APPENDICES COVER PAGE

APPENDIX A-C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES AUSTIN, AKA James Russell Austin,

Petitioner-Appellant,

v.

DANIEL PARAMO, Warden,

Respondent-Appellee.

No. 19-55046

D.C. No. 2:15-cv-01699-JLS-SS
Central District of California,
Los Angeles

ORDER

Before: FARRIS and MURGUIA, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 4) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

Appendix A

General Docket

United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 19-55046
Nature of Suit: 3530 Habeas Corpus
James Austin v. Daniel Paramo
Appeal From: U.S. District Court for Central California, Los Angeles
Fee Status: Due

Docketed: 01/10/2019
Termed: 12/20/2019

Case Type Information:
1) prisoner
2) state
3) 2254 habeas corpus

Originating Court Information:
District: 0973-2 : 2:15-cv-01699-JLS-SS
Trial Judge: Josephine L. Staton, District Judge
Date Filed: 03/09/2015

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
12/13/2018	12/17/2018	01/07/2019	01/10/2019

Prior Cases:
None

Current Cases:
None

Appendix B

JAMES AUSTIN, AKA James Russell Austin (State Prisoner: AK-6078) Petitioner – Appellant,	James Austin [NTC Pro Se] RJDCF – R.J. DONOVAN CORRECTIONAL FACILITY 480 Alta Road San Diego, CA 92179
v.	
DANIEL PARAMO, Warden Respondent – Appellee,	Charles Shang-Rei Lee, Deputy Attorney General Email: charles.lee@doj.ca.gov [COR LD NTC Dep State Aty Gen] AGCA-Office of the California Attorney General 300 S Spring Street Suite 1702 Los Angeles, CA 90013

01/10/2019	1	Open 9th Circuit docket: needs certificate of appealability. Date COA denied in DC: 12/13/2018. Record on appeal included: Yes. [11148076] (HC) [Entered: 01/10/2019 09:40 AM]
01/10/2019	2	Filed Appellant James Austin motion to appoint counsel. Deficiencies: None. Served on 01/03/2019. [11148081] (HC) [Entered: 01/10/2019 09:42 AM]
12/20/2019	3	Filed order (RICHARD C. TALLMAN and JACQUELINE H. NGUYEN) The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Any pending motions are denied as moot. DENIED. [11540294] (JBS) [Entered: 12/20/2019 02:23 PM]
01/13/2020	4	Filed Appellant James Austin motion to reconsider. Deficiencies: None. Served on 01/08/2020. [11561626] (JFF) [Entered: 01/14/2020 11:45 AM]
01/28/2020	5	Filed order (JEROME FARRIS and MARY H. MURGUIA) Appellant's motion for reconsideration (Docket Entry No. [4]) is denied. See 9th Cir. R. 27-10. No further filings will be entertained in this closed case. [11577098] (OC) [Entered: 01/28/2020 03:15 PM]
02/19/2020	6	Filed Appellant James Austin motion to reconsider. Deficiencies: No further filings per 1/28/2020 order. Served on 02/11/2020. [11604553] (JFF) [Entered: 02/21/2020 10:26 AM]
03/11/2020	7	Filed Appellant James Austin letter dated 03/05/2020 re: Request for copy of docket sheet. Paper filing deficiency: None. (Sent appellant copy of docket sheet.) [11626677] (QDL) [Entered: 03/11/2020 03:43 PM]
01/25/2021	8	Filed Appellant James Austin motion for stay . Deficiencies: NAN PER 1/28/2020 order (sent docket sheet). [11980544] (JFF) [Entered: 01/25/2021 04:01 PM]
05/19/2021	9	Filed Appellant James Austin motion to reinstate. Deficiencies: No further filings per 01/28/2020 order (sent docket sheet) Served on 05/13/2021. [12119199] (JFF) [Entered: 05/20/2021 09:26 AM]
08/16/2021	10	Filed Appellant James Austin letter dated 08/05/2021 re: Case status. Paper filing deficiency: None. (Sent copy of docket sheet) [12202558] (RL) [Entered: 08/16/2021 01:42 PM]

JAMES AUSTIN, AKA James Russell Austin,

Petitioner – Appellant,

v.

DANIEL PARAMO, Warden,

Respondent – Appellee.

JAMES RUSSELL AUSTIN
CDCR # AK6078 / E25-C104-4LOW
RICHARD J. DONOVAN CORRECTIONAL FACILITY
480 ALTA ROAD
SAN DIEGO, CA 92179

In Propria Persona

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES RUSSELL AUSTIN,

Petitioner-Appellant,

v.

DANIEL PARAMO, Warden,

Respondent-Appellee. /

COURT OF APPEALS CASE NO.19-55046

(U.S. District Court Case No.2:15-cv-01699-JLS-SS;Central District of California,Los Angeles)

MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(1) OR, ALTERNATELY,RULE 60(b)(6) OF THE FEDREAL RULES OF CIVIL PROCEDURE; AND REQUEST TO REINSTATE APPELLATE JURISDICTION; AND DECLARATION IN SUPPORT OF

TO THE HONORABLE JEROME FARRIS,SENIOR CIRCUIT JUDGE AND ASSOCIATE CIRCUIT JUDGE MARY H. MURGUIA, IN THE UNITED STATES COURT OF APPEALS IN AND FOR THE NINTH CIRCUIT, and all interested parties:

Petitioner-Appellant [James Russell Austin],proceeding in propria persona,hereby gives Notice and moves the Court by way of Motion for Relief from Judgment of the Order entered on January 28,2020 (Docket Entry No.5) denying Petitioner-Appellant's Motion for Reconsideration filed on January 13,2020 (Docket Entry No.4) pursuant to Rule 60(b)(1) or,alternately,Rule 60(b)(6) of the Federal Rules of Civil Procedure, and additionally requests the Court reinstate its Appellate Jurisdiction on Appeal Case No.19-55046 to allow Petitioner-Appellant to file a Request for a Certificate of Appealability and subsequent Opening Brief,or,in the alternative,be allowed to file a Petition for Panel Rehearing pursuant to Rule 40(a)(1) of the Federal Rules of Appellate Procedure;see also Jones v. Ryan,733 F.3d 825,833(9th Cir.2013)("[R]ule

Appendix C

60(b) 'allows a party to seek relief from a final judgment,and request re-opening of his case, under a limited set of circumstances.'" (quoting **Gonzalez v. Crosby**, 545 U.S. 524,528,125 S.Ct. 2641,162 L.Ed.2d 480(2005).)

This Motion is presented on the Grounds,but not limited to,that on December 20,2019,the Honorable Circuit Judges Richard C. Tallman and Jacqueline H. Nguyen issued an Order (Docket Entry No.3) denying Petitioner-Appellant's Request for a Certificate of Appealability. Petitioner-Appellant recieved his copy of the Court's Order on December 26,2019 approximately six days after the Court's ruling. Due to the lack of meaningful access to the Institution's Law Library as a result of the Holiday Weekend and its closure until January 02,2020,Petitioner-Appellant was unable to file the Motion for Reconsideration until January 08,2020 even after diligent attempts to meet the 14 Day Deadline.In addition,to his belief that the 14 Day deadline filing date fell on January 09,2020. Petitioner-Appellant inadvertantly and diligently served an exact copy on Respondent-Appellee on January 08,2020 and submitted his Original Motion for Reconsideration to the Court for filing by "delivering the motion for reconsideration to prison staff for mailing in the institution's internal mailing system,in compliance with the 'mailbox rule.'" See **Houston v. Lack**,487 U.S. 266,275-76 (1988);accord **Saffold v. Newland**,250 F.3d 1262, 1268(9th Cir.2000).

This Motion was Denied by the Court on January 28,2020 based on its Untimeliness, citing **[9th Cir. R. 27-10]** This Rule allows for the requirement that Rehearing Petitions be filed "within 14 days after entry of judgment," unless "the time is shortened or extended by order or local rule." As a result, Petitioner-Appellant attempted to seek relief by attempting to file a Motion to Vacate the Order of Denial issued on January 28,2020 and a Request for Reconsideration by way of improper route to relief. This Motion and Request was also rejected per "no further filings order per 1/28/2020 order." (Docket Entry No.6) on February 19,2020.

Petitioner-Appellant was further deprived of meaningful access to the courts

in order to seek review of his alleged Constitutional Claims when both the United States District Court and this Court denied his Request for a Certificate of Appelability using a heightened Standard and applied inconsistent with Circuit practice. The **Ashwander** rule must apply when determining whether a COA should issue and encourages that,"the court will not pass upon a constitutional question," see **Ashwander v. TVA**,297 U.S. 288,347,80 L.Ed. 688,56 S.Ct. 466(1936)(Brandeiss,J. concurring)

On Application for a Certificate of Appealability in the District Court on April 27,2018, Petitioner-Appellant submitted fundamental Constitutional Claims involving: (1)his **Sixth Amendment** Right to Counsel had attached at the time of the Pretext calls due to his Arrest and Release on Bail pursuant to the United States Supreme Court holding in **Rothgery v. Gillespie County** (2008) 554 U.S. 191, whose guidance served to extend this protection to Pre-indictment Proceedings and to clarify the question of when the **Sixth Amendment** Right to Counsel attaches, which governs in this Case rather than the United States District Court's reliance on **United States v. Gouveia**(1984)467 U.S. 180,187,when it adopted the State Appellate Court's rejection of the claim that was an unreasonable application of established Supreme Court Law,.. .'**Sixth Amendment** rights were not violated because the pretext calls occured before he was brought before a judicial officer.'(**Court of Appeal Opinion at p.19 ¶ 3,Case No.B238535**);(2)his denied right to take the stand and to testify in his own defense, **McCoy v. Louisiana** (2018)584 U.S. ___[138 S.Ct. 1500, 200 L.Ed.821];**Rock v. Arkansas**(1987)483 U.S. 44,49;see also **Gill v. Ayers**,342 F.3d 911,919 (9th Cir.2003),including Defense Counsel's conceding as to Counts 1-10 and ignorance of a point of law fundamental to his case,**Hinton v. Alabama**(2014)134 S, Ct. 1081;**Hernandez v. Chappell**,878 F.3d 843 (9th Cir.2017);(3) right to a trial by unbiased,impartial jurors as guaranteed by the **6th** and **14th Amendments**,**U.S. Const.** was violated and the Procedural failure to entertain and hear the filed Motion for a New Trial resulted in a miscarriage of justice;and (4) Prosecutorial

Misconduct in vouching for the veracity of the complaining witness tainted and rendered the trial fundamentally unfair and prejudicial.

Without Review of these Claims allows for the premise that the Courts can depart from following binding Authority and Precedential aspects of prior Decisions.

Here, on September 11,2018,the Honorable Josephine L. Staton,United States District Judge entered Judgment dismissing the Action with Prejudice and issued an Order denying a COA. Claimed that Petitioner-Appellant had not requested a COA, resulting in his filing of a Motion to Vacate Judgment. On December 13,2018,that Court again denied issuance of a COA. Contrary to the Supreme Court's holding in **Buck v. Davis**,137 S.Ct. 759,773,197 L.Ed.2d 1(2017),which emphasized that a COA's limited inquiry is not coextensive with a merits analysis.and doing so,without full consideration of the factual or legal basis adduced in support of the claims by first deciding the merits of the appeal and justifying its denial of a COA based on its adjudication of the actual merits,it decided an Appeal without jurisdiction by 'invert[ing] the statutory order of operations."**Id.** at 774;see also **Tharpe v. Sellers**,138 S.Ct. 545,546-47,199 L.Ed.2d 424(2018).

A Rehearing Petition is designed to bring to Panel's attention points of law or fact it may have over-looked.See **Missouri v. Jenkins**,495 U.S. 33,46 n.14 (1990);see also **Fed.R.App. P. 40(a)(2)**,compare **Coe v. Thurman**,922 F.2d 528,533 n.1 (9th Cir.1991)(per curiam)(invoking circuit rule allowing court in "appropiate circumstances" to "address an issue raised for first time in a petition for re-hearing.") Here,our "prior decision[s]...[were]published...and became law of the circuit." **Barnes-Wallace v. City of San Diego**,704 F.3d 1067,1076-77(9th Cir.2012); see also **Gonzalez v. Arizona**,677 F.3d 383,389 n.4(9th Cir.2012)(en banc)("[O]ur general 'law of the circuit' rule "is "that a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'" (quoting **Hart v. Massanari**,266 F.3d 1155,1170 (9th Cir.2001).) We are bound by those opinions.See **Old Person v. Brown**,312 F.3d

1036,1039 (9th Cir.2002)("we have no discretion to depart from precedential aspects of our prior decision...under the general law-of-the-circuit rule.")

Here,Petitioner-Appellant's Motion for Relief from Judgment pursuant to Rule 60(b) is appropiate to vacate it January 28,2020 Order and reinstate its Appellate Jurisdiction,allowing it to invoke its discretion afforded under Rule 26(b) of the Federal Rules of Appellate Procedure and permit the filing of a Petition for Rehearing under Fed. R.App. P. 40. The language in Rule 40(a)(1) of the Federal Rules of Appellate Procedure states: "[Unless] the time is shortened or extended by order or local rule," implying the Court's discretion to allow for more time than the 14 days to file a Petition for Panel Rehearing and left open the question whether a Rule 60(b) Motion is a proper route and warrant relief of its January 28,2020 Order and allow for additional time to file a Rehearing Petition that complies with Rule 40(a)(1) of the Federal Rules of Appellate Procedure. Rule 60(b) allows for relief from a final judgment and for requesting re-opening of his case on the basis it is attacking 'some defect in the integrity of the Federal Habeas Proceedings and his showing of 'extraordinary grounds' justifying relief.

This Motion is based on the attached Memorandum of Points and Authorities, and facts set forth in the Declaration in support of Motion.

Dated:_____ Respectfully Submitted:

_____

JAMES RUSSELL AUSTIN
CDCR # AK6078
Petitioner-Appellant
In Propria Persona

JAMES RUSSELL AUSTIN
CDCR # AK6078 / E25-C104-4LOW
RICHARD J. DONOVAN CORRECTIONAL FACILITY
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In Propria Persona

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES RUSSELL AUSTIN,

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v.

DANIEL PARAMO, Warden,

Respondent-Appellee. /

COURT OF APPEALS CASE NO. 19-55046

(U.S. District Court Case No. 2:15-cv-01699-JLS-SS; Central District of California, Los Angeles)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(1) OR, ALTERNATELY, RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE; AND REQUEST TO REINSTATE APPELLATE JURISDICTION

I. INTRODUCTION

On March 9, 2015, James Russell Austin [hereinafter Appellant] initiated United States District Court Proceedings by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 along with a Motion to Stay the Petition pending exhaustion of certain Claims. This Motion was Granted and Ordered lifted on February 10, 2016 after Appellant filed an Amended Petition on October 23, 2015. This Petition alleged Six Grounds for Relief, among these Claims were included Sixth Amendment Ineffective Assistance of Counsel, Fifth Amendment Miranda Violations, Deprivation of Fair Trial, and Due Process of Law. Claims which raised Constitutional Questions, that fall squarely as basis of this Motion.

The Petition and a Certificate of Appealability were Denied on September 11, 2018 and Judgment was Entered on September 12, 2018.

On January 7, 2019, Appellant filed his Timely Notice of Appeal (filed January 10, 2019 by the Court along with his Motion for Appointment of Counsel.)

Appellant's Application for Appointment of Counsel was based on a lack of meaningful access to the courts. This Motion was never Adjudicated. Appellant's Request for a Certificate of Appealability in this Court was Denied on December 20, 2019.

At the crux of this Motion, is Appellant's submittance of a Motion for Reconsideration on January 8,2020 (filed January 28,2020 by this Court). This Court entered a subsequent Order Denying the Motion on January 28,2020 and Ordered the Case Closed.

Appellant attempted to file a Second Motion to Reconsider on February 11,2020 (filed February 19,2020 by this Court) based on his Hospitalization and lack of meaningful access to the courts. The Motion was rejected based on the Court's January 28, 2020 Order, that the Case be Closed.

This Motion for Relief from Judgment of its January 28,2020 Order and Request to reinstate Appellate Jurisdiction pursuant to Rule 60(b)(1) or, alternatively, Rule 60 (b)(6) of the Federal Rules of Civil Procedure, is the appropiate vehicle for this Court to vacate its January 28,2020 Order and to re-open the case. See Jones v. Ryan, 733 F.3d 825,833 (9th Cir. 2013); see also Gonzalez v. Crosby, 545 U.S. 524,528,125 S.Ct. 2641,162 L.Ed. 2d 480(2005).

II. ARGUMENT

A. APPELLANT IS ENTITLED TO RELIEF UNDER RULE 60(b)(1) OR, ALTERNATIVELY, RULE 60 (b)(6)

Rule 60(b) provides for reconsideration where one or more of the following is shown:(1) mistake, inadvertence, surprise or excusable neglect;(2)newly discovered evidence that by due diligence could not have been discovered before the court's decision; (3) fraud by the adverse party;(4)voiding of the judgment;(5)satisfaction of the judgment;(6)any other reason justifying relief. See Fed. R. Civ. P. 60(b); School District 1J v. ACandS, Inc., 5 F.3d 1255,1263 (9th Cir. 1993)

Although couched in broad terms, subparagraph (6) requires a showing that the grounds justifying relief are extraordinary. See Twentieth Century-Fox Film Corp. v. Dunnahoo, 637 F.2d 1338,1341(9th Cir. 1981).

Rule 60(b)"allows a party to seek relief from a final judgment, and request re-opening of his case, under a limited set of circumstances."Jones v. Ryan, supra, at

p.833;see also Gonzalez v. Crosby,545 U.S. 524,528;125 S.Ct.2641;162 L.Ed.2d 480 (2005). The Supreme Court held in Gonzalez,that a "legitimate" Rule 60(b) Motion in the habeas context is one that"attacks ' some defect in the interity of the federal habeas proceedings.'" United States v. Washington,653 F.3d 1057,1060 (9th Cir.2011) (quoting Gonzalez,545 U.S. at 532.) "The general purpose of Rule 60,which provides relief from judgments for various reasons,is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." Boughner v. Secretary of Health,Education and Welfare,572F.2d 976,977 (3rd Cir.1978); Liberty National Bank and Trust Co. v. Yackovich,99 F.R.D. 518,519 (W.D. Pa.1982). "The decision to grant or deny relief pursuant to Rule 60(b) lies in the'sound discretion of the trial court guided by accepted legal principles applied in light of all the relevant circumstances.'" United States v. Hernandez, 158 F.Supp.2d 388,392(D. Del.2001)(quoting Ross v. Meagan,638 F.2d 646,648(3rd Cir. 1981).) A Court's discretion to grant relief has been described as "especially broad," Hopper v. Euclid Manner Nursing Home,Inc.,867 F.2d 291 (6th Cir.1988),and the rule has been described as a "grand reservoir of equitable power to do justice in a particular case" Pierre v. Bemuth,Lembcke Co.,20 F.R.D. 116,117 (S.D. N.Y. 1950). Further,"a 60(b) motion to set aside judgment is to be 'construed liberally to do substantial justice.'" Fackelman v. Bell,564 F.2d 734,735(5th Cir.1977)(citing Laguna Royalty Co. v. Marsh,350 F.2d 817,823 (5th Cir.1965).

Rule 60(b)(1), authorizes relief from judgment for "mistake,inadvertence,surprise, or excusable neglect." In Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship,507 U.S. 380,113 S.Ct. 1489,123 L.Ed.2d 74(1993),the Supreme Court explained that excusable neglect under Rule 60(b)(1) applies when a party's failure to file on time is within "his or her control."Id. at 394. Motions for Relief from Judgment under Rule 60(b)(1) must be filed within one year from the entry of judgment and they must satisfy the four factor test the Supreme Court established in Pioneer. The test considers:(1)the danger of prejudice to the non-moving party, (2)the length of the

filing delay and its potential impact on the proceedings, (3)the reason for the filing delay,and (4)whether the moving party acted in good faith. Id. at 395.;see also **Ahanchian v. Xenon Pictures,Inc.**,624 F.3d 1253,1261 (9th Cir.2010);**Briones v. Riviera Hotel & Casino**,116 F.3d 379,381-82 (9th Cir.1997).

This same Court has held that factors must be fully considered in every case, in determining whether a mistake is excusable. See **Pincay v. Andrews**,389 F.3d 853, 860 (9th Cir.2004)(en banc). The Supreme Court emphasized in **Pioneer** that "all relevant circumstances surrounding," the parties' failure to make a timely filing must be considered. 507 U.S. at 395.

Under the circumstances of this case,application of the **Pioneer** Test compels relief. The first **Pioneer** factor favors relief,where Appellant put the State on Notice when he filed his Appeal on January 10,2019, a whole year prior to filing his initial Motion for Reconsideration on January 8,2020. Also to consider,is his second attempt to file a Motion to Reconsider on February 11,2020,that was Rejected by the Court on the basis of its January 28,2020 Order. Further,when considering the impact of being denied meaningful access to the Institution's Law Library until January 2,2020 approximately 13 days after this Court issued its December 20, 2019 Order denying Appellant a Certificate of Appealability and being subjected to Holiday Closures. Despite the mistake in calculating the actual due date Appellant was diligent in his attempt to file a Motion for Reconsideration on January 8,2020 under the belief the due date was on January 9,2020 rather than the actual due date of January 3,2020 when he erroneously calculated the Holidays and Weekends to the 14th deadline date. Along with Appellant's inability to comprehend the complexities of filing deadlines caused by his age-related Mental disability resulting in his late filing of the Motion for Reconsideration. Appellant plead with the Court seeking it invoke its discretion to extend the 14 Day Filing Deadline by Order which fell on deaf ears. Here,the State cannot effectively argue it would face prejudice if this **Rule 60(b)** Motion is granted to vacate the January 28,2020

Order and for the Court to reinstate Appellate Jurisdiction allowing for Appellant to file a properly drafted **Fed.R.App.P. 40(a)(1)** Petition for Panel Rehearing bringing to the Panel's attention points of law and fact overlooked,**Missouri v. Jenkins**, 495 U.S. 33,46 n.14 (1990);see **Fed.R.App.P.40(a)(2)**,compare **Coe v. Thurman**,922 F.2d 528,533 n.1 (9th Cir.1991)(per curiam)(invoking circuit rule allowing court in "appropiate circumstances" to "address an issue raised for first time in a petition for rehearing."),and follow its language,"[u]nless the time is shortened or 'extended' by order or local rule." **Rule 40(a)(1) of the Federal Rules of Appellate Procedure.** Nor will the State be prejudiced if Appellant's Habeas Appeal is heard on the merits.

Second,the length of the delay and its potential impact on the proceedings favors granting relief,when considering: (1) the delay in filing his Motion for Reconsideration was insignificant...approximately (19)days after the Court's December 20,2019 Order,and (2) the insignificant time required to resolve a Petition for Panel Rehearing filed pursuant to **Rule 40(a)(1),Fed.R.App.P.**,after granting the Rule 60(b) Motion and reinstating Appellate Jurisdiction while invoking its'sound discretion' afforded under **Rule 26(b) of the Federal Rules of Appellate Procedure** to permit its filing. Also,the Court should consider the impact of the COVID-19 Pandemic on not only CDCR's inability to move Inmates safely within and outside the Prison, its closure of Programs including the Law Library to ensure Social Distancing Protocals. But,as a result Appellant's deprivation of meaningful access to the courts (access to the library) and quarantine during a period relevant to the period he may have seeked other available relief. The negative impact of his Hospitalization due to his serious Health Conditions all warrant relief and demonstrate extraordinary circumstances.

The final Pioneer factor is also met when Appellant acted in good faith filed a Motion for Reconsideration on January 8,2020...the 14th day after recieving the copy of the Court's December 20,2019 Denial Order on December 26,2019 via Institutional Legal Mail . Being denied access to the Library until January 3,2020 leaving

Appellant with only (1) day to meet the actual deadline date of January 3,2020 under Rule 40[Fed.R.App.P.].

There is no suggestion,that Appellant missed the filing date in bad faith or to gain any advantage, "and we have said that where other factors counsel relief, a calendaring mistake and related failure to catch that mistake is no bar to Rule 60(b)(1) relief.Ahanchian,624 F.3d at 1262. Appellant from the very onset has made attempts to inform the Court of all the obstacles before him,and although not articulated well,was sufficient for the court to be aware of his good faith. See Balistreri v. Pacific Police Dep't,901 F.2d 696,699 (9th Cir. 1990)(noting court has a "duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to...technical procedural requirements.") Moreover,"[s]trict time limits...ought not to be insisted upon/where restraints resulting from a pro se...incarceration prevent timely compliance with court deadlines." Eldridge v. Block,832 F.2d 1132,1136 (9th Cir.1987)(citing Tarantino v. Eggers,380 F.2d 465,468 (9th Cir.1967);see also Bennett v. King,205 F.3d 1188, 1189 (9th Cir.2000)(reversing district court's dismissal of a prisoner's amended pro se complaint as untimely where mere 30-day delay was result of prison-wide lockdown),and no bar to Rule 60(b)(1) relief. See Ahanchian,624 F.3d at 1262.

*If relief from judgment is not available under Rule 60(b)(1)-(5), Rule 60(b)(6)authorizes the Court to grant relief from judgment for 'any other reason that justifies relief.' Rule 60(b)(6) provides,that a court may act to relieve a party from a final judgment," a party must show external 'extraordinary circumstances' suggesting that the party is faultless in the delay." Pioneer,507 U.S. at 393; Cmty. Dental Sers. v. Tani,282 F.3d 1164,1168 (9th Cir.2002)."In simple english,the language of the 'other reason' clause,for all reasons except the five particularly specified,vest power in courts adequate to enable them to vacate judgments whenever such action is appropiate to accomplish justice."Klapprott v. United States,335 U.S. 601,614-615,93 L.Ed.266,69 S.Ct. 384 (1949);see also Coltec

Industries,Inc. v. Hobgood,280 F.3d 262,273 (3rd Cir.2002)[2004 U.S. Dist. LEXIS 14](describing Rule 60(b)(6) as a "catch all");**DeFeo v. Allstate Ins. Co.**,1998 U.S. Dist. LEXIS 9060,1998 WL 328195 *3 (E.D. Pa.1998). We use **Rule 60(b)(6)**,in particular, "sparingly as an equitable remedy to prevent manifest injustice." **United States v. Alpine Land & Reservoir Co.**,948 F.2d 1047,1049 (9th Cir.1993). "The rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment."**Id.**

In addition, the Supreme Court has also recognized that a Court's Authority to provide relief from judgment includes the authority,in certain circumstances, to vacate and re-enter a judgment to restore the opportunity to appeal. See **Hill v. Hawes**,320 U.S. 520,64 S.Ct. 334,88 L.Ed. 283 (1944). Consistent with the ruling, Congress has neither amended the rules nor enacted a Statute to abrogate the Court's Authority to vacate and re-enter judgment where other grounds support a **Rule 60(b)** Motion. The Rules Committee has expanded the grounds for relief under **Rule 60(b)** to encompass the 'various kinds of relief from judgments which were permitted in the Federal Courts prior to the adoption' of the **Rules. [Fed.R. Civ. P. 60** Advisory Committee's note to 1946 Amendment, see also **Plaut v. Spendthrift Farm,Inc.**,514 U.S. 211,235,115 S.Ct. 1447,131 L.Ed. 2d 328 (1995)(recognizing that Rule 60(b) "codified judicial practice that pre-existed");see also **Klapprott v. United States**,335 U.S. 601,615;69 S.Ct. 384;93 L.Ed.266 (1949(recognizing that Rule 60(b) 'vest power in courts adequate to enable them to vacate judgments whenever such action is appropiate to accomplish justice.")

Additionally, Appellant's filing of his Motion for Reconsideration, although not well-drafted, could be considered and fairly read as a Request for an Extension of Time and suffice to invoke its discretion under **FRAP 26(b). Rule 26(b)** states, "that for good cause,the court may extend the time prescribed by these rules or its orders to perform any act,or may permit an act to be done after that time expires." This is consistent with the Supreme Court's recent statements that

it is "a good thing...that courts sometimes construe one kind of filing as another" to identify a route to relief." See **Mata v. Lynch**,135 S.Ct. 2150,2156,;192 L.Ed. 2d 225(2015).

Here,the Court should conclude,that the circumstances (as described in Appellant's Declaration) entitle him to Relief under well-established Authority applying to **Rule** 60(b)(1) or,alternatively,**Rule** 60(b)(6).

Accordingly, **Jones v. Ryan**,733 F.3d 825,833 (9th Cir.2013) controls and the Court should adopt its reasoning.

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B. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING A COA AND IN ITS SUBSEQUENT DENIAL OF MOTION TO VACATE ITS JUDGMENT WHILE APPLYING THE INCORRECT LEGAL STANDARD TO APPELLANT"S CLAIMS OF SUBSTANTIAL UNDERLYING ERRORS AND CONSTITUTIONAL VIOLATIONS

Where the District Court has rejected the Constitutional Claims on the merits,as it did in the instant case on September 11,2018,the showing required to satisfy 28 U.S.C. S.§ 2253(c) is straightforward. Petitioner must demonstrate that reasonable jurists would find the District Court's assessment of the Constitutional Claims debatable or wrong. Under Appeal Provisions of the AEDPA,an Appellate Case commences with the filing of an Application for a COA.Hohn v. United States,524 U.S. 236,241, 141 L.Ed. 2d 242,118 S.Ct. 1969(1998);see also Fed. R. App. Proc. 22(b). To obtain a COA under 28 § 2253(c)(2),a habeas prisoner must make a substantial showing of the denial of a Constitutional Right,a demonstration that,under Barefoot[463 U.S. 880, 893,103 S. Ct. 3383,77 L. Ed. 2d 1090(1983)],includes showing 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 desearve encouragement to proceed further,"Barefoot,463 U.S. at 893,and n.4("summing up" the "' substantial showing'" Standard).

The Supreme Court has emphasized the limited nature of this inquiry:

> The COA inquiry...is not coextensive with a merits analysis. At the COA Stage,the only question is whether the applicant has shown that jurist 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 desearve encouragement to proceed further.This threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims.When a Court of Appeals sidesteps the COA Process by first deciding the merits of an Appeal,and then justifying its denial of a COA based on its adjudication of the actual merits,it is in essence deciding an Appeal without jurisdiction.

Buck,137 S. Ct. at 773(citations and internal quotations omitted). The Court therefore held that the Court of Appeals erred by denying a COA on a Rule 60(b) Motion by first determining the merits,and thus "invert[ing]the statutory order of

operations."Id. at 774;see also **Tharpe v. Sellers**,138 S.Ct. 545,546-47,199 L. Ed. 2d 424(2018).

Here, Appellant in Ground Three of his Federal Petition raised a **Sixth Amendment** violation of his Right to Counsel having attached at the time of the Pretext Phone Calls under the controlling and binding Authority established by the United States Supreme Court in **Rothgery v. Gillespie County**(2008)554 U.S. 91,that extended the Protection of the **Sixth Amendment** Right to Counsel to Pre-indictment Proceedings. This Rule,recognizes that the Right to the Assistance of Counsel is fashioned according to the need for such assistance,and his need may very well be greater during certain pre-and post trial events than during the trial itself.**Lafler v. Cooper**(2012) 566 U.S. 156,165; **United States v. Wade**(1967)388 U.S. 218,224.For purposes of determining whether the Right to Counsel extends to a particular proceeding,we have described a critical stage as "one'in which the substantial rights of a defendant are at stake'[citation],and 'the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial'[citation]." **People v. Bryant,Smith and Wheeler**(2014)60 Cal. 4th 335,465;**People v. Bustamante** (1981)30 Cal. 3d 88,97-99. More broadly,critical stages can be understood as those events or proceedings in which the accused is brought in confrontation with the State,where potential substantial prejudice to the accused's rights inheres in the confrontation,and where counsel's assistance can help to avoid that prejudice.See **Coleman v. Alabama**(1970)399 U.S. 1,7; accord,e.g.,**Rothgery v. Gillespie County**(2008)554 U.S. 191,212 n.16.

In **Rothgery**,the Supreme Court held,where a defendant learns of the Charge against him and his liberty is subject to restriction,marks initiation of adversary proceedings that trigger attachment of **Sixth Amendment** Right to Counsel,and attachment of Right to Counsel does not also require that a Public Prosecutor,as distinct from a Police Officer,be aware of that initial proceeding or involved in its conduct. Id. at pp.2583-2592.

In the present case, Appellant had been Arrested and Released on Bail on May 12,

2009 with an Order to Appear in Court on June 02,2009. The Investigation Phase of the Case had concluded,and upon his Release on Bail with an Order to Appear,prosecution had commenced. An Accusation filed with a Judicial Officer [Police] is sufficiently formal and the Government's commitment to Prosecute is sufficiently concrete,when the Accusation prompts Arraignment and restrictions on the Accused's liberty. see **Kirby v. Illinois**,406 U.S. 682,689,92 S.Ct. 1877,32 L.Ed. 2d 411,Pp..2587-2589.

During the District Court's analysis of the question whether Appellant's Right to Counsel had attached as guaranteed by the **Sixth Amendment**,it misinterpreted and misapplied the United States Supreme Court's most recent pronouncement on the Question of when the **Sixth Amendment** Right to Counsel attaches. Instead,relying on the initial appearance's significance citing **United States v. Gouveia**,467 U.S. 180,104 S. Ct. 2292,81 L. Ed. 2d 146(1984).

Under its reasoning that," an adversary criminal proceeding has not begun in a case where the prosecution officers are unaware of either the charges or the arrest."491 F.3d at 297(quoting **McGee v. Estelle**,625 F.2d 1206,1208(CA5,1980).

Under the Standard of Prosecutorial Awareness,attachment depends not on whether a first appearance has begun adversary judicial proceedings,but on whether the Prosecutor had a hand on starting it. The Court in **Rothgery** held that Standard is wrong. The District Court's reliance on **Gouveia** is misapplied and erred in not recognizing **Gouveia**...rather than **Rothgery** as controlling on Appellant's issue. Since, **Gouveia** and subsequent Opinions,the Court has sought to clarify what constitutes the initiation of judicial proceedings in the context of the various systems of Criminal Proceedings extant throughout State and Federal Jurisdictions.

The Supreme Court clarified in its holding in **Rothgery** that,"attachment does not also require that a prosecutor(as distinct from a police officer)be aware of that initial proceeding or involved in its conduct."**Id.** at Pp.2583-2592. Here,(as in **Rothgery**), **Gouveia** does not speak to the question at issue. The District Court's misinterpretation of **Rothgery** allowed for the Court to create its own Rule for

what constitutes the initiation of judicial procedures. Thus,ignoring the Right to Counsel and was an attempt to discern the original meaning of"criminal prosecutio[n]" and commencement. Aswell,as violated all the Doctrines of Res Judicata,Stare Decisis, and most recent precedent as controlling law.

Furthermore, in Ground Four (h) & (j), Appellant alleged he was denied his Right to Testify and his absolute Right to decide objective of Defense and insist Counsel refrain from admitting Guilt to Counts 1-10 even when Counsel's experienced-based view is that conceding or confessing guilt might yield the best outcome at Trial in violation of his **Sixth Amendment** Rights as interpreted by the Supreme Court in **McCoy v. Louisiana (2018)**584 U.S.__[138 S. Ct. 1500;200 L. Ed. 2d 821]. An irrefutable "right to take the witness stand and to testify in his or her own defense." **Rock v. Arkansas**,483 U.S. 44,49(1987);**Gill v. Ayers**,342 F.3d 911,919(9th Cir. 2003);see also **United States v. Pino-Noriega**;189 F.3d 1089,1094(9th Cir. 1999)."The right is personal,and may only be relinquished by the defendant,and the relinquishment of the right must be knowing and intentional.'" **Pino-Noriega**,189 F.3d at 1094(quoting **United States v. Joelson**, 7 F.3d 174,177(9th Cir. 1993).

As explained in **McCoy**,"'[t]he right to defend is personal,'and a defendant's choice in exercising that right'must be honored out of"that respect for the individual which is the lifeblood of the law."' ((Citations.) "The choice is not all or nothing: To gain assistance,a defendant need not surrender control entirely to counsel.For the **Sixth Amendment**,in 'grant[ing] to the accused personally the right to make his defense.' 'speaks of the "assistance" of counsel,and an assistant,however expert, is still an assistant.'(Citations). Trial management is the lawyer's province;Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise,and what agreements to conclude regarding the admission of evidence.' [Citations] Some decisions,however,are reserved for the client-notably,whether to plead guilty,waive the right to a jury trial,testify in one's own behalf,and forgo an appeal.[Citations] These are not strategic choices

about how best to achieve a client's objectives;they are choices about what the client's objectives in fact are.[Citation.]"(McCoy,supra,584 U.S. at pp.____[200 L.Ed. 2d at pp.829-830].) Thus,McCoy recognized that even in the face of counsel's better judgment and experience,"[w]hen a client expressly asserts that the objective of'his defen[s]e' is to maintain innocence of the charged criminal acts,his lawyer must abide by that objective and may not override it by conceding guilt." (McCoy, supra,584 U.S. at p.__[200 L.Ed.2d at p.831].) McCoy therefore held:"[A] defendant has the right to insist that Counsel refrain from admitting guilt,even when counsel's experienced-base view is that confessing guilt offers the defendant the best chance to avoid the death penalty.Guaranteeing a defendant the right 'to have the Assistance of Counsel for his defen[s]e,'the Sixth Amendment so demands.With individual liberty- and ,in capital cases,life-at stake,it is the defendant's prerogative,not counsel's, to decide on the objective of his defense:to admit guilt in the hope of gaining mercy at the sentencing stage,or to maintain his innocence,leaving it to the State to prove his guilt beyond a reasonable doubt("Id. at p. ____[200 L.Ed. 2d at p.827].)

A violation of the client's right to maintain his or her defense of innocence implicates the client's autonomy (not counsel's effectiveness) and is thus complete, once counsel usurps control of an issue within the defendant's "sole prerogative."(McCoy, supra, 584 U.S. at p.__[200 L. Ed. 2d at p. 833].)McCoy held that error of this kind is structural and not subject to harmless error review because it "blocks the defendant's right to make fundamental choices about his own defense" and "the effects of the admission would be immeasurable("Id. at p.____[200 L. Ed. 2d at p. 834].)

Preservation of the Sixth Amendment right recognized in McCoy does not necessarily turn on whether a defendant objects in court before his or her conviction.Rather, the record must show (1)that defendant's plain objective is to maintain his innocence and pursue an acquittal,and (2)that trial counsel disregards that objective and overrides his client by conceding guilt.(McCoy,supra,584 U.S. at pp.____,____[200

L. Ed. 2d at pp. 827,829-833].)

In addition,whether a defendant has been deprived of his fundamental right to maintain innocence as the object of his defense(a right founded in autonomy) does not turn on the reasonableness of counsel's conduct.(McCoy,supra,584 U.S. at p.____[200 L. Ed. 2d at p. 833].)

Here, the District Court on September 11,2018, issued an Order accepting and modifying Findings,Conclusions and Recommendations of the Magistrate Judge in a sua sponte analysis and considered whether McCoy altered the Magistrate Judge's analysis of Ground (h) of the FAP. Applying the Standard setforth in Strickland v. Washington,466 U.S. 668(1984),and discussed McCoy. In misrepresenting McCoy,the District Court concluded that McCoy was not implicated in situations where the defendant never expresses a desire to maintain his innocence. Finding that McCoy was inapplicable to Appellant's Case because it had determined that the factual predicate of a McCoy claim was absent. That there was simply no evidence that Petitioner had ever voiced"intransigent objection" or indeed any opposition to his Trial Counsel's strategic decision. Adding, that absent any objection ,Petitioner's autonomy was not overriden thus, McCoy was inapplicable, and that the Court properly addressed Ground Four (h) under Strickland. Contrary to McCoy 's interpretation,that Petitioner had an absolute right to insist his Counsel refrain from admitting guilt and to testify in his Defense to maintain his innocence.

Appellant alleged,that his trial Attorney threatened to withdraw as Counsel, abandoning him if he insisted on testifying. As declared by Petitioner in the supporting Declaration to this instant Motion for Relief from Judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, Appellant repeatedly requested to Testify to Counsel and it resulted in threats of abandonment. McCoy protects defendant's right to determinethe objective of his Defense of Innocence,and the Rule announced in McCoy applies here. These facts alone exclude the use of presumption that Appellant voluntarily waived his Right to testify,especially when

faced with a threat of abandonment and eventual abandonment by Trial Counsel McKesson prior to Sentencing, when rather than pursuing the Court determine the filed Motion for a New Trial on the Jury Misconduct claim,he instead elected to withdraw as Counsel by declaring a Conflict of Interest that resulted in the Trial Court granting the request.

Here too,the District Court neglected to apply the correct Standard when it: (1) acknowledged that no hearing was held to resolve the issue,(2)utilized its own speculation as to why Defense Counsel "might have recommended[Petitioner] not to testify.Defense Counsel reasonably could have worried that painting the underage victim as a suductress would have alienated the jury.Defense Counsel also would have worried that the client was simply not a good witness."Then along with its own accord with the trial court's posterior to trial opinion of finding [him] not credible.(**Magistrate Report & Recommendation,fn.14 at p.72**,(3)its finding that "waiver of the right to testify may be inferred from the defendant's conduct and is presumed from the defendant's failure to testify or notify the court of his desire to do so." quoting **United States v. Joelson**,7 F.3d 174,177 (9th Cir. 1993)

Appellant being under the threat of abandonment by Counsel if he insisted on testifying has been recognized by the United States Supreme Court to violate the **Sixth Amendment** right to counsel. **Holland v. Florida** (2010)560 U.S. 631,652-653,130 S.Ct. 2549,2564,177 L.Ed. 2d 130.

As declared to in his Declaration, Appellant's Trial Counsel Winston McKesson violated **McCoy** when throughout the Trial Proceedings and from the onset refused to allow Appellant to Testify in his own Defense. A Right guaranteed by the **Sixth Amendment** and that coupled with his conceding to Counts 1-10 against Appellant's wishes and his failure to insist the Trial Court hear the filed Motion for a New Trial based on Jury Misconduct violated these fundamental Principles. Appellant's testimony was crucial on the issue of force and duress, the complaining

witness credibility was key. Appellant's belief in consent was a key Defense and his testimony crucial.

Appellant's claim that the Prosecutorial Misconduct in vouching for the veracity of the complaining witness,too denied him a Fair Trial and implicated Federal Constitutional Rights to due process serving only to bolster her Credibility without Appellant taking the Stand in his own Defense.

The failure to insist the Trial Court adjudicate the filed Motion for a New trial on the claim of Jury Misconduct was too fully supported when Appellant was deprived of a Hearing on the filed Motion. Appellant presented Declarations containing juror statements demonstrating bias and a refusal to deliberate. Additionally supported by the Defense's Investigator Joaquin Rodriguez as to his speaking with the Jury Forepreson and obtaining the information regarding the jury misconduct. Not mere speculation as the Court of Appeals reasoned. Here,the failure to hear the New Trial Motion was prejudicial and resulted in a Miscarriage of Justice. Here,too a new trial was warranted as in **People v. Braxton** (2004)34 Cal.4th 798;101 P.3d 994;22 Cal. Rptr. 3d 46;2004 Cal. LEXIS 11764;2004 Dailey Journal DAR 14725;2004 Cal. Daily Op. Service 10984.

Accordingly,Appellant made a substantial showing of Constitutional Violations and was entitled to a granting of a COA on his Claims.

C. APPELLANT HAS BEEN DEPRIVED OF MEANINGFUL ACCESS TO THE COURTS AND IS ENTITLED TO CONSIDERATION OF HIS CLAIMS.

For Good Cause Shown, Appellant was entitled to this Court's extension of time to file his **FRAP 40(a)(1)** Petition for Panel Rehearing when he brought to the Court's attention his lack of meaningful access to the courts (Library Closure). In addition to being elderly and in ill-health,Mobility impaired and unable to comprehend the complexities of litigation requiring his assistance from other Inmates. The Court nevertheless,disregarded these factors when determining the filed Petition for Rehearing after the Denial Order on December 20,2019. As fully supported in the attached Declaration, Appellant has been and is continuing to be denied meaningful access due to the now added impact of the COVID-19 Pandemic

and this impediment meets the extraordinary circumstances prerequisite.

CONCLUSION

FOR THE REASONS STATED in the Motion, supporting Authorities, and facts alleged in the supporting Declaration, the Motion should be Granted in its entirety, or in the alternative, as the court deems proper in the interest of justice.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: 5/12/21

Respectfully Submitted:

JAMES RUSSELL AUSTIN
CDCR # AK6078
Appellant-Movant
In Propria Persona

VERIFICATION

State of California
County of: San Diego

(C.C.P. §445 & 2015.5; 28 U.S.C. §1746)

I, James R Austin declare under penalty of perjury that I am the Declarant/Prisoner in the above entitled action; I have read the foregoing documents and know the contents thereof and the same is true of my own knowledge., except as to maters stated therein upon information, and belief, and as to those matters, I believe them to be true.

Executed this 13th day of May, in the year of 2021 at R.J. Donovan Correctional Facility (RJD) 480 Alta Road, San Diego, CA 92179.

Signature: James R Austin
(Declarant/Prisoner)

PROOF OF SERVICE BY MAIL

(C.C.P. §1013 (a) & 2015.5; 28. U.S.C. §1746)

I, James R Austin am a resident of R.J Donovan Correctional Facility (RJDCF), in the county of San Diego, state of California. I am over the age of eighteen (18) years of age and am / am not a party of the above entitled action. My state prison address is 480 Alta Road, San Diego, CA 92179.

On 5/13/21, I served the foregoing:

Motion & Declaration For Relief From Judgement Pursuant to (Set forth exact title of document served) Rule 60 (b)

On the party(s) herein by placing a true copy(s) thereof, enclosed in a sealed envelope(s), with postage thereon fully paid, in the United States mail, in a deposit box so provided at RJDCF.

U.S. Court of Appeals
For the Ninth Circuit
Clerk of the Court
P.O. Box 193939
San Francisco, CA 94119-3939

and

Atty General - Chas Lee
~~Lyndsay Crewstadt, Dep AG.~~
300 S. ~~[redacted]~~ Spring St
~~Los Angeles~~ L.A. CA 90013

There is a delivery service by United States mail at the place so addressed, and there is regular communication by mail between the place of mailing and the place so addressed. I declare under penalty of perjury that the foregoing is true and correct.

Date: 5/13/21 James R Austin
(Declarant/Prisoner) (Plaintiff in Pro Se)

JAMES RUSSELL AUSTIN
CDCR # Ak6078 / E25-C104-4LOW
RICHARD J. DONOVAN CORRECTIONAL FACILITY
480 ALTA ROAD
SAN DIEGO, CA 92179

In Propria Persona

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES RUSSELL AUSTIN,

Petitioner-Appellant,

v.

DANIEL PARAMO, Warden,

Respondent-Appellee. /

COURT OF APPEALS CASE NO. 19-55046

(U.S. District Court Case No. 2:15-cv-01699-JLS-SS; Central District of California, Los Angeles)

DECLARATION OF JAMES RUSSELL AUSTIN IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(1) OR, ALTERNATIVELY, RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE; AND REQUEST TO REINSTATE APPELLATE JURISDICTION

I, JAMES RUSSELL AUSTIN, DECLARE THE FOLLOWING:

1. I am the Appellant-Movant in the above-entitled Action and am proceeding in pro se.

2. I make this Motion pursuant to Rules 60(b)(1), or, alternatively, 60(b)(6) of the Federal Rules of Civil Procedure seeking relief from the Order issued on January 28, 2020 denying my Motion for Reconsideration after the Court's Denial of a Certificate of Appealability entered on December 20, 2019.

3. I also request that the Court reinstate its Appellate Jurisdiction and issue an Order allowing for me to submit a proper and well-drafted Application for a Certificate of Appealability on my Constitutional claims raised in my Habeas Appeal, or in the alternative, allow me to file a Petition for Panel Rehearing pursuant to Rule 40(a)(1) of the Federal Rules of Appellate Procedure.

4. On December 20, 2019, the Court issued an Order denying me a COA and I

recieved a copy of the Order on December 26,2019 via Institutional Legal Mail.

5. This took (6) days from the (14) days allowed to file a Rehearing Petition.

6. The Prison's Law Library was Closed until January 2,2020 due to the Holidays and Weekend Schedule.

7. I was unable to gain any access to the Law Library until January 2,2020 approximately (13) days after the Court's entry of judgment on December 20,2019.

8. As a result of my inability to comprehend the complexities of calendaring and litigation, I was under the belief that the 14 day deadline started from the day I was served on December 26,2019 by Prison Officials with the copy.

9. I believed I was being diligent in filing my Motion for Reconsideration by way of "Mailbox Rule" on January 8,2020 by handing it over to Prison Staff for its Mailing to the Court.

10. On January 28,2020, the Court issued an Order denying it citing untimeliness under **Rule 27-10 [9th Cir.Rule]** which requires Rehearing Petitions to be filed "within 14 days after entry of judgment."

11. As a result, I attempted once again to bring to the Court's attention the reasons for the delay and in a not well-articulated manner seeked the Court extend the 14 Day deadline and accept my Motion for Reconsideration,but was once again rejected on February 19,2020 based on the January 28,2020 Order which noted,"no further filings per 1/28/20 order."

12. The Court was authorized to extend the time to file the Motion for Reconsideration by way of Order,but I filed the incorrect Motion to invoke its discretion.

13. This prejudiced me,in that I was denied meaningful access to the courts and for my claims of Constitutional Violations to be reviewed.

14. I believe I am entitled to relief pursuant to Rule 60(b) and meet the prerequisite 'extraordinary circumstances' set forth in Jones v. Ryan,733 F.3d 825

(9th Cir.2013),and am 'attacking some defect in the integrity of the federal habeas proceedings,' as held in **Gonzalez v. Crosby**,545 U.S. 524,532 (2005).

15. I also believe that **FRAP 26(b)** applies where for good cause,the court may extend the time prescribed by the Rules or Orders to perform an act, or permit the act be done after the time expires.

16. On my Habeas Petition filed in the District Court,I brought claims, that: On May 12,2009, I was charged ,arrested,and released on bail;ordered to appear in court for the crimes charged. I had already contacted Counsel and had informed law enforcement that I was represented by Counsel prior to being released. On May 26,2009,law enforcement employed the complaining witness to make a pretext phone call to elicit incriminating statements from me. In these two recorded pretext phone calls,I made incriminating statements while answering questions from the complaining witness. This led to two suppression motions being filed by my Attorneys claiming the pretext calls were obtained in violation of my Sixth Amendment right to counsel on the ground that my Sixth Amendment right to counsel had attached at the time of the pretext calls. These suppression motions were denied. I made the claim,that **Rothgery v. Gillespie County**(2008) 554 U.S.191 was controlling.

I alleged that I was denied the right to testify in my own Defense in violation of the **Sixth Amendment**. From the very onset my Attorney Winston McKesson would tell me that I could not be allowed to testify. My testimony was the only way to let the jury hear my belief of consent that would be a key Defense to the Force and Duress allegations. When he filed a Motion for a New Trial and I complained that he had committed Ineffective Assistance of Counsel by denying me the right to testify,he went into Court and claimed a Conflict of Interest resulting in the Court granting his request and never having the Hearing for a New Trial. When new Counsel approached the matter,he only requested that the Court release Juror Information and Order an Evidentiary Hearing relieving

the Court of its duty to hear the Motion for a New trial filed based on Juror Misconduct pursuant to Cal. Pen. § 1202; People v. Braxton,34 Cal.4th 798 (2004).

Also my not testifying coupled with the Prosecutor's vouching for the complaining witness infected my Trial with unfairness when she bolstered the witness's credibility. The sole basis for the findings of force and duress came from the witness's testimony and is possible that with my testimony,the jurors would have some doubts as to her truthfulness in claiming force had the prosecutor not vouched for her honesty. There is no tactical reason for counsel to have forfeited my right to testify in the key Defense of reasonable belief in consent.

17. During the period in question, I have been subjected to Hospitalization, Quarantine, Library Closures,and inability to gain assistance from other Inmate assistance due to Social Distancing Protocal implemented by CDCR due to the impact of COVID-19 Pandemic.

18. The negative impact has affected my attempts to timely file Court imposed Deadlines or act on their required procedural deadlines.

19. As of March 23,2020 through April 01,2021, I have had Modified Program that has deprived me of meaningful access to the Library caused by the impact of COVID-19 Pandemic on CDCR.

20. On January 15,2021, I submitted for filing a Motion for a Stay of all Orders or Judgments pending due to COVID-19 Pandemic and supporting Declaration.

21. In the Motion, I as a 78 Year Old State Prisoner,proceeding in pro se and as an ADA Inmate voiced the negative impact of COVID-19 resulting on my being deprived of meaningful access to the library and my Quarantine on D-Facility on November 10,2020.

22. My inability to retain my Legal Documents from my Inmate Assistant

due to our seperation caused by the Quarantine Protocals.

23. My prejudice suffered by the impact of COVID-19 on CDCR's ability to move inmates safely due to Social Distancing Protocals,suspension of Programs, and Closures of Library Access.

24. I believe, I have demonstrated sufficient set of circumstances to warrant granting of the Rule 60(b) Motion and to allow the Court to reinstate its Appellate Jurisdiction.

25. The granting of the Motion will not prejudice the Respondent-Appellee, but only serve to ensure fundamental fairness and secure a correction of a miscarriage of justice.

FOR THE FOREGOING REASONS, THE Court should grant the Motion in its entirety,or in the alternative,as it deems proper.

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

Executed this 12th Day of May,2021 at San Diego, CA .

Respectfully Submitted:

JAMES RUSSELL AUSTIN
CDCR # AK6078
Appellant-Declarant
In Pro Se

CASE NO. 19-55046

JAMES RUSSELL AUSTIN
CDCR # AK6078 / E25-C104-04LOW
RICHARD J. DONOVAN CORRECTIONAL FACILITY
480 ALTA ROAD
SAN DIEGO, CA 92179

In Propria Persona

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Clerk of the Court
P.O. Box 193939
San Francisco, CA 94119-3939

Re: FILING OF MOTION FOR RELIEF FROM JUDGMENT
PURSUANT TO RULE 60(b)(1), OR, ALTERNATIVELY,
RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE
AND REQUEST TO REINSTATE APPELLATE JURISDICTION

Dear Clerk,

Enclosed you will find an Original Motion for Relief from Judgment to be filed in your Court. I have enclosed an exact copy and stamped Envelope for you to please return a stamped copy filed and showing date of filing. Thank You for your prompt response and attention to this matter.

Dated: 5/12/21

Respectfully Submitted:

James Russell Austin

JAMES RUSSELL AUSTIN
CDCR # AK6078
Appellant-Movant
In Pro Se