and to the three cases we decide today. First, in Lindsey, a pre-AEDPA case, we had no opportunity to consider AEDPA's SSHP restrictions. Second, the petitioner in Lindsey did not file a true Rule 60(b) motion, even though he labeled it as such. The petitioner alleged in his motion, which challenged the constitutionality of his death sentence, that (1) "the district court should reconsider his claim regarding the 'especially heinous, atrocious or cruel' aggravating factor in light of [Maynard v.] Cartwright[, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988)]"; and (2) "the trial judge's override of the jury's recommendation of life imprisonment violated the sixth amendment . . . ." Lindsey, 875 F.2d at 1511. Because his filing was really an SSHP in Rule 60(b)'s clothing, the petitioner would today have to obtain leave of this court under § 2244(b)(3) before presenting the **{2004 U.S. App. LEXIS 145}** SSHP to the district court. 26

26
This conclusion is not, as the majority suggests, in tension with my observation that § 2253 requires a COA only to appeal the district court's judgment denying habeas relief. See Maj. op. at 28 nn. 3-4. An appeal of a district court's dismissal of an SSHP (clothed as a Rule 60(b) motion) for lack of § 2244 leave to proceed requires no COA because it involves only a preliminary jurisdictional inquiry: whether the district court was correct in concluding that it did not have a true Rule 60(b) motion, which it should entertain, before it. Of course, if a petitioner filed an SSHP in the district court after obtaining § 2244 leave, the district court's denial of the SSHP would be "the final order in a habeas corpus proceeding" under § 2253(c)(1). The petitioner would therefore need a COA to appeal the district court's denial.

In Langford, 134 F.3d at 1382, by contrast, at least in the Ninth Circuit's view, the petitioner's so-called Rule 60(b) motion **{2004 U.S. App. LEXIS 146}** "sought relief from a judgment of the district court denying Langford's petition for habeas corpus . . . ." 27 It did not assert constitutional claims attacking his underlying conviction or sentence. Consequently, his motion was not an SSHP, and no COA should have been required to appeal its denial. Ultimately, the Langford court made the same error our panel made in Mobley: it failed to comprehend that Lindsey and cases like it are limited to misuses of Rule 60(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: March 7, 2022