21-7938

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Larry Wayne Kimes

Petitioner,

vs.

United States Of America,

Respondent.

On Petition for Writ Of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Larry Wayne Kimes, Petitioner *pro se*
2225 Normandy Dr.
Irving, Texas 75060

Questions Presented

1. Through local rule or case law, some federal appeals courts, including this Court, require lower courts to explain their opinions or orders sufficiently to aid in the appeal. The District of Columbia, First, Fourth, Sixth, Seventh, and Eleventh Circuits do things one way, and the Fifth Circuit does them differently. There is, therefore, a circuit split on this issue that should be settled.

> Should all federal appeals courts require district courts to explain their opinions and orders in sufficient detail to aid in appeals?

2. The Fifth Circuit erred or abused its discretion when it improperly denied Petitioner's application for a ("COA") and other motions related to rehearing.

> Should this Court remand this case with instructions to reconsider issues that should have been considered when responding to the application for the certificate of appealability COA and other motions/petitions relative to rehearing?

3. Appellate counsel filed an *Ander's* brief in the direct appeal and failed to address obvious non-frivolous issues, thereby rendering ineffective assistance of appellate counsel.

> Did the courts below err or abuse their discretion when they did not grant Petitioner an out-of-time direct appeal based upon ineffective assistance of appellate counsel?

4. The district court erred or abused its discretion when it failed to file mandatory statements of fact or conclusions of law, despite Petitioner's motion in the district court asking for them.

> Did the Fifth Circuit err or abuse its discretion when it did not remand the case with instructions to the district court to provide statements of fact or conclusions of law, as required by Fed. R. Civ. Pro. 52?

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Petition for a Writ of Certiorari

Larry Wayne Kimes, Petitioner, acting *pro se*, an inmate currently in home confinement, respectfully petitions this Court for a writ of certiorari to review the judgments of the United States District Court for the Western District of Texas San Antonio Division (Case Numbers SA-5:12-CR-00886-FB-2 and SA-5:16-CV-716-FB) and the United States Court of Appeals for the Fifth Circuit, which denied both Petitioner's motion under 28 U.S.C. § 2255 (Case No. 18-50070) and his Fed. R. Civ. Pro. 60(b) Motion (Case No. 20-50251).

Preliminary Statement

This is Petitioner's first experience with an appeal to this Court. It may not be customary to include a preliminary statement, but Petitioner believes it might be helpful.

Petitioner is actually, factually, and legally innocent of all charges and can prove it if given a chance.

To be blunt, Petitioner has been horsewhipped by the district court and the Fifth Circuit at every stage of this case because they have not done their jobs.

Eleven days before trial, Petitioner was coerced into pleading guilty by his trial counsel, the prosecutor, and the district court. This is all explained in Petitioner's lower court filings.

This is no small case. Petitioner was sentenced to 12 years and ordered to pay $132,000,000.00 in restitution.

Petitioner's trial counsel and appellate counsel were ineffective. All of Petitioner's pleadings presented the unvarnished facts of this case, and each was meticulously researched and presented. Neither the district court nor the Fifth Circuit chose to carefully review all issues and decide them one by one.

Both courts rendered opinions and orders that were painfully short and told Petitioner extraordinarily little, if anything, about how to proceed. It is clear to Petitioner that neither court spent much time looking at the case or considering the law.

Had either of the lower courts been required to perform a thorough analysis and provide rulings similar to those required by Fed. R. Civ. Pro. 52, the outcome of this case would have been far different. The Seventh Circuit requires this, but it appears that none of the other circuits do. *See* 7th Cir. Local Rule 50.

There are too many cases to cite here, but federal courts routinely pay little to no attention to motions or appeals filed by *pro se* litigants, especially *pro se* incarcerated litigants, such as Petitioner. These cases are routinely dismissed or denied based solely upon procedural issues of which pro se litigants no little.

No matter how or when presented, the merits should always be considered. There is no hope for justice without looking at the merits of the issues raised.

These cases fall by the wayside far too quickly because they are not given the proper consideration. Perhaps this is because of full dockets. Maybe it is because district courts may do what they want without worrying about getting overruled by the courts of appeals. Knowing that this Court is overburdened and can decide only

an exceedingly small percentage of the cases filed each year, the appeals courts may do the same.

This system is a classic case of foxes watching the hen houses.

Opinions Below

The Fifth Circuits denial of the Rule 60 Motion is not published.

The district court's denial of the Rule 60 Motion is not published. It is Case No. is SA-16-CV-716-FB.

Petitioner was indicted and convicted in the United States District Court for Texas, Western District, San Antonio Division on September 19, 2012. (DE 3.)[1]

Opinions and Orders Below Are Insufficient to Aid in the Appeal

This case has been going on for almost ten years. There are many orders and opinions in the lower courts. Although not normally included, Petitioner believes that a short history of the proceedings may be helpful to the Court.

There are many opinions below. If some are no longer appealable, please accept them as examples of how Petitioner's case was treated in the lower courts.

When reviewing a *pro se* litigant's Rule 60 (B) motion to determine which subsection of Rule 60(b) applies, the courts must apply the general rule that "*pro se* filings are 'to be liberally construed." *Willis v. Jones*, 329 Fed. Appx. 7, 14 (6th Cir. 2009). The general rule was not followed in this case.

[1] Documents filed in the district court shall be identified by "DE."

In *Buck v. Davis*, ___U.S.___, 137 5. Ct. 759, 777-778 (2017), this Court held that F. R. Civ. P. 60(b)(6) permits a court to reopen a judgment for "any other reason that justifies relief."

Petitioner will not burden this Court with explanations of many other pleadings filed and numerous other orders declining Petitioner's motions both in the district court and the Fifth Circuit. The opinions and some pleadings are set forth in chronological order in hopes that this Court will understand and appreciate how this case began in district court and ended in this Court.

On May 1, 2014, Petitioner filed a Notice of Appeal related to his criminal conviction. (DE 153.)

On September 3, 2014, Petitioner's court-appointed appellate counsel filed an *Anders* brief and motion to withdraw as Petitioner's counsel. Petitioner agreed to dismissal because his appellate attorney told Petitioner he had a better chance to reverse his conviction by filing a motion under 28 U.S.C. § 2255 (the "2255 Motion").

On July 13, 2015, the direct appeal was dismissed.

On July 12, 2016, Petitioner filed a 2255 Motion. (DE 319.) The Case Number is 5:16-CV-716-FB. The 2255 Motion was later amended. (DE 332.) Petitioner also filed motions and briefs related to the expansion of the record (DE 346), for an evidentiary hearing (DE 350), discovery and production of documents (DE 351), and a request for the district court to take judicial notice (DE 354.)

On November 21, 2017, the district court denied Petitioner's 2255 Motion and all other motions Petitioner filed supporting the 2255 Motion. Petitioner's Appendix ("Pet. App.") 9 and Pet. App. 10-46.

On January 24, 2018, Petitioner appealed the denial of the 2255 Motion to the Fifth Circuit. (DE 363.)

On November 27, 2018, while the direct appeal related to the 2255 Motion was still pending, Petitioner timely filed a motion for reconsideration of the denial of the 2255 Motion pursuant to Fed. R. Civ. Pro. 60 (the "Rule 60 Motion") was based upon procedural errors in the district court. (DE 368.) It contains many arguments, supported by the relevant facts, and exhaustively researched, presented in the 2255 Motion. Pet. App. 47-72.

On January 25, 2019, the Fifth Circuit refused to grant Petitioner a certificate of appealability ("COA") for his appeal of the denial of the 2255 Motion. Pet. App. 73-74. The brevity and lack of a helpful explanation of the issues raised in the denial should be noted.

On January 27, 2020, the district court denied the Rule 60 Motion. (DE 372). Pet. App. 75-77.

On February 27, 2020, when they were not forthcoming, Petitioner filed a motion in district court requesting findings of fact and conclusions of law relevant to the denial of the Rule 60 Motion. (DE 373.) Petitioner believed that the district court prepared findings of fact and conclusions of law as a matter of course pursuant to Fed. R. Civ. P. 52. Pet. App. 78-88.

On March 6, 2020, overlooking, misunderstanding, or misapplying the requirements of Fed. R. Civ. P. 52, the district court held that findings of fact and conclusions of law were not required by law and denied the motion. (DE 374.) Pet. App. 89-90.

On March 26, 2020, Petitioner appealed the district court's denial of the Rule 60 Motion.

On July 30, 2020, in Case No. 20-50251, Petitioner filed an application for a COA relative to his appeal of the denial of the Rule 60 Motion. Pet. App. 91-105.

On July 30, Petitioner filed his Brief in Support of Appellant's Application for a Certificate of Appealability Related to the Denial of Rule 60 Motion. Pet. App. 106-140. This document is crucial to Petitioner's legal arguments. It sets forth the issues and clearly states the facts and law necessary for Petitioner to prevail. If the Fifth Circuit had paid careful attention to this document, it would not have denied the application for the COA.

On September 20, 2021, the Fifth Circuit denied Petitioner's application for a certificate of appealability relative to the Rule 60 Motion. Instead of a single judge ruling on the matter, which Petitioner believed to be normal, a three-judge panel ruled. Pet. App. 141-142. Please note the brevity of the order and the lack of thoughtful explanation of any of the issues presented to that court.

On October 26, 2021, Petitioner filed a petition for reconsideration.

On December 7, 2021, the petition for reconsideration was denied by the same three-judge panel. Pet. App. 143-144.

On January 18, 2021, Petitioner filed a petition for *en banc* reconsideration. Pet. App. 145-168.

On January 18, 2022, the clerk issued a letter indicating that no action would be taken on the Petition for En Banc rehearing because it was late filed. Pet. App. 169. The petitions should have been filed within 14 days after the denial of the petition for rehearing by a three-judge panel. Petitioner believed that he had 45 days to file because virtually all the motions Petitioner had filed in the past allowed 45 days when the United States was a party. Fed. R. App. R. 40 allows 45 days to file a petition for rehearing. Petitioner, acting in good faith, believed that the same filing deadline applied to the petition for rehearing *en banc*. This was an honest mistake that prejudiced no one. It was an abuse of discretion to deny it.

On January 19, 2021, just one day later, Petitioner filed a motion to late file the petition for *en banc* reconsideration. On February 16, 2022, the motion was denied. Pet. App. 170. Denying the motion was an abuse of discretion by the Fifth Circuit, and the motion should have been granted. The motion was brought in good faith. Good cause was shown. There was no prejudice against the government, and the motion was unopposed.

The due date for this writ of certiorari has been extended through May 6, 2022.

Jurisdiction

The unsigned judgment of the court of appeals denying the application for a COA relative to the denial of the Rule 60 Motion was entered on September 20, 2020. The signed version was filed on December 15, 2021. A petition for rehearing was

denied on December 7, 2021. On February 4, 2022, Justice Alito extended the time of filing up to and including May 6, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

United States Constitution, Amendment V:

> 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.

United States Constitution, Amendment VI:

> 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 (SIC).

STATEMENT OF THE CASE

Petitioner is actually innocent of all charges.

Petitioner was a certified public accountant and a whistleblower in this case. Petitioner had a firm with several employees and paid all payroll taxes owed. Petitioner worked on other matters for the client, managing its investments in separate and unrelated companies, and had nothing to do with payroll taxes. Once he suspected criminal conduct on the part of his client, Petitioner was required by accounting ethics to report the suspected crime. Petitioner was also compelled to

report the suspected activity to avoid being charged with misprision of a felony under 18 U.S.C. § 4. This is a payroll tax case, and it was later determined that the client failed to pay over $120,000,000.00 in federal payroll taxes. Petitioner and two co-defendants reported this to the Internal Revenue Service in May 2007.

Petitioner was subsequently indicted in September 2012.

The old saying, "No good deed goes unpunished," seems to apply here.

On January 16, 2014, under coercion, Petitioner pleaded guilty to Klein Tax Conspiracy (18 U.S.C. § 371) and conspiracy to commit mail fraud (18 U.S.C. § 1349). Petitioner was told that if he did not plead guilty that morning, Petitioner's son would be indicted for money laundering. There were no facts to support such an indictment. Petitioner's son had nothing to do with this case. Petitioner was forced to plead guilty to prevent any attack on his son.

On April 15, 2014, Petitioner was sentenced to five years for Klein Conspiracy and twelve tears for conspiracy to commit mail fraud. Petitioner was also ordered to pay the Internal Revenue Service $132,000,000.00. (DE 131.) Pet. App. 1-8.

The following are explanations of the questions presented in this case. The facts and the law support all.

1. Through local rule or case law, some federal appeals courts, including this Court, require lower courts to explain their opinions or orders sufficiently to aid in the appeal. The District of Columbia, First, Fourth, Sixth, Seventh, and Eleventh Circuits do things one way, and the Fifth Circuit does them differently. There is, therefore, a circuit split on this issue that should be settled.

Should all federal appeals courts require district courts to explain their opinions and orders in sufficient detail to aid in appeals?

It is exceedingly difficult for *pro se* litigants to prepare persuasive appeals if they have no idea why the court below denied their petition or motion.

The Fifth Amendment to the Constitution states that "... 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; ...."

The acts and omissions of the district court and the Fifth Circuit unlawfully deprived Petitioner of due process of law, liberty, and property in the form of restitution paid.

D.C. Circuit Local Rule 36(e) states:

> "An opinion, memorandum, or other statement **explaining the basis for this court's action in issuing an order or judgment** under subsection (b) above, which does not satisfy any of the criteria for publication set out in subsection (a) above, will nonetheless be circulated to all judges on the court prior to issuance. A copy of each such unpublished opinion, memorandum, or statement will be retained as part of the case file in the clerk's office and be publicly available there on the same basis as any published opinion." (Emphasis added.)

In *Independent Oil & Chemical Workers, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988), the First Circuit held, "Judicial discretion is necessarily broad - but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Also see In re Application of Malev Hungarian Airlines*, 964 F.2d 97 (2nd Cir. 1992); *Tri-County Wholesale Distribs. v. Wine Group, Inc.*, 565 Fed. Appx. 477, (6th Cir. 2012) ("However, an error of law or fact on the individual

factors themselves is abuse of discretion.") The 6th Circuit then quoted *Independent Oil* verbatim.

"Judgments or orders need to be **fair to the litigants** and **explain everything**." (Emphasis added.) "Be Clear – Supreme Court Justice Wiley B. Rutledge Offers Posthumous Brief-writing Advice" by Bryan A. Garner (ABA Journal February-March 2022, pp. 30-31)

Seventh Circuit Local Rule 50, entitled "Judges to Give Reasons when Dismissing a Claim, Granting Summary Judgment, or Entering an Appealable Order," states:

> "Whenever a district court resolves any claim ... on the merits, terminates the litigation in its court, ... the judge **shall** give his or her reasons, either orally on the record or by written statement. The court urges the parties to bring to this court's attention as soon as possible any failure to comply with this rule." (Emphasis added.)

Litigants are owed substantive explanations.

Following this same logic, the Fifth Circuit should have remanded this case for further proceedings, yet it did not. Petitioner now asks this Court to remand to the Fifth Circuit or the district court.

In *In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003), the 11th Circuit held: "When a party objects to a motion for discovery, a court should rule on the objections and ordinarily give at least some statement of its reasons. 'While [a court] has discretion to grant or deny the motion, it should not grant the motion in the face of well-developed, bona fide objections without a meaningful explanation of its decision.'" *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1370 (11th Cir. 1997).

In *Burris v. Cassady*, 2021 U.S. Dist. LEXIS 70253 (E.D. Mo., E.Div. 2021), that court held, "Petitioner's state habeas petition was also summarily denied by the Missouri Court of Appeals and Missouri Supreme Court pursuant to brief orders containing no substantive explanation for the decisions. (Docs. 45-4; 45-6). "When the last state court fails to provide the rationale for the decision, district courts must "look through" the unexplained decision to the last related state court decision that does provide a relevant rationale, and presume that the unexplained decisions adopted the same rationale.'" *See Hack v. Cassady*, No. 16-04089-CV-W-ODS, 2019 U.S. Dist. LEXIS 11199, 2019 WL 320586, at *3 (W.D. Mo. Jan. 24, 2019) (quoting *Wilson v. Sellers*, ___U.S.___ (2018), 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018)). Petitioner has not challenged this presumption; accordingly, this Court may "look through" to the decision of the Cole County Circuit Court."

In *Wilson v. Sellers*, ___U.S.___ (2018), 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530, 2018, this Court held: ("This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. **We have affirmed this approach time and again**." (Emphasis added.) See, e.g., *Porter v. McCollum*, 558 U. S. 30 (2009) (*per curiam*); *Rompilla v. Beard*, 545 U. S. 374, 388-392 (2005); *Wiggins v. Smith*, 539 U. S. 510, 523-538 (2003).

'The issue before us, however, is more difficult. It concerns how a federal habeas court is to find the state court's reasons when the relevant state-court decision

on the merits, say, a state supreme court decision, **does not come accompanied with those reasons.** For instance, the decision may consist of a one-word order, such as "affirmed" or "denied." What then is the federal habeas court to do? **We hold that the federal court should "look through" the unexplained decision to the last related state-court decision that does provide a relevant rationale.**") (Emphasis added.)

Albeit federal and not state, this is also a habeas corpus case. It began when Petitioner filed his 2255 Motion and has continued since. It makes sense that a court of appeals should "look through" the district court's unexplained decision in this case. Further, the same logic would support this Court's "looking through" the Fifth Circuit's opinions and orders in this case.

In some cases, the Fifth Circuit has remanded cases to the district courts to explain further its reasoning in denying particular decisions. Still, this practice is not mandatory and is not widely used. The outcome would have been substantially different if this practice had been applied to the case, and Petitioner's conviction would likely have been reversed years ago.

Fifth Circuit Local Rule 47.6. entitled "Affirmance Without Opinion." states, in pertinent part:

> "The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: ... (5) no reversible error of law appears."

This local rule should have been applied but was not because there were many reversible errors in this case.

Litigants need to know why they lost their cases. Much of the work in the district court, the circuit courts, and this Court is performed by clerks, most of whom are recent graduates from highly rated law schools. All are overworked because of heavy caseloads. Petitioner has worked long hours before and knows it may easily lead to errors. For example, without a thorough analysis of a lower court's decision, litigants cannot know if their issues and legal support were misread, if the wrong cases were relied upon for controlling precedent if all issues were reviewed thoroughly, or even if the motions, petitions, or supporting briefs were scanned or read at all. It is essential to require lower courts to explain their reasoning or the law they relied upon. Otherwise, justice and fairness go out the window.

2. The Fifth Circuit erred or abused its discretion when it improperly denied Petitioner's application for a ("COA") and other motions related to rehearing.

Should this Court remand this case with instructions to reconsider issues that should have been considered when responding to the application for the certificate of appealability COA and other motions/petitions relative to rehearing?

If one reviews the orders in the Fifth Circuit, it becomes apparent that the Fifth Circuit spent little time or effort in reviewing Petitioner's pleadings before denying them.

The district court either procedurally erred, made a mistake, or abused its discretion, and the Fifth Circuit did the same when it allowed the district court to do so.

Many issues or claims were adequately presented to the district court in the Rule 60 Motion, which challenged the integrity of the proceedings that led to the

denial of the 2255 Motion. The issues or claims were also presented to the Fifth Circuit in the application for the COA relative to the Rule 60 Motion.

The issues or claims are as follows:

A. Ruled that virtually all of Kimes' grounds, claims, or issues were either waived, procedurally defaulted, or were not supported by the evidence. At a minimum, the district court should have ruled on the merits of all of the claims related to whether or not there was ineffective assistance of counsel related to the voluntariness of the plea, as required by *Smith v. Estelle*, 711 F.2d 677 (5th Cir. 1983), a case the district court cited. It could have ruled on Petitioner's claims of ineffective assistance of appellate counsel and granted an out-of-time direct appeal, as could the Fifth Circuit.

B. Ruled that Petitioner's Affidavit Controverting the Affidavit of Richard E. Langlois (DE 355), Petitioner's trial counsel, which was filed on August 3, 2018, was not timely and then did not consider it before denying the 2255 Motion (Petitioner is aware of no case law, rule of procedure, local rule, or statute that sets forth the final due date for filing such an affidavit, so long as it is filed before the final ruling on the 2255 Motion).

This is a "true" Rule 60 motion and not a second or successive 2255 Motion.

By filing this motion, Petitioner is not attacking the merits of the district court's decision in denying the 2255 Motion or advancing substantive claims, which the district court has already denied, and which would not be allowed by law. Petitioner's concerns lie with the procedural aspects of the denial of the 2255 Motion.

See *Gonzalez v. Crosby,* 545 U.S. 524 (2005). *Gonzalez v. Crosby* applies to cases brought under 28 U.S.C. § 2254 cases, but the 10th Circuit in *Peach v. U.S.*, 468 F.3d 1269, 1271 (10th Cir. 2006) states the "same mode of analysis this district court employed in Gonzalez applies when considering post-judgment pleadings filed in §2255 proceedings." Also see *U.S. v. Nkuku,* 602 Fed. Appx. 183, 185-186 (5th Cir. 2015) (per curiam).

C. Denied the 2255 Motion without granting all of the following motions, supporting briefs, and other pleadings filed in support of the 2255 Motion, and these denials prevented Petitioner from proving the facts and allegations contained in the 2255 Motion: 17, 2017;

(i) Motion for Expansion of the Record (DE 346);

(ii) Brief in Support of Motion for Expansion of the Record (DE 347);

(iii) Motion for Evidentiary Hearing on 2255 Motion (DE 350);

(iv) Motion for Discovery and Production of Documents (DE 351);

(v) Brief in Support of Motion for Discovery and Production of Documents (DE 352);

(vi) Motion regarding Judicial Notice (DE 353);

(vii) Second Motion for the Expansion of the Record (DE 354); and,

(viii) Brief in Support of Motion for Evidentiary Hearing (DE 357).

D. Did not respond to any of Petitioner's numerous requests for guidance in the preparation of a supporting brief in support of the 2255 Motion, thereby preventing or interfering with Petitioner's ability to prepare and file a brief in support of the 2255 Motion:

(i) Motion Relative to Brief in Support of Motion Filed Pursuant to 28 U.S.C. § 2255 (DE 330);

(ii) Defendant's Response to Government's Motion to Clarify (DE 334); and,

(iii) Defendants Motion for Clarification of Order and Request for leave to File brief (DE 326 and DE 327).

E. Accepted as true the perjured or fraudulent testimony contained in the Affidavit of Richard E. Langlois ("Langlois" or "trial counsel"), that was attached as Exhibit "C" to the Government's Response to the 2255 Motion (DE 337). Petitioner pointed out this fraud in the Controverting Affidavit of Larry Wayne Kimes Relative to the Affidavit of Richard E. Langlois (DE 355). Still, the district court did not consider Petitioner's controverting affidavit before denying the 2255 Motion. That was a clear error or abuse of discretion.

Langlois was an officer of the district court, and if he lied to the district court in his affidavit, it constituted fraud upon the court, which is a violation of F. R. Civ. P. 60(d)(3). See *Fierro v. Johnson*, 197 F.3d 147, 151 (5th Cir. 1999), reserving whether the circuit's general rule treating [some] Rule 60 motions as successive petitions should be deemed inapplicable when the motion is based upon an allegation of fraud upon the court.

F. The trial court ruled that Petitioner had waived all claims, except those related to the voluntariness of the pleas. The following cases relate to, among other things, the voluntariness of the plea, which petitioner requested the trial court to reconsider in his Rule 60 Motion:

Failure to Investigate - Generally:

1. In *Strickland v. Washington*, 466 U.S. 668, 691 (1984), this district court ruled: "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary." Nothing Langlois did concerning the plea, including investigation of the case, was reasonable.

2. In *Woodward v. Collins*, 898 F.2d 1027, 1029 (5th Cir. 1990), the Fifth Circuit held that "When a lawyer advises his client to plea bargain to an offense which his attorney has not investigated, [s]uch conduct is always unreasonable." There is absolutely no evidence in the record that Langlois investigated the offenses, or the facts and evidence related to them, before advising Petitioner to sign the Plea Agreement.

3. In *Bower v. Quarterman*, 497 F.3d 459, 467 (5th Cir. 2007), the Fifth Circuit held that defense counsel must reasonably investigate the charges against his client. Langlois adopted the Government's version of the facts. Had he investigated the case, Langlois would have discovered that Petitioner was factually, actually, and legally innocent of all of the charges in the indictment.

4. In *Trottie v. Stephens*, 720 F.3d 231, 243 (5th Cir. 2013), the Fifth Circuit held that a defendant who alleges a failure on the part of the defense counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. A reasonable investigation would have revealed Petitioner's actual innocence; his lack of criminal intent; his minimal contact with the conspiracy; and exposed the flawed theory of the case argued by the government

and the true nature and involvement of the leaders of the conspiracy, John D. Walker and Patrick G. Mire. This would have resulted in acquittal or a much lower sentence or probation and a much-reduced obligation for restitution.

Failure to Investigate Defense or Evidence:

5. In *Porter v. McCollum*, 558 U.S. 30, 40 (2009), this Court held that the critical issue is whether, applying prevailing professional norms, trial counsel conducted an objectively reasonable investigation for mitigating evidence. Langlois did not do this. He had the case deemed "complex" but then failed to do anything he asked for, such as hiring an investigator to interview witnesses or hire a CPA expert witness. The only thing he did was hire Carlos Solis, but he did not even do that until one month before the trial date.

6. In *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972), the Fifth Circuit stated: "When a defense counsel fails to investigate his client's only possible defense, although requested to do so by him, and fails to subpoena witnesses in support of the defense, it can hardly be said that the defendant has had effective assistance of counsel." Petitioner's best defenses are that he is actually innocent or did not have the necessary criminal intent to be convicted of any crimes. Petitioner repeatedly told Langlois he was innocent and wanted a fair trial, yet Langlois did nothing to try to prove Petitioner innocent.

Failure to Investigate Witnesses:

7. In *Sears v. Upton*, 561 U.S. 945 (2010), this Court held that defense counsel was ineffective when his investigation was limited to one day or less of interviewing

witnesses. Despite a clear mandate from the district court (by designating the case as "complex"), Langlois interviewed no witnesses whatsoever.

8. In *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1994), the Fifth Circuit held that, at a minimum, counsel must interview potential witnesses and make an independent investigation of the facts and circumstances of the case. Also see *Bryant v. Scott*, 28 F.3d 1411, 1419 (5th Cir. 1994). Langlois relied entirely on the Government's theories and version of the facts, which were wrong.

9. In *Moore v. Johnson*, 194 F.3d 586, 619-622 (5th Cir. 1999), the Fifth Circuit held that trial counsel was ineffective when he failed to investigate witnesses disclosed to counsel by the state and the counsel's failure to proceed reasonably in light of the evidence prejudiced the defendant. Langlois was presented with the Government's witness list and over ninety (90) FBI interviews with potential witnesses; he was approved by the district court to hire an investigator yet did not hire one and still failed to interview even one witness.

10. In *Soffar v. Dretke*, 368 F.3d 441, 473-4 74 (5th Cir. 2004), the Fifth Circuit held that trial counsel was ineffective when he failed to interview exculpatory witnesses. At a minimum, Langlois could have interviewed Petitioner's employees to see if their recollection of the events supported Petitioner's version of the facts. If the law allows it, Langlois should have also interviewed the other five (5) defendants in the case.

Failure to Move for Suppression of Evidence:

11. In *Martin v. Maxey*, 98 F.3d 844, 848 (5th Cir. 1996), the Fifth Circuit held that a failure to file a motion to suppress could be grounds for ineffective assistance of counsel. Langlois failed to file a motion to suppress evidence that Defendant John D. Walker stole from Petitioner's office. That was then, after several months, delivered to the Government directly from Mr. Walker's attorneys without the benefit of a subpoena or search warrant. Because no motion to suppress was filed, the reason for not filing it cannot be reviewed without testimony, which should have required an evidentiary hearing. *U.S. v. Maria-Martinez*, 143 F.3d 914, 916 (5th Cir. 1998).

Failure to Conduct Meaningful Adversarial Testing and Prejudice to the Defendant:

12. In *U.S. v. Cronic*, 466 U.S. 648, 658-659 (1984), this Court held that a presumption of prejudice applies when counsel "... entirely fails to subject the prosecution's case to meaningful adversarial testing," where counsel is actually or constructively denied during a critical stage of the proceedings, or when there are various kinds of state interference with counsel's assistance. Also see *Bell v. Cone*, 535 U.S. 685 (2002).

Any objective review of the record reveals that Langlois failed to conduct meaningful adversarial testing of the Government's case. The Government produced over one million (1,000,000) pages of documents. That should be considered "interference with counsel's assistance" because producing so many documents made it physically impossible for trial counsel to test the prosecution's case or prepare for

trial or be sufficiently prepared to advise Petitioner on whether or not to sign the Plea Agreement.

Failure to Provide Effective Assistance During Plea negotiations:

13. In *McMann v. Richardson*, 397 U.S. 759, 771 (1970), this Court held that a defendant is "entitled to assistance of counsel during plea negotiations." Petitioner was not allowed to negotiate anything related to the Plea Agreement. Petitioner was told to take it or leave it. On January 16, 2014, the date the Plea Agreement was presented to Petitioner, Langlois told the district court that he had just received the Plea Agreement the day before. (DE 167, P. 3, Lines 6-7.) Langlois blatantly lied to the district court when he stated that he had just spent the last three (3) days conferring with Petitioner "nonstop." (DE 167, Page 3, Lines 3-5.) Petitioner was in Dallas, and Langlois was in San Antonio. No email or telephone conversations could be construed as conferring "nonstop." Langlois also says he "spent the day before yesterday" with AUSA McHugh. (DE 167, Page 3, Lines 5-6.) This implies that there had been plea negotiations. Petitioner is unaware of any plea negotiations, as he was not involved. This also begs the question: If he had been with Petitioner "nonstop," how could he have also spent the day with AUSA McHugh?

14. In *Hill v. Lockhart*, 474 U.S. 52, 57 (1985), this Court ruled that a defendant has a Sixth Amendment right to counsel, and his right extends to the plea-bargaining process. Instead of explaining the Plea Agreement to Petitioner, Langlois and Carlos Solis, his associate, spent a short amount of time on the morning of the plea to cajole, coerce, and pressure Petitioner into signing the Plea Agreement because they were

unprepared for trial and had been paid all they were going to get. They wanted out. Also see *Lafler v. Cooper*, 566 U.S. 156 (2012).

Failure to Develop a Trial Strategy:

15. In *Ramonez v. Berghuis*, 490 F.3d 482, 488 (6th Cir. 2007), the Sixth Circuit held that a strategic decision is not objectively reasonable when the attorney failed to investigate his options and make a reasonable choice between them. There is no evidence that Langlois ever developed a trial strategy. There is also no evidence that Langlois did the type of investigation necessary to develop a trial strategy.

16. In *Adams v. Balkcom*, 688 F.2d 734, 738 (11th Cir. 1982), the Eleventh Circuit held that certain defense strategies or decisions might be "ill-chosen " to render counsel's overall counsel representation constitutionally deficient. Again, there was no defense strategy other than getting Petitioner to plead guilty to crimes he did not commit.

Prejudice Under Strickland:

17. In *Glover v. U.S.*, 531 U.S. 198, 203 (2001), this Court held that in assessing whether counsel's deficient performance prejudiced a defendant, "any amount of actual jail time has Sixth Amendment significance." Also see *U.S. v. Reed*, 719 F.3d 369, 375 (5th Cir. 2013); *U.S. v. Rivas-Lopez*, 678 F.3d 353, 357 (5th Cir. 2012).

Langlois' Affidavit:

18. In *Griffin v. Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1359 (4th Cir. 1992), the Fourth Circuit held: "Tolerance of tactical miscalculations is one thing; fabrications of tactical excuses is quite another." Langlois' conclusory

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and self-serving affidavit is full of fabrications and empty justifications for his inadequate performance. Petitioner disputed every one of Langlois' false statements or justifications for his acts or omissions, but the district court did not consider Petitioner's controverting affidavit, which was procedural error.

Failure to Hire Private Investigator:

19. In *Harris By and Through Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995), the Ninth Circuit held that failure to retain an investigator to interview witnesses amounted to ineffective assistance of counsel. *See also Miller v. Wainwright*, 798 F.2d 426 (11th Cir. 1986). Langlois received written authorization from the district court to hire an investigator and a CPA expert and then hired neither one.

Ambiguous Plea Agreement:

20. In *U.S. v. Borders*, 992 F.2d 563 (5th Cir. 1993), the Fifth Circuit held that trial counsel that induced the defendant to plead guilty to an ambiguous plea agreement amounted to ineffective assistance of counsel. Langlois induced Petitioner to plead guilty to an ambiguous plea agreement.

Coercion:

21. In *U.S. v. Sanderson*, 595 F.2d 1021 (5th Cir. 1979), the Fifth Circuit held that trial counsel exerted pressure on the defendant to induce a guilty plea required an evidentiary hearing. Also see *U.S. v. Segarra-Rivera*, 473 F.3d 381, 386-387 (1st Cir. 2007). No evidentiary hearing was held.

22. In *U.S. v. Sanchez-Barreto*, 93 F.3d 17(1st Cir. 1996), the First Circuit held that it was ineffective assistance of counsel to induce the defendant into pleading guilty to conceal counsel's unpreparedness for trial.

23. In *Moore v. U.S.*, 950 F.2d 656 (10th Cir. 1991), the Tenth Circuit held that coercion by the trial counsel and the prosecutor to induce a guilty plea renders the plea involuntary. Petitioner has made a strong claim of coercion.

Failure to Hire a CPA Expert Witness:

24. In *Wiggins v. Smith*, 539 U.S. 510, 523, 525 (2003), this Court found ineffective assistance of counsel for trial counsel's failure to conduct a reasonable investigation. This case is about payroll taxes and comfort letters. The only proper way to investigate would be to hire a CPA expert to help determine if what Petitioner did was illegal or in the ordinary course of business for a CPA. Failure to hire a CPA expert, especially after seeking and receiving approval from the court, rendered Langlois' representation unreliable and the entire proceeding fundamentally unfair. Had Langlois hired a CPA expert, there is a reasonable probability that the results of the proceeding would have been substantially different. But for Langlois' deficient performance, Petitioner would not have pleaded guilty and proceeded to trial.

Procedural Default:

25. The district court indicated in the denial that Petitioner was procedurally defaulted from raising many of his claims because they should have been raised on direct appeal by Petitioner's appellate counsel. The only conclusion that can be drawn from this is that Petitioner's appellate counsel committed ineffective assistance of

appellate counsel, and, at a minimum, Petitioner should have been granted a late in-time direct appeal. Petitioner was clearly prejudiced by losing some of his main arguments. *Lomnard v. Lynaugh*, 868 F.2d 1475 (5th Cir. 1989).

Evidentiary Hearing Required:

26. By allowing and considering the Langlois Affidavit, the district court was required to hold an evidentiary hearing. This is regardless of whether or not the district court allowed or considered Petitioner's controverting affidavit. The 2255 Motion itself was an affidavit since it was signed under penalty of perjury pursuant to 28 U.S.C. § 1746. The 2255 Motion raised numerous issues of fact, and the Langlois Affidavit challenged them, thereby raising significant issues of fact that could only be decided after an evidentiary hearing. *Friedman v. U.S.*, 588 F.2d 1010, 1015 (5th Cir. 1979); *Daniels v. U.S.*, 54 F.3d 290, 293-294 (7th Cir. 1995); *Miller v. U.S.*, 564 F.2d 103, 105-106 (1st Cir. 1977).

27. Petitioner has alleged that his guilty plea was a product of coercion. In support of this allegation, Petitioner submitted the Affidavit of Brett Wayne Kimes, which is a third-party affidavit. In *Matthews v. U.S.*, 533 F.2d 900, 902 (5th Cir. 1976), the Fifth Circuit held that third party affidavits evidencing coercion in the face of representation made during F. R. Crim. P. 11 colloquy requires resolution via an evidentiary hearing.

Controverting Affidavit Should Have Been Allowed and Considered by the District Court:

28. The district court allowed and considered the Langlois Affidavit, even though the Government failed to file a motion to expand the record and the district

court had not requested the filing of an affidavit. The district court relied extensively on the Langlois Affidavit in arriving at its decision to deny the 2255 Motion. Because the district court allowed the Langlois Affidavit, it was required to allow and consider Petitioner's controverting affidavit.

29. The last sentence of Rule 7(b) of the Rules Governing 2255 Proceedings states: "Affidavits also may be submitted and considered part of the record." The district court made a mistake when it failed to consider all of the affidavits Petitioner submitted, which were several. It is also important to note that Rule 7 has no due date by which affidavits should be filed, so the district court also erred in ruling that the controverting affidavit was untimely.

30. In addition to the foregoing, Rule 7(c) of the Rules Governing 2255 Proceedings states: "Review by the opposing party. The judge must give the party against whom the additional materials are offered an opportunity to deny their correctness." Petitioner received no such opportunity, and this was a mistake.

31. 28 U.S.C. § 2246, entitled "Evidence; depositions; affidavits," states:

> "On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

The court did not follow the statute by not allowing Petitioner to take depositions, as requested in his discovery motion, and by disallowing Petitioner's controverting affidavit.

Denial of Petitioner's Motions, Supporting Briefs, and Affidavits:

32. By denying all of the motions Petitioner filed in support of his 2255 Motion, the district court made it virtually impossible for Petitioner to prove the allegations contained in the 2255 Motion. Expansion of the record was appropriate to determine whether an evidentiary hearing was proper. *McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1999). The requested discovery was indispensable to a fair, rounded development of material facts and should have been granted. *Toney V. Gammon*, 79 F.3d 693 (8th Cir. 1996). Petitioner had already been ordered by the district court to reduce the page length of his original 2255 Motion (De 319) from over one hundred pages to fifty (50) pages. Petitioner complied, which required Petitioner to abandon over half of his arguments and supporting facts. Also see 28 U.S.C. 2246; *Payne v. Bell*, 89 F.Supp.2d 967 (WD. Tenn. 2000); *Harris v. Nelson*, 394 U.S. 286 (1969).

Plea Colloquy:

33. In the denial, the district court mentioned Petitioner's statements from the plea colloquy. The plea colloquy took place immediately after Petitioner signed the Plea Agreement. (DE 167, Page 16.) Petitioner was scared and in shock. Petitioner did not even know what a plea colloquy was, much less how important it was. Langlois told Petitioner to answer the questions with yes or no answers and not anger the judge. Petitioner did as he was told. Since the district court brought it up in the denial, Petitioner will address plea colloquy issues.

34. Fed. R. Crim. P. 11 requires that certain things happen at the plea colloquy.

Rule 11(b)(1) states: ("During this address, the court must inform the defendant of, and determine that the defendant understands the following:")

No careful and objective review of the record will reveal that the district court addressed the following four (4) sections of Rule 11(b):

A. Rule 11(b)(1)(G). The nature of each charge to which the defendant was pleading. See *U.S. v. Lalonde*, 509 F.3d 750, 759 (6th Cir. 2007); *U.S. v. James*, 210 F.3d 1342, 1344-1345 (11th Cir. 2000); *U.S. v. Fernandez*, 205 F.3d 1020, 1025 (7th Cir. 2000); *U.S. v. Portillo-Cano*, 192 F.3d 1246, 1250 (9th Cir. 1999).

B. Rule 11(b)(1)(M). The sentencing guidelines and other sentencing factors in 18 U.S.C. §3553(a). See *U.S. v. Chambers*, 710 F.3d 23, 28 (1st Cir. 2013).

C. Rule 11(b)(1)(N). The terms of any plea agreement provisions waiving the right to appeal or to collaterally attack the sentence. See *U.S. v. Puentes-Hurtado*, 794 F.3d 1278, 1284-1285 (11th Cir, 2015); *U.S. v. Rollings*, 751 F.3d 1183, 1189 (10th Cir. 2014); *U.S. v. Corso*, 549 F.3d 921, 927 (3rd Cir. 2008); *U.S. v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005).

D. Rule 11(b)(3). The factual basis for the plea. *McCarthy v. U.S.*, 394 U.S. 459, 467 (1969); *U.S. v. Hildenbrand*, 527 F.3d 466, 474-475 (5th Cir. 2008), *U.S. v. Page*, 520 F.3d 545, 547 (6th Cir. 2008). During the colloquy, the district court asked Petitioner, "And have you gone over these several pages of factual basis here with Mr. Langlois today?" Petitioner answered, "No, sir." (De 167, Page 22, Lines 19 to 22.) This alone forms the basis for setting aside the Plea Agreement. Because the district court did not follow the procedures outlined in Rule 11, the plea was not knowing and

voluntary, and the law requires that the plea of guilty be vacated. At a minimum, the appeal waivers should not be enforced because to do so would be an injustice. The lack of a factual basis for the plea can never be a harmless error. *U.S. v. Bennett*, 291 F.3d 888, 895 (6th Cir. 2002).

35. During the hearing on January 16, 2018, after there had already been one recess for Petitioner to "read" and discuss the Plea Agreement with his counsel, Petitioner asked the district court, "May I say something, Your Honor?" The district court replied, "No, sir. You may not." (DE 167, P. 5, Lines 21 to 25.) The district court went on to say, "You can either have Mr. Langlois and Mr. Solis represent you, or you can represent yourself. But you can't do both. You know better than that." (DE 167, Page 6, Lines 1 to 3.) Petitioner was trying to get guidance from the court about the fact that he did not have time to read the Plea Agreement and about the threats and other pressures and coercion being brought to bear on Petitioner to sign the Plea Agreement. Petitioner could not explain the problems if the court did not allow him to speak.

36. Petitioner's plea was coerced by the actions of both his counsel, the prosecutor, and even the trial court. The court asked Petitioner if he had been forced, threatened, or paid money to plead guilty or give up his rights. Petitioner answered, 'No, sir." (DE 167, P. 26, Lines 8 to 10 and P. 27, Lines 17 to 20.) Petitioner believed that the district court was asking him if he had been threatened with physical violence or if someone had tried to bribe him. Petitioner wanted to tell the district court that, among other things, he had been threatened that morning with immediate

incarceration and told that his son would be prosecuted for money laundering if Petitioner did not sign the Plea Agreement. Petitioner is aware that it is perfectly legal to threaten prosecution of one's family members, but only if there is probable cause. There was no probable cause, so the threat or coercion was unlawful. See the Affidavit of Brett Wayne Kimes on file in the district court.

37. At the colloquy, Petitioner was asked if he had read the Plea Agreement. Petitioner answered in the affirmative. Petitioner had read a portion of the Plea Agreement. Still, because of the reasons already made clear to the court, Petitioner did not have sufficient time to read and understand the entire 48-page Plea Agreement, nor did Petitioner understand the law in relation to the facts. Therefore, Petitioner did not enter into the Plea Agreement knowingly or voluntarily. The Plea Agreement was obtained in violation of Petitioner's constitutional due process rights. As a result, the Plea Agreement is void. *McCarthy v. U.S.*, 394 U.S. 459, 466 (1969). Petitioner said he had read the Plea Agreement because Petitioner was afraid not to say it after the earlier incident when the district court became angry with Petitioner for trying to speak directly to the district court. Since Petitioner stated that he had read the Plea Agreement, there is a presumption that he entered into it knowingly and voluntarily. This is, however, a presumption that has been rebutted by the facts and circumstances surrounding the plea process. As a result, the plea should be vacated.

Fraud Upon the Court:

38. The controverting affidavit is full of examples where Langlois lied. Langlois did not lie to Petitioner; Langlois lied to the court. The court has the inherent power to determine if fraud on the court has occurred. If the court finds fraud upon the court, the remedy can and should be dismissal of the case.

39. The other affidavits that Petitioner filed also made the court aware of the fraud upon the court perpetrated by AUSA McHugh and IRS Special Agent Robbie Henwood. These related to perjured testimony; fabricating evidence in the form of a letter written in Russian (the "Russian Letter") (Petitioner does not read or speak Russian) that AUSA McHugh waived in front of the court and said that Petitioner used the Russian Letter to tell the Government and the court to "Suck my c**k." (This is actually in the transcript from the sentencing hearing.) The "Russian Letter" did not come from Petitioner; it came from a co-defendant during discovery, which means AUSA McHugh lied to the court. Neither the Russian Letter nor its English translation was entered into evidence. AUSA McHugh could have been just as easily waiving his to-do list for all we knew. This greatly prejudiced the court against Petitioner. AUSA McHugh also displayed "CPA comfort letters" in open court that had never been signed or sent to anybody. There was also no proof that any of the CPA comfort letters had ever been mailed, received, or relied upon by the recipients to their detriment. Petitioner sent two perfectly legal CPA comfort letters, but both were to the same person, Louie Ledaux, who is only one out of over 200 clients.

40. Petitioner attempted to make the district court aware of these things in the documents filed supporting the 2255 Motion.

41. Petitioner does not have enough space in this Petition to discuss the foregoing fraud on the court in further detail.

Cumulative Errors:

42. The 2255 Motion contained numerous cumulative errors. Even if those errors are limited to those related to the plea process and, perhaps, sentencing, the number of errors is still voluminous. Cumulative errors, while individually harmless, when considered together, can prejudice a defendant as much as a single reversible error and violate the defendant's constitutional right to due process of law. *Taylor v. Kentucky*, 436 U.S. 478, n. 15 (1978); *Hollins v. Estelle*, 569 F.Supp. 146 (W.D. Tex. 1983), *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984).

In its denial of the Rule 60 Motion, the district court said that the issues raised were successive. They were clearly not, as no merits issues were raised. The 2255 Motion addressed the merits of Petitioner's claims. The Rule 60 Motion addressed only procedural errors related to the denial of the 2255 Motion and ineffective assistance of appellate counsel.

The Fifth Circuit procedurally erred, made a mistake, or abused its discretion when it failed to grant Petitioner a COA. It is difficult to believe that the Fifth Circuit read Petitioner's Rule 60 Motion and decided there had been no reversible errors below.

The issues presented to the district court and the Fifth Circuit were supported by briefs containing facts, case law, rules, and statutes necessary for the Petitioner to prevail, yet he did not.

3. Appellate counsel filed an *Ander's* brief in the direct appeal and failed to address obvious non-frivolous issues, thereby rendering ineffective assistance of appellate counsel.

Did the courts below err or abuse their discretion when they did not grant Petitioner an out-of-time direct appeal based upon ineffective assistance of appellate counsel?

Petitioner raised all of the following issues in the Rule 60 Motion and the application for a COA in the Fifth Circuit. None of these issues were ruled on in either the district court orders or in the Fifth Circuit. All are non-frivolous and should have been relied upon to grant an out-of-time appeal, but they were not:

Petitioner's claims of ineffective assistance of appellate counsel to the extent they related to claims that could have been brought in Petitioner's direct appeal but were not, such as:

(i) the district court's Fed. Crim. Pro. R. 11 errors related to the plea colloquy;

(ii) the district court's failure to timely rule on Petitioner's objections to the PSR (DE 119) before sentencing;

(iii) the district court's failure to rule on Petitioner's Fed. R. Crim. P. 35(a) motion (DE 137) (based upon a clear error in sentencing) within the required 14 days;

(iv) the amount of restitution ordered;

(v) the disparate sentence received by Petitioner; and,

(vi) the running of the statute of limitations, potentially resulting in procedural default, prejudicial to Petitioner.

Petitioner was denied his Sixth Amendment right to effective assistance of appellate counsel and should be granted an out-of-time direct appeal in the Fifth Circuit with instructions to that court to write an opinion that thoroughly explains its rulings on the law and facts of each issue presented.

4. The district court erred or abused its discretion when it failed to file mandatory statements of fact or conclusions of law, despite Petitioner's motion in the district court asking for them.

Did the Fifth Circuit err or abuse its discretion when it did not remand the case with instructions to the district court to provide statements of fact or conclusions of law, as required by Fed. R. Civ. Pro. 52?

In denying the Rule 60 Motion, the district court failed to adhere to the requirements of Fed. R. Civ. Pro. R. 52(a)(1), which states, in relevant part:

> In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.

The exceptions contained in Fed. R. Civ. Pro. R. 52(a)(3) are not relevant to this case.

Compliance with Rule 52 is mandatory. *Lettsome v. United States*, 434 F.2d 907, 909 (5th Cir. 1970), supported by a long line of cases, held that findings of fact and conclusions of law are mandatory and must be sufficient in detail and exactness to indicate the factual basis for the ultimate conclusion reached by the court. *Also see*

Acme Boat Rentals, Inc. v. J. Ray McDermott & Co., 407 F.2d 1324, 1325 (5th Cir. 1969).

Findings of fact and conclusions of law are conspicuous in their absence. From the district court's record.

On February 27, 2020, when they were not forthcoming, Petitioner filed a motion in district court requesting findings of fact and conclusions of law relevant to the denial of the Rule 60 Motion. (DE 373.) Pet. App. 78-88.

On March 6, 2020, the district court held that findings of fact and conclusions of law were not required and denied the motion. (DE 374.) Pet. App. 89-90. The denial was clearly erroneous.

The Fifth Circuit held in *In re Incident Aboard the D/B Ocean King*, 758 F.2d 1063, 1072 (5th Cir. 1985), ("Where the trial court fails to prepare findings of fact and conclusions of law, the proper procedure is to vacate the judgment and remand the case for such findings.")

In *Colonial Penn Ins. v. Market Planners Ins. Agency*, 157 F.3d 1032, 1037 (5th Cir. 1998) the Fifth Circuit held, in actions tried upon the facts to a court, the court must state separately its factual findings and its legal conclusions. Fed. R. Civ. P. 52(a). The findings and conclusions "must be sufficient in detail and exactness to indicate the factual basis for the ultimate conclusion reached by the court." Citing *Acme Boat Rentals* at 1325. If the district court's factual findings are insufficient to allow the district court to review the judgment below, the district court must vacate the judgment and remand for more detailed findings. Citing *In re Incident Aboard*

the D/B Ocean King at 1072. On the other hand, when considering whether facts support the district court's judgment, the court construes the district court's findings liberally and finds them "to be in consonance with the judgment, so long as that judgment is supported by evidence in the record." *Kelleher v. Flawn,* 761 F.2d 1079, 1083 n.1 (5th Cir. 1985). Thus, so long as the court can understand the issues completely and the record gives sufficient basis for the court to consider the merits of the case, the court needs not remand. See, e.g., *Gulf Towing Co. v. Steam Tanker, Amoco*, 648 F.2d 242, 245 (5th Cir. 1981). It would have been difficult or impossible for the Fifth Circuit could have understood the ruling below in this case. There was not enough helpful information.

Although this ruling is based upon the requirements of Fed. R. Civ. P. 52(a), the logic and common sense of Rule 52 should apply to all cases in all federal courts. In some circuits, it does.

Petitioner respectfully requests this Court to apply this approach to all courts.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided on the question presented relating to the district courts' obligations to enter well-crafted and thoroughly analyzed opinions or orders sufficient to aid in the appeal.

There is a circuit split, and deciding the issues presented in this case will affect tens of thousands of cases. The First, Fourth, Sixth, Seventh, and Eleventh Circuits courts of appeals handle this issue differently from the Fifth Circuit. The law of the land needs to be settled. If it is not, the part of the country in which one's case arises

determines whether a district court ruling, or an appeal of that ruling is successful or not.

Neither the district court nor the Fifth Circuit faithfully performs the duties with which they are charged. Allowing this type of jurisprudence to continue will eat at the heart of what is right and wrong in our judicial system.

II. This case presents an issue of natural importance.

The federal courts below ignore the principles of justice and fair play that lie at the heart of American jurisprudence. Too much emphasis is on procedure and reasons to not decide on important matters. That should be unacceptable.

Many lower court opinions, especially those in this case, amount to no opinions at all. In many cases, it is plausible that the motions were never read, much less thoughtfully considered. This practice must stop.

When federal courts do not do what is legally, morally, and ethically expected of them in cases filed by *pro se* litigants, generally, and in cases filed by *pro se* inmates, specifically, thousands and thousands of lives are adversely affected. This includes litigants and their families, as well.

Seventh Circuit Local Rule 50 requires the district courts to do what the Seventh Circuit expects them to do. If the logic of Rule 50 were applied to all lower courts, there would be an incredibly positive sea change. It can easily be argued that this practice would have one or all of the following positive results.

A. Lower courts would be required to review the facts and law of each case carefully and thoroughly, thereby reaching more informed and better decisions.

B. It would result in reduced or eliminated over-incarceration.

C. It would result in less crowded prisons.

D. It would reduce the psychological distress imposed on litigants and their families.

E. It would save the government and litigants billions of dollars in legal and administrative expenses.

F. According to what Petitioner has read, over 6,000 cases are filed in this Court every year. If many cases are resolved at the district court or circuit court level, litigants might find it unnecessary to pursue so many appeals. The docket of this Court would be drastically reduced.

III. The Fifth Circuit's decision is incorrect and should be set aside.

As shown above, the Fifth Circuit allowed the district court to do an unacceptably poor job in this case. That is wrong on many levels.

The district court ignored the required constitutional provisions, case law, statutes, and rules, much to Petitioner's detriment. It ignored Fifth Circuit law and the law of this Court.

It appears that the Fifth Circuit "rubber-stamped" the district court's ruling. Its denial of a COA for the appeal of the Rule 60 Motion was basically boilerplate. It tells the reader virtually nothing and provides no information to aid in the appeal of that denial.

The district court and the Fifth Circuit ignored precedent and Supreme Court case law. Had the case law cited by Petitioner been applied correctly or at all, the result would have been entirely different.

Granting this petition or remanding this case to the Fifth Circuit for further consideration would correct many, if not all, of the injustices suffered by Petitioner.

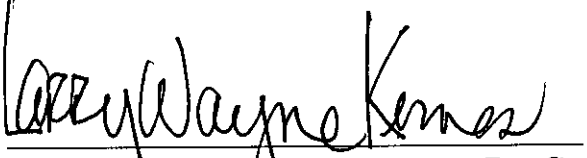
CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this Petition to review the judgments of the district court, if appropriate, and the Fifth Circuit's denial of the application for the COA and grant the appropriate relief.

Pursuant to 28 U.S.C. §1746, under penalty of perjury, I, Larry Wayne Kimes, hereby affirm that the facts contained herein are true and correct.

DATED: May 6, 2022.

Respectfully submitted,



Larry Wayne Kimes, Petitioner *Pro Se*
2225 Normandy Dr.
Irving, Texas 75060

CERTIFICATE OF SERVICE

By my signature above, I certify that on May 6, 2022, I sent a true and correct copy of the foregoing document in a properly addressed and postage-paid package to the following:

Elizabeth B. Prelogar, Esq.
Solicitor General
Counsel of Record
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 33.1(H)

As required by Supreme Court Rule 33.2(b), I certify that the document contains 40 pages, excluding the parts of the documents exempted by Supreme Court Rule 33.1(d).

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

Executed on May 6, 2020.

Larry Wayne Kimes, Petitioner *pro se*