Appendix A
Order
Basey v. U.S.D.C.,
AK, 22-70116
(9th Cir. July 12, 2022) ECF No. 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: KALEB L. BASEY.

KALEB L. BASEY,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA,

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

No. 22-70116

D.C. No. 4:20-cv-00015-RRB
District of Alaska,
Fairbanks

ORDER

Before: SILVERMAN, CALLAHAN, and COLLINS, Circuit Judges.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

No further filings will be entertained in this closed case.

DENIED.

Appendix B
Motion for a COA
U.S. v. Basey, No. 21-35554
(9th Cir. July 27, 2021) ECF No. 3

Kaleb Lee Basey
1775-3006 Cardinal Unit
Federal Medical Center Lexington
P.O. Box 14500
Lexington, KY 40512-4500
Appellant in Pro Se

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

To: Circuit Judge Andrew Kleinfeld

UNITED STATES OF AMERICA, Appellee,	No. 21-35554 D. Ct. No. 4:14-cr-00028-RRB
vs.	
KALEB LEE BASEY, Appellant.	MOTION FOR A CERTIFICATE OF APPEALABILITY

The district court denied Basey a COA in full.[1] Thus Basey now seeks a COA from a circuit judge under 28 U.S.C. §2253 on these six issues:

1. **Independent Source Doctrine.** *Murray v. U.S.* requires courts to assess whether prior illegal searches affected the decision to seek or issue a warrant. Illegal searches of Basey's devices led investigators to contact the FBI who then subpoenaed additional

[1] Dkt. 364; Dkt. 363 at 14.

records before seeking a warrant for Basey's emails. Did the district court err in concluding the prior illegal searches of Basey's devices didn't affect the decision to seek or issue the warrant for Basey's emails?

2. **Particularity and Overbreadth.** The Fourth Amendment requires that warrants be sufficiently particular and not overbroad. Under Ninth Circuit law, courts assess whether these requirements are met by using the three-factor *Spilotro* test. Did the district court err in concluding the warrant for Basey's emails was particular and not overbroad despite omitting a *Spilotro* analysis?

3. **Overbroad Execution.** The Fourth Amendment bars overbroad execution of search warrants. To determine if a search was overbroad, courts consider the purpose disclosed in the warrant application and the manner of execution. Here, the warrant application sought emails between Basey and other specific Yahoo accounts, but the FBI searched emails from Basey to

himself and to a me.com account. Did the district court err in concluding the warrant's execution wasn't overboard?

4. **Preservation Requests Implicate the Fourth Amendment.** Several law professors agree that preservation of Basey's emails was a governmental search or seizure. Other jurists and courts agree that digital duplication in general—which is what preservation under 18 U.S.C. §2703(f) is—implicates the Fourth Amendment. Did the district court err in concluding the Fourth Amendment wasn't implicated in the preservation of Basey's emails?

5. **Unreasonable Warrantless Preservations.** Warrantless searches and seizures must be supported by (1) probable cause and (2) an exigency. Police must then diligently seek a warrant or the seizure becomes unreasonable. Here, police lacked probable cause and an exigency to justify the initial warrantless search ~~and seizure of~~ ~~Basey's emails. Nor~~ was there good cause for waiting nine months to get a warrant. Did the district court err

in concluding the warrantless preservation of Basey's emails was reasonable?

6. **Courts can't be Advocates.** Under our adversary system, courts can't raise counterarguments waived by a party in their Opposition. Here, the district court *sua sponte* raised counterarguments the Government waived in its Opposition to Basey's 2255 motion despite Basey's invocation of the waiver rule in his Reply. Did the district court abuse its discretion in denying Basey's motion for reconsideration arguing the court should've enforced the waiver rule instead of becoming the Government's advocate?

I. Standard of Review.

Where, as here, a district court rejects constitutional claims on the merits, a petitioner must make a "substantial showing of a denial of a constitutional right."[2] To make this showing, Basey must show "that 'jurists of reason could disagree with the district court's resolution of his

[2] 28 U.S.C. §2253(c)(2).

constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' "[3] A jurist is "a person versed in the law, as a judge, lawyer, or legal scholar."[4] The ultimate "question is *debatability* of the underlying constitutional claim, not the resolution of the debate."[5] Indeed, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail."[6]

"The COA inquiry...is not coextensive with a merits analysis" and "should be decided withot 'full consideration of the factual or legal bases adduced in support of the claims.' "[7] "The threshold for granting a [COA]

---

[3] *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

[4] Random House Webster's College Dictionary 720 (2001-02 ed.) (defining "jurist"); Black's Law Dictionary 873 (8th ed.) (defining "jurist" as "one who has thorough knowledge of the law; esp., a judge or an eminent legal scholar.").

[5] *Miller-El*, 537 U.S. at 342 (emphasis added).

[6] *Id.* at 338.

[7] *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336).

is 'relatively low.' "[8] "Any doubt regarding whether to grant a COA is resolved in favor of the petitioner...."[9]

When a district court denies a post-judgment motion in a habeas proceeding, "a COA should only issue...if the movant shows that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the [post-judgment] motion and (2) jurists of reason would find it debatable whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right."[10]

II. Issues.

A. Issue one: Did the district court err in concluding the prior illegal searches of Basey's devices didn't affect either the decision to seek or issue the warrant for Basey's emails?

1. Facts.

---

[8] *Sepulveda v. Covello*, 2020 U.S. Dist. LEXIS 12186, *41 (S.D. Cal. Jan. 23, 2020) (quoting *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002)).

[9] *Graves v. Cockrell*, 351 F.3d 143, 150 (9th Cir. 2003).

[10] *U.S. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015) (my alteration); *See Ruelas v. Muniz*, 2016 U.S. Dist. LEXIS 53036, *20 (C.D. Cal. April 19, 2016) (appling *Winkle* to Rule 59(e) motion).

In January 2014, the Alaska State Troopers (AST) and Army Criminal Investigation Division (CID) investigated a posting on Craigslist they believed was a solicitation of minors for sex.[11] Ultimately, this led to a search of Basey's barracks room and seizure of his computer and iPhone (hereinafter "the devices") under a military warrant that was later deemed lacking in probable cause by the district court.[12] Basey was carted off to CID headquarters shortly after the midnight raid on his barracks room where—after being confronted with the illegal search—he admitted that his computer contained child pornography.[13] This confession was later suppressed as poisonous fruits by the district court.[14]

The AST took custody of Basey's devices and performed an illegal digital forensic examination (DFE) which revealed the presence of child pornography and "several emails documenting the defendant's previous posting of a Craigslist advertisement seeking a minor for sexual

---

[11] Dkt. 160 at 7-8.

[12] Dkt. 110 at 36.

[13] Dkt. 160 at 22, 30-39.

[14] *Id.*

purposes."[15] As one CID agent said, "The way we were able to ***move forward*** was what we found on the digital evidence"—i.e., Basey's devices.[16] In July of 2014, the AST and CID contacted the FBI and told them what they found on Basey's devices and then gave them a copy of the DFE disc.[17]

The FBI did not receive information about the initial Craigslist posting that started the investigation until sometime in August 2014—well after the FBI were briefed on and given a copy of the DFE.[18] After extensively searching this disc and briefing the U.S. attorney on everything, the FBI decided to subpoena additional information from Craigslist.[19] They received down-to-minute information from Craigslist on when emails were exchanged regarding postings linked to Basey.[20]

---

[15] Dkt. 160 at 25-26; Dkt. 296-6 (AST Report 5/7/2014).

[16] Dkt. 80 at 102, LL 11-17 (emphasis added).

[17] Dkt. 295 at 5 & nn. 20-22.

[18] Dkt. 295 at 5 & n. 23 (citing Dkt. 261 at 39, LL 6-10).

[19] Dkt. 295 at 6 & nn. 24-27.

[20] Dkt. 296-9 (additional Craigslist information).

This information was used to obtain a warrant in November 2014 for Basey's Yahoo emails,[21] two of which formed the basis of his conviction.[22] The CID postponed seeking a warrant for Basey's Yahoo emails "pending the results of the forensic exams [of Basey's devices] to support [probable cause] for a warrant."[23] The affiant for the Yahoo warrant testified at trial that the additional information she subpoenaed from Craigslist, not the execution of the November 2014 device warrant, led her to seek the Yahoo warrant.[24]

2. Reasonable jurists could disagree with the district court's resolution of this claim.

To decide an independent source claim, courts ask whether (1) "the agents' decision to seek the warrant was prompted by what they had seen during the initial [illegal search or seizure]" or (2) "if the information obtained during the [initial illegal search or seizure] was presented to the magistrate and affected his decision to issue the

---

[21] Dkt. 172-1 (Yahoo Warrant Package).

[22] Dkt. 295 at 18 (citing Dkt. 261 at 88, 98-100).

[23] Dkt. 296-3 at 2.

[24] Dkt. 261 at 78, LL 8-14 (Trial Tr.).

warrant."[25] In regards to the first *Murray* prong, "that subjective inquiry...turns on whether the particular officer would have still sought the warrant absent the unlawfully-obtained information."[26] The court "must assess the totality of the attendant circumstances to ascertain whether "the officer would still have sought the warrant absent the initial illegality."[27]

The district court did not cite to or apply the two-prong inquiry. The first prong starts with identifying the initial illegality. Here that was the multiple searches of Basey's devices via the DFE occurring under the invalid military warrant between January and late August 2014.[28] There is no evidence in the record indicating a second round of searching occurred after the "legal" November 2014 device warrant.[29]

---

[25] *Murray v. U.S.*, 487 U.S. 533, 542)1988) (my alterations).

[26] *U.S. v. Rose*, 802 F.3d 114, 123-24 (1st. Cir. 2015).

[27] *Id.*

[28] *See* facts above.

[29] There is evidence that on 12/18/2014, "SA Goeden reviewed the child pornography images *that have been identified to date* from [Basey's]...Computer." Dkt. 281-3. But this occurred *after* the Yahoo warrant was issued on November 23 and the FBI "identified all the child porn images" *in August 2014.* Dkt. 296-7 at 8.

Thus, the district court's assertion that it was "the *legal search* of these devices [that] led law enforcement to seek a warrant for Defendant's emails,"[30] is speculative and wrong for several reasons:

- it fails to consider the effect of the earlier illegal searches of Basey's devices via the DFE;[31]
- it fails to consider the fact the FBI were contacted but for the earlier illegal DFE searches;[32]
- it fails to consider the fact the CID were holding off on seeking a warrant until the illegal DFE was done;[33] and
- it fails to consider that the Yahoo warrant's affiant said it was the additional information subpoenaed from Craigslist that caused her to seek the warrant.[34]

Regarding that last point, since the Craigslist information was obtained while Basey's emails (and devices) were unlawfully seized for many months without a valid warrant; its "acquisition...does not cure the illegality and does not constitute an independent source of probable

---

30 Dkt. 363 at 7.

31 E.g., Dkt. 296-7 at 8 (noting the FBI searched the DFE of Basey's devices in August 2016).

32 Dkt. 80 at 102, LL 11-17; *id.* at 105, LL 6-12.

33 Dkt. 296-3 at 2.

34 Dkt. 261 at 78, LL 8-14.

cause."[35] Also, "leads gained from illegal activity"—evidence found in the illegal DFE search—"tend[ed] significantly to direct the investigation toward" the additional Craigslist information.[36] Thus, that information is the fruit of the poisonous tree.

Further, the Government and the district court ***cited no cases*** regarding *Murray*'s first prong or why the fruits of the poisonous tree doctrine is inapplicable. Basey's citation to the recent Ninth Circuit case, *Frimmel Mgmt. LLC v. U.S.*, is directly on point showing how one law enforcement agency can taint another law enforcement agency's evidence simply by revealing the results of an illegal search.[37]

The district court fares no better with *Murray*'s second prong which considers whether information obtained during the illegal search or seizure was presented to the magistrate and affected the decision to issue the warrant. As discussed above, the additional Craigslist information was poisonous fruits and obtained during the illegal seizure of Basey's emails (and devices), thus that information must be purged

[35] *U.S. v. Dicesare*, 765 F.2d 890, 899 (9th Cir. 1985).

[36] *U.S. v. Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974).

[37] 897 F.3d 1045 (9th Cir. 2018); Dkt. 296 at 25-26 (discussing *Frimmel*).

from the affidavit under *U.S. v. Bishop*.[38] Instead of purging that information and analyzing what remained, the court said:

> [T]his Court...specifically found that the federal search warrant to search the seized electronic devices was lawful. The legal search of the devices led law enforcement to seek a warrant for Defendant's email. *Accordingly, the issuance of the warrant* for the Defendant's email was not tainted by the prior illegalities."[39]

Again, the court did not apply *Murray*, but it appears that this court mixed what might be considered a first-prong analysis (what led police to seek?) with what might be considered a second-prong analysis (what caused the magistrate to issue?). This is not a model of clarity. Nor is it appropriate to mix the two prongs since they are mutually exclusive inquiries. "A defendant need only win under one of the two prongs."[40] Assuming the November 2014 device warrant "led law enforcement to seek a warrant for Defendant's emails," it does not necessarily follow that there was enough untainted information in the Yahoo affidavit to cause the magistrate to issue the Yahoo warrant. And

---

[38] 264 F.3d 919, 924 (9th Cir. 2001).

[39] Dkt. 363 at 7-8 (emphasis added).

[40] *U.S. Ponzo*, 853 F.3d 558, 573 (1st Cir. 2017).

although the district court previously analyzed probable cause in the November 2014 affidavit for Basey's devices,[41] it doesn't necessarily follow that a redacted Yahoo affidavit is supported by probable cause.[42]

Regardless, the district court failed to make findings under *Murray*, which the Ninth Circuit has repeatedly held is reversible error. *E.g.*, *U.S. v. Harris*, 642 Fed. Appx. 713, 717 (9th Cir. 2016); *U.S. v. Azzara*, 358 Fed. Appx. 802, 805 (9th Cir. 2009); *U.S. v. Hein*, 197 Fed. Appx. 574, 575 (9th Cir. 2006). Reasonable jurists could disagree with the district court's resolution of this issue on this basis alone.

B. Issue two: Did the district court err in concluding the warrant for Basey's emails was particular and not overbroad despite omitting a *Spilotro* analysis?

1. Facts.

The Government's affidavit says it was seeking only the "communications between Basey and the other email accounts" described in the affidavit.[43] The affidavit failed to mention anything

---

[41] Dkt. 363 at 7 n. 49.

[42] Dkt. 296 at 29-32 (discussing differences between the device and Yahoo affidavits).

[43] Dkt. 172-1 at 38, ¶27 (Yahoo Aff.).

about emails from Basey's swingguy23@yahoo.com account to himself or to estherloocrabb@me.com. And despite the relatively narrow language in the affidavit, Attachment B to the Yahoo warrant sought all of Basey's emails in his account for a six-month period to search for evidence of "enticement of a minor to engage in sexual activity for which any person can be charged with a criminal offense."[44] While no specific offense is listed, the warrant appears to track language in 18 U.S.C. §2422(b) which incorporates hundreds—if not thousands—of federal, state, and foreign criminal laws as predicate offenses.[45]

Ultimately, the FBI obtained child pornography in an email from Basey to himself and in an email to estherloocrabb@me.com.

2. Reasonable jurists could disagree with the district court's resolution of this claim.

In the Ninth Circuit, particularity and overbreadth challenges to search warrants are addressed using a three-factor test under *U.S. v. Spilotro*, which asks:

(1) whether there was probable cause to seize particular items in the warrant;

---

[44] *Id.* at 5-6, ¶¶3-4 (Attachment B).

[45] *E.g., United States v. Dhingra*, 371 F.3d 557, 565 (9th Cir. 2004).

(2) whether the warrant sets out objective standards by which executing officers can determine which items to seize; and

(3) whether the government could have described the items with more particularity when the warrant was issued.[46]

Basey cited *Spilotro*, described this inquiry, and proceeded to argue the Yahoo warrant failed each part of the test.[47] The Government waived counterargument to this issue in its Opposition and Basey invoked the waiver rule in his Reply.[48] The district court acted as Government counsel by raising a *sua sponte* counterargument that failed to cite any cases.[49] The court's conclusion that the Yahoo warrant was particular and not overbroad is wrong for four reasons.

First, *In re Search of Google Email Accounts identified in Attachment A ("Google Emails")*, is directly on point.[50] The warrant there sought the same broad category of material related to enticement

---

46 800 F.2d 959, 963 (9th Cir. 1986).

47 Dkt. 296 at 35-40.

48 Dkt. 334-4 at 58.

49 Dkt. 363 at 8-9.

50 92 F. Supp. 3d 944 (D. Alaska 2015).

of a minor.[51] And like *Google Emails*, the FBI here also had information in its possession from Craigslist[52] it could have used to narrow the date range down to specific email transactions.[53]

Second, the court elides any discussion of the argument Basey raises regarding the enticement statute incorporating thousands of predicate state, federal, and foreign offenses.[54] This alone made the warrant a general one.

Third, the court ignores Basey's argument[55] that the warrant's affidavit established probable cause to search *only* a few email transactions "***between*** Basey and the other email accounts"[56] described in the affidavit. Thus, there was not probable cause to search emails

---

[51] *Compare id.* At 948-49 *with* Dkt. 172-1 at 5-6, ₱3-4.

[52] Dkt. 296-9 (additional Craigslist information).

[53] *Google Emails*, 92 F. Supp. 3d at 952.

[54] Dkt. 296 at 37-40.

[55] *Id.* at 36-37.

[56] Dkt. 172-1 at 38, ₱27.

from Basey to himself[57] or to estherloocrabb@me.com[58]—the emails he was convicted on.

Fourth, contrary to the court's belief that Basey "provided no authority that indicates that the parameters of the search warrant ***application*** here were overbroad or lacked particularity;"[59] Basey cited over 20 cases[60] arguing ***the warrant itself***—not the application—lacked particularity and was overbroad.[61]

Reasonable jurists would at least analyze *the warrant* using *Spilotro* instead of conclusorily analyzing *the application*, which *Groh* says is irrelevant to assessing particularity of the warrant itself.

---

[57] Dkt. 261 at 98-100 (trial evidence of email from Basey to himself).

[58] *Id.* at 88 (evidence of email to estherloocrabb@me.com).

[59] Dkt. 363 at 9 (emphasis added).

[60] Dkt. 296 at 33-42.

[61] *See Groh v. Ramirez*, 540 U.S. 551, 557 (2004) ("The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.")

C. Issue three: Did the district court err in concluding the Yahoo warrant's execution wasn't overbroad?

1. Facts.

There is nothing in the record indicating whether the person who executed the Yahoo search warrant had a copy of the warrant, its attachments, or the affidavit in their possession to guide their discretion.[62] Nor does the record reveal a search methodology. Basey sought discovery on these things,[63] but was denied.[64]

2. Reasonable jurists could disagree with the district court's resolution of this issue.

Again, without citing any caselaw, the district court said the Yahoo warrant's execution was not overbroad because (1) there wasn't "any evidence that the search warrant was not consulted during its execution"[65] and (2) the emails used at trial "were precisely the type of emails requested in the warrant."[66] This is wrong for four reasons.

---

62 Dkt. 296 at 42-43.

63 Dkt. 299-1 at 8, ¶¶17-18; Dkt. 299-2 at 8, ¶1; Dkt. 343 at 13.

64 Dkt. 306 (order re discovery).

65 Dkt. 363 at 9.

66 *Id.*

First, to the extent the court faults Basey for his lack of evidence to support this claim, Basey tried getting discovery on this issue,[67] but the Court denied it saying it wouldn't help establish his claim.[68] Bit of a Catch-22.

Second, it was the Government's duty under *Millender v. County of L.A.*, to establish the warrant was consulted and all of its supporting documents were "physically attached to the warrant or accompanied the warrant on the search."[69] Failure to do so means that the court should not have considered the warrant's effect.

Third, the emails produced at trial were not obtained under the "purpose disclosed in the application for [the] warrant's issuance."[70] The purpose in the application was this: get emails "*between* Basey and the other email accounts" mentioned in the affidavit.[71] Emails from Basey to himself and to estherloocrabb@me.com are not within that purpose.

---

[67] Dkt. 299-1 at 8, ¶¶17-18; Dkt. 299-2 at 8; Dkt. 343 at 13.

[68] Dkt. 306.

[69] 620 F.3d 1016, 1026 (9th Cir. 2010).

[70] *U.S. v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978).

[71] Dkt. 172-1 at 38, ¶27.

And fourth, there appears to have been no search protocol used to avoid looking at emails not within the warrant application's purpose, e.g., date and username filters.[72] This violates the spirit of *U.S. Comprehensive Drug Testing*, 621 F.3d 1162, 1177 (9th Cir. 2010) (en banc).

D. Issue four: Did the district court err in concluding the Fourth Amendment wasn't implicated in the preservation of Basey's emails?

1. Facts.

Basey's tainted confession at CID headquarters on January 18, 2014,[73] led police to assume he used his Yahoo account "to view/distribute child pornography."[74] Thus, Basey's swingguy23@yahoo.com account was preserved under 18 U.S.C. §2703(f) on February 7, 2014, by the CID.[75] On January 25, 2014, Basey deleted all emails in his Yahoo account and then deleted the account itself.[76]

---

[72] Dkt. 296 at 43.

[73] Dkt. 160 at 22, 30-39.

[74] Dkt. 296-2.

[75] *Id.*

[76] Dkt. 295 at 3; Dkt. 296-48 (Basey Decl.).

Deleted Yahoo emails are normally removed from Yahoo's servers within 40 days,[77] but preservation requests issued in the interim will preserve deleted emails.[78] The CID postponed seeking a warrant for Basey's emails "pending the results of the forensic exams [of Basey's devices] to support [probable cause] for a warrant."[79] The FBI got a warrant for Basey's preserved emails on November 20, 2014—nine months after the initial preservation.[80]

2. Reasonable jurists could disagree with the district court's resolution of this issue.

The district court said: "Defendant argues that by preserving the emails, Yahoo became a government agent, and by exceeding the 180 day requirement Yahoo, as a government agent, engaged in an unreasonable search and seizure in violation of the Fourth Amendment....[T]his premise is unsupported by caselaw, as explained

---

[77] Dkt. 296-45; Dkt. 296-4.

[78] Dkt. 296-10.

[79] Dkt. 296-3 at 2.

[80] Dkt. 172-1 at 1. This was approximately eight months after Basey's emails would have been deleted completely after the 40-day removal period.

in the government's briefing."[81] To the extent the Court agrees with the Government's view that 2703(f) preservations are not Fourth Amendment searches or seizures, several jurists disagree:

- Orin S. Kerr, professor of law at Berkeley and former-DOJ attorney (originator of the idea that 2703(f) preservation is a government seizure);[82]
- Brett Kauffman, professor of law at NYU (contributor to Basey's amicus brief in his direct appeal which argued 2703(f) preservation was both a search and seizure);[83]
- Jennifer S. Grannick, renowned privacy advocate (same);[84]
- Armin Tadayon, adjunct professor of law at George Mason (wrote a 44-page law review on 2703(f) preservation largely reiterating Basey's arguments and citing Basey's case with approval).[85]

---

[81] Dkt. 363 at 11 (citing Dkt. 316 at 22-27).

[82] Kerr, *Fourth Amendment Seizures of Computer Data*, 119 Yale L.J. 700, 723-24 (2010) ("[A] government request to an ISP to make a copy of a suspect's remotely stored files and to hold it while the government obtains a warrant would also constitute a seizure."); Kerr, *The Fourth Amendment and Email Preservation Letters*, Washington Post (Oct. 28, 2016) *available at* https://wapo.st/2U6hiKj.

[83] Brief of Amici Curiae ACLU, U.S. v. Basey, No. 18-30121 (9th Cir. Feb. 19, 2019) ECF No. 31.

[84] *Id.*

[85] Tadayon, *Preservation Requests and the Fourth Amendment*, 44 Sea. U.L.R., 105, 147 & n. 226 (Fall, 2020) ("The warrantless seizure of account information pursuant to a §2703(f) letter is unreasonable.").

With regard to the issue of digital duplications in general—which is what 2703(f) is—jurists agree with Basey that the Fourth Amendment applies.[86] Courts have also said digital "duplication does interfere with the owner's control over the information, which could be understood as an interference with the owner's privacy interests in its contents."[87] Justice Gorsuch rhetorically asked in his dissent in *U.S. v.*

---

[86] *E.g.*, Note, *Digital Duplication and the Fourth Amendment*, 129 Harv. L. Rev. 1046 (2016); Taticchi, *Redefining Possessory Interests: Perfect Copies of Information as Fourth Amendment Seizures*, 78 Geo. Wash. L. Rev. 476, 496 (2010) ("The Supreme Court should hold that perfectly duplicating information seizes the information because it deprives the information's owner of her right to exclude others from it."); Maureen Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 999 n. 236 (2016) ("The idea that data is an effect is highly contested position...."); Paul Ohm, *The Olmsteadian Seizure Clause: The Fourth Amendment and the Seizure of Intangible Property (Abridged)*, 2008 Stan. Tech. L. Rev. 1, ¶34 (2008) ("in [*Arizona v.*] *Hicks*, the Court was wrong about the seizure, and the cases which follow its dictum have incorrectly concluded the Seizure Clause does not apply to copies of intangible data."); Ohm, *The Fourth Amendment Right to Delete*, 119 Harv. L. Rev. F. 10 (2005) ("Modern-day police...have tools that duplicate stored records...all from a distance and without need for physical entry....[I]t is unclear whether the Fourth Amendment's restrictions apply to those ~~technologies: Are the~~ acts ~~of~~ duplication and collection themselves seizure?"); Butler, *Get a Warrant: The Supreme Court's New Course for Digital Privacy Rights after* Riley v. California, 10 Duke J. Const. L. & Pub. Pol'y 83, 112 (2014).

[87] *E.g.*, *U.S. v. Loera*, 333 F. Supp. 3d 172, 185-86 (E.D.N.Y. 2018).

Carpenter: "Can the government demand a copy of all your emails...without implicating your Fourth Amendment rights?"[88]

Given that several jurists have already explicitly agreed with Basey on this threshold Fourth Amendment issue, there isn't any doubt about whether a COA should issue. If any doubt exists, widespread agreeance and interest in the larger issue of digital duplication in general resolves any hesitancy about granting a COA. "[T]he question presented 'deserves encouragement to proceed further,' since appellate review could provide important guidance to federal...courts...."[89]

---

[88] 138 S. Ct. 2206, 2262 (2018) (Gorsuch, J., dissenting). His dissent implies they can't.

[89] *Laboy v. Demskie*, 947 F. Supp 733, 745 (S.D.N.Y. 1996); *U.S. v. Mitchell*, 216 F.3d 1126, 1130 (D.C. Cir. 2000) (granting COA to "more clearly define the contours of the issue in this circuit").

E. Issue five: Did the district court err in concluding the warrantless preservation of Basey's emails was reasonable?[90]

1. Reasonable jurists could disagree with the district court's resolution of this issue.

The Government's Opposition to Basey's 2255 motion only argued that §2703(f) is a *reasonable statute on the whole*.[91] Basey noted the Government waived counterargument regarding whether the *case-specific circumstances* made the preservation of his emails reasonable.[92] Ignoring this waiver, the court *sua sponte* argued/ruled that the preservation was reasonable.[93] The district court is wrong.

At the outset, the jurists listed above already agree that the case-specific circumstances here made the preservation unreasonable:

- Kerr said that Basey's attorneys' failure to raise this issue was a "very serious problem,"[94] and cited the same case Basey heavily

---

90 The facts supporting this issue are the same as the previous issue.

91 Dkt. 316 at 28-29.

92 Dkt. 334-4 at 55.

93 Dkt. 363 at 11-14.

94 Dkt. 296-48 (Nov. 5, 2018, email from Kerr).

relies on for the proposition that preservation of email may become unreasonable over time.[95]

- Kauffman and Grannick said: "The Court should hold that the government's protracted, warrantless seizure of Mr. Basey's private data violated the Fourth Amendment."[96]

- Tadayon cites Basey's case,[97] with approval, in a section of his law review article titled: "Preservation of Account Information Violates the Fourth Amendment."[98]

The initial preservation wasn't reasonable.

The district court fails to grasp the exigent circumstances exception. This exception "must be viewed from the totality of circumstances known...***at the time of the warrantless intrusion.***"[99] The court reasons that the February 2014 preservation was supported by probable cause *gathered over the course of the preservation* used to support the November 2014 warrant for Basey's devices.[100] Yet the only

[95] *See* Kerr's Washington Post article *supra* (citing *U.S. v. Mitchell*, 565 F.3d 137 (11th Cir. 2009)).

[96] *See* ACLU Brief *supra* at 3 (page 12 of 39).

[97] Tadayon, *supra* at 147 & n. 226.

[98] *Id.* at 146.

[99] *U.S. Furrow*, 229 F.3d 815, 812 (9th Cir. 2000).

[100] Dkt. 363 at 12-13 ('[T]he same analysis [for the November 2014 device warrant] applies to establish probable cause for the preservation letter.") (my alteration).

information investigators had in February 2014 was the initial Craigslist postings and Basey's tainted confession (which can't be considered). Thus, probable cause was lacking in February 2014 to preserve Basey's emails.[101]

Next, the court cites "the very nature of emails, which can be easily deleted," as the exigency.[102] But the court overlooks the obvious: the risk of deletion occurred but for the investigators' decision not to preserve or get a warrant for Basey's Yahoo account prior to arresting him. The exigent circumstances exception applies only "when the conduct of the police preceding the exigency is reasonable in the same sense."[103] The Government's conduct was not reasonable because they had enough time to get a telephonic military warrant for Basey's devices.[104] Why not spend a few extra minutes to preserve or get a

---

[101] *See* Tadayon, *supra* at 148 (arguing that "investigators [should] be aware of facts establishing probable cause...at the time the preservation request was made.").

[102] Dkt. 363 at 13.

[103] *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011).

[104] Dkt. 45-1 (military warrant).

warrant for the emails?[105] As this Court has repeatedly held, "Exigent circumstances alone, however, are insufficient as the government must also show that a warrant could not have been obtained in time."[106]

Finally, if there was an exigency, why wait from January 18 (when Basey was arrested/tipped off) until February 7 to preserve the emails? This delay is but one factor in the totality of circumstances overlooked by the court.

The continued preservation wasn't reasonable.

Without citing any authority, the district court summarily concluded that the nine-month delay in seeking a warrant didn't "infringe on any constitutional right."[107] The jurists listed above beg to differ. Several courts addressing lesser delays in obtaining warrants—which Basey cited in his filings[108]—would also beg to differ.

---

[105] *See Missouri v. McNeely*, 569 U.S. 141, 172-73 (2013) (noting that judges can "issue warrants in as little as five minutes" nowadays).

[106] *U.S. v. Good*, 780 F.2d 773, 775 (9th Cir. 1986); *U.S. v. Lindsey*, 877 F.2d 777, 780 (9th Cir. 1989).

[107] Dkt. 363 at 13.

[108] Dkt. 296 at 58 n. 244 (citing *U.S. v. Mitchell*, 565 F.3d 1347, 1353 (11th Cir. 2009) (21-day delay); *U.S. v. Riccio*, 2011 U.S. Dist. LEXIS 108931, *6 (S.D. Cal. Sept. 22, 2011) (75-day delay); and *U.S. v. Escobar*,

Moreover, this is another issue that "appellate review could provide important guidance" to courts.[109] The Court denied this motion.[110]

F. Issue six: Did the district court abuse its discretion in denying Basey's motion for reconsideration arguing the court should've enforced the waiver rule instead of becoming the Government's advocate?

1. Facts.

Basey's Memorandum of Law in Support of his §2255 Motion argued the Yahoo warrant was overbroad and lacked particularity[111] and that its execution was overbroad.[112] The Government didn't counterargue these issues in its Opposition. Basey's Reply invoked the waiver rule: "The Government does not contest the Yahoo warrant was overbroad and lacked particularity. Nor does it contest the execution of the warrant was overbroad. Thus it [h]as waived counter argument to

---

2016 U.S. Dist. LEXIS 88371, *13-15 (D. Minn. July 7, 2016) (8-month delay)).

[109] *Laboy*, 947 F. Supp. at 745; *Mitchell*, 216 F.3d at 1130.

[110] Dkt. 381.

[111] Dkt. 296 at 33-42.

[112] *Id.* at 42-44.

these issues."[113] The court's amended order *sua sponte* counterargued these issues and ignored Basey's invocation of the waiver rule.[114] Basey filed a motion for reconsideration saying the court should strike its *sua sponte* argument and uphold the waiver.[115]

2. Reasonable jurists could disagree with the district court's resolution of this issue.

First, Basey's quote from *Scott v. Collins* that "[a] district court's ability to dismiss a habeas petition *sua sponte* as an initial matter...does not amount to a power to cure *sua sponte* a party's waiver [,]"[116] was not abrogated by *Day v. McDonough*.[117]

Second, the court ignores Basey's arguments distinguishing jurisdictional defenses (like timeliness), which can be raised *sua sponte*,

---

[113] Dkt. 334-4 at 58.

[114] Dkt. 363 at 8-9.

[115] Dkt. 365.

[116] 286 F.3d 423, 430 (6th Cir. 2002).

[117] 547 U.S. 198, 202 (2006) (court cannot override State's deliberate waiver).

from nonjurisdictional defenses (like responding to substantive issues), which cannot be raised *sua sponte* once waived.[118]

Third, the court's conclusion that waiver is inapplicable because the particularity and overbreadth issues " 'have been raised and briefed' "[119] is flawed because Basey was the only party to brief those issues, thus the waiver rule applies.[120]

Fourth, the court faults Basey for drawing attention to the Government's waiver by using the word "waiver."[121] Yet if Basey had not explicitly invoked the waiver rule the court would likely say Basey waived the waiver by not using the word "waiver."

Fifth, the court ignores *Herbst v. Cook*'s requirement of affording petitioners notice and opportunity to respond to *sua-sponte* dismissals.[122]

---

[118] *See* Basey's arguments in Dkt. 373-1 at 3-4.

[119] Dkt. 381 at 4.

[120] *See* Basey's arguments in Dkt. 373 at 4 (collecting waiver cases).

[121] Dkt. 381 at 4.

[122] 260 F.3d 1039, 1043-44 (9th Cir. 2001).

Sixth, the court found the Government did address the particularity and overbreadth issues because it addressed them four years ago in pretrial briefing.[123] Yet that prior briefing wasn't referenced in its answer, nor did it have a collateral estoppel effect, nor did it address overbroad *execution* of the Yahoo warrant.[124]

Finally, for reasons stated above in issues II and III, the court's circular logic regarding overbreadth and particularity ignores controlling law requiring analysis of both the warrant affidavit/application *and* the warrant itself. Indeed, the court cites no law in that paragraph.[125]

Since a violation of party-presentation principles and *Herbst* involve one's constitutional due process rights and Basey's underlying claims involve a denial of constitutional rights, the requirements of *U.S. v. Winkles* are satisfied.[126]

---

123 Dkt. 381 at 4-5.

124 *See* Basey's arguments in Dkt. 373-1 at 4-5.

125 Dkt. 381 at 5.

126 795 F.3d 1134, 1143 (9th Cir. 2015).

Conclusion

A COA should be granted on each of the issues.

Respectfully submitted this 23rd day of July, 2021.

Kaleb Lee Basey

Kaleb Lee Basey
Appellant in Pro Se

CERTIFICATE OF SERVICE

I, Kaleb Basey, certify that on July 23, 2021, I caused to be mailed on the following:

1 original and 3 copies of the Motion for a Certificate of Appealability and Motion for Suspension of Local Rule (FRAP 2) on the Ninth Circuit Clerk of Court at the following address:

Molly Dwyer, Clerk of Court, Office of the Clerk,
United States Court of Appeals Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

1 copy of the Motion for a Certificate of Appealability and Motion for Suspension of Local Rule (FRAP 2) on government counsel at the following address:

G. Michael Ebell, Federal Bldg. & U.S. Courthouse
222 W. 7th Ave. #9, Room 253
Anchorage, AK 99513-7567

Kaleb Lee Basey
Signature of Person Filing
Kaleb Lee Basey, Appellant in Pro Se

CERTIFICATION OF RULE 32 OF COMPLIANCE

I, Kaleb Lee Basey, hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Motion for a Certificate of Appealability is proportionally spaced, has a typeface of 14 points, and contains 5,600 words.

Appendix C
Motion for Suspension of Local Rule
U.S. v. Basey, No. 21-35554
(9th Cir. July 27, 2021) ECF No. 4

KALEB LEE BASEY
17753-006 Cardinal Unit
Federal Medical Center Lexington
P.O. Box 14500
Lexington, KY 40512-4500
Appellant in Pro Se

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. KALEB LEE BASEY, Appellant.	No. 21-35554 D.C. No. 4:14-cr-00028-RRB MOTION FOR SUSPENSION OF LOCAL RULE (FRAP 2)

Appellant in pro se, Kaleb Basey, moves this Court to suspend 9th Cir. R. 25-2 so that Basey can file the accompanying Motion for Certificate of Appealability (COA) directly with Judge Kleinfeld so that he may rule on it. There is good cause to suspend this local rule for the following reasons.

I. Local rule 25-2 conflicts with federal law and rules allowing COA requests to be filed directly with a single circuit judge.

Under Federal Rule of Appellate Procedure (FRAP) Rule 2, "[O]n...a party's motion, a court of appeals may...for good

cause...suspend any provision of the[] [FRAP] in a particular case...." (my alterations). Ninth Circuit local rule 25-2 provides that "parties shall not submit filings directly to any particular judge." That rule, however, does not bar a party from requesting that a filing be forwarded to a particular judge. Regardless, local rule 25-2 appears to conflict with the FRAP and decisional law insofar as it bars habeas petitioners from requesting a COA directly from a single judge.

Start with FRAP 47(a) which requires that local rules promulgated by the Circuits to "be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §2072," which includes the FRAP.[1] One inconsistent Rule with local rule 25-2 is FRAP 22(b)(1) which provides that "[i]f the district judge has denied the [COA], the applicant *may request a circuit judge to issue it.*" (emphasis added). This language leaves it to the discretion of the applicant whether to seek a COA directly from the Circuit judge or, alternatively, under FRAP 22(b)(2) to submit a "request *addressed to the court*"

[1] *See* 28 U.S.C. §2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure...for cases in...courts of appeals.").

whereby the Circuit can delegate consideration of the request to "a circuit judge or judges, *as the court prescribes.*"[2]

Another inconsistency arises with FRAP 27(c) which provides that "[a] circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding." Further, FRAP 25(a)(3) says "[i]f a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge [and] the judge must note the filing date on the motion and give it to the clerk." (my alteration).

The Ninth Circuit's local rules on handling COA requests are not inapposite. Local Rule 22-1(d) leaves it to the COA applicant's discretion to file his request directly to the court as a whole: "appellant *may* file a request for a COA *in the court of appeals.*" (my emphasis). This jibes with the discretionary choice of where to direct the COA request mentioned above in FRAP 22(b)(1) and (2).

This is all confirmed by decisional law holding that COA requests may be directed to and considered by particular judges. In *Hohn v. United States*, the High Court observed that FRAP "Rule 22(b) by no

[2] FRAP 22(b)(2) (emphasis added).

means prohibits *application to an individual judge*, nor could it, given the language of the statute."[3] The Ninth Circuit is in accord.[4]

And while the Ninth Circuit has a General Order that explains how COAs are generally decided in two-judge panels (presumably when a COA applicant chooses to address his COA request to the court under FRAP 22(b)(2));[5] FRAP 47(a) states that any binding rules of practice "must be in a local rule rather than an internal operating procedure or standing order." The same can be said for General Order 12.8 which prevents single judges from receiving and acting on COA requests from prisoners.[6]

---

[3] 524 U.S. 236, 244 (1998) (emphasis added).

[4] *Salgado v. Garcia*, 384 F.3d 769, 774 (9th Cir. 2014) (" '[A] single judge is authorized to grant a [COA].' ") (quoting 9th Cir. R. 27-1 advisory comm. n. 2).

[5] *See* 9th Cir. Gen. Order 6.2(b) ("The Court shall appoint 2 judges to serve as the certificate of appealability ('COA') (panel.").

[6] *See* 9th Cir. Gen. Order 12.8 ("Mail addressed by a prisoner to a member of the Court shall be opened by the clerk who shall act on any procedural matter as appropriate. All substantive matters shall be forwarded to the Court.").

CONCLUSION

Since 9th Cir. Rule 25-2 is inconsistent with federal law and the FRAP insofar as it forbids COA requests from being sent to particular individual judges, this Court should allow Basey to submit the accompanying Motion for COA directly to Judge Kleinfeld so that he may decide the motion if he so chooses under FRAP 25(a)(3). Alternatively, for the above-stated reasons, the accompanying Motion for a COA should be forwarded to Judge Kleinfeld. If this motion to suspend local rule 25-2 is denied, then the Court should at least accept the accompanying Motion for a COA and consider it under its usual method under 9th Cir. R. 22-1(d).

Respectfully submitted this 23rd day of July, 2021.

Kaleb Lee Basey

Kaleb Lee Basey
Appellant in Pro Se

Appendix D
Order
U.S. v. Basey, No. 21-35554
(9th Cir. Jan. 18, 2022) ECF No. 7

FILED

JAN 18 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KALEB L. BASEY, Defendant-Appellant.	No. 21-35554 D.C. Nos. 4:20-cv-00015-RRB 4:14-cr-00028-RRB-1 District of Alaska, Fairbanks ORDER

Before: PAEZ and HURWITZ, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2255 motion and subsequent Federal Rule of Civil Procedure 59(e) motion. The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015).

Any pending motions are denied as moot.

DENIED.

Appendix E
Petition for a Writ of Mandamus
Basey v. U.S.D.C., No. 22-70117
(9th Cir. June 13, 2022) ECF No. 1-3

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22-70116

In re Kaleb Basey,
Petitioner,

U.S. District Court for the District of Alaska,
U.S. Court of Appeals for the Ninth Circuit,
Respondents.

PETITION FOR A WRIT OF MANDAMUS OR ADVISORY OR SUPERVISORY MANDAMUS (Fed. R. App. P. 21)

Kaleb Lee Basey
17753-006 Cardinal Unit
Federal Medical Center Lexington
P.O. Box 14500
Lexington, KY 40512-4500
Petitioner in Pro Se

Table of Contents

Table of Authorities

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Statutes **Page(s)**

Rules **Page(s)**

Rules **Page(s)**

Other **Page(s)**

I. Relief sought.

1.) A writ of mandamus directing the District of Alaska to consider whether "reasonable jurists would find the district court's assessment of [Basey's] constitutional claims debatable," in accordance with *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and either issue or deny a certificate of appealability ("COA") to Basey;

2.) a writ of mandamus directing the Clerk of the Ninth Circuit to forward the accompanying Motion for a COA[1] to Judge Andrew Kleinfeld; or

3.) advisory or supervisory mandamus relief regarding 1) and 2).

II. Issues presented.

This petition presents two clusters of related issues:

1. Is a district court's denial of a COA insufficient where it fails to consider or even reference the "debatability" prong of *Slack v. McDaniel*? If so, is mandamus the proper remedy to cure the district court's deficiency?

2. Does a habeas petitioner have the right to pick a specific circuit judge to decide his request for a COA under Federal Rule of Appellate Procedure ("FRAP") 22(b)(1)? If so, should a writ of mandamus be issued to retroactively honor a

[1] Appx. A. "Appx." refers to items in the Appendix at the back of this Petition.

COA-requester's choice of a specific judge where the choice was initially ignored by the clerk or foreclosed by local circuit rules?

III. Facts necessary to understand the issues presented.

Basey is serving a 180-month sentence for his federal convictions on one count of transporting and one count of distributing child pornography. Dkt. 257 at 1.[2] His projected release date is September 29, 2027.

Basey timely filed a §2255 motion challenging his conviction. Dkt. 294 (2255 Mot.). The District Court denied the motion on the merits and denied him a COA in full by saying this: "Finally, because Defendant has failed to make a substantial showing of the denial of a constitutional right, and reasonable jurists could not find otherwise, the Court declines to grant a [COA] pursuant to 28 U.S.C. §2253(c)." *U.S. v. Basey*, 2021 U.S. Dist. LEXIS 70988, *15 (D. Alaska April 13, 2021) (my alteration).

Basey timely appealed and requested a COA from Circuit Judge Andrew Kleinfeld. Mot. for COA, *U.S. v. Basey,* No. 21-35554 (9th Cir.

[2] "Dkt." refers to items on the docket in U.S. v. Basey, No. 4:14-cr-00028-RRB (D. Alaska).

July, 27, 2021) ECF No. 3.[3] In bold letters at the top of page one of his request for a COA, Basey typed, "To: Circuit Judge Andrew Kleinfeld." *Id.* at 1. He concurrently filed a motion arguing that this Circuit's local rules should be relaxed to ensure Judge Kleinfeld received his request. Mot. for Suspension of Local Rule, *U.S. v. Basey*, No. 21-35554 (9th Cir. July 27, 2021) ECF No. 4.[4]

Ultimately, Judges Paez and Hurwitz denied Basey's request for a COA and deemed the concurrently-filed motion moot. Order, *U.S. v. Basey*, No. 21-35554 (9th Cir. Jan. 18, 2022) ECF No. 7.[5] Despite the fact the district court ruled on the merits of Basey's claims—i.e., not on procedural grounds—the two-judge panel's boilerplate denial said this:

> The request for a [COA]...is denied because the appellant has not shown "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct *in its procedural ruling*." [*Id.* (quoting *Slack*, 529 U.S. at 484) (emphasis added).]

---

[3] Appx. A.

[4] Appx. B.

[5] Appx. C.

Basey petitioned for a rehearing and this too was denied, the case ordered closed, and "[n]o further filings w[ould] be entertained...." Order Denying Pet. for Rhrg., *U.S. v. Basey*, No. 21-35554 (9th Cir. Jan. 31, 2022) ECF No. 9, *available at*, 2022 U.S. App. LEXIS 2751.

Basey then sought review by the Supreme Court and was rejected. *Basey v. U.S*, No. 21-7274 (cert. pet. filed on 2/12/22 and denied on 3/28/22). Undeterred, he filed a motion to recall the mandate in the now-closed COA proceeding arguing that he was denied his right to have his request for a COA decided by a circuit judge of his choice. *U.S. v. Basey*, No. 21-35554 (9th Cir. April 18, 2022) ECF No. 12.[6] This filing was deemed deficient since the case was closed.

IV. Reasons why a writ should issue to the District of Alaska.

A. This Court has jurisdiction to grant the requested relief.

This Court has authority under FRAP 21 and the All Writs Act (28 U.S.C. §1651(a)) to grant writs of mandamus. Mandamus jurisdiction lies in this Court " 'where the underlying proceeding is one actually or potentially within [its] appellate jurisdiction.' " *In re Arunchalam*, 663

[6] Appx. D.

Fed. Appx. 237, 239 (3d Cir. 2016) (quoting *New York v. U.S. Metals Ref. Co.*, 771 F.2d 796, 801 (3d Cir. 1985)). Basey seeks a writ of mandamus to force the district court to conduct a proper COA analysis; if a COA is granted, then this Court will have appellate jurisdiction under 28 U.S.C. §2253(c)(1)(B). Thus, this Court has jurisdiction to compel the district court "to exercise its authority when it [has a] duty to do so." *Wills v. U.S.*, 389 U.S. 90, 95 (1967) (my alteration).

B. The *Bauman* factors governing the issuance of writs of mandamus weigh in favor of granting a writ.

"The writ of mandamus is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.' " *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). "[O]nly exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion will justify the invocation of this...remedy." *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004). "The petitioner bears the burden of showing 'its right to issuance of the writ is "clear and indisputable." ' " *In re Van Dusen*, 654 F.3d at 840-41 (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)).

In deciding whether to grant mandamus, courts consider five factors:

1) whether the petitioner has other adequate means, such as a direct appeal, to attain the relief he or she desires;

2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal;

3) whether the district court's order is clearly erroneous as a matter of law;

4) whether the district court's order makes an "oft-repeated error," or "manifests a persistent disregard of the federal rules"; and

5) whether the district court's order raises new and important problems, or legal issues of first impression.[7]

"The third factor, clear error as a matter of law is a necessary condition for granting a writ of mandamus." *In re Van Dusen*, 654 F.3d at 841. The other factors, while helpful, rarely provide "bright-line distinctions." *Id.* The factors should not be mechanically applied. *Id.* "[A]ll five factors need not be satisfied at once" to grant mandamus. *In re Henson*, 869 F.3d 1052, 1062 (9th Cir. 2017).

[7] *Bauman v. U.S. Dist. Court*, 554 F.2d 650, 654-55 (9th Cir. 1977).

1. Clear error.

The clear-error factor must be reviewed first "because the absence of this factor will defeat a petition for mandamus." *In re Van Dusen*, 654 F.3d at 841. This is a highly deferential standard of review. *Id.* This Court must have a "definitive and firm conviction that the district court misinterpreted the law...or committed a clear abuse of discretion." *In re Perez*, 749 F.3d 849, 855 (9th Cir. 2014).

The district court judge had a clear duty to grant or deny a COA in Basey's §2255 proceeding. See 28 U.S.C. §2253(c)(1)(B); FRAP 22(b)(1); Rules Governing Section 2255 Proceedings R. 11(a). In making this ruling, the court must indicate it made the requisite considerations set forth in *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000):

> To obtain a COA under §2253(c), a habeas petitioner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, 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 deserve encouragement to proceed further." *Barefoot*, supra, at 893, and n.4....[(emphasis added)].

This standard has been repeatedly affirmed by the High Court. *E.g., Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Court, however,

has stressed the ultimate "question is *debatability* of the underlying constitutional claim, not the resolution of the debate." *Id.* at 342 (emphasis added).

Here, the district court did not "engage in a reasoned assessment of each claim presented by the petitioner, as required by the Supreme Court in *Slack v. McDaniel*[.]" *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001); *Cf. Portfield v. Bell*, 258 F.3d 484, 486 (6th Cir. 2001) ("[T]he court did not provide us with any analysis to indicate that it had engaged in the *two-pronged inquiry* set forth in *Slack*[.]") (emphasis added). Without citing any caselaw, the district court said this: "[B]ecause Defendant has failed to make a substantial showing of the denial of a constitutional right, *and reasonable jurists could not find otherwise*, the Court declines to grant a [COA]...." *Basey*, 2021 U.S. Dist. LEXIS 70988 at *15 (emphasis added). Several things are wrong with this.

While "judges are presumed to know the law and to apply it in making their decisions," *Walton v. Arizona*, 497 U.S. 639, 653 (1990), this presumption is rebuttable when "some indication in the record suggests otherwise [.]" *U.S. v. Lymon*, 905 F.3d 1149, 1155 (10th Cir.

2018); *Burrell v. Bd. of Trustees of Ga. Military Coll.*, 125 F.3d 1390, 1395 (11th Cir. 1997) ("only if no reasonable construction of what the district court wrote can support a lawful judgment, will we find error."). Here, there is information in the record in addition to the judge's one-sentence COA denial indicating it did not properly consider and apply *Slack's* debatability prong.

First, the first part of the court's COA ruling—"because Defendant has failed to make a substantial showing of the denial of a constitutional right"—is pure conclusory, tautological *ipse dixit*. *See* Black's Law Dictionary (10th ed. 2014) (defining "conclusory" as "[e]xpressing a factual inference without stating the underlying fact on which the inference is based"); Oxford English Dictionary (2d ed. 1989) (defining "tautology" as a term "[a]pplied to the repetition of a statement as its own reason"); Black's Law Dictionary (defining "ipse dixit" as Latin for "he himself said it" and "[s]omething asserted but not proved"). The whole point of *Slack* and its progeny was to provide courts a workable standard to grant or deny a COA beyond parroting the statutory language of §2253.

Second, the *Slack* opinion phrases the relevant inquiry with the disjunctive "or" as in: "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable *or* wrong." 529 U.S. at 484 (emphasis added). Here, the court used the conjunctive "and." *See* Antonin Scalia & Bryan A. Garner, Reading Law 116 (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives."). But *Slack* doesn't require that reasonable jurists be able to find the court's resolution of the claims to be wrong *and* also be able to debate the resolution of the claims. Rather, *Slack* requires that jurists be able to *either* find the court's resolution on the claims to be wrong *or* debate the resolution of the claims. Which brings us to the next point.

Third, the final part of that sentence—"and reasonable jurists could not find otherwise"—addresses only one aspect of the *Slack* standard: wrongness of the court's resolution of the constitutional claims. The district court omitted any discussion of the potential debatability of the resolution of Basey's claims by reasonable jurists. This omission is important because debatability is the key factor. *Miller-El*, 537 U.S. at 342. Indeed, the Supreme Court has said, "a claim

can be debatable even though every jurist might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail." *Id.*

Fourth, we cannot assume the court considered or addressed the issue of the debatability of the resolution of Basey's claims by its use of the phrase, "Defendant has failed to make a substantial showing of the denial of a constitutional right[.]" In a series of about 10 habeas cases in 2021, the district judge said this: "For the reasons set forth in this Order, [petitioner] has not made a substantial showing of a constitutional right, *or* that jurists of reason could disagree with the district court's resolution, *or* that he deserves encouragement to proceed further." *E.g., Hall v. Houser*, 2021 U.S. Dist. LEXIS 130786, *7 n. 35 (D. Alaska July 14, 2021) (my alteration and emphasis); *Stern v. Houser*, 2021 U.S. Dist. LEXIS 113337, *8 n. 41 (D. Alaska June 17, 2021) (same). Here we see the judge used disjunctive phrasing to signify that he believes a failure to make a "substantial showing" of the denial of a constitutional right is not the same as showing the debatability of

the resolution (i.e., "that jurist of reason could disagree").[8] Thus, we must assume that through the repeated use of this standard in 2021—the same year the judge decided Basey's §2255 motion—he did not regard debatability as being encompassed by the above-mentioned phrase.

Finally, when read in its entirety, the district court's order denying Basey's §2255 motion does not demonstrate that it considered *Slack's* debatability aspect. For instance, one of Basey's claims dealt with his attorneys' failure to timely raise a motion to suppress the emails used to convict him challenging their 9-month warrantless seizure under 18 U.S.C. §2703(f). The judge said this: "Despite the *criticism* of §2703(f), the use of §2703(f) letters remains a law enforcement standard." *Basey*, 2021 U.S. Dist. LEXIS 70988, *13-14 (emphasis added). The Judge footnoted that sentence by citing a recent law review article that criticizes §2703(f). *Id.* at 14 n. 71 (citing Armin Tadayon, *Preservation Requests and the Fourth Amendment*, 44 Sea. U.L. Rev. 105 (Fall 2020)). Further, that law review article extensively cited an amicus brief filed

[8] The word "disagree" does not fully capture the meaning of the word "debate" as used in *Slack* since jurists could ultimately agree with the court's resolution, but still could debate the claim.

in Basey's direct appeal to support its critique of §2703(f). *E.g.*, *Tadayon*, at 125 n. 22; *id.* at 116 n. 85 (citing Brief of Amici Curiae ACLU at 6, *U.S. v. Basey*, No. 18-30121 (9th Cir. 2019), 2019 WL 829338, *6).

A law review article that is as on point and favorable as the one cited by the judge clearly shows at least some of Basey's claims were debatable. *See McGee v. Bartow*, 2007 U.S. Dist. LEXIS 69390, *2 (E.D. Wis. Sept. 17, 2007) ("Although I dismissed his petition and rejected his habeas challenge, McGee's claim is not fantastical; in fact, *he cites a favorable law review article* that makes similar conclusions. Accordingly, because the issue McGee raises is at least debatable by reasonable jurists, I conclude a COA should issue.") (emphasis added).

Given all this, there is more than "some indication in the record suggest[ing]"[9] that the judge failed to consider and apply the debatability prong in *Slack*.

Therefore, the judge committed clear error by failing to consider and indicating he had considered the debatability aspect as required by *Slack*. Since this requirement is established by the Supreme Court and

[9] *Lymon*, 905 F.3d at 1158.

persuasive authority from another Circuit; this factor weighs heavily in favor of granting mandamus relief. *See Grice v. U.S.*, 974 F.3d 950, 955 (9th Cir. 2020) ("Where no prior Ninth Circuit authority prohibits the district court's ruling, or where the issue in question has not yet been addressed by any circuit in a published opinion, the ruling cannot be clearly erroneous.").

In *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001), the court remanded for a proper COA determination where the district court "failed to provide any analysis whatsoever" regarding a COA and "*failed to consider* each issue raised by Murphy under the standards set forth by the Supreme Court in *Slack*." *Id.* (emphasis added).[10]

2. Direct appeal is unavailable.

A deficient COA determination is not a final decision subject to an ordinary direct appeal under 28 U.S.C. §1291, nor is it otherwise collaterally appealable. "Because 'contemporaneous ordinary appeal' is unavailable, [this] *Bauman* factor supports the issuance of the writ."

[10] While FRAP 22(b)(1) was amended in 2009 to remove an explanation requirement from the Rule, it did not relieve courts of actually considering both aspects of *Slack*. Often, the only way to know what a court's thought processes are is to examine its written decision, as observed by the *Murphy* court.

In re Henson, 869 F.3d at 1058; *see also Clorox Co. v. U.S. Dist. Court for N. Dist. of Cal.*, 779 F.2d 517, 519 (9th Cir. 1985) (equating "contemporaneous ordinary appeal" with "direct appeal").

Respondent may argue that the appellate court's COA determination is Basey's adequate remedy. Not so. First, this proposition was rejected in *Herrera v. Payne*.[11] Second, an appellate court's COA determination does not address the district court's compliance with *Slack's* standards, rather, it applies the *Slack* inquiry itself in assessing the district court's resolution of the merits of the claims. And finally, mandamus relief has a track record for petitioners seeking a COA ruling. *Herrera*, 673 F.2d at 308 ("We hold that a statement of reasons must be provided when a certificate of probable cause is denied. Accordingly, the petition for writs of mandamus are granted."); *see also In re Coleman*, 2018 U.S. App. LEXIS 33469, *2-3 (11th Cir. 2018) (mandamus petition seeking COA determination mooted by district court's COA ruling while petition for mandamus was pending); *U.S. v. Osbourne*, 79 Fed. Appx. 592 (4th Cir. 2003) (same).

[11] 673 F.2d 307, 308 (10th Cir. 1982).

Respondent may argue that a Rule 60(b) remedy is an adequate remedy. Not so. The alternative remedy must be "a plain, speedy, and adequate remedy at law." *Delgado v. Chavez*, 140 U.S. 586, 590 (1891). "[I]f the remedy at law be doubtful, a court of equity will not decline cognizance of the suit" and a petitioner "ought not...speculate upon the chance of his obtaining relief at law." *Union P.R. Co. v. Weld County,* 247 U.S. 282, 285-86 (1918).[12] This Court has not explicitly ruled that 60(b) is a viable way to challenge a judge's deficient COA determination, thus, "the existence of such a remedy is debatable and uncertain." *Union P.R. Co.*, 247 U.S. at 286; *see id.* ("[T]he Supreme Court of the State has not passed on or considered [the question]....In these circumstances, it cannot be said that the company certainly or plainly has an adequate and complete remedy at law.").

3. Prejudice not correctable on appeal.

This factor and the previous factor are generally examined together as they are closely related. *In re Henson*, 869 F.3d at 1058.

---

[12] While *Union P.R. Co.* is an equity case, this Court and the High Court have equated equity power with mandamus power. *See Bresgal v. Brock,* 843 F.2d 1163, 1171(9th Cir. 1987) (" '[A] court may exercise its equity powers, or equivalent mandamus powers....' ") (quoting *Virginia Ry. Co. v. System Fed. No. 40,* 300 U.S. 515, 551 (1937)).

Since there is no ordinary appeal process (or any appeal process for that matter), the prejudice Basey suffers from a deficient COA determination cannot be corrected until mandamus relief issues. Meanwhile, Basey remains deprived of his "substantive" right to a "first-level ruling" regarding a COA. *See Gardner v. Pogue* , 558 F.2d 548, 550 (9th Cir. 1977) (remanding for a proper certificate of probable cause ruling).

4. The district court's error is repeated.

This was no one-time mistake:

- Judge Beistline—Basey's district judge—recently made an even more deficient COA ruling in *Mark v. Houser* which simply said: "A [COA] shall not issue." 2021 U.S. Dist. LEXIS 207658, *2 (D. Alaska Nov. 29, 2021). No citation to relevant authority, no mention of any standards, just that one sentence.

- In *Quinn v. Houser*, Judge Beisline candidly admitted he dismissed a habeas petition "without addressing the matter of a...(COA)." 2021 U.S. Dist. LEXIS 149530, *1 (D. Alaska Aug. 10, 2021).

- In 2018 he made the same error, only this Court had to remand the case to force him to make a COA determination. *U.S. v. Gadson*, 2018 U.S. Dist. LEXIS 228936, *1 (D. Alaska, Dec. 19, 2018).

- In 2013 this Court again had to force the judge to make a COA determination. *U.S. v. Thomas*, 2013 U.S. Dist. LEXIS 206264, *1 (D. Alaska Nov. 13, 2013). He butchered the COA standards in this as well by omitting a debatability analysis.

- In *Notesline v. Houser*, Judge Beistline dismissed a §2241 petition without a COA decision. 2021 U.S. Dist. LEXIS 7455 (D. Alaska April 19, 2021).

- His COA determination in *U.S. v. Hayes* is also more deficient than the one given to Basey "[G]iven the facts of this case and the Court's view that Defendant has not made a substantial showing that he has been denied a constitutional right, no [COA] will issue." 2013 U.S. Dist. LEXIS 200207, *3 (D. Alaska Oct. 1, 2013).

- As explained in the clear-error section, there are about 10 cases in 2021 alone where the judge applied a disjunctive formulation of the *Slack* standard that included "[petitioner] has not made a substantial showing of the denial of a constitutional right" as one of the *Slack* considerations. *E.g., Hall v. Houser*, 2021 U.S. Dist. LEXIS 130786, *7 n. 35 (D. Alaska July 14, 2021).

Judge Beistline is not alone. A boolean LEXIS search of cases in this Circuit from 2017 to the present using the search term < "further ordered that a certificate of appealability" and not "debat*" > revealed hundreds of instances of deficient COA determinations. Most just said something similar to this: "IT IS FURTHER ORDERED that a [COA] be DENIED." *E.g., Alexander v. Madden*, 2022 U.S. Dist. LEXIS 8079, *2 (C.D. Cal. Jan. 14, 2022); *Lucia v. Nev.*, 2021 U.S. Dist. LEXIS 142417, *2 (D. Nev. July 30, 2021).

Others used strikingly similar language to Judge Beistline's determination in Basey's case that mentions disagreement but omits

debatability. *E.g., Vidal v. U.S. ICE*, 2021 U.S. Dist. LEXIS 129090, *5 (D. Nev. July 12, 2021); *U.S. Balva*, 2020 U.S. Dist. LEXIS 65359, *14 (D. Nev. April 13, 2020); *U.S. v. Williams*, 2020 U.S. Dist. LEXIS 123022, *43 (D. Nev. July 10, 2020).

One was nearly identical. *Crowder v. Asuncion*, 2019 U.S. Dist. LEXIS 240581, *15 (C.D. Cal. Aug. 23, 2019) ("IT IS FURTHER ORDERED that a [COA] is denied because petitioner has failed to make a substantial showing of the denial of a constitutional right and, under the circumstances, jurists of reason would not disagree with the Court's determinations herein.").

The fact that this is not an isolated occurrence with Judge Beistline and other judges weighs heavily in favor of granting relief. *See In re U.S.*, 791 F.3d 945, 960 (9th Cir. 2015); *U.S. v. Sanchez-Gomez*, 859 F.3d 649, 659 (9th Cir. 2017) ("In its supervisory mandamus role, a court of appeals properly addresses the harm of a district court policy affecting a huge class of persons who aren't parties to the mandamus petition.").

5. Mandamus to cure a deficient COA is an issue of first impression in this Circuit.

While the district court's duty to explain and make a proper COA determination is clear, what is less clear in this Circuit is how to remedy a deficient COA determination. As mentioned above, the *Herrera* court granted mandamus to fix a deficient certificate of probable cause. But outside of remands where a COA determination by the district court is completely missing—as has happened with Judge Beistline—there is no guidance in this Circuit on the issue. Yet since courts often make deficient COA determinations, there should be guidance from this Court to deter judges from making incomplete decisions and provide petitioners a way to see their right to a full first-level ruling regarding a COA is upheld.

There are rare cases when traditional mandamus standards are not met where courts exercise their power under the All Writs Act to issue advisory mandamus. *E.g., In re Justices of the Supreme Court of the Dep't of Mass.*, 218 F.3d 11, 15 (1st Cir. 2000); *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 123 (2d Cir. 2000). "Advisory mandamus...may issue to clarify novel and important questions of law...[that are] likely to confront a number of lower court judges in a number of suits before appellate review is possible." *U.S. v. U.S. Dist.*

Court for the Cent. Dist. of Cal., 858 F.2d 534, 537 (9th Cir. 1988) (citations and quotations omitted).

Given the large number of cases where deficient COA determinations are made and the novelty of fashioning a remedy for these errors, this case would be a prime candidate for advisory or supervisory mandamus if traditional mandamus is deemed inappropriate. *See, e.g., In re U.S.*, 791 F.3d 945, 956, 960 (9th Cir. 2015) (granting advisory mandamus where there "was little guidance about what constitutes a valid reason for denying pro hac vice admission in a civil case" and "this case was not an isolated occurrence"); *Sanchez-Gomez*, 859 F.3d at 659.

In sum, all factors weigh in favor of granting mandamus or advisory mandamus relief.

V. Reasons why a writ should issue to the Clerk of the Ninth Circuit Court of Appeals.

A. This Court has jurisdiction to grant the requested relief.

Should the district court deny a COA after appropriately considering and ruling on the debatability of the resolution of Basey's claims among reasonable jurists, this Court would have jurisdiction of

the subsequent application for a COA under §2253. Should this Court compel the Clerk to forward Basey's COA request to Judge Kleinfeld, and should he grant a COA, this Court would have jurisdiction over the subsequent appeal under §2253. Thus, the "underlying proceeding is one actually or potentially within [this Court's] appellate jurisdiction." *In re Arunchalam*, 663 Fed. Appx. at 239.

It is axiomatic that "[a] writ of mandamus can issue to compel the clerk to fulfill his or her duty." *In re Lawrence*, 2020 U.S. App. LEXIS 25096, *2 (11th Cir. 2020) (citing *Semel v. U.S.*, 158 F.2d 229, 230-31 (5th Cir. 1996)). Courts also have an inherent power "to supervise the conduct of its officers[.]" *U.S. v. Allred*, 155 U.S. 591, 595 (1895). Thus, a court need not go so far as to issue a full-fledged writ of mandamus to control or direct its clerk. *See In re Forsyth*, 78 F. 296, 301 (1897). Advisory mandamus or supervisory mandamus may be an appropriate way to channel this power over the Clerk.

B. The *Bauman* factors weigh in favor of granting mandamus relief or advisory mandamus relief.

1. Clear error.

The Clerk had a clear duty to forward Basey's request for a COA to Judge Kleinfeld and failed to do this. FRAP 22(b)(1) provides that

"[i]f the district judge has denied the [COA], the applicant may **request** a circuit judge to issue it." (my alteration). FRAP 22(b)(2) offers an alternative: "A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes." In this Circuit, such generalized requests are handled by two-judge panels. *See* Ninth Cir. Gen. Order 6.2(b).

"[P]rinciples of statutory interpretation apply also to the federal rules[.]" *U.S. v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2010). One such principle is that "courts must give effect, if possible to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Courts must also "presume differences in language...convey differences in meaning." *Henson v. Santander Consumer USA*, 137 S. Ct. 1718, 198 L. Ed. 2d 177, 182 (2017).

A plain-language reading of FRAP 22(b) that applies these principles leads one to believe he can request or submit his application for a COA to a specific circuit judge. Otherwise, subsection (b)(1)'s language would be rendered mere surplusage if every request were to be treated in the fashion (b)(2) describes—"as the court prescribes." An interpretation which renders part of a statute to be surplusage should

be avoided. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Further, the use of the word "a" implies the petitioner may have any circuit judge review his application for a COA (i.e., a specifically chosen judge), not simply a judge that is assigned to the case. *See* Oxford English Dictionary (2021) (defining "a" as "one of a class: one, some, any"); Black's Law Dictionary 94 (6th ed. 1990) ("any" is defined as "Some; one out of many; any indefinite number. One indiscriminately of whatever kind or quantity").

This reading of FRAP 22(b)(1) is confirmed by how the Supreme Court and this Court has interpreted it. *Hohn v. U.S.*, 524 U.S. 236, 244 (1998) ("Rule 22(b) by no means prohibits application to an individual justice...."); *Salgado v. Garcia*, 384 F.3d 769, 774 (9th Cir. 2014) (quoting 9th Cir. R. 27-1 advisory comm. n. 2).

Further, it was a habeas petitioner's right at common law to proceed from court to court and judge to judge until he obtained a favorable ruling. *See generally* Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure, 7th Edition, §28.2[a] n.3 (Matthew Bender) (collecting cases). And while Congress has limited this practice with regard to *petitions*, nothing prohibits this practice with COAs. In fact, FRAP 22(b)(1) appears to be in the spirit of

the common-law practice. Reading the Rule more narrowly could amount to a suspension of habeas corpus or a violation of due process. *See INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.' "); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) ("[I]n determining what due process of law is...the court must look to those settled usages...in the common...law[.]").

Basey did not address the envelope he sent his COA request in to Judge Kleinfeld because 1) this Court's rules forbid it, *see* 9th Cir. R. 25-2 ("Parties shall not submit filings directly to any particular judge"); 9th Cir. Gen Order 12.8, and 2) Judge Kleinfeld's address is not available in materials he has access to in prison. But he did address his COA request to Judge Kleinfeld by including "To: Circuit Judge Andrew Kleinfeld" in bold lettering on the first page of his request. Appx. A at 1. Additionally, he filed a motion asking that this Court's rules be relaxed to allow him to file his request with Judge Kleinfeld since those rules appeared to conflict with FRAP 22(b). Appx. B.

a. The Clerk had a duty to address Basey's procedural motion to suspend a local rule.

The Clerk has been delegated authority to act on certain motions. 9th Cir. R. 27-7 & advisory comm. note to R. 27-7. Specifically, this Court requires the Clerk to address procedural matters when an inmate attempts to address mail to a judge. 9th Cir. Gen. Order 12.8 ("Mail addressed by a prisoner to a member of the Court shall be opened by the Clerk who *shall* act on any procedural matter as appropriate.") (emphasis added). Basey's motion to suspend this Court's local rules was a procedural motion. Thus, the Clerk failed to perform its duty resulting in Basey losing his right to have his COA request decided by a circuit judge of his choice.

While there is no reported case where mandamus was used to enforce a petitioner's right to a decision on his COA request by a circuit judge of his choice, this does not negate the clearly-established right Basey had or the duty the Clerk had to act on procedural motions from inmates. Further, "the very existence of the fifth *Bauman* factor, whether the issue presented is one of the first impression—illustrate[s], the necessary 'clear error' factor does not require the issue be one as to which there is established precedent." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1138 (9th Cir. 2010) (my alteration).

b. This Court's local rules conflict with FRAP 22(b)(1).

To the extent that 9th Cir. R. 25-2 and 9th Cir. Gen. Order 12.8 played a role in preventing Basey from exercising his right under FRAP 22(b)(1), that rule and general order are unlawful. FRAP 47(a) and 28 U.S.C. §2071(a) requires that local circuit rules be consistent with the FRAP. Because 9th Cir. R. 25-2 and 9th Cir. Gen. Order 12.8 effectively bar habeas petitioners from exercising their right under FRAP 22(b)(1) to apply directly to a circuit judge of their choice for a COA, these provisions run afoul of FRAP 47(a) and §2071(a).

Writs of mandamus (including advisory and supervisory mandamus) are routinely sought and granted to enjoin use of local rules that allegedly conflict with governing laws. *E.g., Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010); *Colgrove v. Battin*, 413 U.S. 149, 150-51 (1973); *In re Sony BMG Music Entm't*, 564 F.3d 1, 3 (1st Cir. 2009); *see also La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (" '[T]o find that the rules have been practically nullified by a district judge...[this Court] would not hesitate to restrain [him]....' ") (quoting *Los Angeles Brush Mfg. Co. v. James*, 272 U.S. 701, 706 (1927)) (my alteration).

Courts have also set out proper COA procedures in opinions. *E.g.*, *Fitzsimmons v. Yeager*, 391 F.2d 849, 855 (3d Cir. 1968). FRAP 47(b) also provides a way for courts to conform procedures in any given case to governing laws. *Id.* ("A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuits.").

This Court should enter an appropriate order or opinion enjoining the use of 9th Cir. R. 25-2 and 9th Cir. Gen. Order 12.8 insofar as it prevents habeas petitioners from exercising their right under FRAP 22(b)(1) to apply directly to a circuit judge of their choice for a COA.

2. Direct appeal is unavailable.

Basey attempted to correct the Clerk's error by filing a motion to recall the mandate, but was denied since this Court ordered that no other filings be accepted. Appx. D. Since there is no other way to correct the Clerk's error and certainly no "contemporaneous ordinary appeal," *In re Henson*, 869 F.3d at 1058, this factor weighs in favor of granting mandamus relief.

3. Prejudice not correctable on appeal.

Since no appeal is available, Basey remains deprived of his right to review of his COA request by a circuit judge of his choice.

4. The Clerk's error is novel.

Admittedly, this is likely the only time a habeas petitioner has attempted to avail himself of FRAP 22(b)(1)'s provision regarding selection of an individual judge to hear the COA request. Thus, this factor does not weigh in favor of mandamus. But not every factor must be present to grant mandamus relief. *In re Henson*, 869 F.3d at 1062. It should be noted, though, that the courts of appeal have drafted local rules that appear to foreclose application to a single judge. *E.g.*, 9th Cir. R. 22-1(d); 9th Cir. Gen. Order 6.2(b).

Because local circuit rules and general orders omit provisions that allow petitioners to exercise their right under FRAP 22(b)(1), this factor should weigh less as its novelty is caused by needless restrictions on petitioners' ability to invoke FRAP 22(b)(1). Basey cannot challenge those rules and general orders in the district court. *See, e.g., Schmier v. U.S. Ct. of App. for the Ninth Circuit*, 136 F. Supp. 2d 1048, 1050 (N.D. Cal. 2001) ("[T]he court believes that the preposition that it has subject matter jurisdiction to review a rule promulgated by a higher court is

dubious at best."); *Coombs v. Staff Attys. Of the Third Circuit*, 168 F. Supp. 2d 432, 435 (E.D. Pa. 2001).

5. This is an important question of first impression.

This is a novel issue because no one has tried to assert their right to a COA decision from a specific circuit judge under FRAP 22(b)(1). But there's a first time for everything. And the circumstances show just how elusive review can be when a petitioner attempts to assert this right. Accordingly, this case presents an excellent candidate for this Court to invoke its advisory or supervisory mandamus authority. *See, e.g., Perry*, 591 F.3d at 1138 (advisory mandamus relief is appropriate where a "novel and important question [that] may repeatedly evade review"); *In re Cement Litig.*, 688 F.2d 1297, 1304-05 (9th Cir. 1982) ("[A]n important question of first impression will evade review unless it is considered under our supervisory mandamus authority."); *In re EEOC*, 709 F.2d 392, 395 (5th Cir. 1983) (approving use of mandamus "as a one-time-only device to 'settle new and important problems' that might have otherwise evaded expeditious review").

This case could create awareness of a right to a circuit judge of choice under FRAP 22(b)(1) that will encourage petitioners to choose a

judge they best think will grant them a COA. This may ease the burden on the COA panel and allow senior circuit judges, who are usually exempt from COA panel duties to contribute to these decisions as well. If this eventually proves to create more problems than it helps solve, then Rule 22(b)(1) should be amended. But it is not this Court's duty to sit as a super-legislative body and ignore whatever Rule they see fit.

This factor also weighs in favor of granting mandamus relief.

Conclusion

This Court should:

1.) grant a writ of mandamus directing the District of Alaska to consider whether reasonable jurists would find the district court's assessment of Basey's constitutional claims ***debatable*** and either issue or deny a COA to Basey,

2.) grant a writ of mandamus directing the Clerk of the Ninth Circuit to forward the accompanying Motion for a COA (Appx. A) to Judge Andrew Kleinfeld for a decision, or

3.) advisory or supervisory mandamus relief to the same effect as 1) and 2).

Respectfully submitted this 9th day of June, 2022.

Kaleb Basey

Kaleb Basey
Petitioner in Pro Se

Statement of Related Cases

I certify the following cases before this Court are related to this case:

- *U.S. v. Basey*, No. 21-30196 (9th Cir.) (ripe for decision)

Kaleb Basey
Kaleb Basey

Certificate of Service

I certify that I caused to be mailed a copy of the forgoing on the following:

G. Michael Ebell
Federal Bldg. & U.S. Courthouse
222 W. 7th Ave. #9 Room 253
Anchorage, AK 99513-7567

Judge Ralph Beistline
222 W. 7th Ave.
U.S. Courthouse
Anchorage, AK 99513-7567

Ninth Circuit Staff Attorney
P.O. Box 193939
San Francisco, CA 94119-3939

Date: June 9, 2022 Kaleb Basey
Kaleb Basey

Certificate of Compliance

I certify that this brief, excluding the items exempted by FRAP 21(d), is less than 30 pages or 8,400 words using the page/word conversion formula in 9th Cir. R. 32-3. The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

Kaleb Basey
Kaleb Basey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case Number 4:20-CV-00015-RRB
4:14-CR-00028-RRB

KALEB LEE BASEY,
Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT defendant's application for post-conviction relief [28 U.S.C. § 2255] is dismissed. The Court declines to grant a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c).

APPROVED:

Ralph R. Beisline

Ralph R. Beistline
Senior United States District Judge

Date April 13, 2021

Brian D. Karth
Clerk of Court

Suzannette David-Waters
(By) Deputy Clerk

JMT2255 – rev. 1-13-15