No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

Jonathon Herrera – PETITIONER

vs.

United States of America – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Table of Contents

Table of Authorities iii

Question Presented 1

Parties to the Proceeding 1

Opinion Below 3

Jurisdiction 3

Statutory Provisions Involved 4

Statement of the Case 8

I. District Court Indictment, Conviction, and Sentencing 8

II. Fifth Circuit Appeal of Conviction 10

III. 28 U.S.C. § 2255 Motion to Set Aside, Vacate, or Correct Sentence 11

IV. Request for Certificate of Appealability as to § 2255 Motion 13

V. Request for Relief Pursuant to Rule 60(b) 14

VI. Fifth Circuit Appeal of Rule 60(b) Motion 15

Argument in Support 17

I. Precedent from this Court Makes Clear that a Circuit Court Should Engage in a Mere Threshold Inquiry in Deciding a Motion for a COA and Should Not Address the Merits of the Underlying Petition for Post-Conviction Relief 17

II. The Fifth Circuit Improperly Decided Petitioner's Motion for a COA on the Merits of His § 2255 Petition Rather than Engaging in the Proper Threshold Inquiry Set by this Court's Precedent 20

III. Reasonable Jurists Could Debate Whether Petitioner Made the Necessary Showing to Reopen His § 2255 Motion by Way of His Rule 60(b) Motion, Warranting a COA 21

A. Rule 60(b) Can Be Utilized to Reopen a § 2255 Motion Where "Extraordinary Circumstances" Exist Warranting Relief 21

B. Petitioner Made a Threshold Showing in His Rule 60(b) Motion and Subsequent Motion for COA that the Limitations Period for Filing Petitioner's § 2255 Motion Should Be Equitably Tolled Due to Petitioner's Reliance on Affirmative

Misrepresentations by His Prior Counsel 22

C. Petitioner Made a Threshold Showing in His Rule 60(b) Motion and Subsequent Motion for COA that Because the Limitations Period Should Be Equitably Tolled, Relief from the Court's October 1, 2019 Order Dismissing Petitioner's § 2255 Motion Is Warranted Under Rule 60(b)(2), (6) 27

IV. Therefore, Certiorari Should Be Granted Because the Fifth Circuit's Decision Was Contrary to this Court's Precedent 28

Conclusion 30

Table of Authorities

Statutes, Rules, & Regulations

U.S. CON., Amend. V 11

18 U.S.C. § 924 9

18 U.S.C. § 3231 4

21 U.S.C. § 841 9

21 U.S.C. § 846 ..... 8, 9

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1291 4

28 U.S.C. § 2253 ..... 4, 17

28 U.S.C. § 2255 ..... *passim*

Federal Rule of Civil Procedure 60(b) ..... *passim*

Supreme Court Rule 10 28

Supreme Court Rule 13 3

Case Law

Buck v. Davis, 137 S. Ct. 759 (2017) 19, 20, 21, 22, 29

Didon v. Winchester, 2011 U.S. Dist. LEXIS 13113 (S.D. Miss. 2011) 24

Hohn v. United States, 524 U.S. 236 (1998) 3

Hurst v. Cain, 2008 U.S. Dist. LEXIS 70262 (E.D. La. 2008) 24

Miller-El v. Cockrell, 537 U.S. 322 (2003) 18, 19, 20, 21, 29

Olivo v. Quarterman, 2007 U.S. Dist. LEXIS 101814 (N.D. Tex. 2007) 24

Slack v. McDaniel, 529 U.S. 473 (2000) 17, 18, 21, 29

United States v. Patterson, 211 F.3d 927 (5th Cir. 2000) 22

United States v. Perkins, 481 Fed. Appx. 114 (5th Cir. 2012) 23

United States v. Riggs, 314 F.3d 796 (5th Cir. 2002) 23

United States v. Wynn, 292 F.3d 226 (5th Cir. 2002) 23

Wessinger v. Cain, 358 F. Supp. 2d 523 (M.D. La. 2005) 24

Secondary Sources

March 19, 2020 Order of the Supreme Court 3

QUESTIONS PRESENTED

I. This Court has held a certificate of appealability ("COA") should issue where the petitioner has made a threshold showing that jurists of reason could disagree with the district court's holding or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. This Court has specifically held, moreover, that where the petitioner has filed a motion under Federal Rule of Civil Procedure 60(b) to reopen a habeas corpus proceeding under 28 U.S.C. § 2255, a COA should issue as to the Rule 60(b) motion where "reasonable jurists could debate the District Court's procedural holding that [the petitioner] had not made the necessary showing to reopen his case under Rule 60(b)(6)[.]" Accordingly, the issue presented is whether the order of the United States Court of Appeals for the Fifth Circuit holding that Petitioner failed to make this threshold showing and refusing to grant a COA as to the district court's denial of Petitioner Rule 60(b) Motion conflicts with this Court's precedent?

PARTIES TO THE PROCEEDING

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

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

JONATHON HERRERA,

Petitioner,

- v. –

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATED COURT OF APPELAS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jonathon Herrera ("Petitioner"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case ("Petition").

OPINION BELOW

On May 17, 2021, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") entered an Order denying Petitioner's Motion for a COA as to an October 1, 2019 Order of the United States District Court for the Northern District of Texas ("District Court") denying Petitioner's Motion for Relief Under Rule 60(b). On June 8, 2021, the Fifth Circuit entered an Order denying Petitioner's Petition for Rehearing En Banc.

These and all other orders entered by the Fifth Circuit in this matter are attached herein, along with the District Court's October 14, 2020 Order denying Petitioner's Rule 60(b) Motion and other relevant orders entered by the District Court and other filings which may be relevant to this Court's consideration of this Petition.

JURISDICTION

The Fifth Circuit entered its Order denying the Motion for a COA on May 17, 2021 and entered its Order denying Petitioner's timely Petition for Rehearing En Banc on June 8, 2021. This Petition is, therefore, timely filed pursuant to Supreme Court Rule 13, as modified by this Court's March 19, 2020 Order extending the time for filing of petitions for a writ of certiorari in all cases filed after that date to one-hundred and fifty (150) days due to the COVID-19 pandemic.

This Court has proper jurisdiction pursuant to 28 U.S.C. § 1254(1) and *Hohn v. United States*, 524 U.S. 236, 253 (1998) (holding that the Supreme Court has jurisdiction to review denials of applications for a COA).

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 provides,

> "(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (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—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255 [28 USCS § 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.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

28 U.S.C. § 2255 provides,

> "(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> (c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> (d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.
>
> (e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by

motion is inadequate or ineffective to test the legality of his detention.

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

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

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

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

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

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

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

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

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

Federal Rule of Civil Procedure 60 provides,

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

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

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

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

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

(4) the judgment is void;

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

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for

reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

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

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

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

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

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

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

STATEMENT OF THE CASE

I. District Court Indictment, Conviction, and Sentencing

Petitioner was initially arrested in this matter on June 7, 2016 pursuant to a criminal complaint issued against him on November 3, 2015 in the Northern District of Texas, docket no. 4:2016-cr-00107, alleging that he and three (3) co-defendants engaged in a conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846—namely, fifty (50) grams of more of methamphetamine.

Petitioner began cooperating with the Government following his arrest, and his cooperation apparently led to the arrest of at least three (3) other individuals. On June 8, 2016, however, Petitioner failed to appear at an arraignment in the District Court.

On June 15, 2016, a Second Superseding Indictment was issued against Petitioner, charging him with one (1) count of conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846.

Petitioner was apprehended in September, 2016, at which time U.S. Marshals allegedly located a small amount of cocaine and a firearm in the vehicle Petitioner was driving.

Subsequently, on December 14, 2016, a Third Superseding Indictment was issued against Petitioner, charging him with one (1) count of conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846 (namely, fifty (50) grams or more of methamphetamine), one (1) count of possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and one (1) count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i).

A jury trial commenced in Petitioner's matter on January 9, 2017, and the jury found Petitioner guilty the following day of one (1) count of conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846 and not guilty as to Counts Two and Three of the Third Superseding Indictment.

Petitioner was sentenced by the District Court on May 12, 2017 to a term of four-hundred and eighty (480) months' imprisonment and four (4) years' supervised release. Due to the amount of methamphetamine alleged to have been involved in the count of conviction, a ten-year (10) mandatory minimum applied under 21 U.S.C. §§ 846 and §§ 841(a)(1), (b)(1)(C). Although the May 12, 2017 judgment entered by

the District Court states that a "Statement of Reasons" is attached, no such Statement of Reasons was provided on the District Court's docket.

Petitioner is presently serving his sentence at the FTC Oklahoma City facility.

II. Fifth Circuit Appeal of Conviction

On May 23, 2017, Petitioner submitted, through counsel, a notice of appeal of his sentence and conviction and, subsequently, filed an appellate brief with the Fifth Circuit, docket no. 2017-dcrim-10582. In Petitioner's appellate brief, he argued, in summary, that the District Court reversibly erred in refusing to sever Count One of the Third Superseding Indictment from Counts Two and Three and that the District Court plainly erred in calculating Petitioner's criminal history score under the United States Sentencing Guidelines ("Guidelines").

The Government filed a response brief on October 24, 2017.

Through a February 22, 2018 unpublished per curium Opinion and Order and a March 16, 2018 Mandate, the Fifth Circuit affirmed Petitioner's conviction and sentence. In the unpublished Opinion, the Fifth Circuit held, in summary, that even if joinder of Count One with Counts Two and Three was improper, Petitioner failed to clear, specific, and compelling prejudice as a result and that any error by the District Court in calculating Petitioner's criminal history score did not affect his substantial rights because Petitioner's sentence would have been within the Guidelines' range either way.

III. 28 U.S.C. § 2255 Motion to Set Aside, Vacate, or Correct Sentence

On June 11, 2019, Petitioner filed with the District Court, docket no. 4:2019-civ-00460, a Motion to Set Aside, Vacate, or Correct a Sentence under 28 U.S.C. § 2255 ("§ 2255 Motion"). In the § 2255 Motion, Petitioner argued, in summary:

1. He was coerced into confessing to being a part of the alleged conspiracy, in violation of the Fifth Amendment and which Petitioner argued amounted to prosecutorial misconduct;
2. His trial counsel was ineffective, due to personality conflicts with Petitioner's parents, "in failing to get evidence suppressed, calling me as a witness against all better judgment saying otherwise, failing to properly investigate germane evidence, conceding points for contention, and providing milquetoast objections to a clearly hostile judge", and his appellate counsel was ineffective "in his attempts to show the bias and abuse of discretion on the part of the district court";
3. The District Court Judge was biased, which led to "a biased trial and guilty verdict"; and
4. Petitioner's sentence of 408 months' imprisonment constituted cruel and unusual punishment for a first-time drug offense.

Petitioner argued, among other things, that he was arrested under the wrong name ("Jonathon Obregon"), suggesting a case of mistaken identity, and that his trial counsel failed to request and obtain critical evidence from the Government, including, among others, any recordings of Petitioner's interviews with law enforcement agents,

failed to call critical witnesses, and offered very limited objections to the Government's case in chief. Petitioner's trial counsel, moreover, called no witnesses at trial beyond Petitioner himself.

Petitioner also noted in his § 2255 Motion that his trial counsel had requested to be removed from the case, but that his request was denied by the District Court, which Petitioner submitted further evidenced the ineffectiveness of his counsel at trial.

While the § 2255 Motion was technically filed pro se by Petitioner, he completed it with the guidance, counsel, and assistance of a consulting firm and one of its employees, who was hired by Petitioner's mother, Cynthia Argil ("Ms. Argil").

This consultant first held himself out to Ms. Argil as a licensed attorney and later repeatedly assured Ms. Argil that her brother's § 2255 Motion would be prepared by attorneys and filed on time, as set forth in Ms. Argil's affidavit which was enclosed as "Exhibit A" to Petitioner's Rule 60(b) Motion. Unbeknownst to Ms. Argil and Petitioner, this individual was not in fact a licensed attorney, and the § 2255 Motion was not timely filed.

On September 10, 2019, the Government filed a motion to dismiss Petitioner's § 2255 Motion on the basis that it was untimely because it was filed outside the applicable statute of limitations period. Petitioner filed a reply to the Government's motion to dismiss on September 30, 2019.

Through an October 1, 2019 Order, the District Court dismissed Petitioner's § 2255 Motion as time-barred on the basis that the one-year (1) statute of limitations

began to run on the date of the Fifth Circuit's February 22, 2018 opinion, rather than the date of the March 16, 2018 Fifth Circuit mandate, plus the ninety-day (90) period for petitioning for a writ of certiorari from the Supreme Court. The District Court concluded in the Order that Petitioner's judgment, therefore, became final on May 23, 2018, and the statute of limitations for filing a § 2255 motion expired on May 23, 2019.

Ms. Argil asserts, as set forth in her affidavit, that she and Petitioner had been incorrectly advised by the individual who assisted in preparing the § 2255 Motion on multiple occasions that the limitations period for doing so ran from the date of the Fifth Circuit Mandate, rather than the date of the Fifth Circuit Order, which is why the § 2255 Motion was not filed within the correct limitations period.

Petitioner and his mother reasonably relied on this incorrect advice, as they had been misled by this individual into believing that he was a licensed attorney and that the motion would be prepared with the guidance of other licensed attorneys from the "federal defense consulting" firm which he had hired.

IV. Request for Certificate of Appealability as to § 2255 Motion

On December 11, 2019, Petitioner submitted a pro se motion for a COA from the Fifth Circuit, docket no. 2019-prswo-11133, in order to appeal the District Court's denial of his § 2255 Motion. In his pro se motion, Petitioner argued, in summary, that the limitations period should have been equitably tolled, his § 2255 Motion should have been held in abeyance pending a decision from this Court in the matter

of *Shular v. United States*, and the District Court opened the door for appellate review when it addressed the merits of his § 2255 Motion.

The Government did not file a response to Petitioner's pro se motion for a COA as to his § 2255 Motion.

On May 29, 2020, the Fifth Circuit issued an Order denying Petitioner's request for a COA, on the basis that he failed to make the required "substantial showing of the denial of a constitutional right".

V. Request for Relief Pursuant to Rule 60(b)

Petitioner subsequently retained new counsel, who submits this Petition on his behalf, and through whom he submitted to the District Court on October 13, 2020, docket no. 4:2019-cv-00460, a motion for relief under Federal Rule of Civil Procedure 60(b) ("Rule 60(b) Motion") from the District Court's October 1, 2019 Order. Because the Order in question was entered on October 1, 2019, Petitioner's Rule 60(b) Motion was timely under Rule 60(b).

In the Rule 60(b) Motion, Petitioner argued, in summary, that relief from the District Court's order denying Petitioner's § 2255 Motion is warranted under Rule 60(b) based upon newly discovered evidence and/or "other reasons justifying relief", because the limitations period for the filing of that petition should be equitably tolled due to Petitioner's reliance on affirmative misrepresentations made by prior counsel and such affirmative misrepresentations constitute "newly discovered evidence".

Accordingly, Petitioner requested in his Rule 60(b) Motion that the District Court reopen his § 2255 Motion to allow the filing of an amended and/or supplemented petition by new counsel.

The Government did not file a response to Petitioner's Rule 60(b) Motion.

The District Court entered an Order on October 14, 2020 denying Petitioner's Rule 60(b) Motion on the basis, in summary, that Petitioner knew in October, 2019 that his § 2255 Motion was untimely and yet waited an additional year before seeking relief.

The District Court further held that even if it had found equitable tolling was warranted, Petitioner had not "shown any ground that would have been meritorious". Finally, the District Court held that Petitioner failed to make a substantial showing of the denial of a constitutional right and, therefore, that it would not issue a COA.

VI. Fifth Circuit Appeal of Rule 60(b) Motion

Petitioner subsequently filed on October 21, 2020, through counsel, a notice of appeal to the Fifth Circuit, docket no. 2020-prsw-11060, as to the District Court's denial of his Rule 60(b) Motion.

On October 26, 2020, the Fifth Circuit issued a letter advising that a motion for a COA must be filed before an appeal of the Rule 60(b) Motion could proceed.

Petitioner moved for permission from the Fifth Circuit to submit a Motion for a COA and supporting Memorandum of Law one (1) day out of time, which was granted by the Fifth Circuit through an Order dated December 10, 2020. Petitioner

thereafter filed with the Fifth Circuit, through counsel, his Motion for a COA and supporting Memorandum of Law on that same date.

In the Motion for a COA, Petitioner submitted, in summary, that:

1. Petitioner made a substantial showing that relief is warranted under Rule 60(b) because the limitations period for filing his § 2255 Motion should be equitably tolled due to Petitioner's reliance on affirmative misrepresentations by his prior counsel;
2. Petitioner made a substantial showing that because equitable tolling of the limitations period is warranted as a result of Petitioner's reasonable reliance on affirmative misrepresentations made by his prior counsel resulting in the filing of his § 2255 Motion outside the applicable limitations period, relief is warranted under Rule 60(b) from the District Court's October 1, 2019 Order denying Petitioner's § 2255 Motion as time barred; and
3. Reasonable jurists could disagree with the District Court's decision to dismiss Petitioner's Rule 60(b) Motion, warranting a COA.

Once again, the Government failed to file a response to Petitioner's Motion for a COA.

On May 17, 2021, the Fifth Circuit issued an Order denying the Motion for COA on the basis that Petitioner failed to make a substantial showing of the denial of a constitutional right.

The Fifth Circuit did not elaborate in its May 17, 2021 Order as to the basis for its denial, other than reciting the standard from *Slack v. McDaniel*, 529 U.S. 473 (2000) which held that, where, as here, the district court rejects the petition on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

On May 28, 2021, Petitioner submitted, through counsel, a petition for rehearing en banc by the Fifth Circuit.

On June 8, 2021, the Fifth Circuit entered an Order treating the petition for rehearing as a petition for reconsideration and denying the petition. On June 16, 2021, the Fifth Circuit entered a mandate denying the motion for COA on the basis that Mr. Herrera failed to make a substantial showing of the denial of a constitutional right.

This timely Petition followed as to the issue set forth above.

ARGUMENT IN SUPPORT

I. Precedent from this Court Makes Clear that a Circuit Court Should Engage in a Mere Threshold Inquiry in Deciding a Motion for a COA and Should Not Address the Merits of the Underlying Petition for Post-Conviction Relief.

28 U.S.C. § 2253 provides that a final order issued in a habeas corpus proceeding under 28 U.S.C. § 2255 may not be appealed "[u]nless a circuit justice or judge issues a certificate of appealability." The statute further provides that a COA

may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."

Precedent from this Court, discussed below, makes clear that in deciding a motion for a COA, the circuit court should engage in a threshold inquiry only and should not address the merits of the underlying petition for post-conviction relief. This precedent holds that a COA should issue if the threshold inquiry indicates that reasonable jurists could debate whether the petition raised a constitutional issue, which does not require a finding that reasonable jurists would grant the requested post-conviction relief.

For example, this Court held in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), that where, as here, the district court rejects a petition on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Subsequently, in *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), this Court elaborated that the issuance of a COA requires a "substantial showing of the denial of a constitutional right", which requires the petitioner to "'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 336, quoting *Slack*, 529 U.S. at 484.

This Court further noted:

> "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 side steps 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.
>
> . . .
>
> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."

Id. at 336-38.

In *Miller-El*, this Court ultimately determined that the Fifth Circuit improperly made a decision on the merits in denying the petitioner's motion for a COA, which it in fact had no jurisdiction to do before a COA was issued. *Id.* at 342. As a result, this Court reversed and remanded the Fifth Circuit's denial of the petitioner's motion for a COA. *Id.* at 342.

Likewise, in *Buck v. Davis*, 137 S. Ct. 759 (2017), this Court again reversed and remanded the Fifth Circuit's denial of the petitioner's motion for a COA. In *Buck*, the petitioner had filed a Rule 60(b) motion in the Southern District of Texas to reopen his habeas proceeding based upon "extraordinary circumstances". *Id.* The district court denied the motion, and the Fifth Circuit declined to issue a COA. *Id.*

This Court reiterated in *Buck* that, "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the

district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* at 773, citing *Miller-El*, 537 U.S. at 557.

Accordingly, this Court held, the Fifth Circuit's inquiry in *Buck* should have been "whether reasonable jurists could debate the District Court's procedural holding that Buck had not made the necessary showing to reopen his case under Rule 60(b)(6)". *Id.* at 775.

This Court concluded in *Buck* that while, "The court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief, but it reached that conclusion only after essentially deciding the case on the merits"—namely, that Buck had failed to demonstrate extraordinary circumstances. *Id.* at 773

Finally, this Court held that Buck had made a showing that "extraordinary circumstances" exist to warrant relief under Rule 60(b) and that Buck had, moreover, demonstrated ineffective assistance of counsel. *Id.* at 780.

II. The Fifth Circuit Improperly Decided Petitioner's Motion for a COA on the Merits of His § 2255 Petition Rather than Engaging in the Proper Threshold Inquiry Set by this Court's Precedent.

Petitioner submits that the Fifth Circuit here, as in *Buck*, improperly denied his Motion for a COA based upon the merits of his § 2255 Motion and Rule 60(b) Motion, rather than limiting its decision to the threshold inquiry set forth by this Court in *Slack*, *Miller-El*, *Buck*, *et al.* of whether jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude

the issues presented are adequate to deserve encouragement to proceed further. *See Slack*, 529 U.S. 473; *Miller-El*, 537 U.S. 322; *Buck*, 137 S. Ct. 759.

III. Reasonable Jurists Could Debate Whether Petitioner Made the Necessary Showing to Reopen His § 2255 Motion by Way of His Rule 60(b) Motion, Warranting a COA.

As noted above, 28 U.S.C. § 2253 provides that a COA should issue if "if the applicant has made a substantial showing of the denial of a constitutional right." This Court has specified that this requires a showing that "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

This is merely a "threshold inquiry" and should not include an analysis of the merits of the underlying constitutional claim, which the circuit court in fact does not have jurisdiction to decide until a COA has issues. *Miller-El*, 537 U.S. at 336-37.

This Court has instructed, specifically in the context of a COA for a Rule 60(b) motion, the appropriate inquiry is, "whether reasonable jurists could debate the District Court's procedural holding that [the petitioner] had not made the necessary showing to reopen his case under Rule 60(b)(6)[.]" *Buck*, 137 S.Ct. at 775.

A. Rule 60(b) Can Be Utilized to Reopen a § 2255 Motion Where "Extraordinary Circumstances" Exist Warranting Relief.

In his Rule 60(b) Motion, Petitioner made a clear showing that his § 2255 Motion should be reopened. Namely, Rule 60(b) provides that "On motion and just terms, the court may relieve a party or its legal representative from a final judgment,

order, or proceeding . . .” for reasons including, among others, “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)” or “any other reason that justifies relief”. Fed. R. Civ. P. 60(b)(2), (6).

In *Buck*, 137 S. Ct. 759, this Court noted that Rule 60(b) can be used to reopen a § 2255 proceeding, where sufficient justification exists under the rule. Where a motion is based upon Rule 60(b)(6)—“any other reason that justifies relief”—this Court held that extraordinary circumstances must be present to warrant relief. *Id.* at 777.

In determining whether extraordinary circumstances are present under Rule 60(b)(6), the court may consider a variety of factors, including “‘the risk of injustice to the parties’ and ‘the risk of undermining the public’s confidence in the judicial process.’” *Id.* at 777-78, citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U. S. 847, 863-64 (1988).

B. Petitioner Made a Threshold Showing in His Rule 60(b) Motion and Subsequent Motion for COA that the Limitations Period for Filing Petitioner’s § 2255 Motion Should Be Equitably Tolled Due to Petitioner’s Reliance on Affirmative Misrepresentations by His Prior Counsel.

The one-year (1) limitations period for the filing of a § 2255 motion may be equitably tolled under certain circumstances. *E.g.*, *United States v. Patterson*, 211 F.3d 927, 928 (5th Cir. 2000) (holding that “. . .the limitations provision in § 2255 may be equitably tolled in rare and exceptional circumstances” and noting that the statute

of limitations should not be applied too harshly because dismissal of a § 2255 motion is a "'particularly serious matter'").

In *United States v. Perkins*, 481 Fed. Appx. 114, 117 (5th Cir. 2012), the Fifth Circuit explained that in order to establish that equitable tolling applies, the petitioner must show that: (1) he has been pursuing his rights diligently and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Id.*, citing *Holland v. Florida*, 560 U.S. 631 (2010).

Petitioner made, in the very least, a threshold showing in his Rule 60(b) Motion and subsequent Motion for COA that he has been diligently pursuing his rights with regard to his § 2255 Motion throughout the limitations period and that an extraordinary circumstance, namely, affirmative misrepresentation by his prior counsel, stood in the way of his timely filing, warranting equitable tolling. *See Perkins*, 481 Fed. Appx. at 117.

In *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002), the Fifth Circuit held that equitable tolling of the § 2255 limitations period may be warranted where, among other circumstances, the petitioner can establish that he was affirmatively misled by his attorney and that he reasonably relied on that affirmative misrepresentation in making the late filing. *See also United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) (noting that an attorney's intentional deceit may be a basis for equitable tolling, if the petitioner can establish that he relied on the attorney's deceptive misrepresentations), citing *Wynn*, 292 F.3d at 230-31.

In *Wessinger v. Cain*, 358 F. Supp. 2d 523, 529-30 (M.D. La. 2005), the district court reiterated this, stating,

> "[A]n attorney's conduct, if it is sufficiently egregious, may constitute the sort of 'extraordinary circumstances' that would justify the application of equitable tolling to the one year limitations period. . . . An attorney's intentional deceit may warrant equitable tolling of statute of limitations on a motion for collateral relief if a petitioner shows that he reasonably relied on his attorney's deceptive misrepresentations."

The court further noted in *Wessinger* that, in order for equitable tolling to apply, the petitioner must show that he diligently pursued his petition and that he relied on counsel's deceptive misrepresentation. *Id.* at 530. The court then held that Wessinger had diligently pursued his application, which was filed only twenty-one (21) days after expiration of the limitations period and that he had reasonably relied on his counsel's silence and misrepresentations, especially because he was incarcerated and had little access to other legal assistance or the courts. *Id.* at 531.

The court concluded that the limitations period should be equitably tolled through the date of the last filing made by Wessinger's counsel through his exhaustion of state court remedies. *Id.* at 532.

Numerous other district courts within the Fifth Circuit have also noted that ineffective assistance of counsel may warrant equitable tolling if it rises to the level of affirmative misrepresentation. *See Didon v. Winchester*, 2011 U.S. Dist. LEXIS 13113 (S.D. Miss. 2011); *Olivo v. Quarterman*, 2007 U.S. Dist. LEXIS 101814 (N.D. Tex. 2007); *Hurst v. Cain*, 2008 U.S. Dist. LEXIS 70262 (E.D. La. 2008).

In this matter, Petitioner's prior counsel, who assisted him in preparing his § 2255 Motion, affirmatively misrepresented himself as a licensed attorney, when in fact he was not. This individual was employed by a "federal defense consulting firm" and initially represented to Petitioner and his mother that he was himself a licensed attorney and, later, represented that Petitioner's § 2255 Motion would be prepared under the guidance of licensed attorneys for the firm.

Petitioner, who was incarcerated with limited access to other legal assistance or the courts, relied on this individual and consulting firm in preparing and filing his § 2255 Motion. He reasonably assumed that because the individual was an attorney (when in fact he was not), he was familiar with the procedures for filing a § 2255 motion, including, among other things, the limitations period for doing so. Petitioner was misled by this individual into believing that the limitations period was calculated from the date of the Fifth Circuit Mandate, rather than the correct date of the Fifth Circuit Order.

In fact, Petitioner's mother has advised that she inquired of this individual on at least four (4) occasions by telephone and text message whether the § 2255 Motion would be filed on time, and each time, the individual assured that it would be timely filed.

Because the Fifth Circuit Mandate was filed on March 13, 2018, Petitioner's prior counsel calculated the Mandate to become final ninety (90) days later, on June 13, 2018 and, subsequently, the limitations period for filing a § 2255 motion to expire on June 14, 2019. Petitioner's prior counsel incorrectly advised him of the June 13,

2019 deadline, upon which Petitioner reasonably relied, having been misled into believing that the advice was coming from a licensed attorney.

According to this incorrect advice, Petitioner filed his § 2255 Motion on June 11, 2019, which he believed, based on incorrect advice from counsel, was within the limitations period. In fact, however, the limitations period should have been calculated from the Fifth Circuit's February 22, 2018 Opinion, rather than the March 13, 2018 Mandate, resulting in a deadline of May 22, 2019 for filing of the § 2255 Motion. As a result, Petitioner's § 2255 Motion was filed a mere twenty (20) days after the expiration of the limitations period and was subsequently rejected by this Court as untimely.

Petitioner submits that had his prior counsel in fact been the licensed attorney that he held himself out to be, he would have known that the limitations period is calculated from the date of the Opinion rather than the date of the Mandate and would have ensured that Petitioner submitted his § 2255 Motion within the limitations period. Likewise, had Petitioner's prior counsel not affirmatively misrepresented himself as an attorney, Petitioner and his family would have consulted with an actual licensed attorney, and his petition would have been filed on time.

Accordingly, Petitioner's prior counsel affirmatively misled him and his family into believing that he was a licensed attorney, which he was not. Petitioner reasonably relied on this affirmative misrepresentation when he accepted counsel's

advice as to the deadline for filing his § 2255 Motion. As a result, Petitioner's § 2255 Motion was filed outside the limitations period.

For these reasons, Petitioner made at least a threshold showing in his Rule 60(b) Motion and subsequent Motion for COA that equitable tolling of the limitations period for filing a § 2255 Motion is warranted in this matter, to allow sufficient time for Petitioner to consult with new counsel as to the motion and then time for new counsel to prepare and file, with the court's permission, an amended and/or supplemented brief to accompany the motion.

C. **Petitioner Made a Threshold Showing in His Rule 60(b) Motion and Subsequent Motion for COA that Because the Limitations Period Should Be Equitably Tolled, Relief from the Court's October 1, 2019 Order Dismissing Petitioner's § 2255 Motion Is Warranted Under Rule 60(b)(2), (6).**

Petitioner made, moreover, a threshold showing in his Rule 60(b) Motion and subsequent Motion for COA that because equitable tolling of the limitations period is warranted as a result of Petitioner's reasonable reliance on affirmative misrepresentations made by his prior counsel resulting in the filing of his § 2255 Motion outside the applicable limitations period, relief is warranted under Rule 60(b) from the District Court's October 1, 2019 Order denying Petitioner's § 2255 Motion as time barred.

The District Court's October 1, 2019 Order was based upon the limitations period without equitable tolling, as the District Court was unaware when the Order was entered of the facts warranting equitable tolling, which, we submit, constitutes an "extraordinary circumstance" meriting relief under Rule 60(b)(6).

In addition, Petitioner did not learn that his prior counsel had affirmatively misled him into believing he was a licensed attorney and, later, that his motion would be prepared under the guidance of licensed attorneys from the "federal defense consulting firm" which he had hired, until after the motion had been filed. Therefore, this constitutes "newly discovered evidence", which Petitioner could not have discovered prior to the filing of his § 2255 Motion, given his incarceration, warranting relief from the District Court's October 1, 2019 Order under Rule 60(b)(2) as well.

Finally, Petitioner's § 2255 Motion was filed only twenty (20) days after expiration of the limitations period, Petitioner has been incarcerated for the duration of the limitations period with limited access to legal resources or the courts, and Petitioner has since retained new counsel, through whom the instant Petition is filed. Petitioner has, therefore, been diligently pursuing his rights with regard to this matter for the duration of the limitations period, as well as the time that has followed since the expiration thereof.

Accordingly, Petitioner made a threshold showing in his Rule 60(b) Motion and subsequent Motion for COA that relief is warranted from the District Court's October 1, 2019 Order, warranting the issuance of a COA.

IV. Therefore, Certiorari Should Be Granted Because the Fifth Circuit's Decision Was Contrary to this Court's Precedent.

Supreme Court Rule 10 provides, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Pursuant to Rule 10, the "character of reasons the Court

considers" in determining whether to grant certiorari includes, among others, situations where, "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."

In this matter, for the reasons set forth above, the Fifth Circuit denied Petitioner's Motion for COA in a manner which conflicts with the clear precedent set by this Court in *Slack*, *Miller-El*, *Buck*, *et al.* *See Slack*, 529 U.S. 473; *Miller-El*, 537 U.S. 322; *Buck*, 137 S. Ct. 759.

In fact, reasonable jurists could disagree with the district court's resolution of Petitioner's constitutional claims or could conclude the issues presented are adequate to deserve encouragement to proceed further, warranting a COA pursuant to this Court's precedent. *See Slack*, 529 U.S. 473; *Miller-El*, 537 U.S. 322; *Buck*, 137 S. Ct. 759.

Petitioner submits, moreover, that a COA is especially warranted in light of the injustices suffered by Petitioner in this matter, including, among others, error by the Fifth Circuit in refusing to issue a COA, the extreme 408-month sentence which he received as a first-time drug offender, the fact that this trial lasted less than two (2) days, and the affirmative misrepresentations made to Petitioner and his mother by the consultant who assisted Petitioner in filing his § 2255 Motion and falsely held himself out to be a licensed attorney, and the serious errors made by his trial counsel in, among other things, failing to request and obtain critical evidence and failure to call witnesses.

A COA is necessary so that Petitioner may have his § 2255 Motion reopened so that he may raise these arguments and have his § 2255 Motion regarding these injustices heard on the merits.

Accordingly, Petitioner submits that certiorari is warranted and that this Fifth Circuit's May 17, 2021 Order denying Petitioner's Motion for COA should be reversed and a COA should be issued to allow Petitioner to appeal the District Court's denial of his Rule 60(b) Motion.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari.

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Respectfully submitted,

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